http://www.incadat.com/ ref.: HC/E/AU 458
[27/05/2002; Full Court of the Family Court of Australia (Sydney); Appellate Court]
Janine Claire Genish-Grant and Director-General Department of Community Services
[2002] FamCA 346

FAMILY LAW ACT 1975

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

BEFORE: Finn, Holden and Barlow JJ

HEARD: 10th and 11th days of April 2002

JUDGMENT: 27th day of May 2002

Appeal No. EA 110 of 2001

File No. SY 4998 of 2001

IN THE MATTER OF:

Janine Claire Genish-Grant

Appellant

- and -

Director-General Department of Community Services

Respondent

REASONS FOR JUDGMENT

APPEARANCES: Mr Connor of counsel (instructed by Swaab, Attorneys, Swaab House, Level 5, 12 O'Connell Street, Sydney, NSW 2000) appeared on behalf of the appellant

Ms Hartstein of counsel (instructed by Department of Community Services, Legal Services Unit, 164-174 Liverpool Road, Ashfield, NSW 2131) appeared on behalf of the respondent

JUDGMENT:

1. FINN and BARLOW JJ. This is an appeal by the mother of two children, aged approximately nine and five years old, against all orders made by O'Ryan J on 10 December 2001, the essential effect of which was to order the return of the two children "to Israel" pursuant to the provisions of the Family Law (Child Abduction Convention) Regulations ("the Regulations").

2. The factual background to this case, and a detailed analysis of O'Ryan J's reasons for judgment, are contained in the judgment of Holden J. We do not need to repeat any of that material.

3. Holden J has also set out in his judgment the nine grounds of appeal which the mother pursued before us, and which raised issues concerning a number of different provisions in the Regulations. Ultimately, his Honour has concluded that there is no substance in any of the mother's grounds of appeal, and accordingly he would dismiss the appeal.

4. We agree with his Honour that there is no substance in any of the grounds of appeal, and we agree generally with his reasoning for so concluding.

5. However, as Holden J has recorded in his judgment, at the hearing of the appeal, the mother sought leave to adduce further evidence. Part of that evidence, being a travel advice from the Department of Foreign Affairs and Trade ("DFAT") issued on 3 April 2002, and current on 10 April 2002 (when the hearing of the appeal commenced), was admitted by consent.

6. Holden J has concluded that, notwithstanding that DFAT travel advice (the terms of which we will shortly set out, but which can briefly be described as an upgraded warning to Australians from that which was current at the time of O'Ryan J's orders), the mother has still failed to establish that there is a grave risk of exposure to physical harm to the children if they were returned to Israel because of unrest in that country.

7. We do not agree with his Honour's conclusion in relation to this matter. Contrary to his Honour's conclusion, we would allow the appeal on the basis of the further evidence constituted by the DFAT travel advice, and make an order dismissing the application of the Central Authority for the return of the children to Israel. Our reasons for so concluding are as follows.

8. Regulation 16(3) of the Regulations provides that:

"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;"

9. In the relatively recent High Court decision in DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services (2001) FLC 93-081, Gaudron, Gummow and Hayne JJ made the following observations in relation to the construction of Regulation 16(3)(b) (emphasis added):

"41. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. *The burden of proof is plainly imposed on the person who opposes return.* What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in "an intolerable situation". That requires some prediction, based on the evidence, of what may happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

42. Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that *certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description "grave".* Leaving aside the reference to "intolerable situation",

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

43. Because what is to be established is a grave risk of exposure to future harm, *it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence* [cf Re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR(UK) 1145 at 1154 .] . The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.

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

10. Before us, the mother has sought to rely simply on the terms of the DFAT travel advice issued on 3 April 2002 in order to satisfy the Court that there is a grave risk of physical harm to the children within the meaning of Regulation 16(3)(b) if they were to be returned to Israel. The question for us is whether that document provides "clear and compelling evidence" that there is a grave risk of exposure to future harm for these children.

11. The terms of that DFAT travel advice are as follows (emphasis added):

***"Australians should defer all travel to Israel.* Australians should not travel to the West Bank and the Gaza Strip. Australians already in Israel should carefully consider their need to be in the country at this time, taking into account the security situation and their personal circumstances.**

Australians in the West Bank and Gaza Strip should leave where it is possible and safe to do so. Australians in closed military zones should not attempt to leave until advised by local authorities that it is safe to do so.

The deterioration in the security situation has included a high number of terrorist attacks in recent days against civilian targets in Netanya, Tel Aviv, Jerusalem and Haifa. *All population centres in Israel are at very high risk of terrorist attack at the present time. Targets in the past have typically been areas where large numbers of people gather*, including *hotels,* pedestrian promenades, street shopping malls, *restaurants, cafes and other places of entertainment* and buses and bus stations.

The situation on the West Bank and the Gaza Strip is extremely dangerous. The Israeli Defence Force (IDF) have entered a number of Palestinian towns, including Ramallah, Bethlehem, Qalkilya and Tulkarem and declared general curfews. Travel outside of residences in these areas is extremely unsafe. Regular exchanges of live fire are taking place. House to house searches are also being undertaken by the IDF. Further IDF incursions into the West Bank and possibly the Gaza Strip should be expected."

12. While we recognise that this advice primarily focuses on the "extremely dangerous" situation in the West Bank and the Gaza Strip, and that the area where the children's father resides is some distance (relatively speaking) from these places, the advice does say that Australians should defer "all travel to Israel". It will be recalled in this regard that O'Ryan J's order simply required the return of the children "to Israel".

13. Further, and particularly significant for present purposes, is the fourth paragraph of the notice, where it is said that "[a]ll population centres in Israel are at a very high risk of terrorist attacks at the present time", and that "[t]argets in the past have typically been areas where large numbers of people gather". It is to be noted that hotels, places of entertainment and bus stations are then mentioned. We consider this part of the travel advice to be significant in the present

case, because of the following findings by O'Ryan J concerning the place where the father of the children lives and works:

"27. In November 1995 the father found a restaurant complex near Moshav Amirim north of Israel overlooking the sea of Galilee and the Mediterranean Sea. There was room for a large restaurant and 21 rooms as well as performance areas, workshop and what he called a healing space room. It also had a large apartment where the parties could live and a large garden.

28. In November 1995 the parties then commenced to live at and operate a hotel/restaurant complex near Moshav Amirim. It is called the Hotel Han HaGalil Amirim and is located in the Merom HaGalil County in the North of Israel. The father was the manager.

29. The mother also gave evidence about how at the complex the father did kabbalat shabbat ceremonies in the restaurant and that this began to draw crowds at the restaurant. The mother described the father as a "charismatic performer". The mother supported the father's wishes for herself and the children to be involved with this religious event and that it was highly successful. The media were involved and stories of the "three partners" were in magazines, newspapers and television. The mother said that the father became famous.

