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[12/01/1994; Family Court of Australia (Sydney); First Instance]
In the Marriage of S.S. and D.K. Bassi (1994) FLC 92-4

FAMILY LAW ACT

FAMILY COURT OF AUSTRALIA, Sydney

BEFORE: Johnson J.

HEARD: 20, 22 December 1993, 12 January 1994

JUDGMENT: 12 January 1994

In the Marriage of S S and D K BASSI

REASONS FOR JUDGMENT

APPEARANCES:

Cummings instructed by H K Roberts, Crown Solicitor for the Central Authority.

Broun QC instructed by Henry Davis York for the wife.

JUDGMENT: Johnston JR.

1. These are proceedings brought pursuant to the Family Law (Child Abduction Convention) Regulations in relation to two children, L born on 18 May 1980, who is therefore 13 years of age and N born on 21 September 1987, who is therefore 6 years of age. The Director-General of the Department of Community Services, as Central Authority, seeks an order that the children's father be permitted to remove the children from Australia forthwith for the purpose of returning them to England pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction.
2. The children had been brought to Australia from the United Kingdom by their mother. They left the United Kingdom on 4 July 1993 and arrived in Australia on 5 July 1993.
3. The wife is a British citizen. She was born on 14 August 1954 in India and moved to the United Kingdom when she was 5 or 6 years of age. The husband is a citizen of India resident in the United Kingdom. He was born on 25 July 1952 in India and moved to the United Kingdom when he was 11 years of age. The children were both born in the United Kingdom, are British citizens and they have lived in the United Kingdom throughout their lives.
4. The husband and wife were married on 26 February 1978. They separated in February

1992 when the husband left the former matrimonial home following a request by the wife that he do so. The husband has lived at his parents' home since that time.

5. The wife says that she has been subjected to a great deal of physical violence, verbal abuse, harassment and damage to their property by the husband during the marriage and after separation. The wife says that since late 1992, the husband has also been threatening to kill her and that he has also threatened on numerous occasions to kill himself and the children as well as M, her de facto spouse.

6 The wife has filed affidavits by other persons which corroborate the wife's allegations and which provide evidence of quite obsessional behaviour on the part of the husband. The husband denies most of the allegations although he concedes that on occasions he has assaulted the wife and caused damage to property. I note that on 20 October 1989 the wife obtained ex-parte, an order from the Stourbridge County Court excluding the husband from the matrimonial home and restraining him from molesting, assaulting or interfering with her or communicating directly with her and that this order was continued on 2 November 1989. The wife said the parties subsequently reconciled, she said due to pressure on her by members of both families. The wife said the parties did not resume a sexual relationship. I note also that the husband was convicted of an assault causing bodily harm to the wife on 24 April 1993.

7. The wife also says that she takes the husband's threats very seriously and believes that given the opportunity, he will kill her. The wife says she regards the husband's threats to kill her as being not just a personal vendetta against her but also his cultural reaction to a situation where he would consider it necessary to kill her to protect his own dignity and family name. The wife says that because of the husband's threats and the effect that these threats and his violent and abusive behaviour had been having on her and the children, she decided to leave the United Kingdom with the children. The wife says that because of her fear that the husband will kill her she cannot return to the United Kingdom.

8. The wife says that early in 1993 an opportunity arose for her to transfer within the company Upjohn Pty Ltd, by which she was then employed, to another part of the United Kingdom. The wife said that when the husband found this out he threatened her by saying he would find her wherever she might go. The wife says she therefore abandoned her idea of transferring to another part of the United Kingdom. The wife says she left the United Kingdom to preserve her safety and that of the children.

9. The wife also says that in early June 1993 she was informed by M that he had been appointed managing-director of the company Upjohn Pty Ltd for Australia, and that he would be returning to live in Australia. The wife and M have lived together with the children in Australia since mid-July 1993.

10. The wife telephoned the husband from the airport prior to leaving the United Kingdom on 4 July 1993 and informed him that she and the children were going to the United States. The husband says he informed the wife that what she was doing was wrong. The wife said she did not wish the husband to know she would be living in Australia because she feared the harassment she had been enduring would continue through M, which in fact it has.

11. The husband subsequently ascertained that M had been transferred to Australia and he concluded that it was probable that the wife and children were in Australia with M. The husband then brought these proceedings.

