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[16/03/2000; Full Court of the Family Court of Australia (Brisbane); Appellate Court]
The Director General, Department of Families, Youth and
Community Care v. R. Bennett [2000] Fam CA 253

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Brisbane

BEFORE: Kay, Coleman and Barlow JJ

HEARD: 22 February 2000

JUDGMENT: 16 March 2000

Appeal No NA 4 of 2000

File No BR 9671of 1999

IN THE MATTER OF:

The Director General, Department of Families Youth and Community Care

Appellant

- and -

Rhonda May Bennett

Respondent, Wife

REASONS FOR JUDGMENT

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APPEARANCES:

Mr. Green of Counsel, instructed by C.W. Lohe, Crown Law, Level 11, State Law Building, 50 Ann Street, Brisbane, Qld 4000, appeared on behalf of the Appellant.

Mr. Hamwood of Counsel, instructed by, Primrose Couper Cronin Rudkin, Solicitors, 35-39 Scarborough Street, Southport, QLD 4215, appeared on behalf of the Respondent Wife.

JUDGMENT:

Introduction

1. On 22 February 2000, we heard an appeal by the State Central Authority against Hilton J's dismissal of its application seeking the return of a child to the United Kingdom. At the conclusion of the hearing we announced that the appeal would be allowed and we made orders providing for the return of the child within 21 days. These are the reasons why we allowed the appeal.

Background

2. R was born in England in September 1994. His father is English by birth and his mother is Australian by birth. His parents married in England in April 1986 and made their home there. It is convenient to refer to R's parents as "the husband" and "the wife". From 1991 onwards the husband was unable to work due to psychological illness.

3. The family came to Australia for a visit on 11 February 1999. The husband understood that it was to be a short visit and the family would return to the United Kingdom at the conclusion of the visit. The wife had other ideas. She asserted before Hilton J that she had been very unhappy in the marriage and had planned to stay in Australia with R and not return to England. She only communicated this information to the husband via a letter from her solicitors delivered by her parents to the husband at Brisbane airport just as the family were due to board the plane to England on 24 March 1999.

4. The husband was very distressed by this news, and it had an immediate adverse reaction on his health. He was forcibly restrained and placed in a psychiatric hospital in Australia for several days. The wife and child went into hiding.

5. Upon his discharge from hospital in about April 1999, the husband returned to the United Kingdom and then commenced proceedings under the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") seeking the return of the child to the United Kingdom.

6. An application was brought by the relevant State Central Authority seeking the return of the child to the United Kingdom. The application came on for hearing before Hilton J in Brisbane on 16 December 1999.

7. At the hearing the wife conceded that the habitual residence of R, immediately prior to his retention in Australia, was the United Kingdom. It was conceded that there had been a retention in Australia of the child in breach of rights of custody of the husband. It was however asserted that the Court ought not make an order for R's return to the United Kingdom because there was a grave risk that such return would expose R to physical or psychological harm or otherwise place him in an intolerable situation. It was further asserted that R's return to the United Kingdom would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

8. It was the wife's case that she had overwhelmingly provided for the care of R and that R was closely bonded to and psychologically dependent upon her. She asserted that she was unable for medical reasons to travel to the United Kingdom and that a forced return of the child would necessarily separate her from R and leave R in the care of his father, who was a person experiencing serious psychological difficulties.

9. It was further asserted that as the wife was unable to travel to the United Kingdom she would be unable to effectively prosecute any proceedings for a residence order. This would mean that the child, once again, would be in an intolerable situation because issues relating to his welfare could not be decided by a court hearing at which both of his parents could effectively participate. Reliance was placed on the decision of Joske J in State Central Authority v Ardito (unreported Family Court of Australia, 29 October 1997).

10. Finally, it was submitted on behalf of the wife that R was a child of Torres Strait Islander descent. It was submitted that an English court could not properly understand the ramifications of R's cultural heritage as there was no equivalent in the English family law to s 68F(2)(f) of the Family Law Act 1975, which specifically required a court in Australia when determining what was in a child's best interest to consider.

"the child's...background (including any need to maintain a connection with the lifestyle, culture and traditions of... Torres Strait Islanders)..."

The proceedings before Hilton J and his reasons for judgement

11. It is important to note for the purposes of this appeal that the proceedings before Hilton J were determined on the affidavit material provided to his Honour. There was no viva voce evidence called and no cross-examination of deponents took place. There was no opportunity sought, nor was any opportunity taken, to test the credit of any of the deponents. His Honour had before him conflicting and untested testimony.