34. Notwithstanding the lack of evidence about precisely when the parties separated, and the circumstances surrounding the separation, and where each party lived, it is conceded that at the time when the mother and the children returned to Australia the parties were separated although they were living in the same complex and perhaps were living under the same roof. In her oral evidence the mother said that the parties separated in August 2000. I am satisfied, however, that shortly prior to the mother and children leaving Israel the parties and the children continued to live in the complex and that the father's participation with the children was to the same extent as it was prior to the separation of the parties."

14. We acknowledge that much of the description of the father's residence and workplace given by his Honour related to the position in 1995. Nevertheless, the father is apparently still at the same complex, and there is nothing to suggest that its operations have changed.

15. Moreover, a return to Israel would obviously involve, and this was conceded before us by Counsel for the Central Authority, the children returning to Israel through an international airport, and then travelling by public transport to the Amirim area. We mention in this regard that as Holden J has explained in his judgment, this case proceeded on the basis that the children would be returned to the Amirim area.

16. Given these considerations regarding the type of place where the father lives and works and the travel arrangements which would be involved in returning these children to Israel, we are prepared to accept the passages of the DFAT travel advice to which we have drawn particular attention, as constituting clear and compelling evidence of a grave risk that return of the children to Israel would expose them to harm.

17. It is not without some relevance, in our view, that once the DFAT travel advice was before us by consent, the Central Authority did not seek the opportunity to obtain updating evidence from Yaakov Dahan, the Commander of the Security Services of the local County Council of the Upper Galilee County whose affidavit evidence, filed 5 November 2001, is referred to by Holden J in his judgment.

18. We have had regard in reaching this conclusion to what was said in Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996), where the United States Court of Appeals for the Sixth Circuit 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."

19. The United States Court of Appeals did not define the concept of "a zone of war", but we are of the view that the situation, as described in the last paragraph of the passage quoted earlier from the DFAT travel advice (albeit describing the situation in the West Bank and Gaza Strip) could well be regarded as coming within the description of a zone of war.

20. In order for the mother to satisfy us that a return of the children to Israel would expose them to a grave risk of harm, it is not in our view necessary for her to prove that such a return would expose them to a grave risk of direct harm over and above the risk of harm to which any individual in Israel is exposed. We reach this conclusion because, when the relevant harm sought to be relied on for the purpose of establishing the defence under Regulation 16(3)(b) is in the nature of warfare or civil unrest, we do not think it necessary or possible to draw any distinction between a direct risk to a particular individual and the risk to which the relevant population is generally exposed.

21. Having regard to the decision of the High Court in CDJ v VAJ (1999) 197 CLR 172; (1998) FLC 92-828 (and particularly what was said by McHugh, Gummow and Callinan JJ at [109], [111] and [114]), it is clear that further evidence, particularly where the evidence relates to events occurring after the trial, can be admitted by the Full Court in order to demonstrate that the order under appeal (although not necessarily erroneous at the time that it was made) has been rendered erroneous, and where that further evidence is not in dispute, this Full Court is able to evaluate it and to take it into account in determining the appeal without the necessity for a new trial.

22. As we have indicated earlier, the DFAT travel advice was admitted by consent. We did not understand Counsel for the Central Authority to dispute that if, on the basis of that evidence, this Court was satisfied that there is a grave risk that the return of the children to Israel would expose them to physical harm, within the meaning of Regulation 16(3)(b) of the Regulations, then this Court could in the exercise of its discretion make an order dismissing the application of the Central Authority for the return of the children to Israel. In our opinion this is the course that this Court should adopt. It was not suggested by either side that there should be a new trial of this matter.

23. We would also add that we agree with what Holden J has said regarding the possibility of the grant of a stay pending the development of the situation. We agree that such a course would not be appropriate.

24. The orders which we would therefore propose should be made are as follows:

That the appeal be allowed.

That Orders 1 to 4 of the orders made by O'Ryan J on 10 December 2001 be discharged.

That the application of the Central Authority filed on 10 August 2001 be dismissed.

25. In relation to our proposed orders, we would explain that although the appeal was against all orders made by O'Ryan J, we consider that it is only necessary to discharge Orders 1 to 4, which are concerned with the return of the children to Israel. Order 5 discharged interlocutory orders which it seems appropriate to discharge. Orders 6 to 9 are of a procedural nature.

26. In relation to the costs of this appeal, we received brief oral submissions in relation to this matter from both Counsel at the conclusion of the hearing of the appeal. We are of the view that there should be no order as to costs.

27. HOLDEN J: This appeal involves the application of the Family Law (Child Abduction Convention) Regulations 1986 ("the Regulations"). Janine Claire Genish-Grant ("the mother") appeals against orders made by O'Ryan J on 10 December 2001 the most important of which was:

"That the Central Authority make such arrangements as are necessary to ensure the return of the children S.G. born on 29 June 1993 and H.G. born on 22 May 1997 to Israel."

Background

28. The mother was born in Australia on 21 November 1961. Moshe Genish ("the father") was born in Israel on 26 April 1965. The parties commenced cohabitation in about April 1990 and were married on 19 January 1997. The parties finally separated in late 2000. The two children of the marriage are those named above. The parties lived at various places in Australia from 1990 until March/April 1995 when they went to live in Israel.

29. The mother returned to Australia with the children on 3 December 2000 with the agreement of the father that she could remain in Australia for a period of 3 months. His Honour found that the mother admitted prior to leaving Israel that she had promised that she would return the children and that when she said this to the father it was a lie because she did not intend to return. He accepted the submission that at all times during 2001 the mother had no intention of returning the children to Israel and that she had led the father to believe that she would.

30. An application was filed on behalf of the Central Authority on 10 August 2001. The matter was heard by his Honour on 9 and 14 November 2001 and on 10 December 2001 he delivered his reasons for judgment and made inter alia the order referred to above.

The Judgment of the Trial Judge

31. Having set out what he referred to as the "short history" albeit in far more detail than I have, his Honour referred to the relevant principles and set out Regulation 16 in full. He then referred to the non-contentious issues which were that: Israel is a Convention country; the children were under the age of 16 years; the children were in Australia; and the application of the Central Authority was filed on a day less than one year after the day on which the children were removed to or first retained in Australia.

