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<http://www.incadat.com/> ref.: HC/E/AU 574  
[17/09/2003;Family Court of Australia (Australie);Première instance]  
State Central Authority, Secretary to the Department of Human Services v. M.

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**FAMILY LAW ACT 1975**

**FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS 1986**

**IN THE FAMILY COURT OF AUSTRALIA AT MELBOURNE**

**No. (P)MLF1179 of 2003**

**IN THE MATTER OF THE CHILDREN**

**P.M. born 7 July 1996 and J.M. born 16 May 2001**

**BETWEEN:**

**STATE CENTRAL AUTHORITY, SECRETARY TO THE DEPARTMENT OF HUMAN SERVICES**

**(Applicant)**

**and**

**T. MANDER**

**(Respondent)**

**CORAM: THE HONOURABLE JUSTICE KAY**

**DATE OF HEARING: 17 SEPTEMBER 2003**

**DATE OF JUDGMENT: 17 SEPTEMBER 2003**

**REASONS FOR JUDGMENT**

**APPEARANCES:** Ms Bennett of Counsel, instructed by Victorian Government Solicitor, DX 300077, Melbourne, appeared on behalf of the applicant; Mr Wilson of Counsel, instructed by O'Farrell Robertson McMahon, Solicitors, DX 55021, Bendigo, appeared on behalf of the respondent.

**1. These are proceedings brought pursuant to the provisions of the Family Law (Child Abduction) Regulations 1986 seeking the return of two children to England.**

2. There are three children who come into the equation, although only two are the subject matter of the application. The three children have the same mother, the younger two have the same father who is effectively the applicant in these proceedings.

3. The three children are J., a female born 15 July 1990, her sister P. born 7 July 1996, and JJ. born 24 May 2000. I will refer in the course of these reasons for judgment to persons described as "the father" and "the mother". The father refers to P. and JJ.'s father, not J.'s father. The mother is the mother of all three children.

4. The parents of P. and JJ. commenced a relationship in March 1995. The mother asserts that she never lived together with the father, although they continued some form of relationship intermittently until the mother left the United Kingdom on 22 October 2002.

5. According to the mother's affidavit in these proceedings and the chronology prepared by the mother's English solicitors, the following events occurred:

-In May 1996 in the course of an argument the father threw his shoe at the mother and slapped her on the head. She fled to the home of a neighbour but the father followed her and demanded that she return home. When she returned with him she attempted to telephone the police but the father snatched the phone out of her hand and hit her around the head with it.

-When she tried to end the relationship the father would insist upon coming to her home.

"...There were many occasions when I would call the Police to try and get him away from me. There were also many times when he would hit me."

-This pattern continued until She then moved to Stroud where the father continued to harass her.

-Mid 1997 –the parties went to Torquay for the weekend. The father punched the mother in the back. She developed a swelling the size of a grapefruit. He would not allow her to get medical treatment. She eventually went to a GP in Gloucester and went to hospital for three days.

-Early 1998 she went into a refuge when P. was between 18 months and 2 years old. The refuge was in the Forrest of Deane. She stayed there for three months. The father engaged a private detective to find her, and once he did so he waited outside J.'s school for her and then persisted in contacting her.

-On 29 July 1998 an order was made by the County Court at Gloucester which provided for P. to reside with her mother, for the father to have contact for two days per week and for the father to have parental responsibility.

-In July 1999 when she told the father the relationship was over he came around to her home and kicked her front door open. The police arrested him and placed the mother and her children in a refuge. The father was charged with criminal damage.

-Even though she was living in a refuge she spotted the father on another occasion "ranting and raving at me". Several hours later there was a knock at the door of the refuge. When the mother went to open the door but realised the father was there, she slammed the door. He started yelling "you \*\*\*\*". The father kicked the door in and came in. The police were called and he was arrested for criminal damage.

**-On 24 November 1999 the parties went drinking to celebrate the mother's birthday. The father assaulted the mother, hitting her twice in the face and kicking her in the back. She suffered extensive haemorrhaging and acute inflammation requiring an operation for the evacuation of the haematoma with three days hospitalisation. The hospital notes include in their history "28 year old woman, hit on back by partner...last night, swelling size of golf ball after now bigger than fist...We also note that the partner is currently in custody pending charge."**

**The formal reason for admission is given as "haematoma on back following assault".**

**-When the father tried to visit the mother in hospital the security guard at the hospital refused to let the father see her so he attacked the security people. He was charged with assault on a security officer and a nurse and subsequently sentenced to a term of imprisonment.**

**-The mother then moved to Brockworth on the outskirts of Gloucester. She was living close to her aunt. The mother deposed that the father soon found out where she was. Her aunt began to be harassed by the father, which included the making of threats to fire bomb her house with her children inside. She asserts that the father attempted to run over the aunt in his car one day. The aunt became too scared to help her and she was left "pretty much on my own". She fell back into the relationship with the father and became pregnant with the child JJ.**

**-The parties holidayed together in Spain in January 2001. One night an argument developed between them. The father pushed a bottle of Coke that the mother was drinking as she had it up to her mouth. The bottle caused bleeding and chipped her front tooth. The police were called and the matter was calmed down. On that holiday it was deposed that the father shot the child J. with a pellet gun. There are no circumstances detailed in the mother's material describing whether it was an accident or intentional. I draw no inference from it.**

**-When the parties returned from Spain the mother asserts that the father took the mother and the children back to his flat in Gloucester and held them captive there for three days. She said after that event she received items on her front doorstep "like dead birds and old dead funeral wreaths" which she interpreted to be death threats made to her from the father's friends.**

**-After JJ.'s birth in June 2001 the father came and visited the home and left without causing a scene. The mother commenced to allow him to have access to J. and P. She said that he interpreted her cooperation as a signal for a closer relationship and on one occasion suggested that when he dropped the girls off he would have tea with her. When she said "No" he attended the house to return the children and rang the front door bell. She indicated that she would allow the children back into the flat but not the father. He then climbed in through the kitchen window. The mother escaped through the bedroom window, but the father managed to locate her and punch her a few times. The police were called. "From then I tried to stay in the house as much as possible so he would not be able to get me. I had a neighbour take the children to and from school. He made threats to the neighbour, holding her up against a fence, threatening to punch her in the head."**

**-The father was bailed on condition he could not come near the mother. He drove his motor cycle past her home. He was charged with a breach of the bail conditions even though he denied so doing.**

**-In August 2001 he appeared with some Mexican food which enticed the children to insist on letting him come in for dinner. He was playing with the children when the mother concluded**

that the play was getting too rough. When P. complained to the mother he screamed at the child saying "\*\*\*\* grassing me up to your mother". He then hit P. in the back of the head and threw a plastic bottle at the mother whilst she was holding JJ. He then threw the dinner plate at the wall and smashed up the mother's panic alarm.

-The next day the father insisted taking the children on an outing. The mother called the police who caught up with the father and brought the children back to her. They then moved them into a refuge at Bournemouth. After sometime the mother received a message from the father indicating that he knew where she was.

-In August 2001 the father sought an order for a disclosure of the children's whereabouts.

-On 11 September 2001 the Gloucester County Court ordered that the mother be prohibited from removing the children from the jurisdiction of England and Wales until further order.

-The Gloucester County Court proceedings were transferred to the Bournemouth County Court in October 2001.

-On 19 October 2001 the mother was directed to file a statement dealing with the following issues:

- (a) whether or not she intended to leave the jurisdiction of the court;
- (b) the allegations of domestic violence against her and the children; and,
- (c) whether or not she was opposed to contact in respect to either or both children.

-A welfare report was ordered on 23 November 2001, including the question of the mother's possible immigration to Australia.

-On 26 November 2001 the father was forbidden from using or threatening violence against the applicant mother, from intimidating, harassing or pestering her or any of the children, or encouraging, instructing or in any way suggesting that any other person should do so. The order was to last for three months.

-On 29 November 2001 the mother received an interim residence order. A welfare report was ordered in respect of

- (a) the father's application for contact to P. and JJ.;
- (b) the father's application for parental responsibility regarding JJ.;
- (c) allegations made by the father in respect of any intention by the mother to immigrate to Australia;
- (d) allegations by the mother in respect of domestic violence against her and the children.

-Arrangements were made on 26 November 2001 for the father to be able to deliver to the children, via the mother's solicitors, some presents and cards. The solicitor's secretary deposed to the father then following her during the day presumably with the view to trying to discover the mother's whereabouts.

-There were several further directions hearings conducted.