12. The manner in which the proceedings were conducted by his Honour was consistent with authority. Hague Convention proceedings are usually determined on the papers. The Hague Convention is a "hot pursuit remedy" and any delay in the proceedings is to be avoided if at all possible. Regulations 15(2) and (4) of the Family Law (Child Abduction Convention) Regulations 1986 ("the Regulations") recognise this need for expedition, although at the same time Reg 15(2) recognises that the matter has to be given "proper consideration". We adopt the observations of the Chief Justice in DM v Director-General, Department of Community Services (1998) FLC 92-831; 24 Fam LR 168.

13. In DM the Full Court (cor Nicholson CJ, Kay and O'Ryan JJ) dealt with an application for the return of a child to Macedonia. The father left Macedonia with the child, arriving in Australia on 14 April 1998. On 13 April 1998, upon application by the mother, the Welfare Centre of Veles in Macedonia determined that, pending court proceedings for divorce/custody, the child should be returned to the mother. That decision was affirmed by the Primary Court of Veles on 15 April 1998. On 17 July 1998, an application was filed in the Family Court of Australia by the Department of Community Services as the Central Authority seeking the return of the child pursuant to the Hague Convention. The father resisted the return of the child and on appeal sought to have the proceedings adjourned. The Chief Justice said at FLC 85,513; Fam LR 170:

"The principles that govern Hague Convention cases are somewhat different from other cases. There are specific provisions in reg 15(2) and 15(4) of the Family Law (Child Abduction) Regulations which provide for the matters to be dealt with in a speedy fashion. Regulation 15 (2) provides that:

'A court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows.'

And reg 15(4) provides that:

'If an application made under regulation 14 is not determined by a court within the period of 42 days commencing on the day on which the application is made:

the responsible Central Authority who made the application may request the Registrar of the court to state in writing the reasons for the application not having been determined within that period; and as soon as practicable after a request is made, the Registrar must give the statement to the responsible Central Authority.'

Presumably, that regulation is referring to the determination of a matter at first instance, within the period of 42 days but, in my view, it is no answer to that proposition to say, as the appellant has sought to say here, that he has the right to set his own pace in relation to the appellate process. That runs entirely contrary to the spirit and provisions of the convention. In this regard I refer to the remarks of Kirby J in De L v The Director-General of New South Wales Department of Community Services (1996) 187 CLR 640 at 667; 20 Fam LR 390 at 409; FLC 92–706 at 83,459 where his Honour said:

'While due allowance must be made for the complexity of some of the questions raised, the serious legal interests in apparent conflict, the novelty of some of the propositions (at least so far as the higher courts in Australia are concerned) and the general importance of the matter as a "test case", I cannot but agree with Kay J that the delays have accumulated to defeat the apparent purposes of

the Convention, the Act and, if they be valid, the Regulations. By repeated provisions, the Convention envisages a speedy process and a summary procedure. The same sense of urgency is reflected in the Regulations. It is reflected in judicial observations about the meaning and purposes of the Convention, and of municipal laws designed to give it effect [footnotes omitted].'

It seems to me that that encompasses the approach that the court should take to applications of this nature."

14. It was conceded before us by counsel for the respondent wife that the finding by the trial Judge that there was a grave risk that the return of the R to the United Kingdom would expose him to psychological harm or otherwise place him in an intolerable situation was not a finding which involved an exercise of discretion but was an application of the Regulations which governed the issue as to whether or not the child should be returned to such of the facts as were capable of being established.

15. One consequence of the case having been heard only on the written material is that the trial Judge did not have any special advantage over this appellate court in making findings of fact. Such an advantage arises when the trial Judge has been able to hear the witnesses and assess their credibility (see Warren v Coombes (1979) 53 ALJR 293; 23 ALR 405; Re C (Abduction) [1999] 2 FLR 478 at 486).

16. The husband asserted that he had shared in the care of the child, and that as he had not been in employment at all during the life of the child, he had been home to help in the child's care. The wife asserted that she was the one who overwhelmingly provided for the care of the child. The trial Judge had no opportunity to assess the veracity of either witness on this issue.

17. His Honour reached a conclusion that

"on the evidence contained in the affidavit material I incline to the view that this [the wife has overwhelmingly provided for the care of the child] is the case."

In order to reach that conclusion his Honour had to discount the evidence of the husband as being the less probable of the two stories facing him. This was a situation in which both parents had been in the home for the entire duration of the child's life. There was no clear uncontested evidence to suggest that the circumstances of the parties was such that inevitably the care of the child fell on the shoulders of one parent rather than the other.