32. His Honour then turned to consider the issue of whether or not the children were habitual residents of Israel immediately before their removal or retention. His Honour concluded as follows:

"69. The parties lived together in Israel from April 1995 to the end of 2000. The father went to Israel to see his mother and also pursue his ambition about peace which the mother agreed with and supported. The father became the manager of a resort complex in November 1995 and has been successful. The mother became a citizen of Israel. The children are citizens of Israel. The mother agreed that she decided to live in Israel. The mother came to Australia in 1996 and 1999 and returned to Israel. The mother knew when the parties separated, and she wanted to return to Australia, that the father would not agree to the children not returning to Israel.

70. I am of the view that the parties lived in Israel for a significant period of time and that they did so after November 1995 with a settled purpose. The mother says that she was unhappy living in Israel and having considered what the mother said in her affidavit this unhappiness seems to relate, inter alia, to what she said about the infidelities of the father. I am satisfied that after

November 1995 the habitual residence of the parties changed from Australia to Israel and that as at December 2000 the children were habitually resident in Israel."

33. His Honour then turned to consider whether or not the father had "rights of custody". He considered the provisions of the Capacity and Guardianship Law (1962) of Israel. He concluded:

"75. Section 14 of the Capacity and Guardianship Law provides that parents shall be the natural guardians of their minor children. Section 15 provides:

The guardianship of parents shall include the duty and the right to take care of the needs of the minor, including his education, studies, vocational and occupational training and work, and to preserve, manage and develop his property; it shall also include the right to the custody of the minor, to determine his place of residence and the authority to act on his behalf."

76. The combined legal effect of ss. 14 and 15 is that each parent has the right to custody of minor children and to determine the residence of minor children. Israeli law distinguishes between guardianship and custody. On behalf of the father evidence was given by a Director of the State of Israel Ministry of Justice that the combined effect of ss. 14 and 15 is to establish that both parents are the joint guardians of their children and that this right includes the right to determine their place of residence. The right to guardianship also establishes the separate rights of custody and the right to act on the child's behalf. "

34. His Honour then considered various other sections of the Capacity and Guardianship Law (1962). He referred to the submission made on behalf of the mother, that the father had agreed prior to her departure in December 2000 that the children would live with her and that he would have contact and thus that he only had rights of access. It was further submitted that the mother had the right to determine the children's place of residence because the father agreed that she would have physical custody of the children in Israel. His Honour determined that submission as follows:

"82. I accept that the submission of the mother has no basis in Israeli law and is without merit. There were no orders in relation to any aspect of the guardianship of the children. The mother and the children were living in the complex and the father was actively involved in the daily lives of the children although the parties were separated. Even if there had been a court order giving the mother custody of the children as long as the father was exercising his rights of access as the natural guardian of the children he has an equal right with the mother to determine the children's place of residence.

83. In the result, I am satisfied that at the time of the retention of the children by the mother in Australia the father was exercising rights of custody. He was the joint guardian of the children and had the right to determine the place of residence of the children. I am satisfied that the mother did not have sole rights of custody under the law of Israel. There was no court order giving her those rights. I am also satisfied that the father had not agreed that the mother had the sole right to determine the place of residence of the children."

35. As to the issue of wrongful retention, his Honour said as follows:

"84. In re: S (Minors) (Abduction; wrongful retention) (1994) FLR 70 Wall J held that where a parent announced her intention not to return the children to their country of habitual residence at all that parent could no longer rely on the other parent's agreement to the limited period of removal or retention.

85. In early March 2001 the father agreed that the children could stay in Australia for a further month. However, the mother made no effort to return the children at the expiration of a month. I am of the view that as and from 3 April 2001 the mother wrongfully retained the children in this country. It was at that point that the mother breached the agreement she had with the father to return the children."

36. As to whether or not the father consented to the removal of the children to Australia or acquiesced in their retention in this country, his Honour said:

"86. The mother and the children came to Australia for a holiday for a period of three months and this was agreed to by the father. The father then agreed to the mother and the children remaining in Australia for a further period. O (sic) accept that the mother having asserted prior to her departure that she intended to return to Israel and at each stage upon the father's request that she return stated that she intended to return and just required a little more time in Australia cannot assert that the father consented or acquiesced in the children remaining in this country.

87. As seen, in early June 2001 the father caused his solicitor to write to the mother requesting that the children be returned to Israel and the mother refused.

88. For reasons I have already given I am of the view that at no time has the father consented or acquiesced to the children being retained in Australia."

37. The reasons that his Honour had already given referred to in paragraph 88 of his judgment, were as follows:

"71. As to what has happened since the mother arrived in Australia it is relevant to consider the evidence of the mother in cross examination that she deliberately did not tell the father what her real intentions were namely to get to Australia and not return to Israel because she knew that the father would not agree. I do not accept the evidence of the mother about what the father is asserted to have said to the mother before the mother and the children left Israel in December 2000 about living in Israel, Australia or anywhere. Although he was not cross examined I prefer the evidence of the father. After considerable discussion and negotiation between the parties, involving others, it was agreed that the mother and the children would come to Australia for three months for a holiday which means that they were to return in March 2001. After December 2000 the parties were in regular communication by telephone and in early March 2000 the mother sought and the father agreed to an extension of one month. After 4 months (April) the mother asked for more time and the father did not agree. After 5 months (May) the mother refused to talk to the father. The mother asserts and, inter alia, relies upon conversations that the parties had in June 2000 to establish that the father agreed that the children should remain in Australia.

72. I accept that between December 2000 and June 2001 the parties, and others, had conversations about the future of the parties' relationship and the father seeing the children. The latter matter is understandable given the close relationship between the father and the children. On 12 June 2001 the father's lawyer in Israel wrote to the mother advising that unless the children were returned to Israel within 10 days then the father would regard the mother's refusal as "kidnapping". It is relevant to consider the contents of this letter.

73. In conclusion, I am of the view that at no time after 3 December 2000 did the father agree that the children could continue to reside in Australia or continue to reside in a country other than Israel. …"

38. His Honour had to consider whether there was a grave risk that the return of the children to Israel would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

39. His Honour referred to the following passage from a report of Dr Brent Waters:

"It is my view, based on the material I have seen, if Mrs Genish-Grant were to return to Israel to live and the children reside with her, it is likely that her anxiety would be significantly increased and that her capacity to care for the children would be significantly eroded which would expose them to physiological harm.

I am not satisfied that it is probable that the return of the children to Israel would expose the children to physical or physiological harm or otherwise place the children in an intolerable situation by virtue of contact with their father, or if they were to reside with him."