**-15 February 2002 the mother filed a further application seeking to extend her non-molestation order asserting that the father had discovered her whereabouts and had been attending her home seeking contact.**

**-The mother's sister visited the UK in early 2002. During the course of her visit the mother says that on 20 February 2002 the father had contact with P. and J. On returning them he asked if he could stay the night as he had no electricity in his bedsit. She thought he was behaving reasonably and allowed him to do so. He was drinking lager and watching a video. The more he drank, the more aggressive he got. The mother retired to her bedroom. The father complained saying "You think you are going to \*\*\*\* bed do you?" When the mother tried to hush him up so as not to wake JJ. he hit her with the flat of his hand three times. She said "he grabbed my head between his hands and shook me violently and hit me again three or four times." All this commotion woke JJ. The mother lay on the bed trying to coax the child back to sleep. The father lay on the bed also. The mother said she was too scared to try to stop him. Eventually the father's conduct was such that the mother thought it wise to push a panic button to call the police. That caused the father firstly to beg her to report it as a false alarm and then when she refused**

**"...He grabbed my shoulders and pushed me into the sink in the kitchen. That gave me a large bruise on my back. The Father then ran away and the Police came and I made a statement.**

**94. As a result of that incident I sustained bruising to my back, my left ear, my left jaw line and a whip lash injury. This was all seen by my GP."**

**-She asserts that over the next few days the father made constant telephone calls and sent her a number of text messages. He was arrested for breaching an order and sentenced to a term of imprisonment.**

**-On 28 February 2002 the mother filed a show cause order asserting violence against her on Wednesday 20 and early hours of Thursday 21 February 2002 and asserting several other matters that were said to amount to breaches of the non-molestation orders, including sending several text messages.**

**-On 15 March 2002 the application for committal was dismissed, as was what has been described as "the application for extension of injunction order dated 26 November 2001". It is not precisely clear exactly which injunction that relates to as there were several made on that day. A further welfare report was ordered.**

**-On 23 May 2002 the Bournemouth Borough Council sought a supervision order regarding the three children and an order was made by consent that the father be forbidden to use or threaten violence against the mother nor instruct, encourage or in any way suggest that any other person should do so.**

**-An interim supervision order was made in favour of the Borough Council on 10 June 2002. An order was made for the appointment of a children's guardian and the solicitor for the child was granted leave to instruct a child psychiatrist to prepare a report on the children. The matter was fixed for hearing for 1½ days on 15 July 2002 on the issues of allegations of domestic violence.**

**-On 18 July 2002 a 28 day interim supervision order was made.**

**-Late in August 2002 she went away for a holiday with the children and upon her return she had been home only for a few hours and the father turned up "asking what we'd been**

**doing". When she refused to let him in the house he jumped through the kitchen window. She started screaming, as did P.:**

**"P. was terrified and ran and hid upstairs. I later found her cowering behind the curtains in an upstairs room."**

**-When she tried to get the telephone to call the police the father hit her. When she tried to run out the front door the father caught up with her and grabbed her, pulling her back and slamming her into the wall. When the father was distracted the mother was able to lock him out of the house and call the police. The father was arrested in relation to the incident.**

**-On 10 September 2002 an order was made releasing the father from custody to remain on bail. He was again forbidden from:**

**-using or threatening violence against the mother or instructing, encouraging or in any way suggesting any other person to do so,**

**-entering or attempting to enter a property in Kingston, Bournemouth or going within 100 yards thereof,**

**-communicating in any way with the mother whether by himself or by encouraging, instructing or suggesting anybody else to do so,**

**-communicating with the children, save during periods of contact supervised by the Bournemouth Borough Council or by cards, letters and presents sent to the applicant's solicitors.**

**-She said thereafter the father started calling her, making threats to her.**

**"109. ...He told me that it didn't matter who won the family law case because if I got the kids he would have me knocked off. He was saying things like he wanted to make sure he got the kids so that they didn't turn out like J.**

**110. [He said] 'It is amazing what people will do for a bag of billy'. I knew that by the term 'billy' the Father meant speed or amphetamines as I had heard him and his friends use that term in that context previously. I also knew the Father would be capable of giving someone 'billy' as I knew that he was a drug dealer.**

**111. I understood this to mean that the Father could arrange to have me killed and that he would do so to make sure he got the children.**

**112. I believed that the Father was capable of arranging to have me killed. I was terrified for my life."**

**-Shortly thereafter, with her mother's assistance she decided to come to Australia with the children, saying:**

**"118. ...I did not think about doing the wrong thing in leaving England while the court proceedings were still pending or removing the children [from] their Father. Instead I saw it as the only option available to save my life and protect the children.**

**119. I also knew that the only options available in England to protect me I had already used and the Father had beaten them. He had found me in refuges and in new accommodation on many occasions. He had broken non-molestation orders. He had assaulted me despite me**

**calling the Police, despite me even having a panic alarm. Leaving for Australia was the only way I thought we could be protected."**

**-The supervision order was extended to 10 October 2002 and then subsequently to 7 November 2002 and then until 5 December 2002.**

**-There were some directions orders made on 31 October 2002 by the Bournemouth County Court, including the provision of all relevant documents in the proceedings to social services and welfare authorities in Australia.**

**-On 31 January 2003 leave was given to the Bournemouth Borough Council to withdraw the application for a supervision order. However, it was ordered "in the event that the Mother is ordered to return to either England/Wales or she returns of her own volition with the children her English solicitors must inform the Local Authority forthwith of any Order, date of return, address where she will live with the children. No information may be given to the Father in relation to the Mother's address upon her return to England/Wales."**

**6. The father's application for parental responsibility and contact was adjourned generally. The mother's committal application was adjourned generally. The nature of that order seems to give further fuel to the proposition that the English authorities were not only concerned about the children in the hands of their father but were also concerned about the children in the hands of their mother.**

**7. The mother further deposes that since coming to Australia the children have flourished. She describes P. as a "completely different child". She said:**

**"[Life in England] consisted of going to school and then coming home and either trying to hide from the Father or putting up with his behaviour. [P. has changed from an aggressive child to one who is easy going and sweet.]"**

**8. She says P. is insistent that she does not want to return to England and constantly seeks reassurance that "we are not going back". The mother says that she is very scared to return to England.**

**"I am scared that the Father would kill me for having done this, I think that returning to England would be a death sentence for me."**

**She said returning to England would -**

**"...lead to a disadvantaged and miserable life for the children and myself. [Life in England would be moving amongst women's refugees. The children would have to constantly change schools]."**

**9. The mother asserts that she would not be entitled to further welfare payments if she went back to England, but there is no evidence to support that assertion and no reason to assume it is correct. She is English by birth. The children are English by birth.**

**10. She asserts further that the father is deeply involved in dealing with drugs. He has convictions for violence against people including causing grievous bodily harm and criminal damage.**

**The Local Authority's concerns.**

**11. Tendered to me during the hearing was a document headed "Draft Threshold Criteria on behalf of the Local Authority". This is a document that would be filed in support of their**

application for a supervision order. The relevant portions of that document appear to be as follows:

"2. ... J., P. and JJ. are likely to suffer significant harm in the future. The significant harm and the likelihood of harm is attributable to the care given to the children or likely to be given to them if he (sic) order were not made, not being what it would be reasonable to expect a parent to give them.

3. The grounds upon which the local authority rely are as follows:-

Social Services in Gloucester and Bournemouth,

Domestic Violence Unit in Cheltenham and Bournemouth and woman's refuge have all been involved with this family due to the extensive history of domestic violence between Mr B. and Ms M. On occasions, following the incidents of violence Ms M. has sought treatment and required hospital admission. The police and Ms M. have stated that the children have witnessed these violent incidents. History shows that following incidents of domestic violence Ms M. and Mr B. have resumed their relationship."

12. The document then draws attention to the pellet gun incident with J. and the assertion of Mr B. hitting P. around the back of her head in August 2001. It says that there would be emotional harm, particularly for J. who has witnessed incidents. It says of P.:

"P. is angry that due to the incidents of domestic violence, she has had to leave her home, her school and her friends."

13. The writer describes the reaction of Mr B. towards P. when he asserted that she had turned to grassing him as "he went ballistic at P.". It says:

"...the children are likely to be at the risk of physical harm if they get in the way of their parents fights or if Mr B. is angry and takes it out on the children."

14. It says as to emotional harm:

"(i) If, the incidents of domestic violence continue, witnessed by the children, they are likely to suffer significant emotional harm and require counselling.

(ii) If, the incidents of domestic violence continue, and Ms Mander moves home. It is likely to be emotionally damaging to the children once again having to make new friends change home and possibly change schools.

(iii) P. believes that due to problems of contact between her mother and father, when she goes for contact with Mr B. he will kidnap her. If, the parties cannot agree on contact, if the parties continue to argue in relation to contact [then] P. is likely to suffer harm."

15. That the local authority sought a supervision order seems to be consistent with my anticipation that it is not only the role of the father in the proceedings that is the basis of care but the reality that the mother and the father tend to attract each other like opposite poles.

16. Notwithstanding the mother's protestations of terrible behaviour towards her particularly, and to a lesser degree towards the children, she finds herself in a continuing relationship with the father. Notwithstanding the father's protestations that he has learned his lesson and has had enough and will not go back he finds himself yet again in further conflict with the mother.



17. The children's maternal grandmother has sworn an affidavit in these proceedings, but I do not find it helpful in regard to the issues I have to determine. The sister's evidence

18. I also have an affidavit from the mother's sister K.H. who said that when she was in England in January 2002 visiting the mother and her children one day whilst walking to the supermarket with the mother and the children a car pulled up in front of them blocking them. She said:

"[The father] jumped out of the car and immediately ran towards us shouting, 'T. don't move. I just want to speak with you.'...

...[I] tried to walk away but Mr B. kept blocking our path. He kept repeating that he would leave us alone if only we would let him spend time with P."