12. The husband approached the Lord Chancellor's Department in late October 1993 and

made a request for action to be taken to achieve the return of the children pursuant to the Convention. The Lord Chancellor's Department as the Central Authority for England and Wales approached the Attorney-General's Department, Canberra as Central Authority for Australia on 27 October 1993.

13. I note in passing that on 6 September 1993 the husband had obtained a Prohibited Steps Order pursuant to s 8 of the Children Act 1989 ex-parte, the effect of which was to prevent the wife from removing the children from England and Wales without the husband's consent. That order was continued on 20 September 1993 and adjourned generally with liberty to restore on 4 October 1993.

14. The application by the Director-General was filed on 3 November 1993 and made returnable on 9 November 1993. On that occasion it came before me and I made certain ex-parte orders. These included orders that until further order the children not be removed from Australia, that until further order the wife surrender to the Registrar passports for herself and the children and that details of the children were to be placed on the airport watch lists. I also ordered that a warrant issue authorising and directing the Marshal and the police to take possession of the children and deliver them to officers of the Department of Community Services. The matter was made further returnable for mention on 24 November 1993.

15. In fact the proceedings were re-listed before me on short notice on 22 November 1993 because the warrant had been executed at the Sydney Airport apparently in circumstances where the wife, M and the children had presented themselves for departure, from memory, on holiday to Bali. On that day, and on the following day, certain consent orders were made including an order that the wife have interim custody of the children upon certain conditions that she surrender relevant passports and not remove the children from Australia.

16. In my view the first matter for consideration is whether the Convention applies in this case. At the time of removal of the children there were no orders of any court in operation relating to the children.

17. Pursuant to Article 1 of the Convention, the Convention applies where a child has been wrongfully removed to or retained in any Contracting State. Australia and the United Kingdom are both Contracting States. Article 3 of the Convention provides as follows:

The removal or the retention of a child is to be considered wrongful where

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

18. The meaning of "rights of custody" for the purposes of the Convention is provided for in Article 5 as follows:

(a) "rights of custody" shall include rights relating to the care of the person of the child and,

in particular, the right to determine the child's place of residence;

19. Article 4 of the Convention provides that the Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

20. In my view, the children were habitually resident in the United Kingdom immediately before their removal. They had been living with their mother in the former matrimonial home in Wolverhampton until shortly before they left the United Kingdom on 4 July 1993.

21. It was submitted by learned senior counsel on behalf of the wife that the removal of the children was not wrongful within the meaning of the Convention because at the time of removal of the children the husband was not actually exercising any rights of custody. This was on the alleged basis that the husband had had little contact with the children in terms of him being responsible for them and the only contact he had had for quite a long time had been when they went to visit their paternal grandparents and he happened to see them on such occasions. The submission was also on the basis that the husband had disregarded his responsibilities by reason of his violence and harassment and particularly the fact that he has paid no child maintenance.

22. I reject this submission. Subsection 2(1) of the (United Kingdom) Children Act 1989 provides as follows:

Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

Subsection 2(7) of the Act provides as follows:

Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

Section 3 of the Act defines "parental responsibility" as: "all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

23. In addition, in my view, there is a right given to the husband as a parent of the children, to determine that their residence shall not be outside the United Kingdom by s 1 of the Child Abduction Act 1984. This provides that it is an offence for one parent to remove a child from the United Kingdom without the consent of the other parent. In my view, the husband is a person who pursuant to the Children Act has parental responsibility for the children and in my view this responsibility carries with it the responsibility to determine the children's place of residence. As I have said, he also has the responsibility provided by the Child Abduction Act. There is no evidence that the husband has ever given up this responsibility to determine the children's residence and therefore, in my view, at the time of removal of the children he was exercising "rights of custody" within the meaning of the Convention.

24. I note that in the case in this court of Police Commissioner of South Australia v Temple (1993) 17 Fam LR 144;[1993] FLC 92-365 Murray J considered the relevant provisions of the Children Act 1989 and the Child Abduction Act 1984 in a case involving a British child who was habitually resident in the UK immediately prior to retention of the child in Australia. Her Honour held that the husband in that case, as a person with parental

responsibility, had the right under English law to give or withhold consent to the child's removal from England. Her Honour held that it followed that the husband had the right to determine the child's place of residence and that he had not abandoned that right. Her Honour also held that in these circumstances the child's retention in Australia was wrongful.

25. Her Honour's decision in the case was the subject of an appeal to the Full Court of this court. I note, however, that her Honour's finding that the child's retention in Australia was wrongful was not challenged on appeal.