40. His Honour noted that Dr Waters was cross-examined and that no expert evidence was called by the Central Authority. He also noted that it was not suggested in cross-examination that Dr Waters was in error in his opinion. He therefore concluded that his evidence was largely uncontradicted. His Honour determined this issue as follows:

"100. As to the risk of psychological harm Dr Waters did assess the degree of risk in that he said that it is "likely" that the mother's anxiety would be significantly increased and that her capacity to care for the children would be significantly eroded which would expose them to physiological harm. In DP v Commonwealth Central Authority (supra) Gaudron, Gummow and Hayne JJ did say that certainty is not required and that what is required is persuasion that there is a risk which warrants the qualitative description ''grave''. Further, that the risk that is relevant is not limited to harm that will actually occur, but extends to a risk that the return would expose the child to harm. Their Honours also said (at 586) that the application of reg 16(3)(b) requires consideration of what are said to be the consequences of return which is essentially a question of fact.

101. Counsel for the mother relied upon a decision of the Ontario Court of Appeal of Pollastro v Pollastro (1999) 171 D.L.R. (4th) 31 as an example of a case where the defence of grave risk of harm was established. In that case Abella JA said at 41 that in Thomson v Thomson [1994] 3 S.C.R.551 the Supreme Court of Canada established the interpretative framework for deciding cases under the Hague Convention. Abella J.A. referred to the judgment of La Forest J. and said at 43:

[23] It must be a "weighty" risk of "substantial" psychological harm, "something greater than would normally be expected on taking a child away from one parent and passing him to another" (at p.597, quoting with approval Re A. (A minor) (Abduction), [1998] 1 F.L.R. 365 (Eng. CC)). Both the risk and the harm must be substantial.

[24] La Forest J. also stated that the source of the harm was not material…"

102. If the children lived with the father there is no risk. However, on the basis that the children lived with the mother, in my view, in assessing the risk it is also relevant to take into account that the risk may be mitigated by the children having the opportunity to see and spend time with the father. Although it was not put to Dr Waters it is open to me to find that the father may have the opportunity and be able to shield the children from the impact on them of the mothers' inability to do so. In the result I am not satisfied that there is a grave risk of harm to the children or of being exposed to harm."

41. He went on to say:

"109. Dr Waters made it clear in cross examination that the stressor to the mother's condition was not the result of a single thing but the result of a series of things although at the moment it is the prospect of going back to Israel. Further, that the mother's condition may have existed prior to December 2000 and was related to the separation of the parties. The children and in particular the youngest child had some problems after the parties separated and while in Israel.

110. It is clear from the authorities that the psychological harm must be of a substantial or weighty kind. Dr Waters did not say that the harm would fit this description. Further, as I have said, these children have a close relationship with the father and are missing him. The eldest child wishes that the parents were happy and lived together ever after in Australia. The environment in which these children experienced in Israel and in which they would live if they returned to that country is very different to what for example were the circumstances in Pollastro (supra). I am therefor (sic) not satisfied that the harm suggested is of a substantial or weighty kind.

111. In conclusion, I am not satisfied that there is a grave risk of psychological harm to these children if they returned to Israel."

42. His Honour also had to consider whether or not the children would be at grave risk of physical harm. He concluded:

"112. As to the grave risk of physical harm to the children if they were returned to Israel the mother lived in Israel for five years. She returned to Israel in 1996 and 1999. Lisa Segelov lives and works in or near Tel Aviv. She has three children and proposes to continue to live in Israel because of her commitment to lead a fulfilling Jewish life and yet she said that she believes that there is a grave risk of physical harm to children simply by being present in Israel. I place very little weight on her evidence. The Australia Department of Foreign Affairs has issued a travel information advise (sic) to Australian travellers to Israel of safety and security risks.

113. However, evidence was given by the father about the situation in the area where the resort complex is located. As well, evidence was given by Michale (sic) Agam who is also involved in running the hotel. Evidence was also given by Yaakov Dahan who is the Commander of the Security Services Division of the Local County Council of the Upper Galilee County. His duties include the security needs of a number of settlements including Amirim. He described the area under his command as one of the most secure and trouble free area (sic) of Israel. The unrest that is experienced in Israel is not in relative proximity to the family residence. The mother and the children were able to leave Israel. There is no evidence for example that the play group and school that the children attended are closed or that the business is not open.

114. Israel has had a security issue since 1948 and it continues to experience security issues. The gravity of the security issues has varied. I accept what counsel for the Central Authority said about the need for caution in certain parts of Israel for example in Jerusalem. However, I accept the evidence of the father and his witnesses as to the situation in the area where the father lives. I am not satisfied that the mother has established by clear and convincing proof that there is a grave risk of physical harm to the children because of unrest in Israel.

115. I am also not satisfied that the children would be placed in an intolerable situation if they were returned to Israel."

43. His Honour was satisfied that the mother had failed to establish the defence that the children objected to being returned to Israel. As no grounds of appeal address that issue, it is unnecessary for me to take that matter any further.

44. His Honour then went on to say that even if he was of the view that in the circumstances of the case one of the grounds for refusal to make an order under Regulation 16(3) was established, he would nevertheless order the return of the children to Israel stating:

"122. The discretion is not governed by the principle that the children's welfare is the paramount consideration. However, the children have a close and loving relationship with both parents. I have no doubt that the children are missing the father. The mother's anxiety is having an effect on the children and this is causing them harm. The current stressor is the mother's anxiety about the situation in Israel. There is no guarantee that her situation will abate and it may persist because of other stresses. These children need to have a relationship with the father.

123. Importantly, I am of the view that in the event that the children needed protection in Israel the courts in that country could be expected to provide that protection."

Grounds of Appeal

45. The grounds of appeal are set out in the Notice of Appeal filed 20 December 2001. At the hearing of the appeal ground 7 was abandoned and a new ground 7 was relied upon without objection, and ground 10 was abandoned.

"1. That His Honour erred at law in failing to find that there exists a grave risk of exposure to physical or psychological harm, or otherwise the children may be placed in an intolerable situation, in the event that they are returned to Israel.

2. That his Honour erred in finding that there was no grave risk of psychological harm if the children were returned to Israel.

3. That His Honour erred in finding that there was no grave risk of physical harm to the children by returning to Israel.

4. That His Honour erred in accepting the evidence of the father over the evidence of the mother when the mother was cross-examined (as were her witnesses) and the father was not made available to be cross-examined.

5. That His Honour erred in finding that the children's habitual residence was Israel at the time immediately before the alleged retention.

6. His Honour erred in failing to find that the husband had consented or acquiesced in the children remaining in Australia.

7. That his Honour erred in law in holding that the respondent was actually exercising rights of custody at the time of the alleged retention in or removal to Australia and in finding that the respondent would not (sic) have so exercised rights of custody but for the alleged retention in or removal to Australia.

8. His Honour erred in finding that the father may have the opportunity to be able to shield the children from exposure to psychological harm when clear evidence was available that this had not occurred in the past and had adverse impacts on the children.