19. Ms H. further deposed that the mother constantly received telephone calls on her mobile from Mr B. and when Ms H. listened to the calls they were almost always demanding that he be allowed to see the mother. Some of them included saying things like, "Hello, this is your stalker." Eventually arrangements were made for contact to take place between the father and P. At the commencement of one contact period the father told Ms H. that he loved T. and just needed to talk to her.

20. One evening Ms H. and the mother accepted an invitation to take the children together with the father to a local Jumping Jungle activity centre. On the way home the father indicated he was going to come into the house for a drink when he dropped them off. When the women objected there was an argument. They got home and the father followed them into the house. The mother became distressed, crying and begging the father to leave. He refused. He was still there the next morning and refused to leave saying he was staying because he wanted to take the children to the movies that night. Ms H. says that she and her sister were too scared to force him to leave.

21. With the assistance of police a panic alarm was installed in the house. On one occasion the father arrived at the house uninvited and ignored all of the requests to leave. When he finally went out to the shop the women locked all the doors and windows and telephoned the police who arrived and told him to go. Thereafter the mother was observed to be too scared to leave the home. All doors and windows to the house were always locked and the curtains were constantly drawn.

22. Ms H. says that on another occasion when she was walking to the shop at 9 o'clock at night to get cigarettes she noticed the father driving his car very slowly virtually crawling behind them. He shouted at her that he wanted to see T. She warned him that she would call the police. When she did manage to get inside the house and lock herself in the father started shouting through the letterbox and trying to open the door. Police arrived and escorted him out in the street warning him not to come back.

23. She said her sister was in constant fear of and terrified of the father. Her life was constantly trying to anticipate what he would do next and living in fear trying to hide from him.

#### The psychologist's evidence

24. The mother's material was supplemented today by an affidavit from Judith Baldaccino, the psychologist who saw P., JJ. and J. some time presumably between the last hearing which took place before me on 8 September and today. She has prepared a report annexed to an affidavit sworn yesterday. It appears that she also spoke to the mother. She said:

"I interviewed the above clients [the mother and the three children] in respect to assessing whether or not they could cope with returning to England to a life of violence, threatened violence and fear. I discern no particular ability in these children to cope with this situation."

25. The form of the report has some difficult syntax. Ignoring that as best I can, the report provides observations under five subheadings and then a summary and recommendations. Under the heading of Level of Fear the Children have of the Father she describes that J. and P. - without telling me who is making comment – said "I was crying and hiding" and "I can't stop him".

26. The children described how they could not have windows open during summer days and nights because the father had broken into the house and proceeded to assault their mother. They had very clear and vivid memories. P. had recurring nightmares of the family being somewhere and the father appearing and hurting or killing members of them. She said her nightmares were nightly and J. reported weekly nightmares.

27. The two elder children described in detail violent incidents, including running and hiding, watching him throw a bottle which missed the baby, slapping and closed fist hitting their mother, shouting verbal abuse, scratching and hurting their mother. They watched him break and wreck their toys and possessions. They said that violence was frequent rather than occasional.

28. Under the heading Level of Social Support they described that they were always on the move in England and did not have any friends or family apart from refuge staff.

29. Under the heading Level of Attachment Between Siblings she noted that J. would travel if the others went back to England. Under the heading The Children's Expressed Concerns she said that both P. and J. wanted to stay in Australia. They enjoyed school, enjoyed having friends sleep over and enjoyed being able to go out and being able to feel safe.

30. The Summary and Recommendations were:

"...P. drew happy pictures of her family in Australia and her disquiet about M. may be discerned in the picture of the dragon." I interpose and say that is one possible interpretation. There are no doubt many others.

"...Both girls are articulate and although J. was reticent as she finds talking about M. very distressing, they were able to describe a situation where they had witnessed significant violence, had learnt fear and helplessness from these exposures, had felt abandoned by authorities meant to ensure safety, and learnt to hide both themselves and their feelings. They have since felt safe, which has translated into excellent progress at school and a sense of a safe future.

...I consider that these children would be at significant risk of psychological and/or physical harm if they were to be returned to a situation where the father of P. and JJ. would have any contact with them."

The father's evidence

31. The material relied upon by the State Central Authority consists of four statements by the father none of which are made in direct response to the material provided by the mother in these proceedings.

**32. The first statement is a document prepared in September 2001 in support of the father's application seeking an order restraining the removal of the children from England and Wales. The father states:**

**"3. Miss M. and I have had a difficult relationship. We have separated on numerous occasions. I have either had to leave the family home because of her allegations that I had been violent or aggressive to her or she has left the property and moved to a Womens Refuge. She has been re-housed on a number of occasions. Miss M. has however always contacted me again and I have returned to live with her and the children at her invitation. Miss M. has, on occasions, hit me and threatened me and I admit that I have, on occasions, in these arguments pushed and slapped her. I have been convicted of common assault on three occasions. The last occasion was in December 2000. I realise that I should not push or slap Miss M., but I have, on occasions, been provoked by her violent temper."**

**33. The chronology of this statement has some importance given that it is the first of several statements that conclude with a similar statement of insight by the father and yet following the statements of insight events of violence still occur.**

**34. The hospitalisation events occurred in 1997 and 1999. The parties holidayed in January 2001 in Spain. In June 2001 the father climbs in through the bedroom window. In August 2001 he is allowed in the house and the incident occurs where he accuses P. of "grassing" him and then attacks her and attacks the mother. It would seem that in response to that event proceedings took place in September 2001 that led to the father's statement that he said "I realise I shouldn't push her, but I have on occasions been provoked".**

**35. The father states there was a previous incident when the mother left England without consulting him in 1998 and returned to Australia. He says she made contact with him after two months indicating she wanted to return to England. He borrowed over £2000 and paid for her to come back to England with J. and P.**

**36. The second of the father's statements was made on 24 January 2002. It was in support of an application for contact to P. and JJ. In this statement he describes his relationship with the mother in the following terms:**

**"3) Miss M. and I have had an on/off relationship for approximately 6 years. I deny the accusations of constant physical violence made by the Respondent although there have been occasions when I have slapped Miss M. out of self defence when she has been hitting me. I also do not believe that Miss M. is scared of me. If that were indeed the case then she would not have contacted me each time we had separated giving me her new address and asking me to go back to her....Miss M. has given me the address of all but one of the women's refuges she stayed at, asking me either to go and collect her or to meet her there..**

**4) I accept that my relationship with Miss M. was a volatile one and we had many arguments that resulted in us shouting and swearing at each other. I believe that P. may have witnessed some of these arguments but I have certainly never been violent at all to P. or JJ. in any way and they have not witnessed any violent incidents.**

**5) Miss M. has accused me of being responsible of (sic) the haematoma on her back in November 1999. I deny that I have hit her in the back at any time. As far as I am aware, the Respondent has an ongoing back problem that flares up if knocked against anything. It happened that day because the Respondent was hitting and kicking me because my ex-girlfriend had rung me while I was with the Respondent. The Respondent banged her back on the side of the caravan as she tried to kick me."**

37. The father acknowledges that there was a confrontation between himself and security guards at the hospital after which he pleaded guilty to common assault and was committed to prison. He said the respondent wrote to him and visited him on several occasions. He acknowledges that on a trip to Spain there was an incident in which he pushed a bottle towards the mother's mouth and caught her tooth. He denies following her solicitor's secretary. He concluded the statement by saying:

"14) I accept that there have been very serious problems between the Respondent and myself in the past. I believe those problems were as a result of the Respondent and myself being in and out of our relationship. I accept that the Respondent and I will not get back together now and I would not do so even if the Respondent now asked me to..."

38. Again I return to the time line. This is a statement made on 24 January 2002. A month later, in mid-February 2002, the father is back at the mother's home. I have already detailed the version of the events mid-February 2002 as given by the mother and her sister.

39. The third statement was an affidavit of the father sworn 6 March 2002 and filed in the Bournemouth County Court proceedings. In that affidavit he says:

"3) The Applicant has made allegations against me of violence throughout our relationship. Although I admit that our relationship has been volatile and there have been many arguments between us I deny the physical violence I am being accused of. I have only ever hit the Applicant in self-defence, when she has been hitting me, scratching me, slapping me or threatening me with a knife.

...

(5) The Applicant has accused me of chasing her around the country on occasions when she has left me and finding out where she is living. I deny this. The Applicant has kept in telephone contact with me every time we have separated and has given me her new address each time, of her own free will, either because she then wants us to reconcile or because she wants me to give her money."

40. His version of the events of February 2002 are in significant contrast to those given by the mother and the sister. He says he was telephoned by the mother on 16 February and invited to come down so he could spend time with the children. He arrived at 8 pm and -

"...she was acting like we were back together. One thing [led] to another and we slept together in her room. She did not appear uncomfortable or upset..."

41. He says that on the Sunday he took the elder children to amusements and they all went out as a family to dinner and "again we slept together that night".

42. He said that on Monday and Tuesday he took the children to school and spent the daytime with the mother and the child JJ., similarly on the Wednesday. On Wednesday evening they sat down and watched a video and were drinking lager together. The mother began to question him aggressively about a girl he had been seeing. She was quite drunk. She went into the kitchen returning with a knife and waving it at him threateningly. A scuffle ensued as he disarmed her. The mother went upstairs upset and he followed eventually calming her down and they fell asleep. At 2 am he awoke and told the mother he was going back to his home. She accused him of going back to his girlfriend saying, "You haven't seen anything yet of what I'm going to do to you." She then ran out of the room and returned with the panic button. She said "I think I might just press my button".