18. His Honour then turned to the wife's claim that she was "unable for medical reasons to travel to the United Kingdom". The medical evidence was contained in an affidavit by Dr Andrew Byth, a psychiatrist, who had seen the wife on 2 November 1999 for the sole purpose of preparing a report to the Court. He was not the wife's treating psychiatrist and there was no evidence that the wife has not undertaken further psychiatric treatment in Australia. His Honour set out paragraphs 10, 11 and 12 of Dr Byth's report which read (emphasis added):-

"10. Clinical Course

10.1 She began to gradually develop anxiety and depression around 1990, in response to her husband's changed behaviour and her subsequent unhappiness about the deterioration of their marriage.

10.2 She was disturbed by his unpredictable and contradictory behaviour and attitudes, which she believed stemmed from his mental illness since 1990. Her anxiety and depression were increased by her fear of unpredictable episodes of verbal and physical abuse.

10.3 Her symptoms of anxiety and depression reached clinically significant levels when she underwent counselling in 1994. Her therapy was prematurely terminated by her husband.

10.4 Her symptoms continued to worsen between 1994 and 1999, and reached a peak of intensity during her visit to her family in Australia in early 1999.

10.5 Since she separated from her husband, and has undergone therapy in Australia, her symptoms appear to be slowly improving. She is also receiving significant support and understanding from her parents.

11. Prognosis

11.1 If she is able to remain in Australia, and continue in individual and group therapy, and receive support from her parents, I believe it is likely that her Adjustment Disorder will slowly improve over the next 12-24 months.

11.2 If she were forced to return to the United Kingdom, she would be unable to proceed with psychotherapy, because of her husband's opposition. Her prognosis would be worsened also by isolation from her family supports in Australia, which are a crucial part of her requirements for recovery.

12. Discussion and Recommendations

12.1 R.B. is suffering from a Chronic Adjustment Disorder with mixed anxious and depressed moods. She suffers from clinically significant anxiety and depression, which have stemmed from difficulties within her marriage since 1990.

12.2 I believe that it would be unsafe and unwise [for] her to travel to United Kingdom. She requires ongoing outpatient counselling in Australia for treatment of her Adjustment Disorder. Her condition would be likely to relapse if she were forced to travel to the United Kingdom.

12.3 Her chance of recovery from Adjustment Disorder would be significantly reduced she would dislocated [sic] from support from her family in Australia. She also would lack any form of financial support if she returned to the United Kingdom.

12.4 She has a vulnerable and sensitive personality type, and has been subjected to a long period of apparently intimidatory and unpredictable behaviour from her husband. Her apprehension about the possibility of further verbal and physical abuse is currently still contributing to perpetuate her Adjustment Disorder.

12.5 It would not be medically sound from her [sic] to return to the United Kingdom, and thereby place herself in such stressful circumstances again. There is a high likelihood that her anxiety and depression be worsened by a return to these circumstances.

12.6 I was particularly concerned by her history of her husband's refusal to allow her to undertake psychotherapy. I believe this is another reason why she should remain in Australia, to receive the correct treatment she requires for her Adjustment Disorder.

12.7 She presents as a very caring and highly motivated parent towards her son and is very keen to see that the boy is properly cared for. With the assistance of her parents, I believe that she is capable of satisfactorily raising her son, despite the presence of her Adjustment Disorder."

19. His Honour observed:

"This is the only evidence before me as to the wife's health".

He then said:

"The report of Dr Byth was not challenged in any particular. I accept his evidence and in the circumstances, on the evidence before me, having found that the wife has been the primary caregiver to the child, I find that she should not have to return to the United Kingdom and in all likelihood endanger her mental health."

20. It was strenuously argued before us, and we think correctly, that underpinning the doctor's recommendations was a false premise. The doctor emphasises in par 11.2 why it would be detrimental for the wife to travel to the United Kingdom. He asserts two reasons, the first of which is that a return to the United Kingdom would leave her unable to proceed with psychotherapy because of her husband's opposition.

21. The nature of the proceedings before the Court envisaged the return of the child to the United Kingdom. It did not envisage a return of the child to the husband, nor did it envisage a return of the wife to the husband. There was no evidence placed before the Court to indicate that it would be impossible for the wife to live in England apart from the husband, nor was it suggested that once in England the wife would be unable to obtain any appropriate psychotherapy. Finally, there was no consideration at all by the doctor of the proposition that the return of the wife might only be a temporary return purely for the purposes of litigating as to the future of the child.