9. His Honour erred in placing "little weight" upon the evidence of Lisa Segelov when this evidence was uncontradicted and she was not required for cross-examination."

10. [Abandoned]

Further Evidence

46. By an application received by the Court but not filed by it on 2 April 2002 the mother sought leave to adduce further evidence. The evidence that was sought to be introduced was:

(a) that the Australian Department of Foreign Affairs and Trade ("DFAT") had upgraded the warning in relation to travel to Israel; and

(b) to lead "further evidence in relation to a Declaration of War on Terrorism issued by Israel against Palestinian forces in the occupied territories. [t]o adduce expert evidence that this development should be treated as analogous to a Declaration of War, as recognised by International Law".

47. Upon the hearing of the appeal, the upgraded DFAT notice went into evidence by consent. The Court was informed that the additional evidence in relation to a declaration of war was not pressed but that the mother would want to adduce further evidence in the event that the Court was minded to re-exercise the discretion.

48. The relevant portion of the DFAT notice issued on 3 April 2002 is as follows:

"Australians should defer all travel to Israel. Australians should not travel to the West Bank and the Gaza Strip. Australians already in Israel should carefully consider their need to be in the country at this time, taking into account the security situation and their personal circumstances.

Australians in the West Bank and Gaza Strip should leave where it is possible and safe to do so. Australians in closed military zones should not attempt to leave until advised by local authorities that it is safe to do so.

The deterioration in the security situation has included a high number of terrorist attacks in recent days against civilian targets in Netanya, Tel Aviv, Jerusalem and Haifa. All population centres in Israel are at very high risk of terrorist attack at the present time. Targets in the past have typically been areas where large numbers of people gather, including hotels, pedestrian promenades, street shopping malls, restaurants, cafes and other places of entertainment and buses and bus stations.

The situation on the West Bank and the Gaza Strip is extremely dangerous. The Israeli Defence Force (IDF) have entered a number of Palestinian towns, including Ramallah, Bethlehem, Qalkilya and Tulkarem and declared general curfews. Travel outside of residences in these areas is extremely unsafe. Regular exchanges of live fire are taking place. House to house searches are also being undertaken by the IDF. Further IDF incursions into the West Bank and possibly the Gaza Strip should be expected."

Submissions on Appeal

49. Before dealing with the individual grounds of appeal, it is appropriate that I deal with the submission that his Honour misconstrued Regulation 29 in that he:

"held, in substance, that:

(i) the CA [Central Authority] had no need to make deponents available for cross-examination; and

(ii) their affidavit or statement evidence is evidence of the facts."

50. Regulation 29 provides as follows:

"29(1) [*Application, document or affidavit admissible as evidence*] In proceedings under these Regulations in a court:

(a) an application under regulation 13, 14, 24 or 25 or any document attached to or forwarded in support of that application is admissible as evidence of the facts stated in the application or document; and

(b) the affidavit of a witness who resides outside Australia that is filed in the proceedings is admissible as evidence in the proceedings despite his or her non-attendance for cross-examination in the proceedings.

29(2) [*Statement in document admissible as evidence of fact* to same extent as oral evidence of fact] In proceedings under these Regulations in a court, a statement contained in a document that purports:

(a) to set out or summarise evidence given in proceedings in a court in a convention country, or before a competent authority of that country, in relation to the custody of a child and to have been signed by the person before whom the evidence was given;

(b) to set out or summarise evidence taken into a convention country for the purposes of proceedings under these Regulations (whether in response to a request made by the court or otherwise) and to have been signed by the person before whom the evidence was taken; or

(c) to have been received as evidence in proceedings in a court in a convention country or before a competent authority of that country in relation to the custody of a child and to have been signed by a judge or other officer of the court or that authority;

is admissible as evidence of any fact stated in the document to the same extent as oral evidence of that fact, without proof of the signature of the person purporting to have signed it or of the official position of that person."

51. By a letter dated 6 November 2001 (3 days prior to the trial) the solicitor for the mother gave notice that he required for cross-examination all deponents of affidavits relied upon by the Central Authority. On the same day the solicitor for the Central Authority replied as follows:

"Except for myself, all the other deponents of the affidavits filed by the Central Authority are currently in Israel. Consequently, those persons will not be available for cross-examination at the hearing. I refer you to Regulation 29 of the Family Law (Child Abduction Convention) Regulations in this regard."

52. The submission of the Central Authority (contained in the outline of case document) which it is said his Honour incorrectly accepted was:

"The Respondent has asked that the deponents of the Applicant's affirmations be made available for cross examination. These witnesses are resident outside Australia and cannot be made available for cross examination. In any event, it is submitted, the Applicant has no need to make deponents available for cross examination as their affidavit or statement evidence is evidence of the facts."

53. I perceive that submission to be correct insofar as it relates to the admissibility of the affidavits, notwithstanding that the deponents are not made available for cross-examination. Nowhere did his Honour indicate that the deponents could not be required for cross-examination or that the Regulation precluded him from attaching such weight to the affidavits as he considered appropriate in the event that they were not made available for cross-examination.

54. The simple fact was that after the exchange of correspondence that took place on 6 November 2001, the matter was taken no further. Counsel for the mother conceded that no request was made of his Honour to direct that deponents of affidavits be made available for cross-examination either in person or by telephone or video link. It was submitted that this was because his Honour had expressed his view on the proper construction of Regulation 29 so strongly that counsel for the mother appearing at trial concluded that there was no point in making such a request. There are two difficulties with that submission.

55. The first is that the passages of the transcript to which the Court was referred do not support the proposition that his Honour had made his views known as to the proper construction of the Regulation strongly or otherwise.

56. The second and insurmountable difficulty with this submission is that in the absence of direct reference in the transcript, I have no way of knowing what was in the mind of counsel for the mother. For all I know, counsel for the mother made a deliberate decision that it would not be in the best interests of the mother's case to require the deponents for cross-examination.

57. In my view, therefore, it cannot be said that his Honour adopted one set of rules for the mother and another less stringent set of rules for the Central Authority with the effect that procedural unfairness results.

58. Finally, on this point, it was submitted that Regulation 29(1) was somehow limited in its operation by the provisions of Regulation 29(2). I need take this submission no further than to say that a plain reading of the two sub-sections does not support the submission.

59. I now turn to consider the individual grounds of appeal. I intend to deal with those grounds in the same order as they were argued.

60. Ground 5 asserts that his Honour erred in law in finding that the children's habitual residence was Israel at the time immediately before the alleged retention.

61. Counsel for the mother placed considerable reliance upon the following passage in Re B (Minors) (Abduction) (No. 2) (1993) 1 FLR 993 where at page 995 Waite J summarised the principles relevant to habitual residence in the following terms:

"1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.