43. He drove off. He returned the next day to find out what she had told the police and was unable to make contact with her. Telephone calls were left unanswered although he received two friendly text messages from the child J. He concludes the affidavit by saying:

"...I would ask the Court not to commit to prison as I have now accepted that I cannot have any direct contact with the Applicant as the outcome for that for me is disastrous. I only want to move on and be able to see my children on a regular basis."

44. Again returning to the time line these are the recollections in March 2002 relating to the disturbance that occurred between the parties in February 2002. The mother's story has the father returning into her life late August early September 2002 upon her return from her overseas trip, breaking into the house and assaulting her.

45. Before we get to the September 2002 events, the last of the statements from the father is a document in reply to the mother's statement of 20/7/2002 which statement is not before the Court. The relevant parts of the reply include:

"The First Respondent has made very serious allegations of domestic violence against me. I deny that violence was an ongoing factor in our relationship although I would agree that the First Respondent and I are both tempestuous people and we have a stormy on and off relationship in which we would occasionally have very loud and fierce arguments. I would say that during those arguments we were each as bad as the other, although it was T., if anyone, that would tend to violence. She has threatened me with a knife on two occasions..."

46. He then says that on one occasion she actually struck him with a knife leaving a scar. He said:

"...I accept that our relationship in the past was not at all that it should have been, for the children's sake at least. I agree that it is in the children's best interests for the First Respondent and myself to have no contact with each other but I do not want that to mean I have to stop seeing my children."

47. He then indicates that the respondent's inconsistent attitude towards him continued after the alleged assaults in February 2002. He received text messages from her which included 10 March 2002:

"Happy birthday big bollocks lots of love the \*\*\*\* from the bournemouth."

48. Some nine minutes later: "I love u as well M.B."

49. One would assume if the chronology is accurate that the second of those was in response to some message that he sent to her.

50. He then dealt with a number of apparently specific allegations raised by the mother under the heading "Schedule of Alleged Incidents of Domestic Violence". Apart from many specific denials, he admits to the following in the following manner: "April 1996, Punch to back in Torquay. I pushed the Respondent in the back when she began an argument with me in the middle of Torquay high street. I was trying to make her go back to the Hotel to avoid a scene. It was not a violent push. The next day her back had swollen up but I believe this was due to an unusual back condition and not due to me.

...

**July 1999, Door kicked open. We had argued the night before so I stayed at my property. The next day I went to see TKM with flowers. I pushed the door open when TKM pushed it shut, I did not kick it.**

**August 1999, incident at refuge. TKM had ended relationship again by text. I went to see her to find out why, she refused to see me and tried to slam the door in my face. She pushed it so hard that it bounced open again so I was able to follow her in. It was only then that I realised it was a refuge. ...**

**24 November 1999 Incident. TKM contacted me from the refuge and asked me to take her out for a birthday drink. I did so. She then willingly came back to my caravan with me. During the evening TKM began an argument about a girl I had been seeing while we had been apart. I had finished the relationship at TKM's demand. I did not hit her or kick her in the back. She tried to kick me from a lying down position during the argument and twisted her back around, catching it on the side of the caravan cupboard. She left during the night without me knowing and I rang her the next day she was in hospital. When I went to see her she set the security guards on me. There was no nurse involved. The security guards were aggressive and I tried to defend myself. I was charged with GBH and pleaded not-guilty but the CPS said that they would go with common assault if I pleaded guilty so on the advice of my solicitor I accepted that. ...**

**July 2002, Harassment. I would only have contacted her to try to arrange contact with the children. ...**

**August 2001, Throwing a dinner plate at wall. ...I knocked the plate onto the floor in an argument. It was an accident.**

**August 2001, Smashing panic button. The button smashed when TKM threw it at me during an argument. She kept it and produced it later to the police. I admitted it because it seemed like such a trivial matter at the time. ...**

**20 February 2002, Incident at TKM's property. ...TKM had a split lip which she told me she had done on JJ.'s cot which was next to the bed. We did have an argument over my ex-girlfriend which escalated and TKM threatened me with a knife. I grabbed her hand to make her drop it and pushed her so that she sat down on the settee and then I left the property.**

**21 February 2002, Shouting through the door. TKM refused to let me in and I had no idea why, I tried to speak to her but I left. ...**

**25th –27th May 2002, Police called. TKM did not at any time ask me to leave. We already had agreed that I would return to Gloucester on the 27th May which I did."**

**51. The evidence about the history of the father's convictions was incomplete. Counsel for the State Central Authority said that her position is that the English Central Authority was unable to obtain the police records because this was not a police matter. The requesting parent was able to give consent to the provision of the records but no such consent was forthcoming. The Hague Convention.**

**52. The Convention on the Civil Aspects of International Child Abduction is in operation between Australia and England. The Convention is incorporated into Australian law via the Family Law (Child Abduction Convention) Regulations 1986. They provide that when a child is removed from a Convention country to Australia an application may be made to a**

court for an order for the return of the child to the country to which he or she habitually resided immediately before his or her removal.

53. For the purposes of the Regulations the removal there referred to is a removal in breach of the rights of custody of a person, an institution or another body in relation to the child if at the time of the removal those rights were actually exercised either jointly or alone or would have been so exercised but for the removal of the child. Such a removal is conveniently described as "a wrongful removal" (see regulation 17).

54. In this case it is conceded that the removal of P. from England by the mother was in breach of the father's rights of custody created by the order of the County Court at Gloucester made 29 July 1998 that granted the father parental responsibility for the child. It is further conceded that the removal of the child JJ. was either in breach of the father's inchoate rights of custody (see *Re B (A Minor) (Abduction)* (1994) 2 FLR 249) or perhaps more appropriately the removal was in breach of the rights of the Bournemouth County Court [see *Brooke v Director-General of Community Services* [2002] FamCA 259; *Re H (Abduction: Rights of Custody)* (2001) FLR 374; *Re W*; *Re B (Child Abduction: Unmarried Father)* (1998) 2 FLR 146.

55. Regulation 16 provides that if the application is filed less than one year after the day of the removal the court must make an order for the return of the child. Subregulation 16(3) enables the court to refuse to make an order for the mandatory return if the person opposing the return establishes that inter alia 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.

56. The effect of the regulation is to empower the court to exercise a discretion not to make an order for the return if any of the exceptions set out in regulation 16(3)(b) are demonstrated. In *DL v Director-General New South Wales Department of Community Services* (1996) 187 CLR 640; (1996) FLC 92-706; 20 Fam LR 390 Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said:

"The regulations are silent as to the matters to be taken into account in the exercise of that discretion and the discretion is therefore unconfined, except insofar as the subject matter and scope of the purpose of the regulations enable it to be said that a particular consideration is extraneous."

57. In *TB v JB (Abduction: Grave Risk of Harm)* (2001) 2 FLR 515, to which I shall return in greater detail later, when allowing the father's appeal the English Court of Appeal held that the trial Judge had erred in not taking into account measures the mother could reasonably have been expected to take in New Zealand to protect herself and the children from domestic violence. The alleged perpetrator was not the father applying for their return, but the wife's subsequent husband. Hale LJ in dissent noted:

"Primary carers who fled from abuse and maltreatment should not be expected to go back to such an environment if this would have a serious detrimental effect upon the children."

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

**59. I will return to the consideration of the exercise of the discretion in the event that I become satisfied as to the existence of the exception.**

#### **Lack of Funds to Enable a Return**

**60. Mr Wilson on behalf of the mother sought to rely on two bases which would enliven the exercise of the discretion. The first matter which he sought to rely upon was the economic circumstances of the mother. He indicated without any challenge from the State Central Authority that the mother was effectively penniless. She had no capacity to provide any moneys to enable the return of herself or any of her children to the United Kingdom. He submitted that a forced return of the children P. and JJ. without their mother and without their sister J. would place the children in an intolerable situation. There was no suggestion in the father's material that he had the capacity to care for the children, nor was it being suggested by any person on behalf of the State Central Authority that the separation of the children from their mother or their siblings would advance their welfare in any way.**

**61. Ms Bennett on behalf of the State Central Authority seemed to concede that absent the resources to send the family back to England the discretion was enlivened. She said, however, she had instructions that the father would provide the necessary funding. Today I have been advised that the parties have reached agreement that the sum of \$8500 would be appropriate to transport the mother and three children back to England and would be the appropriate sum for the father to provide as a condition precedent to any return order taking effect.**

**62. The mother has asked through her counsel that in the event that I was to make such an order that she be at liberty to pay any supplement to ensure that there are in existence return tickets even though she may not be able to utilise those return tickets. At least it would minimise the cost of the return to Australia of the family in the event that the mother and children were granted permission by an English court to so return.**

**63. If cost was the only issue that stood between the retention of the children in Australia and their immediate return to the United Kingdom I would have had no hesitation but to exercise the discretion enlivened by the defence and to make an order for the return of the children conditional upon the provision of the appropriate funding within a reasonable time frame. There was, however, a second and perhaps more compelling reason raised by the mother; namely, the violence.**

#### **Domestic Violence constituting a grave risk of harm**

**64. The second of the bases relied upon on behalf of the respondent as falling within the exceptions set out in regulation 16(3)(b) is as follows: Mr Wilson submitted that given the history of violence and the persistent and tenacious attitude of the father in ignoring restraining orders that return of the children to the United Kingdom accompanied by their mother would necessarily entail a grave risk of exposure to physical or psychological harm. He submitted that the father's repeated acts of violent conduct and unwanted visits to the various places of hiding of the mother and the children is intimidation of the mother and his pestering of her would necessarily place the mother in such a state of anxiety and concern that it would have to reflect itself on the wellbeing of the children.**

**65. Additionally, there was a significant risk of exposure of the children to seeing the violence occurring between their parents. On that basis he submitted the defence had been established. He had strange ally, namely the State Central Authority who in its submissions indicated that it was not necessarily only the persistence of the father and his ignoring of the restraining orders that might be troublesome for the children, but it was the willingness of**



the mother to engage him in an ongoing relationship which was the concern of the local council in bringing its applications for supervision orders.