22. It was submitted to us, and we think soundly, that once one of the fundamental assumptions made by Dr Byth is found to be unsubstantiated, all that is left is the doctor's opinion that the wife suffers from a Chronic Adjustment Disorder and that her chances of recovery from it would be significantly reduced were she dislocated from the support of her family in Australia.

23. In our view, that evidence could not be seen as indicating a bar to the wife returning to the United Kingdom for the temporary purposes of litigating over the future welfare of the child, nor did it give any insight into the manner in which the wife's symptoms may be ameliorated by therapy and treatment available for her in England.

The Family Law (Child Abduction Convention) Regulations

24. Once it is established that the child, the subject matter of proceedings under the Regulations, has been wrongfully retained in Australia then an order for the return of the child must be made unless one of the prescribed defences is established. Here the wife sought to rely on Reg 16(3)(b) and (d) which state:-

"16. (1) Subject to subregulations (2) and (3), on application under regulation 14, a court must make an order for the return of a child:

(a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia...

...

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

...

(b) there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

...

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

25. Sub-regulations 16(3) (b) and (d) reflect the provisions of Articles 13(b) and 20 of the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). 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. (Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction prepared by the US State Department 51 Fed Reg 10,503 (1986) at 10,509).

26. At the second Special Commission meeting to review the operation of the Convention (18-21 January 1993) when initiating discussion on the exceptions to mandatory return, Adair Dyer (First Secretary) stressed that as Art 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. (Report of the Second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (18-21 January 1993) drawn up by the Permanent Bureau; Sourced from http://www.hiltonhouse.com). Discussion at the Special Commission revealed that Art 13 has been given a narrow interpretation in most jurisdictions and that in only a few cases are the exceptions found to apply.

27. The narrow nature of these exceptions to mandatory return has been noted in many reported decisions. Australian courts have predominantly pursued the aims of the Convention vigorously and insist on a strict and narrow reading of the exceptions. In Director General of Family and Community Services v Davis (1990) FLC 92-182 Nygh J, with whom Strauss and Rowlands JJ agreed, stated (at 78,226):

"It is, therefore, the intention of the Convention and the Regulations which implement it to limit the discretion of the court in the country to which the children have been taken quite severely and stringently."

28. In Gsponer v Johnstone (1989) FLC 92-001; (1988) 12 Fam LR 755 the Full Court dealt with an application for the return of a child to Switzerland after the child had been brought to Australia by her mother without his father's consent. The mother made it clear both to the father and in material filed in the proceedings that she did not desire or intend to return with the child to Switzerland. The Court said of Reg 16(3)(b), (at FLC 77,160; Fam LR 768):-

"...reg 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 country which Australia has entered into this Convention with. There is no reason why this court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare. Indeed the entry by Australia into this Convention with the other countries may justify the assumption that the Australian Government is satisfied to that effect

...

We agree with the comment of Kay J in Re Lambert (Family Court of Australia, 3 April 1987, unreported) that 'the Convention is clear. In my view, the exceptions to it are likely to be few and far between...'"

29. In Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) the United States Federal Court enumerated those types of dangers which might be considered to create a "grave risk" of the type of harm envisioned by the Convention:

"Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only 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--e.g., returning the child to a 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."

30. Similarly, the English Court of Appeal commented in Re M (Abduction: Psychological Harm) [1997] 2 FLR 690 (at 695):

"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."

31. In Re C (Abduction: Grave risk of psychological harm) [1999] 1 FLR 1145 at 1154, 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."

32. In Issak, A v Issak, P (March 3 1993, PS 5382/92) Chaim Porat 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."

33. Kirby J, in his dissenting judgment in De L v Director General, Department of Community Services (1996) FLC 92-706 at 83,470; 20 Fam LR 390 at 423-4; 187 CLR 640 observed:

"The structure of the Convention, as of the regulations, is ordinarily to require the return of the child unless a relevant exception is established. Any other construction would tend to undermine the achievement of the purposes of the Convention and of the regulations incorporating it."