26. Accordingly, on the basis that I find that the husband was actually exercising rights of custody within the meaning of the Convention under the law of the United Kingdom where the children were habitually resident immediately before their removal to Australia, in my view that removal was wrongful within the meaning of the Convention.

27. In these circumstances, pursuant to r 16(1) of the Regulations I am required to order the return of the children to the United Kingdom unless I am satisfied that at least one of the matters referred to in r 16(3) of the Regulations has been established.

28. It has been submitted on behalf of the wife that several of the matters referred to in r 16(3) of the Regulations are present in this case.

29. Subregulation 16(3) is as follows:

A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that

(a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal;

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

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

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

30. The first submission in relation to r 16(3) is that there is a grave risk that the return of the children to the husband would expose them to physical harm. This was on the alleged basis that the husband drinks alcohol to excess, that he is of violent disposition and has frequently been violent, that he has actually physically injured the children in the course of physical attacks on the wife, that he has threatened to kill the children and that by reason of his cultural and social background his threats should be taken seriously.

31. There is affidavit evidence by a witness in support of the wife's case to the effect that in April 1993 the husband was very drunk, that he put his fist through a window in the wife's home, kicked the front door, punched the witness in the face and threatened to kill the witness. It appears that the husband was arrested on this occasion. The husband conceded that he was convicted of a drink driving offence in 1993 and had his licence cancelled. He says this is the only such offence he has had and said the offence occurred in August 1993 on the day he discovered the wife had removed the two children from the United Kingdom.

32. The wife also alleged that on two occasions when the husband was threatening her with a large kitchen knife the child L intervened to prevent the husband causing the wife harm and the child's hands were cut by the knife.

33. The wife also alleged that on many occasions after October 1992 the husband threatened that he would kill her, kill the children and kill himself and that some of these threats were made in the presence of the children who became very upset. There is an affidavit by a witness in support of the wife's case to the effect that in approximately mid-June 1993, N the younger child, after speaking to the husband on the telephone asked the wife what the husband meant when he said "if he can't have us nobody will and he will do us all in".

34. In my view, it is clear from the decision of the Full Court of this Court in the case of Director-General of Family and Community Services v Davis (1990) 14 Fam LR 381; [1990] FLC 92-182, particularly at missing page number 14 Fam LR 385; FLC 78,227 that the degree of harm referred to in r 16(3) must be substantial and to a level comparable to an intolerable situation. In making an assessment about the gravity of the risk of physical harm to the children it seems to me that two other matters are relevant. The first is the fact that notwithstanding the wife's allegations referred to above, the wife continued to allow the children to visit the husband and his parents on weekends prior to her removal of the children. The second is that at p 6 of the Family Report, Ms Gluckstern who interviewed the child L said as follows:

L does not believe her father would hurt her or N however, she believes he would hurt her mother and this causes her anxiety.

35. In my view, there is insufficient evidence of severe degree of risk of physical harm to which the children would be exposed by being compelled to return to the husband required by r 16(3) to justify an order that they not be returned.

36. The next submission on behalf of the wife was that there is a grave risk that the return to the husband of the children would expose them to psychological harm. This was on the basis that each of the children fear their father for good reason, that they would be separated from their mother who has been their primary care-giver since birth because she cannot return to the United Kingdom because she fears the husband will kill her and because the husband's violence, drunkenness, criminal behaviour and attitude that women have an inferior role would place the children under constant emotional stress, inhibit their proper psychological development and cause substantial psychological distress to them.

37. I note that p 5 of the Family Report includes the following paragraph:

L's attitude to being required to return to the UK

When asked this question, L replied "I'd be frightened" and this seems to relate to her father going out, perhaps coming home intoxicated, possibly fighting with his parents L spoke of this as if it was a pattern she had experienced when living in the U.K.

38. It is the case that the wife's allegations of long-standing and ongoing violent attacks on her and threats to her life and the lives of the children have not been tested by cross-examination. The wife has filed affidavits by numerous witnesses in support of her allegations. These provide some objective evidence that the husband has perpetrated acts of violence on the wife, that the children have been present during such violence and have been upset by it, that L has told the wife to keep a hammer by her bed in case the husband came

around to kill her and that many persons associated with the wife's de facto husband M through the company of which he is managing-director have deposed that the husband has threatened to kill them during the course of telephone conversations he has had with them during his endeavours to contact M.