66. The proper interpretation of regulation 16(3)(b) has been the subject matter of much judicial writing. In the Convention itself the exception to mandatory return appears in article 13 which reads:

"There is a grave risk that his or her harm would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

67. For my purposes there is no practical difference between the words set out in Article 13 (b) and the words in Regulation 16(3)(b). At issue is the application of the facts in this case to the criteria that the court needs to be satisfied about, namely the existence of the grave risk referred to in the Regulation. The Convention itself is the subject matter of constant review. Special Commissions have been held on four occasions where the nations who are signatories to the Convention have gathered in the Hague to discuss its implementation and its operation.

68. At the Fourth Special Commission in March 2001 the Commission recommended as follows:

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

69. The view of the Commission is at odds with the majority of the High Court most recently expressed in *DP v Commonwealth Central Authority, JLM v Director-General New South Wales Department of Community Services* (2001) 206 CLR 401; (2001) FLC 93-081 at paragraphs 8 and 41. Their Honours emphasised that the words of the enacting regulation should be given their natural meaning, that the words "grave" and "intolerable" imposed the limits on the exception.

70. In *DP; JLM* in his dissenting judgment Gleeson CJ noted that:

"Whilst the regulation provides that the risk demonstrated must be grave, the nature and degree of physical or psychological harm is unspecified. However, the words 'will otherwise place the child in an intolerable situation' give guidance as to what is in contemplation."

71. Gleeson CJ went on to say:

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

I find those words particularly applicable in this case.

72. The particular problem created by allegations of domestic violence has been the subject of significant debate in cases throughout the world. There has been much academic writing about it. It seems to be generally accepted that the Convention was basically designed to discourage abducting non-primary caregivers, usually fathers, but that in its operation it has most significantly affected a group who can be loosely termed to be "escaping mothers".

These persons are often primary caretakers who want to relocate with their children back to their own country of origin or into a new relationship somewhere else or to a place they see as a safe refuge from an unsatisfactory relationship.

73. The operation of the Convention which has the effect of potentially sending a mother back into a situation of risk to her own physical wellbeing has been a matter of significant academic criticism (see Merle Weiner's article *International Child Abduction and the Escape from Domestic Violence* (2000) *Fordham Law Review* available at [HTTP://www.lanecountrylegalservices.org/fordhamlawreview.htm](http://www.lanecountrylegalservices.org/fordhamlawreview.htm); Miranda Kaye, *The Hague Convention and the Flight From Domestic Violence: how women and children are being returned by coach and four*, (1999) *IJLPF* 13 191-212; the Australian Law Commission report on *Equality Before The Law ALRC 69 Part IV Violence Against Women, Violence and Family Law* paragraphs 9.39 to 9.46) where the Commission said as follows:

"The principal purpose of the Convention is to deter child abductors by preventing any advantage flowing from the removal of a child to another country. This approach works well in the majority of cases where the abductor is in fact seeking to thwart the other party by taking the law into his or her hands and thereby gain an advantage. But it can have unjust consequences on a person who has a just cause for leaving if it penalises those women who have been subjected to violence and who flee with their children for their own safety. It is not in the child's best interests to enforce the return of the child and mother to the country of habitual residence to determine custody when this would expose the child's mother and perhaps the child to serious danger. Violence against the mother has significant effects on the child. This should be directly reflected in the regulations so that the child's return should not be ordered if to do so is likely to endanger the safety of the parent in whose care the child is. Furthermore, to expose the mother to the trauma, difficulty and cost of returning to pursue custody litigation is not consistent with the purpose of the Convention when she is a survivor of her husband's violence and took a reasonable course of action to protect herself. The Hague Convention gives a court a discretion whether to return the child in these circumstances. Given the strict interpretation the court has taken of the Regulations, they should be amended. The issue could also be raised by the Commonwealth as part of its reporting functions under the Convention."

74. The ALRC then recommended in recommendation 9.5:

"Regulation 16 of the Family Law (Child Abduction Convention)

Regulations should be amended to provide that in deciding whether there is a grave risk that the child's return would expose the child to physical or psychological harm or an intolerable situation regard may be had to the harmful effects on the child of past violence or of violence likely to occur in the future towards the abductor by the other parent if the child is returned.

The Commonwealth Contracting Authority should be requested to raise the problem of women fleeing with their children from violent spouses with the monitoring body of the Convention with a view to amending the Convention to make it clear that in deciding whether a child should be returned under subregulation (3) the Court must take into account the likelihood that the child will be exposed to violence or the effects of violence by one parent against the other.

The regulations should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child.

**Funds should be provided by the Commonwealth to the Commonwealth's contracting authority to ensure that in appropriate cases either parent can take action for custody to be determined in the Family Court."**

**75. Those recommendations have never been acted upon by the government, save that the issue of the problem was raised at the third and fourth Special Commissions at the behest of the Australian delegation.**

**76. This stereotypical view of the Convention as applying only to abducting fathers does not fit entirely comfortable with the provisions of paragraph 13 of the explanatory report by Perez-Vera where the rapporteur said:**

**"The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child. Indeed in the majority of cases the person concerned is the father or mother."**

**77. The leading Australian case where the issue of violence was directly raised as a defence to mandatory return was the decision of *Murray v Director of Family Services ACT* (1993) FLC 92-416, (1993) 16 Fam LR 982. The husband was a member of the New Zealand motorcycle gang known as "the Mongrel Mob". The mother brought her children aged five, four and two to Australia from New Zealand. Her evidence was that she was the victim of several violent attacks which included head butting, punching, kneeling her at the base of the spine. She had received death threats. The acts of violence either took place in the presence of or in close proximity to the children.**

**78. She said the husband had an arsenal of weapons which included firearms, knives, chains and meat cleavers and was likely to use the weapons against her. The husband whilst admitting to a turbulent relationship with the wife and some incidents of violence said her claims were exaggerated. The trial Judge had rejected regulation 16(3)(b) defence commenting that it was not possible to determine the veracity of the allegations and that the evidence relating to them would be available only in New Zealand.**

**79. The Full Court in rejecting the mother's appeal characterised the evidence as: "almost entirely directed at the prospective threat to the wife of a return to New Zealand and more particularly to a return by her to Dunedin."**

**They said:**

**"Whilst there is nothing that requires the wife to return to New Zealand, it is obviously desirable and from the point of view of the children that she does so. However, there is no requirement imposed by this court that she or they must return to Dunedin. It is open for her to return to another part of New Zealand where the danger to her may be less and it is of course open to her to seek orders from the New Zealand courts both for personal protection and interim and final custody immediately upon her arrival in New Zealand. She can also, if she wishes, seek leave from the New Zealand court to take the children to Australia. As his Honour pointed out, New Zealand has a system of family law and provides legal protection to persons in fear of violence which is similar to the system in Australia.**

**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. In our view, and in accordance with the views expressed by this court in *Despona's case*, the circumstances in which regulation 16(3) comes**

into operation should be largely confined to situations where such protections are not available.

Similar views have been expressed by the courts in other countries, eg Seigal J in the Superior Court of New Jersey in *Tahan v Duckett* and in *Re A: A Minor* and *Re Evans*, both Court of Appeal judgments.

For us to do otherwise would be to act on untested evidence to thwart the principal purposes of the Hague Convention which are to discourage child abduction and where such abduction has occurred to return such children to the country of habitual residence so the courts of that country can determine where or with whom their best interests lie. These children are New Zealand citizens who have lived all their lives in New Zealand and it is for a New Zealand court to determine their future."

80. The reference to Gsponer is a reference to the Full Court's judgment (Fogarty, Frederico and Joske JJ) (1989) FLC 92-001; (1988) 12 Fam LR 755 that the return of the child to the Convention country rather than to the claiming parent, about whom allegations of violence had been made would lead to the position that: "once the child has been so returned, no doubt the appropriate court in that country will make whatever orders are then thought to be suitable for the future custody and general welfare of that child, including any interim orders...there is no reason why this court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare."