2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.

All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in Re J, sub nom C v S (above) [(1990) 2 FLR 442] refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in Re F (above) [(1992) 1 FLR 548] the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country."

62. Counsel placed great reliance upon the term "shared intentions". It was argued that his Honour failed to consider the question of shared intention. I would have thought that his Honour's finding that "[t]he mother agreed that she decided to live in Israel" against which there is no ground of appeal, would be a complete answer to that submission.

63. I have no difficulty in concluding that it was open to his Honour as the primary judge of fact in this case, to find on the totality of the evidence before him that, at the relevant time, the children were "habitually resident" in Israel within the meaning of the Convention.

64. For the sake of completeness, I now refer to the other matters contained in counsel for the mother's written submissions. The submission that the Central Authority, as an institutional litigant, failed to lead admissible evidence in relation to habitual residence was not developed and I need say nothing more about it.

65. His Honour did not reject the mother's evidence in its entirety or prefer the evidence of the father in its entirety on the issue of habitual residence. He appears to have relied upon facts about which there was little or no dispute and the admission of the mother during the course of cross-examination. In arriving at his decision with respect to habitual residence, his Honour does not appear to have relied upon the evidence of either Treister or Korathota.

66. The amended ground 7 asserts that his Honour erred in law in holding that the father was actually exercising rights of custody at the time of the alleged retention in or removal to Australia and in finding that the father would have so exercised rights of custody but for the alleged retention in or removal to Australia.

67. The relevant law of Israel is the Capacity and Guardianship Law (1962). As his Honour noted, s 14 of the Capacity and Guardianship Law provides that parents shall be the natural guardians of their minor children. Section 15 provides:

"The guardianship of parents shall include the duty and the right to take care of the needs of the minor, including his education, studies, vocational and occupational training and work, and to preserve, manage and develop his property; it shall also include the right to the custody of the minor, to determine his place of residence and the authority to act on his behalf."

68. His Honour correctly observed that the combined legal effect of ss 14 and 15 is that each parent has the right to custody of minor children and to determine the residence of minor children.

69. The submission to this Court was that there could be no unlawful retention, nor could it be said that the father was exercising a right of custody having regard to s 18 of the Capacity and Guardianship Law. It was said that this is particularly so where the father would need to "trigger" a rebuttal of presumption of agreement in s 18.

70. Section 18 of the Capacity and Guardianship Law reads as follows:

"18. In any matter within the scope of their guardianship the parents shall act in agreement. The consent of one of them to an act of the other may be given in advance or subsequently, expressly or by implication, for a particular matter or generally. Either parent shall be presumed to have agreed to an act of the other unless the contrary be proved. In a matter admitting of no delay, either parent may act on his own."

71. In my view, a proper construction of s 18 does not allow me reach a conclusion that the acts of the mother resulted in the father losing his rights of custody.

72. In any event, there is no dispute that the mother obtained the father's consent to her leaving Israel with the children by lying to him. I would have thought that to be ample rebuttal of any presumption that she acted with his consent.

73. I now turn to a consideration of grounds 1, 2, 3 and 8 all of which relate to the issue of whether there is a grave risk that the return of the children to Israel would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

74. The submissions under the four grounds of appeal may be summarised as follows:

That his Honour misconstrued the test to be applied pursuant to Regulation 16(3)(b)

That there was no "Answer" raised by the Central Authority to the mother's claim of grave risk

That his Honour preferred the entirety of the evidence of the father over the mother when the father had not been cross-examined and the mother had

That his Honour did not consider the current political environment in Israel

That his Honour did not consider the children's exposure to physical or psychological harm relative to the father and the marital situation generally

That his Honour gave insufficient weight to the evidence of Dr Waters

75. Regulation 16(3)(b) reads as follows:

"16(3) [*Where court may refuse to order child's return*] A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:

(a)

(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;"

76. The correct construction to be given to the words of this Regulation were recently considered in DP v Commonwealth Central Authority; JLM v Director General, NSW Department of Community Services (2001) FLC 93-081. Gaudron, Gummow and Hayne JJ said at 88,390:

"Narrow construction"?

41 In the judgment of the Full Court of the Family Court which gives rise to the first of the matters now under consideration (DP v Commonwealth Central Authority) it was said that there is a "strong line of authority both within and out of Australia, that the reg 16(3)(b) and (d) exceptions are to be narrowly construed". Exactly what is meant by saying that reg 16(3)(b) is to be narrowly construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in "an intolerable situation". That requires some prediction, based on the evidence, of what may happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

42 Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description "grave". Leaving aside the reference to "intolerable situation", and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would expose the child to harm.

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

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

77. The mother submits that when his Honour stated "It is clear from the authorities that the psychological harm must be of a substantial or weighty kind" that he was applying a narrow construction. I do not agree with that submission. What is required is persuasion that there is a risk which warrants the qualitative description "grave". In my view, all his Honour is saying is that the risk of harm must be more than trivial or fanciful. This is consistent with what the High Court said in DP v Central Authority (supra) at 88,390. The Court referred to the application of Regulation 16(3)(b) in the following terms:

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

result when they speak of a grave risk to the child of exposure to physical or psychological harm on return."

78. It is submitted that the Central Authority did not answer the mother's claim of grave risk. It was further submitted that it was incumbent upon the Central Authority as an institutional litigant to lead evidence on the issue.

79. Reliance for that proposition is placed on Laing v The Central Authority (1999) FLC 92-849. At 85,994 Kay J said as follows:

"Special duties of the Central Authority

93. It was submitted that it was incumbent upon the Central Authority to have the matter reopened once it was apparent that the wrong Regulations had been considered. There is weight in the submission that the Central Authority needs to act to some degree as an honest broker. Its role may be likened to that of a Crown Prosecutor who is required to put before the Court matters which might assist the accused as well as matters which might lead to a conviction. The Central Authority's obligation is not to secure the return of the child but to implement the requirements of the Convention."

He went on to say:

"94. If in implementing the requirements of the Convention it obtains the return of a child who ought to be returned then it is carrying out its function. If it draws to the Court circumstances which might lead the Court to make an order other than the return of a child then it is also carrying out its function."

80. Nicholson CJ said, at 85,954:

"63. However, I do consider that there was a special obligation upon the Central Authority to take action as a result of the High Court's decision in De L as to the correct regulations to be applied in this case.

64. To use the language of Marc Galanter 'Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Society Review 95, there are aspects of the legal system which involve claimants who have only occasional recourse to the courts and "repeat players" who are litigants in a range of similar cases. Organisations comparable to the Central Authority here are State and Territory child protection services, or, for example, to look to other jurisdictions, prosecutors in criminal matters and government departments in freedom of information applications.