34. The majority judgment in De L v Director General, Department of Community Services emphasised that the then relevant Regulation concerning the manner in which the Court paid attention to the child's objections to being returned did not need to be read narrowly. The Hague Convention was noted to be the result of a compromise (at FLC 83,450; Fam LR 394; CLR 649):

"The nature of the compromise has been identified as follows (Anton, "The Hague Convention on International Child Abduction" (1981) 30 International and Comparative Law Quarterly 537 at 550):

'Most delegates at The Hague were agreed that, after a wrongful removal to or retention in another country, its courts — in principle at least — should order the return of the child forthwith without entering into the merits of any custody dispute between the parties. Some delegates, indeed, argued that the achievement of the main purpose of the Convention would be imperilled if the door were left even slightly ajar to abductors to justify the new situation of the child by an inquiry in the State to which the child had been abducted into what allocation of custody rights was in the best interests of the child. Other delegates, while accepting that in principle an abducted child should be returned forthwith, considered that in certain cases a departure from this principle might be justified in the interests of the child …

What emerged was inevitably a compromise. It was agreed that a refusal to return the child should not be based on public policy or any analogous general ground. The Convention should rather limitatively enumerate the exceptions which it allowed.'"

35. Those observations concerning the then form of Reg 16 regarding the child's objections, were distinguished by the majority judgment from the long line of foreign cases concerning the narrow application of the other Reg 16 defences which concerned the enactment of Article 13. That Article requires the party seeking to rely on one of the other defences to establish the existence of such a defence, whilst the "child objection" defence carries with it no such onus. As the defences relied upon in this case require the establishment of their existence by "the person opposing return", the broader approach adopted by the majority judgment in De L does not impinge upon the strong line of authority both within and out of Australia, that the Reg 16(3)(b) and (d) exceptions are to be narrowly construed.

Was there a grave risk of harm or an intolerable situation?

36. In our view, Hilton J should not have been satisfied that the Reg 16(3)(b) criteria had been established. The doctor had said, and the Judge had accepted, that the wife should not return to the United Kingdom due to her poor health, because:

she could not obtain appropriate therapy in the United Kingdom; and

she would be without the support of her family.

37. As already indicated, there was no appropriate basis for the first of those findings. Accordingly, there was inadequate material before his Honour which could support his Honour's ultimate conclusion that it would be so detrimental to the wife's health to travel to the United Kingdom that she was effectively barred from so doing.

If the wife was unable to travel was that an intolerable situation?

38. Once having reached the conclusion that the wife's health effectively precluded her from returning to the United Kingdom, his Honour said:

"If the wife were not able to personally prosecute her case in respect of residence because of her health, it would have the effect of placing the subject child in an intolerable situation."

39. Reference was made to the decision of Joske J in State Central Authority v Ardito (supra). In Ardito, an Australian mother had removed a child habitually resident in America to Australia. The mother was unable to obtain a visa to return to the United States to prosecute any proceedings relating to the custody of the child. In those circumstances, Joske J held that her inability to partake in the proceeding amounted to placing the child in an intolerable situation should the child be returned to the United States. His Honour said at p 40:

"In my view the fact that the respondent is unable to gain entry into the United States for the purposes of appearing in these proceedings, amounts to what can only be described as a serious denial of natural justice. The right to be heard is a fundamental requirement of natural justice...Accordingly, I am of the opinion that the fact that the respondent has been denied entry into the United States constitutes a grave, or in this case an almost certain risk that the child Bittany was placed in an intolerable situation."

40. In Director-General, DFYCC (Qld) v Hobbs [1999] Fam CA 2059, Lindenmayer J described the mother in Ardito as being "precluded, as a matter of law, from entering the United States and contesting the proceedings." Joske J was thus said to have:

"ultimately concluded that it would place the child in an intolerable position if, having been ordered to be returned to the United States, the child's mother would be precluded, as a matter of law, from appearing there and contesting the issue of her custody."

41. Counsel for the State Central Authority has urged upon us to limit the application of the principles identified by Joske J in Ardito to the peculiar facts where an inability to attend at the proceedings is brought about by the laws of the country to which the child is sought to be returned. It has been urged upon us that we should not allow those principles to be extended to situations that arise by reason of "the circumstances of the abducting parent". It was submitted to us that the denial of natural justice identified by Joske J was something brought about by the laws of the requesting country and not by the personal circumstances of the abductor.

42. The State Central Authority in its submissions said as follows:

"The Appellant accepts the importance of the abducting parent being able to meaningfully participate in and have input into the judicial/administrative decision making process about the welfare of the child, made by those bodies in the requesting country. To that extent, the Appellant does not assert that Ardito was wrongly decided. However, the Appellant challenges that in every case, such meaningful input can only be achieved by the abducting parent/person being physically

present to provide instructions and conduct the case. It is submitted that to the extent Ardito stands for this proposition, then it has been incorrectly decided."