81. There have been a number of international cases where the courts have declined to return children in circumstances where there were significant allegations of violence. In *Re F (minor: abduction: rights of custody abroad)* (1995) 3 All ER 641, the Court of Appeal reversed the decision of the trial Judge and dismissed an application seeking a return of a four-year-old child to Colorado. The child's Welsh mother had removed the child from the United States without the father's permission. The findings of the Court of Appeal that led to the reversal of the trial Judge's decision were stated by Butler-Sloss LJ at 648 as follows:

"This child was, like so many other children, present at acts of violence and displays of uncontrollable temper directed at his mother or elsewhere, and at occasions of violence between the parents. These included assaults on his mother and one on his grandmother on 6 June 1994, and destruction of household items such as ripping the fridge door off its hinges. More important in my view was that the child was himself the recipient of the violence by the father. ...There were other incidents. He destroyed the child's toys by stamping on them and smashing them when the child was present. This happened more than once. On several occasions he pinched the child on the legs causing bruising. One occasion of pinching was witnessed by the maternal grandmother. On 6 June 1994, C was thrown out of the house as well as his mother. On this occasion, which was immediately before the mother made her ex parte application to the county court, the police were called and took his father away. His father in his presence threatened to kill him and his mother. In these incidents the child was not a bystander to matrimonial discord but a victim of it. In addition other aspects of the behaviour of the father towards the child were unusual and inappropriate, such as waking up the child aged under 4 in the early hours of the morning, once to get him to help wash the jeep. In addition after the temporary restraining order was made and the father left the house, the father seems to have engaged in a campaign of intimidation and harassment directed at the mother, including following her about in his car and threatening her with a gun. He also camped in the jeep several doors away from the matrimonial home, which had a very adverse effect upon the child as well as upon the mother.

The child is asthmatic and the effect upon him of this behaviour was serious. He was present when his grandmother, who was recovering from surgery, was forcibly pushed out of the house and thrown against a wall. The child's reaction was to scream and to cry. He started to bedwet regularly and to have nightmares where he screamed out in his sleep. He became unusually aggressive at the child care centre as well as at home. The effect of the father camping nearby in the jeep made him scared and upset. He copied the tantrums, the yelling, the screaming and bad language of his father.

Since leaving the USA he has been living in Wales in his maternal grandfather's house. The misbehaviour, the bedwetting and the nightmares ceased after he settled down. But his mother told him after the start of the present proceedings that he might have to return to Colorado. He has had a disturbing resumption of the bedwetting and nightmares and has begun to wet himself during the day. He has become aggressive towards other children at the nursery school he is attending and towards grown-ups.

The extent to which the child has himself been drawn into the violence between his parents and the clear evidence of the adverse effect on him of his father's violent and intimidating behaviour would not in my view in themselves be sufficient to meet the high standard required in Art 13(b). The matters which I find most telling are:

- (1) the actual effect upon the child of the knowledge that he may be returning to Colorado together with the unusual circumstances;
- (2) that he would be returning to the very same surroundings and potentially the very same situation as that which has had such a serious effect upon him before he was removed.

There has to be concern as to whether the father would take any notice of future orders of the court or comply with the undertakings he has given to the judge. How is a child of 4 to have any security or stability or from his perception come to terms with a return to his former home? I have come to the conclusion on the unusual facts of this case that the extreme reaction of the child to the marital discord and the requirement by Art 12 to return him on the facts of this case to the same house with the same attendant risks would create a grave risk that his return would expose him both to psychological harm and would place him in an intolerable situation."

82. The President, as she now is, of the Family Division was obviously somewhat uncomfortable with the outcome that she felt she was obliged to reach in that case. She appears to be even more uncomfortable in her judgment in *Re M (Abduction: Leave to Appeal)* [1999] 2 FLR 550, where the Court of Appeal rejected an appeal against an order of the then president of the family division, Sir Stephen Brown, dismissing an application for the return of a two-and-a-half-year-old child to South Africa. The child was described by the Court of Appeal as being: "of mixed parentage - his mother being English and his father being a South African Zulu."

83. The trial Judge had heard evidence from both parties and accepted that:

"there was a considerable degree of violence by the father against the mother."

84. Included in the exhibits was a photograph which showed what the President called "quite horrifying marks on the back of the mother".

85. Butler-Sloss LJ thought if she were the trial Judge she may well have sent the child back, but she did not believe it was appropriate for the appellate court to interfere. As this was the

first case between England and South Africa after South Africa had enacted the Convention she was most anxious to reassure the South Africans that the outcome was not typical:

"The unusual aspect of this case, particularly the oral evidence, is really what has put the case outside the way in which it would normally have been dealt with which would have been to send it back to South Africa."

86. In *Pollastro v Pollastro* (1999) 171 DLR (4th) 32 the Ontario Court of Appeal (Catzman, Abella and Feldman JJA) were not so sensitive to their Californian brethren. The facts in *Pollastro* make for some fairly distressing reading, including medical evidence of the wife presenting three days after leaving with the child with bruises on her neck, arms, back and thighs. There were telephone transcripts of the father making very specific threats to the wife and to her family. The Court of Appeal summarised the established facts as follows:

"32 While many of the facts and allegations in this case are disputed, the following facts supported R.P.'s allegations about her husband being established:

- (a) he has been verbally abusive and threatening to his wife, family and friends;
- (b) he has been violent towards her causing physical harm;
- (c) he has behaved irrationally and irresponsibly both during and after their cohabitation;
- (d) he has a drug and/or alcohol problem;
- (e) he has been unpredictable and unreliable when he was responsible for T.'s care;
- (f) his temper is difficult for him to control;
- (g) his hostility towards his wife is palpable.

...

34 On the facts of this case the threatening phone calls reflect a continuing inability on the father's part to control his temper or hostility. That means that the mother who would inevitably accompany the child if he is ordered to return to California would be returning to a dangerous situation. Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting T.'s interests are inextricably tied to her psychological and physical security. It is, therefore, relevant to consider whether the return to California places the child in an intolerable situation to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.

35 There is also evidence that returning T. to California represents a grave risk of exposure to serious harm to him personally. The father's hostility, irresponsibility and irrational behaviour are ongoing. Although J.P. has not been overtly physically violent to his son, he has been violent and had temper outbursts when his wife has been with the child. On one occasion, for example, he threw hot coffee at her, narrowly missing their 7-day-old son whom she was holding.

36 T. is barely two years old. His safety is seriously at risk if he is forced to return to the very volatility which caused his mother to leave with him in the first place. He and his mother would be removed from the sanctuary of her family in Canada, and forced to return to California where the potential for violence is overwhelming. This exposes the child to the

serious possibility of substantial psychological and/or physical harm and, in addition, creates a grave risk that he would be placed in an intolerable situation."

87. Interestingly, there was no discussion, perhaps because of the strength of the facts, about the exercise of the residual discretion that arose once the defence was established.

88. The leading American case on which the defence based on domestic violence was successful was the decision of the United States Court of Appeal in the First Circuit in *Walsh v Walsh* 221 F.3d 204. Again the facts are dramatic.

89. The case involved the application for the return of two children to Ireland. The parties' daughter was aged 10 and their son was six. The couple had lived in America but had moved to Ireland in 1994 after the husband had absconded from criminal charges pending in Massachusetts involving a charge of breaking and entering and threatening to kill a next-door neighbour.

90. The parties lived together in Ireland until the mother brought the children to America in late 1997, almost four years later. The mother gave details of persistent severe assaults over those four years. The medical evidence corroborated her story. She had widespread bruising to her face, chest and knees, they were all swollen. She had a broken tooth. On another occasion she had an injured coccyx. There was evidence of frequent police intervention. The husband was frequently drunk and violent when under the influence of alcohol. The event that led to the end of their cohabitation was described by Lynch CJ in his judgment as follows [MW is the parties' daughter, MMW is the husband's son, JA is the wife and J is the husband]:

"On 24 May 1997, the night before MW's communion JM, MW and JA's sister's M who had come to Ireland for the event went out to a number of local pubs. On the way home when JA and the children were asleep J attacked MMW, fists flying, simply because MMW had broken a beer bottle. This was not their first fight or their last. Indeed they immediately fought again when they arrived back at the house. When all was over both J and MMW were bleeding and the room was splattered with blood. J hauled his daughter MW down to the bloodied room where her half-brother was and told to look at her bloodied half-brother and tell him to leave. MW was very frightened. She was about eight years old at the time. JA intervened and took MW back to her room and then JA went to her own bedroom. J followed JA in and hit her with an open hand about the head causing a swollen and bloodied ear. The next day J refused to go to the communion because it was obvious he had been in a fight.

The day after the communion, 26 May 1997, J again assaulted JA and she fled the house without the children. He had repeatedly punched her in the head and kicked her. Fearing for her life JA went to her friend's pharmacy. The pharmacist's daughter took JA to the police station where the police told her that domestic abuse was not uncommon in Tremor and that she should seek help at the legal aid office in Waterford City, the county seat. JA filed a report and accompanied by the police she returned to the house for her things only to find J throwing her bags into the street. After those events the wife obtained non-molestation orders. Despite the existence of those orders the husband broke into the wife's home and ransacked it when she was not there on one occasion. On another occasion he came to the house and threatened harm towards her. On the third occasion he broke into the house, smashed everything breakable and threw turf around the house. The wife removed the children from Ireland following that event notwithstanding she had given an undertaking to the Irish court that she would not do so."