39. In my view, there is sufficient material for the court to reach the view that the husband has engaged in violent, drunken, obsessional behaviour in the presence of the children and that he has made threats to the life of their mother, the children and himself in their presence. In this context, in my view, there is a basis for L to be frightened about being returned to the husband's care. I also have the view that it would be surprising if the younger child N did not also have such a fear. Are these circumstances such that the children would be placed in an intolerable situation by being required to return to their father's care? Is it tolerable for the children to be placed in a situation in which L says she would be frightened?

40. I note that in *Davis'* case, referred to above, the trial judge made a finding that the return of a 4 year old child to his father would expose him to psychological harm which would place him in an intolerable situation. The trial judge's view was on the basis that the child was highly anxious and also seeking his mother to provide him with security. That view was arrived at after consideration of the following passage of the Family Report in that case:

F avoided all attempts to discuss or draw his family, apart from asking several times if he would, "have to go away in a man's car". F was most anxious to ascertain at regular intervals [the wife's] whereabouts. This behaviour indicates F's awareness of some aspects of the current dispute and the consequent anxiety this has generated for him.

In considering whether the trial judge's conclusion was correct, the Full Court referred to the statement made by Lord Donaldson of Lynton MR in the decision of the English Court of Appeal in *C v C (Abduction: Rights of Custody)* (1989) 1 WLR 654, particularly to the passage at 664, where his Lordship said:

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.

The Full Court said that upon testing the trial judge's conclusion "in the light of that, admittedly stringent test" one could only conclude there was no evidence from which the trial judge could infer that a grave risk of such a severe degree would occur if the child was returned.

41. Comparing the evidence in the Family Report in the present case, namely, that L said she would be frightened if she was required to return to the husband, with the evidence in the Family Report in *Davis'* case, namely that the child asked whether he would "have to go away in a man's car" and the "consequent anxiety (the dispute) has generated for him" it seems to me that in a broad sense they are comparable. In one case the child would be caused anxiety and in the other case the child would be caused fear. In these circumstances, in the absence of other evidence from which one could infer that in relation to the children in the present case their return to the husband would involve a grave risk of psychological harm of the severe degree required, the court is bound by the decision of the court in *Davis'* case to find that the grave risk of psychological harm has not been established.

42. I note that a similar submission was made in the case of *In the Marriage of Murray and Tam*; Director, Family Services, (ACT)(Intervener) (1993) 16 Fam LR 982;[1993] FLC 92-416. In that case there was some evidence by the mother and other witnesses that the father had committed acts of domestic violence on the mother and various threats including death threats against the mother by him, although there was no evidence that any violence or threat had been made against the children. The Full Court rejected the submission. The Full Court said at Fam LR 1002; FLC 80,259:

It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the courts.

43. There was a further submission on behalf of the wife pursuant to r 16(3) (b) of the Regulations. This was that the return of the children to the husband would place them in an intolerable situation, this being on the basis that the husband is unemployed and has no income to support the children, that he has no appropriate accommodation for the children, that he is violent, drinks to excess, has a criminal record and is wholly unsuited to have the care of the children, that the children would be liable to be placed in care for their own protection, that they would be removed from contact with their mother and that they would be placed in a culture which gives women an inferior and subservient position.

44. I reject this submission. It is really a variation of the other submissions in relation to r 16 (3) (b) and in my view the evidence does not support the conclusion sought.

45. The wife also made a submission pursuant to r 16(3)(c) of the Regulations, namely, that the child L objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of her views. L is 13 years 7 months of age. As indicated, in view of her age an order was made that a Family Report be prepared the primary purpose being to ascertain her degree of maturity and her attitude in relation to being returned to the United Kingdom.

46. At pp 3 and 4 of the Family Report, Ms Gluckstern reports as follows:

L is a tall well built attractive girl; this presentation could easily lead to her being perceived as older and more mature than her years.

She impressed as intelligent and well mannered with good verbal ability. She was somewhat nervous and softly spoken, however her comments were thoughtful and measured.

She recounted how she came to Australia in July of this year for a six month holiday. Her initial reaction was she "liked it" here. After a while she felt a "bit down" missing her family and friends and she specifically mentioned her cousin M. These feelings passed and now L states "I'm settled now want to stay here".

L attends Cumberland High School where she says she has "loads of friends". Though the system is different, L does not perceive problems in adapting to or managing her academic life.