43. It was submitted that the inability of a party to be physically present in court to present their case and/or instruct a legal representative should not be viewed as a rigid requirement of natural justice in every case. It may be that the courts of the requesting country have or are able to put in place facilities and/or procedures that allow a party to meaningfully take place in a hearing without being physically present. An obvious example is the availability of telephone and video links.

44. The State Central Authority further submitted:

"...that the onus of proof is upon the respondent to adduce evidence which establishes that they will not be unable to meaningfully take part in the decision making process which will decide where and with whom the child lives such that a fair hearing cannot be had. This is not automatically satisfied by establishing the abducting person is unable to be physically present in the requesting country. There is no such evidence to establish in the present case."

45. We do not consider that this case is a suitable vehicle for defining the limitations on the Ardito principle. We have already concluded that his Honour erred in accepting that the evidence satisfied the Reg 16(3)(b) defence. As such, the issue of the so-called Ardito principle, namely the effect of the inability of the abducting parent to attend at the hearing, does not arise in this case.

46. We would observe, however, that the line urged upon us by the State Central Authority, that Ardito should be limited to circumstances where the return of the abductor to the place of return of the child is impeded or prohibited by the law of the requesting country, may place too much of a fetter on the trial Judge's capacity to find circumstances in which the return of the child could be considered to be intolerable.

47. By way of example, where a very young baby was wrongfully removed or retained in circumstances that would otherwise lead to its return being ordered, if it was being breast-fed by its "abducting" mother and her personal circumstances genuinely precluded her return with the child (eg. her medical condition or perhaps even her incarceration), then the Reg 16(3)(b) exception might be made out. In Re G (Abduction: Psychological Harm) [1995] 1 FLR 64 Ewbank J declined to order the return of a child to the USA when the evidence demonstrated that a forced return of the mother (who would not part from the three very young children) carried with it a likelihood that she might become psychotic, and that such a serious deterioration in her health would adversely affect the children.

48. Cases involving the welfare of the child at appellate level frequently emphasise the special position of a trial Judge in being able to evaluate the parties and their proposals. That special position must clearly be diminished if both of the parties are unable to attend at the hearing concerning the welfare of the child. The fact of an inability to attend, be it through operation of the laws of the requesting country or through circumstances personal to the abducting parent, may be sufficient to give rise to the existence of the Reg 16(3) defence. The matter would then move from requiring a mandatory return into determining whether a return is still appropriate.

49. In those circumstances, the court would then need to pay attention to whether the competing and conflicting reasons would make it still appropriate to return the child notwithstanding the existence of the "intolerable" situation. By way of example, a violent abduction of a child from a requesting country in circumstances where there existed long standing orders granting the custody of the child to the parent left behind could well lead to the child's return being ordered even though a Reg 13 defence was shown to exist. In Karides (ML 2927/95 unreported 23 May 1996) the mother took a 2 month old child from the USA to Australia then hid from authorities for some 18 months. Whilst her "grave risk" defences were rejected, Kay J expressed a view about the exercise of discretion in case his conclusions about those defences were wrong. He said (at 23-24):

"In my view whilst there are several features of this case that make it appropriate to exercise discretion not to order the child's return in favour of the mother, namely the tender age of the child

and the fact that the child has only known the mother as a parent, there are countervailing issues which make it appropriate that I return the child.

This is a classic case of exactly what the Hague Convention is aimed at avoiding. International abduction of children has long been considered to be a significant social evil. It is difficult to see how it is possible to suggest that the abductor should be rewarded by the success with which they have been able to place themselves underground, perhaps aided and abetted by others near and dear to them.

This child has been deprived for its formative months of a relationship with its father. It appears to have been deprived of that relationship solely by the behaviour by the mother, and those offering her succour. In my view Adam is entitled to the opportunity to have a court determine whether or not his father is the most appropriate person to raise him or whether his mother is the most appropriate person to raise him, and to have determined what relationship he should have with his non-custodial parent. In my view there is nothing in the material before me that precludes the wife from returning to the United States to litigate such issues.

Whilst I recognise there is unlikely to be freely available legal aid in the United States, there is nothing put before the Court which would indicate that the wife would not otherwise have resources sufficient to provide for herself and conduct litigation within the United States. She has managed to be significantly resourceful enough to stay underground within Australia for some fifteen months. Further, I am certain that the courts in the United States, like the courts here, entertain applications by litigants in person.

Notwithstanding each of the matters identified by Justice Lindenmayer in Regino's case (1995) FLC 92-587, in my view I would exercise my discretion adversely to the wife and order the immediate return of the child to the United States. (See also N v N (1995) 1 FLR 107)."