The trial Judge concluded:

**"The evidence does not reveal an immediate serious threat to the children's physical safety that cannot be dealt with by the proper Irish authorities."**

**91. The Court of Appeal took a different view.**

**"Relying on the district court's rulings J's position on appeal was that the court correctly found there to be no grave risk of harm for even if he may have beaten his wife, which he denies, he has not beaten his children and any concerns on that point should be alleviated by his undertakings. JA's position is that the court applied too stringent a measure of harm, that the children have been and will be harmed by witnessing the assaults on their mother, that they are at grave risk of being assaulted themselves that J has already disregarded Irish courts' orders to stay away from the marital home and has flouted the law there by making his undertakings worthless."**

**92. In its analysis of the case law the court acknowledged that there might be capacity to mitigate the grave risk of harm:**

**"A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings. Necessarily, the 'grave risk' exception considers, inter alia, where and how a child is to be returned. The undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction. Given the strong presumption that a child should be returned, many courts, both here and in other countries, have determined that the reception of undertakings best allows for the achievement of the goals set out in the Convention while, at the same time, protecting children from exposure to grave risk of harm. See, e.g., *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999) (*Blondin II*); *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000); *Thomson v. Thomson* [1994] 3 S.C.R. 551, 599 (Can.); *P. v. B.* [1994] 3 I.R. 507, 521 (Ir. S.C.). See generally Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 156-72 (1999)."**

**93. However, it concluded**

**"Yet, there may be times when there is no way to return a child, even with undertakings, without exposing him or her to grave risk. Thus, on remand in *Blondin*, the district court found that the 'return of [the children] to France, under any arrangement, would present a 'grave risk' because 'removal . . . from their presently secure environment would interfere with their recovery from the trauma they suffered in France; . . . returning them to France, where they would encounter the uncertainties and pressures of custody proceedings, would cause them psychological harm...'"**

**94. The court was critical of the District Court's reasoning that any acts of violence had been directed not at the children but at their mother. They said:**

**"The district court distinguished these acts of violence because they were not directed at M.W. and E.W... the district court's conclusions are in error, whatever the initial validity of the distinction.**

**-First, J. has demonstrated an uncontrollably violent temper, and his assaults have been bloody and severe. His temper and assaults are not in the least lessened by the presence of his two youngest children, who have witnessed his assaults -- indeed, M.W. was forced by him to witness the aftermath of his assault on M.M.W.**



**-Second, J. has demonstrated that his violence knows not the bonds between parent and child or husband and wife, which should restrain such behavior.**

**-Third, J. has gotten into fights with persons much younger than he, as when he attempted to assault the young man in Malden.**

**-Fourth, credible social science literature establishes that serial spousal abusers are also likely to be child abusers. See, e.g., Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 *Violence Against Women* 134 (1999); Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 *J. Fam. Psychol.* 578 (1998); Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in Kersti Yllo & Michele Bograd, *Feminist Perspectives on Wife Abuse* 158 (1988); Susan M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents*, 20 *Child Abuse & Neglect* 589 (1996). But cf. Nunez-Escudero, 58 F.3d at 376-77; *K. v. K.* [1997] 3 F.C.R. 207 (Eng. Fam.).**

**Fifth, both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser. Thus, a congressional resolution, passed in 1990, specifically found that: Whereas the effects of physical abuse of a spouse on children include .**

**. . . the potential for future harm where contact with the batterer continues;**

**Whereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent; ... These factors are sufficient to make a threshold showing of grave risk of exposure to physical or psychological harm.**

**The question remains whether J.'s undertakings, or even a potential barring order from the Irish courts, are sufficient to render any risk less than grave. J.'s undertakings require him to obey the orders of the district court and the courts of Ireland. We do not believe the undertakings received by the district court or even a potential barring order, are sufficient to protect the children from the exposure to grave risk in this case. We have no doubt that the Irish courts would issue appropriate protective orders. That is not the issue. The issue is J.'s history of violating orders issued by any court, Irish or American. Courts, when confronted with a grave risk of physical harm, have allowed the return of a child to the country of habitual residence, provided sufficient protection was afforded. See, e.g., *Re K.* (Abduction: Child's Objections) [1995] 1 F.L.R. 977 (Eng. Fam.); *N. v. N.* (Abduction: Article 13 Defence) [1995] 1 F.L.R. 107 (Eng. Fam.); cf. *Friedrich*, 78 F.3d at 1069 (finding that the grave risk exception only applies when the child is in 'danger prior to the resolution of the custody dispute -- e.g., returning the child to a zone of war, famine, or disease . . . [or when] 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 . . . to give the child adequate protection'). Such an approach has little chance of working here. J.'s past acts clearly show that he thinks little of court orders. He has violated the orders of the courts of Massachusetts, and he has violated the orders of the courts of Ireland. There is every reason to believe that he will violate the undertakings he made to the district court in this case and any barring orders from the Irish courts.**

**Our conclusion here is similar to that of the English Court of Appeal in *Re F. (a Minor)* (Abduction: Rights of Custody Abroad) [1995] 3 All E.R. 641 (Eng. C.A.). In that case, the father, an American citizen, petitioned for the return of his son. The father had abused the mother and was harsh with the son, including pinching his legs so hard as to leave bruises and other forms of abuse. After the mother obtained a temporary restraining order, the father 'engaged in a campaign of intimidation and harassment directed at the mother.'**

Granting the father's petition, the lower court held that the mother did not make out a case under article 13(b). The Court of Appeal allowed the appeal (thus reversing the lower court). The Court of Appeal was particularly concerned that the child would have been returned to the 'very same surroundings and potentially the very same situation as that which has had such a serious effect upon him,' and noted, in particular, that '[t]here has to be concern as to whether the father would take any notice of future orders of the court or comply with the undertakings he has given to the judge.'

... we believe that the district court underestimated the risks to the children and overestimated the strength of the undertakings in this case. The article 13(b) exception must be applied and the petition must be dismissed.

V.

We do not come to this conclusion lightly. International child abduction is a serious problem. ...Further, a court's interpretation of a treaty will have consequences not only for the family immediately involved but also for the way in which other courts -- both here and abroad -- interpret the treaty. ... In the United States, the vast majority of Hague Convention petitions result in the return of children to their country of habitual residence, and rightly so. But the Convention provides for certain limited exceptions to this general rule. The clearly established facts of this case -- including the father's flight after indictment for threatening to kill another person in a separate case and a documented history of violence and disregard for court orders going well beyond what one usually encounters even in bitter divorce and custody contexts -- lead us to conclude that this case fits within one of these. The judgments of the district court are affirmed in part and reversed in part and the case is remanded with instructions that J.'s petition be dismissed."

95. In *TB v JB (Abduction: grave risk of harm)* [2001] 2 FLR 515, the English Court of Appeal was divided on the issue of whether three children should be returned from England to New Zealand. Among the factors relied upon were the mother's fear of violence from her second husband, the first husband being the applicant for the return of the children. As already indicated *Laws and Arden LLJ* determined the children should be returned. *Hale LJ* determined the children should not be returned. She was in agreement with the trial Judge, *Singer J*, who dismissed the application for their return.

96. The parties separated in 1990. The mother married Mr H in June 1994. They had a child of that marriage. They separated in February 1997. In March 2000 the mother took the children to England without the permission of the first husband. She asserted, amongst other things, there was a grave risk of harm for the children to return because she could not cope with the return having regard to the pattern of domestic abuse she had suffered at the hands of Mr H. She made allegations of violence over an extended period of time including anal rape and threats to kill. There was also an allegation of assault upon her eldest child. The trial Judge found that she reasonably held anxieties about Mr H's potential for dominating, subjugating, manipulating and controlling her and the children by his psychologically damaging activity.

97. In her dissenting judgment *Hale LJ* identified the problem of applying the Convention to escaping mothers when she said:

"[43] As Mr Nicholls on behalf of the mother points out, when the Hague Convention was first drafted, the paradigm abductor was not the children's primary carer, but the other parent who 'snatched' them away from her. Hence a deliberate distinction was drawn between rights of custody and rights of access. Summary return was not the remedy to protect mere rights of access. Now, however, in 72% of cases, the abductor is the primary

**carer: the parent who has always looked after the children, upon whom the children rely for all their basic needs, and with whom their main security lies. The other parent is using the Hague Convention essentially to protect his rights of access. He can do this because 'rights of custody' include the right to veto travel abroad, and most such parents now enjoy that right. But return to the home country may be a sledge hammer to crack a nut, because however much the children need contact with the other parent, they need a secure happy home with a competent and caring parent even more. There is often good reason to believe that the home country will allow them all to emigrate. It is therefore regarded as a real risk by the Hague Conference that spurious Art 13(b) defences will be raised in such cases: there is equally a real risk that the courts of the requested states will either succumb too readily to such defences, out of the kindness of their hearts and a natural reluctance to do anything which does not appear to them to be in the best interests of the children, or alternatively become unsympathetic and fail to recognise those few which should succeed.**

**[44] It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it. This case is, however, particularly difficult to assess, not so much because of the ill treatment, but because of the lapse of time since the separation."**

**98. Ultimately her Ladyship said:**

**"This was not an easy case. It was essentially an issue of fact...in my view there was sufficient here for this very senior and experienced judge to conclude that Article 13(b) was satisfied in respect of all three children."**