A telephone conversation with L's form teacher supported this view. She appears to be coping well and it is expected she will go into Year 9 next year. She enrolled just 2-3 weeks prior to the final year exams and the results would not be an accurate view of her work standard. She is however seen to be an able student, who, on the basis of previous results in

the UK, is in the highest class. She was described as a gentle quiet girl who has made friends with what were termed "good kids". She is not seen to present any problems and her teacher had not detected any anxiety or stress in her behaviour or demeanour.

Ms Gluckstern also reports at page 4 as follows:

She does not feel she has been influenced by her mother to make a particular decision in the present circumstances.

Page 5 of the Report includes the following:

L stated that she rang her father last Sunday and told him she wanted to stay in Australia. According to L, her father did not believe her and he was convinced her mother was forcing her to say that. L felt angry about her father's reaction and it seems likely that in L's estimation, this will widen the distance between them. Mr Bassi's reaction gives L no confidence that if she were to be sent back to the UK he would be able to understand how she would feel. "He believes I'd be happy if I went back ... he thinks I'm sad". L stated her paternal grandmother, to whom she also spoke, is of the same view.

L's attitude to being required to return to the UK

When asked this question, L replied "I'd be frightened" and this seems to relate to her father going out, perhaps coming home intoxicated, possibly fighting with his parents L spoke of this as if it was a pattern she had experienced when living in the UK".

Page 6 of the Report is as follows:

L also stated her sadness at the prospect of leaving her mother, "I've lived with her all my life" and of leaving the friends she has made here.

Should she return to the UK, L perceives she would be living with her father at the paternal grandparents' home. Her grandmother is "quite strict" eg L might be required to wear her hair in a traditional Indian manner. Her grandmother does not read or speak English. The house is small, finances limited and it would seem L could not have the benefits she had when living in the UK with her mother or those she presently experiences in Australia. L commented that she doesn't think her father has thought about how he would support them if they returned to the UK.

L does not believe her father would hurt her or N however, she believes he would hurt her mother and this causes her anxiety. For herself she anticipates her father would get angry and ask a lot of questions about her mother's behaviour and this would be stressful for her. She does not perceive she would be under any stress from her father to adopt (strict) Indian culture, as in the past he has been supportive of the way her mother raised the children.

When asked about visiting her father in the UK should she stay in Australia, L stated "he might not let me come back ... I'd worry about that". She states that she will see him when "he's got himself together". At the moment she sees her father as wanting "revenge" but she does believe he is capable of getting his life back together again.

47. In relation to L's degree of maturity the Report is as follows at p 8:

L is considered to be above average maturity for her age.

She presented a coherent considered account of past and recent events and seemed to have an understanding of the individual perspectives of her family.

She seems able to be balanced in her view though she has clearly been caught between her parents as the marriage disintegrated.

Her discussion did not indicate she is overly identified with her mother nor did she seem markedly negative or fearful in her assessment given the history recounted by Mrs Bassi.

Her perception of the future should she return to the UK seems quite consistent with her past experience rather than reflecting any undue influence placed on her to think in a particular way.

48. Ms Gluckstern concludes as follows at p 9 of the Report:

L stated her preference to stay in Australia in a clear and thoughtful manner. She is considered to be more mature than expected for a 13 1/2 year old. Her account of events seemed related to her experience of them rather than as a consequence of input from other sources.

She perceives herself to have settled in Australia and to be building a life based on family and peer relationships, sporting activities and academic life. It is likely that here L feels a measure of freedom from the family conflict that seems to have been present in her life for the last 12 months and is able to focus more appropriately on her own developmental tasks.

L is not rejecting of her family relationships in the UK but seems to be postponing them to a time when either the situation between her parents is more settled or she is old enough to be independent in her movements between her father and mother.

The reaction of her father to her wish to remain in Australia appears to have affected L. There was a tendency for her to be more resolved in her statements between the first and second interview for this report, (when the phone call occurred).

She appears, at this time, to be psychologically closer to her mother with whom she has always lived and with whom she can feel understood and discuss her problems.

49. In my view, on the basis of the material contained in the Family Report, the court must conclude that L objects to being returned and that she has reached an age and degree of maturity at which it is appropriate to take account of her views.

50. The next matter to determine is whether to exercise the discretion to refuse to make an order under r 16(1) of the Regulations for the return of L. The exercise of such discretion was considered by Lord Justice Balcombe in the English Court of Appeal case of S v S [1992] 2 FLR 492 at 501. His Lordship said as follows:

(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 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.