Human rights and fundamental freedoms

50. Ground 8 of the notice of appeal raises arguments that would arise if it could be said that the facts fell within the exceptions contained in Reg 16(3)(d) [set out at par. 24 above]. Whilst the trial Judge recognised that submissions were being made to him in reliance of that sub-regulation, his Honour never dealt with those submissions beyond identifying them. His Honour said:

"The second ground of the wife's case was based on Regulation 16(3)(d) of the Family Law (Child Abduction Convention) Regulations. For the medical reasons which I have previously referred to, it is stated that the wife will be unable to return to the United Kingdom. That is not strictly correct. She will be able to return to the United Kingdom, but I find on the evidence before me that due to her poor health, she should not return to the United Kingdom. That being so, she would be unable to be present and participate in proceedings in relation to the custody/residence of the child. To that extent she would be denied natural justice, according to Mr Hamwood, as she would be denied the basic right to effectively participate in proceedings with respect to the welfare of the child. This submission is supported to some extent by Joske J.'s decision in the case of the State Central Authority v. Ardito (supra)."

51. Once the submission was identified by his Honour, his Honour turned to submissions that were being put on the basis that the child was of Torres Strait Island descent and as such somehow required an Australian court to adjudicate on its future because the Family Law Act recognised the special significance of the child's Torres Strait Island culture and heritage.

52. Again, beyond identifying those arguments, it is not clear that his Honour in fact in any way relied upon them. In his conclusion he said:

"I am conscious of the fact that the Family Law (Child Abduction) Regulations should not be departed from lightly: Indeed, for the Convention to operate effectively it is only in, one might say, dire cases that there should be a departure. I have adverted to the intolerable situation that will occur if this matter was remitted to the United Kingdom for hearing and having regard to the

circumstances which I have set out in this judgment, I find that this matter should be determined in Australia."

53. Giving that passage the most generous interpretation that we can, we think that what his Honour was there saying was that if a ground for refusing mandatory return of the child existed, namely that because the mother could not travel to the United Kingdom because of her health, there would be two effects on the child; firstly, that he would be separated from his primary caregiver; and, secondly that he would be denied the opportunity in England of having both parents being able to properly present their case before the English courts to decide the child's future.

54. Again, giving that passage a generous interpretation, we see his Honour as saying that he had been satisfied that an exception to mandatory return had been established and, a consideration for the exercise of his discretion was that, additional to the absence of the mother from the child and her inability to partake in English proceedings, the child because of his Torres Strait Islander descent would be more likely to have his welfare provided for by a trial in Australia rather in the United Kingdom.

55. It is unnecessary for us to comment very extensively in respect of the latter part of this exercise as we have already indicated that in our view the Reg 16(3)(b) exception has not been established in this case.

Protection of Human Rights and Fundamental Freedoms.

56. The Reg 16(3)(d) exception is extremely narrow and is limited to circumstances in which the return of the child ought not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms. There is nothing demonstrated whatsoever in respect of a return of an English born child to England which would resemble any breach of any human right or fundamental freedom which this child possessed. Regulation 16(3)(d) derives from Art 20 of the Convention. According to the Report of the Second Special Commission meeting to review the Convention's operation, Art 20 was inserted because the 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.

57. In McCall and McCall; State Central Authority (Applicant); Attorney-General of the Commonwealth (Intervener) (1995) FLC 92-551 the Full Court declined to find that the return of a child to England, without treating its individual welfare as paramount, would be in breach of Reg 16(3)(d). The Full Court said of the Second Commission Report at 81,519:

"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 Regulation 16(3)(b). However, that issue can no doubt be resolved in the future."

58. The Hague Convention was accompanied by an explanatory report prepared by E. Perez-Vera, (see Hague Conference on Private International Law, Actes et documents de la Quatorzieme session,vol. Ill, 1980, p. 426). In its discussion of the exceptions to mandatory return the report says:

"31 There is no obligation to return a child when, in terms of article 20, its return `would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'. Here, we are concerned with a provision which is rather unusual in conventions involving private international law, and the exact scope of which is difficult to define.

Although we shall refer to the commentary on article 20 for the purpose of defining such scope, it is particularly interesting to consider its origins here. This rule was the result of a compromise between those delegations which favoured, and those which were opposed to, the inclusion in the Convention of a `public policy' clause.