65. In my view, the repeat involvement of such organisations in forensic disputes places them in a circumstance of greater awareness of decisions which are material to their routine work. That awareness brings responsibilities. In matters of law, the playing field is not even when repeat organisational players are in dispute with a party who lacks a similar familiarity to be informed and lacks the organisationally vested responsibility to be vigilant for the effect of decisions as to the law in the area of their mandate. I would therefore place at a more stringent level than Kay J, the obligation upon the Central Authority as to the applicable regulations and the question of preventing a perfected order discussed below.

66. A Central Authority is by design within a system of intelligence as to legal developments that cannot be deemed as equivalent to an individual respondent to an application under the Regulations. There are advantages in litigation that cannot be glossed over. As will become evident, such a view of the responsibilities which come from being a repeat player have bearing upon the question of how my findings to this point affect the view I have taken of the power to reopen."

81. It is of some consequence that these comments by their Honours were made in the context of the Central Authority having failed to take action upon becoming aware of a High Court decision which indicated that the wrong Regulations had been applied in the court below.

82. The comments by their Honours were adopted by the Full Court in P and the Commonwealth Central Authority (2000) FamCA 461. In that case the central issue was whether or not appropriate services existed for a child suffering from severe autism. During the course of the reasons for judgment, the Full Court (Nicholson CJ, Buckley and Kay JJ) said as follows:

"168. We reiterate our comments at paragraph 68 above, and draw attention to the views expressed in Laing v The Central Authority (1999) FLC 92-849 (paras 62-66 per Nicholson CJ and paras 93-95 per Kay J) about the special duties of the Central Authority as an institutional litigant. We think that in the present case, the CCA could have better performed its "honest broker" role, by investigating for itself whether appropriate services exist in Greece for E.L. We would hope that Authorities will be alert to comparable situations in future cases and will make their own inquiries rather than relying on the onus placed on the person opposing return."

83. I agree that there may well be circumstances where the Central Authority is required to perform the role of an "honest broker". That obligation does not, however, in my view, extend to making independent enquiries as to whether or not there may be evidence upon which a respondent might rely to bring himself or herself within the exceptions of Regulation 16.

84. The onus is clear and has been recently affirmed by the High Court in DP v Central Authority (supra) where Gaudron, Gummow and Hayne JJ at 88,389 said as follows:

"39. Automatic return of a child to the place of habitual residence in such a case may not be a desirable outcome for that child. If it would expose the child to a grave risk of physical or psychological harm, or an intolerable situation, the discretion to refuse to make an order for return is enlivened. It is for the Australian court to decide whether return would expose the child to that risk. Of course it must be recalled that the onus of proof lies on the party opposing return. It will be for that party to demonstrate a grave risk of exposure to harm."

85. The Central Authority is only required to produce an "answer" once the respondent has established the grave risk. In this case his Honour was not satisfied that the mother had established a grave risk, which leads me to a consideration of the evidence that was before his Honour and the fresh evidence.

86. I observe at the outset that it is incorrect to assert that the learned trial Judge preferred the entirety of the evidence of the father over that of the mother, the subject of Ground 4. He only rejected two aspects of the mother's evidence. The first related to the incident which occurred on 14 November 2000 when the parties were swimming. His Honour found that he was not persuaded that on this occasion the father had abused the mother. That finding was, in my view, not particularly relevant to the outcome of this case.

87. His Honour indicated that he did not accept the evidence of the mother about what the father is asserted to have said to her before she and the children left Israel. His Honour found that although the father was not cross-examined he preferred his evidence. It is relevant to note that his Honour arrived at that finding because of statements the mother had made during the course of her cross-examination.

88. As to the evidence generally of grave risk of physical harm, his Honour considered the evidence of the father, Michael Agam and Yaakov Dahan who is the commander of the Security Services Division of the Local Country Council of the Upper Galilee County. On the basis of that evidence I am satisfied that it was open to his Honour to conclude that to order the return of the children to Israel would not constitute a grave risk of exposing them to physical harm.

89. In arriving at that conclusion his Honour also took into account the evidence of the mother's witness, Lisa Segelov. In my view, he was entitled to place little weight on her evidence. Accordingly I would reject Ground 9 for the reasons he gave in his judgment.

90. Finally, it is asserted that his Honour failed to give sufficient weight to the evidence of Dr Waters. His Honour clearly accepted his evidence and arrived at the conclusions that he did for the reasons set out in paragraphs 13 to 15 of this judgment.

91. His Honour found that there would be no risk of psychological harm if the children were to live with their father. Given the contents of Dr Water's report it was open to his Honour to find that the risk of psychological harm if they lived with their mother may be mitigated by them having the opportunities to see and spend time with their father.

92. The mother complains that his Honour made a finding unsupported by evidence that the father would be able to shield the children from "the impact on them of the mother's inability to do so". For the reasons advanced by counsel for the father, I am satisfied that the inference was available to his Honour on the evidence.

93. It follows from these reasons that but for a consideration of the fresh evidence I would have dismissed the appeal as I do not find merit in any of the grounds relied upon. The fresh evidence relates to risk of exposure to physical harm.

94. The words of Regulation 16(3)(b) explicitly speak of a return of a child "*to the country in which he or she habitually resided immediately before the removal*" (emphasis added). The emphasised words replaced an earlier form of Regulation 16(3)(b) which spoke of "the child's return to *the applicant*" (emphasis added).

95. In P v Commonwealth Central Authority (supra) the Full Court commented on this amendment as follows:

"82. First, the change makes it clear that return is to a jurisdiction rather than to a particular person, institution or body.

83. Secondly, although a majority of the Full Court in Laing held that Gsponer was wrongly decided, their Honours were concerned with a different point, namely whether the Central Authority was the "applicant" for the purposes of the prior version of reg 16(3)(b). The correct manner in which to read the "three categories" of reg 16(3)(b) thus remains as set out in Gsponer at page 77,159 and Davis at 78,227 to which the trial Judge in this case correctly referred (see para 39 above).

84. Thirdly, having regard to the nature of the amendment, too much should not be made of the reference to "return of the child to the country in which he or she habitually resided immediately before the removal" (emphasis added). A strictly literal reading of the provision would leave no room to consider the practical reality of ordering a return to the country of the child's habitual residence, nor to the return of a child to another country where his or her lawful custodian resides for the time being.