Thus in *Re M* (above) the court refused to order the return of three children aged 11, 9 and 8 to America. In the course of his judgment the President said:

"I am, however, concerned for the children. I find that they do object to being returned and that each of them has attained an age and a degree of maturity at which it is appropriate to take account of their views. I feel that I must take account of their views. Their views are not however determinative of the position and I have to consider how far they should affect me.

"I feel that I should give effect to their objection in this case in the light of the fact that they give valid reasons, in my judgment, for objecting to going back to America into the care of their father, because of his former conduct. I consider that he has materially admitted this. I do not therefore propose to order their return. That is the sole extent of the order that I make. I do not determine custody rights or access rights or any other rights as between the parties. But in the light of the children's objections to being returned, I decline to order their return under the terms of the Convention and the provisions of the Child Abduction and Custody Act 1985."

51. It seems to me that in the present case it is appropriate to give serious consideration to L's views as expressed by her to Ms Gluckstern. It is clear that L has a close relationship with her mother and clearly she would prefer to stay with her mother. However, L gives what I regard to be valid reasons for not wanting to return to the United Kingdom. She said that she would be frightened and I am satisfied that such a fear is based on her father's past conduct already referred to by me above. As I have said, in my view, there is sufficient material before the court to reach the view that the husband has engaged in violent, drunken, obsessional behaviour in the presence of the children and that, in their presence, he has made threats against the life of their mother, against their lives and against his own life. As I also said, this is a basis for L to be frightened of returning to the United Kingdom. I also take into account all the other reasons referred to in the Family Report including the fact that the child perceives her daily life in Australia to be preferable to that which she perceives would be available to her in the United Kingdom.

52. In my view, this is the exceptional case and the discretion should be exercised against ordering L to return to the United Kingdom.

53. In these circumstances, does the Convention require the court to order the return of N, the younger child? It was submitted on behalf of the wife that if I was to find that L should not be required to return to the United Kingdom, and N would be required to return, there would then be a grave risk that N would be exposed to severe psychological harm or otherwise placed in an intolerable situation. It was submitted that this would be on the basis that the children have a close relationship with one another, never having lived separately

and apart since birth, and that separation of N not only from L but also from her mother, which would be likely for the reasons stated earlier, would be likely to have serious psychological consequences for her. It was submitted that there is some evidence in the Family Report to support such a conclusion by the court and this is as follows at p 7:

L's relationship with her sister

L perceives N as shy and still very dependent on Mrs Bassi. N rarely stays away from Mrs Bassi and in the past when staying with her grandparents in the UK N would usually want to go home. She perceives her father and grandmother have problems managing N who will cry and scream if she is upset.

This would seem to have ramifications for L should the children be returned to the UK. One could hypothesise L may have greater responsibilities for her sister especially in an emotional/ nurturant sense.

54. I accept this submission. In general, the court has been most reluctant to separate siblings because of the likely consequent emotional and psychological effect of doing so. To require N to return would not only be likely to expose her to the very things which cause L fear, but would do so in circumstances where neither her sister nor her mother would be present. If N was returned to the appropriate child care authorities rather than to the husband this may remove some concerns only to replace them by a situation where the child may be cared for by strangers.

55. The conclusion which I reach is that to require N to return without either her mother or her sister would place her in an intolerable situation within the meaning of the Convention.

56. In my view the orders sought by the Director-General should not be made.

57. There was a further submission on behalf of the wife which related to r 16(3)(d) of the Regulations. In view of the decision I have arrived at, it is not necessary to deal with this submission.

58. I make the following orders:

(1) I order that the application of the Central Authority contained in paragraph 3 of the application filed on 3 November 1993 be dismissed.

(2) That orders 2, 3, 4 and 5 as amended of the orders made on 22 November 1993 continue in operation until 14 February 1994 and to be further extended until further order if the Central Authority files an application for review of this decision within the period provided by the Rules.

(3) That the exhibits shall be released on 14 February 1994 in the event that a review has not been filed.

(4) That liberty be given to both parties to relist these proceedings for mention on 48 hours notice.

(5) I note that order 1 of the orders made on 22 November 1993 is to continue until further order.

(6) I adjourn the wife's custody and guardianship application to the Registrar's s 37A list at

9:45 am on Friday, 11 March 1994.

(7) I order that service of the wife's said application may be effected on the husband by pre-paid post care of Messrs Dunham Brindley & Linn of Wolverhampton, United Kingdom.

(8) I dismiss the wife's application for costs.

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