The inclusion of such a clause was debated at length by the First Commission, under different formulations. Finally, after four votes against inclusion, the Commission accepted, by a majority of only one, that an application for the return of a child could be refused, by reference to a reservation which took into account the public policy exception by way of a restrictive formula concerning the laws governing the family and children in the requested State. The reservation provided for was formulated exactly as follows: `Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed'. The adoption of this text caused a serious breach in the consensus which basically had prevailed up to this point in the Conference proceedings. That is why all the delegations, aware of the fact that a solution commanding wide acceptance had to be found, embarked upon this road which provided the surest guarantee of the success of the Convention.

32 The matter under debate was particularly important since to some extent it reflected two partly different concepts concerning the Convention's objects as regards the return of the child. Actually, up to now the text drawn up by the First Commission (like the Preliminary Draft drawn up by the Special Commission) had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State, an internal law which could come into play in the context of the quoted provision either to `evaluate' the fight claimed by the dispossessed parent or to assess whether the action of the abductor was well-founded in law. Now, such consequences would alter considerably the structure of the Convention which is based on the idea that the forcible denial of jurisdiction ordinarily possessed by the authorities of the child's habitual residence should be avoided.

33 In this situation, the adoption by a comforting majority 16 of the formula which appears in article 20 of the Convention represents a laudable attempt to compromise between opposing points of view, the role given to the internal law of the State of refuge having been considerably diminished. On the one hand, the reference to the fundamental principles concerning the protection of human rights and fundamental freedoms relates to an area of law in which there are numerous international agreements. On the other hand, the rule in article 20 goes further than the traditional formulation of 'public policy' clauses as regards the extent of incompatibility between the right claimed and the action envisaged. In fact, the authority concerned, in order to be able to refuse to order the return of the child by invoking the grounds which appear in this provision, must show not only that such a contradiction exists, but also that the protective principles of human rights prohibit the return requested....

Articles 13 and 20 - Possible exceptions to the return of the child

113 In the first part of this Report we commented at length upon the reasons for, the origins and scope of, the exceptions contained in the articles concerned. We shall restrict ourselves at this point to making some observations on their literal meaning. In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion - and does not impose upon them a duty - to refuse to return a child in certain circumstances.

114 With regard to article 13, the introductory part of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs a and a* is imposed on the person who opposes the return of the child, be he a physical person, an institution or an organization, that

person not necessarily being the abductor. The solution adopted is indeed limited to stating the general legal maxim that he who avers a fact (or a right) must prove it, but in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who in theory has chosen what is for him the most convenient forum.

...

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

...

118 It is significant that the possibility, acknowledged in article 20, that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the last article of the chapter: it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will 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. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view."

59. As far as the Torres Strait Islander issue was concerned, we consider that such a submission might be open in appropriate factual circumstances where a court reaches the stage of exercising its discretion as to whether to return the child or not. There might well be evidence of circumstances where a child of Aboriginal or Torres Strait Islander descent has been habitually resident in a requesting country and either wrongfully removed from that country or wrongly retained in Australia. At the time of the hearing for summary return of the child, a recognised exception is established and an issue then arises as to whether or not in the exercise of discretion the child ought be returned to the requesting country. In such circumstances then an issue such as the likely special expertise of the local tribunal to deal with such issues as has been identified in B and R (1995) FLC 92-636 can be given consideration. Generally, however, it would be presumptuous to believe that a foreign court could not adequately and properly deal with these issues. That said, there may very well be a narrow band of cases where it would be appropriate to give some consideration to the likely special expertise of an Australian court in dealing with issues relating to aboriginality or Torres Strait Islander heritage.

60. In this case, however, the threshold of needing to determine that consideration has never arisen. This child has one great-great-grandparent who was a Torres Strait Islander. The mother emphasises her heritage and indicates that it is an important part of the child's life. It cannot,

however, be said to be likely to be so dominant an element in the child's life that only an Australian court could evaluate the significance of it.

Conclusions

61. This appeal was allowed because the evidence did not establish that the return of R to England would expose him to a grave risk of physical or psychological harm or otherwise place him in an intolerable situation. At its highest the evidence established that R's mother's health might be deleteriously affected if she accompanied him to England, was parted from the support of her family and was prohibited from obtaining appropriate treatment in England. There was no evidence to support the existence of the latter condition.

62. It may be open to a court in an appropriate case to refuse to order the return of a child where the personal circumstances of either parent prohibit that parent from returning to the country where it is sought to send the child. This was not such a case.

63. The return of a child of Aboriginal or Torres Strait Islander heritage to a foreign country child is not per se in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms. The ability of a foreign court to give proper consideration to such heritage would only arise if an exception to mandatory return was otherwise established.

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