**99. She also said:**

**"[57] But it cannot be the policy of the Convention that children should be returned to a country where, for whatever reason, they are at grave risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems. And Mr H has clearly indicated his intention to make it difficult for the mother to secure a solution. ...**

**[59] ... It would require more than a simple protection order in New Zealand to guard the children against the risks involved here..."**

**100. In her judgment, Lord Justice Arden indicated that whilst the wife had received harassing telephone calls and unwanted visits from the second husband after separation:**

**"there is no recent evidence, however, of his having exhibited violence to the mother or the children of the totally unacceptable and traumatic kind that occurred prior to her separation from him in February 1977."**

**101. Her Ladyship said:**

**"[96] ...It would appear that the judge did not consider (a) whether the courts of New Zealand could offer protection from Mr H ...**

**[97] ...The policy of the Convention ... seems to me to require that the evaluation of risk is carried out on the basis that the abducting parent will take all reasonable steps to protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk. The onus would thus be on the mother in this case to show that, even if she took all reasonable steps, she would not be adequately protected from Mr H in New Zealand.**

**[98] In this context, in my judgment, the court is entitled and bound to take the view in the absence of evidence to the contrary that the courts of New Zealand can make appropriate protective orders, extending if necessary to a full prohibition of any form of contact or entering the area where the family live, and can effectively punish any non-compliance. (In this country if there was persistent non-compliance, there might be a custodial sentence).**

**[99] In my judgment it is reasonable to expect the mother to make all appropriate use of orders of the New Zealand courts for her protection and that of her children. ...**

**[100] No reliance was placed on the possibility of harm to the children through having witnessed domestic violence in the past and, in the light of the protective orders available in New Zealand, I do not consider that such harm would be relevant for the purposes of the mother's Art 13 defence.**

...

**[102] An assessment of the gravity of harm is an exercise which involves an overall assessment of the evaluation on the basis mentioned. Since Singer J made his evaluation without taking into account measures that the mother could reasonably be expected to take in New Zealand to protect herself and her children from Mr H, this court must re-evaluate the gravity of the risk of harm.**

**[103] I will proceed in the mother's favour on the basis that Mr H will harass her by telephone and visit her at her home. If she satisfies the New Zealand courts that this is likely to harm her or the children, the New Zealand courts will make adequate orders to protect her and the children. Provision may require to be made for Mr H to have access to B but I do not see why this cannot be done without the mother or her other children having to come face-to-face with Mr H if that is thought dangerous. In those circumstances, I cannot see that there would be a sufficient basis for saying that the mother's capacity to care for her children would be endangered by her return to New Zealand. Accordingly, I conclude that the evidence does not show a 'grave risk' of harm justifying the court in not making an order for the immediate return of the children.**

...

**[105] I note that there is reason to believe that there has been a change in the profile of abductors since the signing of the Hague Convention, but our attention has not been drawn to any modification to the Convention to take account of this despite the fact that reviews of the operation of the Convention are held. In those circumstances, I consider that the court should apply the Convention as it stands and in accordance with this court's established jurisprudence in it.**

**[106] On my conclusion, the question of discretion under Art 13(b), does not arise. Had it arisen, I would, in view of the policy of the Convention, have had some doubt as to the desirability of forming a view as to the attitude of the New Zealand courts to an application**

for return to the UK (see Ward LJ Re C (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478, above) cf, H v H (Abduction: Acquiescence) [1996] 2 FLR 570. However I would regard as relevant the convenience of the same court dealing with all matters in dispute between the parties, including the disputes between the parties as to emigration, child support (on the evidence, it would appear this probably has to be dealt with in New Zealand), access and KI's paternity. Indeed in my view the courts of New Zealand are better placed than the English courts to determine those issues since both parents will be in the jurisdiction and available for cross-examination. I also regard it as relevant that the children's grandparents and extended family are in New Zealand, and are clearly able to provide some, perhaps small, but none the less valuable, measure of moral support for these children."

102. The international jurisprudence on cases with similar facts reach no easy conclusion. It comes back to the words of Gleeson CJ in DP; JLM that:

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

103. The criterion which Arden LJ appeared to be critical of is amongst the list of criteria that were considered and accepted by Hale LJ and originating in a decision of Waite LJ in W v W (Child Abduction: acquiescence) [1993] 2 FLR 211 where his Lordship set out six matters that would weigh upon the exercise of discretion if the ground is established namely:

1. the comparative suitability of the forum to determine the child's future in the substantive proceedings;
2. the likely outcome in whichever forum of the substantive proceedings;
3. (not relevant to these proceedings);
4. the situation which would await the absconding parent if the child was compelled to return;
5. the anticipated emotional effect upon the child of an immediate return, a factor which is to be treated as significant but not paramount; and
6. the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order is refused."

104. Arden LJ is critical of the concern as to the likely outcome of the substantive proceedings in whichever forum. She is effectively saying the court here in determining whether or not to send these children back to England should not try to second guess what the English courts will do.

105. It is important for the operation of the Convention, however, that the courts have confidence in the proper application of relocation principles by the country where the children are likely to be returned. It is far more comfortable for a judge exercising a discretion to know that the country where the child will be returned is likely to provide the child with a fair hearing and a fair opportunity to achieve all possible outcomes that might advance the welfare of the child. In terms of the application of the laws relating to relocation, the English Court of Appeal probably sits amongst the most liberal of the courts if liberality is to be measured by the ease in which a parent is granted permission to remove a child out of the jurisdiction.

**106. But it is not my task to determine whether these children should or should not live in Australia and whether sending them back to England would simply result in a return back to Australia because of the application of appropriate English principles on the law of relocation. To that extent I would agree with the comments of Arden LJ that the second of the criteria is not necessarily a useful criteria to be given too much weight in the exercise of the discretion. A grave risk of harm is established**

**107. I feel it is safe to make findings that there has been a significant amount of violence between the parties. It is probable - but I make no ultimate finding - that much of that has been instigated by the father.**

**108. It is also safe to make a finding that the parties are unable to extract themselves totally from their relationship one with the other. The truth is far more complicated than the mother's assertion that she tries to go into hiding but the father ferrets her out. I think there is more likely to be significant substance in the father's assertions that the mother has been somewhat proactive in continuing their relationship over the years, understandably in circumstances where she has little extended support system available to her in a foreign environment.**

**109. It is clear that the existence of court orders and criminal sanctions has not abated the degree of violence. It is clear, notwithstanding the many promises given to the courts that a lesson has been learned, that the problem has not gone away. What flows from that is it is unlikely to go away. Whether that is because it is entirely brought about by the father's behaviour or by this strange magnetic relationship that the parties seem to have is not abundantly clear. It is clear that many of the factual circumstances of this case present themselves in little glimpses in each of the cases that I have referred to.**

**110. The violence in this case does not raise itself to anything like the levels involved in either Walsh and Pollastro. The intensity of the threats does not reach the level of the behaviour in either Re F or Pollastro. But the common sub-theme exists of an ongoing and chronic situation where the children find themselves living in fear and constantly living on the move without any form of security.**

**111. Although I found it a difficult case to come to grips with in light of the very strong underlying message within the Convention, ultimately I am satisfied of the existence of a grave risk of harm in this case. It arises as a result of the history of the relationship as I have described it and the common substratum of facts that emerges from each side's story. There have been years of sporadic violence in the presence of the children. It has necessitated constant court proceedings, and regular invocation of criminal sanctions. The problem persisted until the mother left England. I am confident a return to England would most likely lead to a continuation of the problems that have dogged these children for all of their lives in England.**

**112. It is beyond argument the exposure of children to violence between their parents cannot be seen to be in the children's interests. I feel the discomfort that Butler-Sloss LJ felt in her decisions in Re F and in the South African case in light of the strong underlying currents of the Convention and the need to overcome the scourge of wrongful removal. But the High Court has reminded us on several occasions that the Convention is to be read as a whole. It is a Convention with exceptions.**

**113. This case, on balance, fits within one of the exceptions. A return to England would place these children at grave risk of being once again exposed to the father's persistent attitude of continuing to harass the mother and the mother's persistent inability to end her relationship**

with him other than would be necessary to provide for ongoing contact between the children and the father.

#### Discretion

114. That brings to play the exercise of discretion. I think given the nature of the key finding that whilst the English legal system provides ample legal protection, and the English police and social services provide excellent care for "battered women", the reality of the life of these children in England, be it brought about either by the mother's behaviour or the father's behaviour, is that the presence of the mother and the father in the same country at the same time is likely inevitably to lead to further incidents of violence between them. As Butler-Sloss LJ said in Re F (above)

"There has to be concern as to whether the father would take any notice of future orders of the court or comply with the undertakings he has given to the judge."

115. In those circumstances I would not exercise my discretion to order a return of these children and accordingly the application will be dismissed.

116. In the matter of the State Central Authority v M. the formal order of the Court will be:

1. That the application filed 20 January 2003 be dismissed.
2. That orders 1, 2, 4 and 5 of the orders made by Judicial Registrar Ramsden on 23 January 2003 be discharged.
3. That the respondent be at liberty to collect any passports lodged by her on her own behalf and on behalf of the children from the Registry Manager.

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