85. We would endorse the approach referred to in Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 06/26/1995). John R Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit delivered the judgment of himself, Magill and Loken JJ. The appeal was against the lower Court's refusal to order the return of a mother and baby to Mexico. His Honour said:-

"[22] ...After examining the text of the Convention and cases from a range of other countries, the Supreme Court of Canada concluded that only severe potential harm to the child will trigger this Article 13b exception:Currier v. Currier, 845 F. Supp. 916, 923 (D.N.H. 1994) (in determining grave risk, Article 13 requires the court to evaluate the surroundings to which the child is to be

sent and basic personal qualities of those located there); In re Coffield, 644 N.E.2d 662, 665 (Ohio Ct. App. 1994) (Article 13 allows the court to consider "the basic environment" of the home country and "the basic nature" of the individuals with whom child would live). To ensure that the child is adequately protected, the Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence."

96. During the course of its reasons for judgment in allowing an appeal from that decision, (DP v Central Authority (supra)) the High Court (per Gaudron, Gummow and Hayne JJ) said as follows:

"64 Having decided that the primary judge had posed the wrong test by asking whether the child's removal from Greece had been justified, the Full Court concluded that application of the right test to the findings of the primary judge would lead to the same conclusion. The critical step the Full Court took in reasoning to that view was that it had been for the appellant to demonstrate a lack of services appropriate to the needs of the child anywhere in Greece. That was because:

(a) the "return" of which the Regulations speak is return to a jurisdiction rather than to a particular person, institution or body; and

(b) return is a return for the limited purpose of allowing the state to which the child is returned to determine issues relating to the child's future welfare.

65 As we have earlier pointed out, the return contemplated in this case was in circumstances where there would be a judicial determination about custody. That is not always so. Secondly, while it may be right to say that return is to a country, not a place or a person, the application of reg 16(3)(b) requires consideration of what are said to be the consequences of that return. That is essentially a question of fact which will fall for decision on the evidence that is adduced in the proceedings. No doubt it is necessary to bear in mind not only that the person opposing the return carries the onus of proof, but also the way in which the proceedings are conducted both by the person opposing return and by the Central Authority.

66 If, as was the case here, upon return of the child there will be a judicial determination of questions of custody and access, it will probably often be the case that assertions of risk of exposure to harm will not be established. But the bare fact that there will be such a judicial determination in the country of return does not mean that reg 16(3)(b) can have no operation. Cases in other jurisdictions concerning the possible return of a child to a sexually predatory or violent parent illustrate why that is so. The fact that there will be proceedings between the parties in the country of habitual residence does not relieve the Australian court of its obligation to give effect to the whole of the Regulations including, where applicable, the provisions of reg 16(3)(b).

67 The present case having been contested at trial in the way it was, it was not open to the Full Court to conclude from the findings made by the primary judge that reg 16(3)(b) was not engaged. The appellant's case at trial had been that she could not obtain the services the child needed. If the Central Authority had wished to challenge this point or had wished to adduce evidence about what facilities are available in Greece, whether in the area to which the mother's evidence was directed in great detail, or elsewhere, it should have done so at trial. The Central Authority not having challenged the premise upon which her contention was based (that return of the child to Greece meant him returning to the area in which his father lived) it was too late on appeal to the Full Court to attempt to do so. The Full Court's refusal of the applications to adduce further evidence appears to recognise that this was so." [Footnotes omitted]

97. Although during the course of her re-examination the mother indicated that she would not want to live in the Amirim area, the case proceeded on the basis that that was where the children would be returned. The evidence as to the situation in that area of Israel that was before this Court was identical to that which was before his Honour.

98. The parties had lived in the Amirey HaGalil hotel complex near that village for 5 years prior to the mother's departure from Israel. The eldest child lived there for much of her life and the youngest, all of his life.

99. Amirim is approximately 13 kilometers from Karmiel, the nearest city, and Karmiel is approximately 190 kilometers from the extreme edge of the Gaza.

100. According to the evidence there has not been a terrorist attack in the area in the last 25 years. It is described by Yaakov Dahan as "one of the most secure and trouble free areas of Israel and this is reflected in the large number of Israeli tourists who spend weekends in our area".

101. He goes on to say:

"b) the settlements are not in large, built up areas where terrorist attacks and suicide bombers can cause large loss of life, which is their usual objective. They seek out crowded places to spread maximum fear;

c) The local Arab community is well established and largely pro Israel, even serving in the Israeli Army and security forces;

d) I say this area is far away from disputed borders. Whilst there was a katusha rocket attack once in the past from Lebanon, that was before the withdrawal of the Israeli Army from Lebanon, and the border with our area has been very quiet since. Even when there was a katusha rocket attack about 5 years ago, there was no person injured in any way, and no property damage. This is because of the rural, spread out, and mountainous nature of the area. I say the area is quiet and secure."

102. Lastly, he says:

"9) I say there is no security risk for the average person living in this area and there is no security danger in travelling by car or public transport from Amirim to Haifa or Tsefat."

103. In my view, caution ought to be exercised in placing undue reliance upon the DFAT warning. The Notice advises Australian nationals that they ought not travel to Israel. It does not state that residents of Israel ought not return home.

104. It is obviously appropriate for the Australian Government to warn casual visitors to Israel, whether they intend to be there for business or pleasure, not to expose themselves to the risks that they may face in Israel.

105. It is, in my view, however, quite another matter to assume that residents of Israel will face the same risks. There has been turmoil and violence in Israel during this whole period which at times has escalated significantly. This may well be one of those times. Even under the particular circumstances Israel is experiencing, the evidence does not establish that its inhabitants are doing other than continuing to carry out their daily activities.

106. One assumes, perhaps unlike the position of the casual visitor, that residents of Israel would be acutely aware of the risks associated with living in Israel and of the need to exercise caution whilst going about their daily lives.

107. What is to be established is a grave risk of exposure to future harm. In my view, this Court ought not to be persuaded of that without some clear and compelling evidence. In my view, the mere assertion that there are real risks that, sadly, Israeli children face on a daily basis that most other children throughout the Hague world do not, is insufficient. In my opinion, it is necessary for a court to examine the facts of the particular case before it.

108. Like the trial Judge, and notwithstanding the further evidence, I am not satisfied that the mother has established by clear and compelling evidence that there is a grave risk of exposure to physical harm to the children because of the unrest in Israel. Accordingly, I would dismiss the appeal.

109. For the sake of completeness, I should say that during the course of oral argument there was some discussion as to the possibility of granting a stay of the order so as to effectively adopt a "wait and see" position as to how the situation in Israel unfolds. Upon reflection, I am of the view that would not be an appropriate course of action. The Regulations are quite clear that unless the mother can bring herself within either Regulation 16(2) or 16(3) the Court must make an order for the return of the children. To order otherwise would be akin to exercising a discretion that is not provided for in the Regulations.

I certify that the preceding 109 paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

[J Edwards]

Associate

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]