IN THE SUPREME COURT OF NEW ZEALAND SC 37/2010

BETWEEN **K**

Appellant

AND **B**

Respondent

Hearing:	12 August 2010
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	C R Pidgeon and R S Pidgeon for the Appellant V A Crawshaw and D J Taylor for the Respondent

---

CIVIL APPEAL

MR PIDGEON QC:

May it please Your Honours, I appear on behalf of the appellant with my learned junior, Mr Richard Pidgeon.

ELIAS CJ:

Thank you, Mr Pidgeon.

MS CRAWSHAW:

May it please, Your Honours, Ms Crawshaw appearing for the respondent with my learned junior, Ms Taylor.

ELIAS CJ:

Thank you, Ms Crawshaw and Ms Taylor. Yes Mr Pidgeon?

MR PIDGEON QC:

May it please, Your Honours. In determining what is a relatively narrow point of statutory interpretation, it might be helpful to briefly set out what the position was in regard to relocation prior to the enactment of the Care of Children Act 2004. The approach that was adopted by Family Court Judges was in accordance with the decision of the Court of Appeal in *D v S* (2002) NZFLR 116, which is case 1 in the common bundle of cases, and I refer particularly to paragraph 33, which is on page 7 of the bundle. The Court held that, "The Court must weigh all relevant factors in the balance in determining –

ELIAS CJ:

Sorry, paragraph?

TIPPING J:

33.

MR PIDGEON QC:

– what will be in the best interest of the child." It is necessarily a predictive assessment, it a decision about the future, it is not a reward for past behaviour, there is no room for a priori assumptions, and until the enactment of this Act, that was how the Family Court applied or had regard to the issue on relocation: essentially, what is in the best interest of the child. In the bundle of cases that were of a very recent decision since my submissions were prepared, that were discovered by my learned junior, and I'm grateful to him for that, is a case, *PAH v RJR* (FAMC Nelson, FAM-2005-006-300, 5 May 2010, Judge Russell) – this was in the emailed bundle – a judgment of Judge Russell, and in paragraph 58 of that case –

ELIAS CJ:

Just hold on while we get it. Paragraph 8 –

MR PIDGEON QC:

58. In paragraph 57 he refers to the decision which is the subject to this appeal, *Bashir v Kacem* [2010] NZCA 96 is the name that's been given in the Court below to the parties in this appeal. And at paragraph 58 he set out the criteria which was often cited in Family Courts, as set out in the judgment of Justice Fisher in *D v W* (1995) 13 FRNZ 336, and they were listed, starting from A to L, and they included essentially the same matters that were set out in detail in section 5 of the

Care of Children Act including, for example, subsection (d), "Support for continued relationship with the other parent." Now, after the enactment of the Care of Children Act there were a number of High Court decisions on the effect of section 5 of the Care of Children Act, which the Court of Appeal has said at least two of those principles must be given a weighting or priority, contrary to the basis on which this litigation had been approached in the past. The High Court in two decisions – and this is paragraph 10 of my written submissions – by Priestley J in *Brown v Argyll,* [2006] NZFLR 705 and the correct spelling is A-R-G-Y-L-L and *Downing v Stanford* [2008] NZFLR 678 and of Harrison J in *S v L (Reclocation)* [2008] NZFLR 237 and those cases are all in the bundle, made it clear that there's no presumptive weight was to be given to any factor and although they are outlined in some detail, the reasons for that, I think it would be acknowledged by my learned friend that up until the decision of the Court of Appeal, with the exception of a Family Court judgment of the Judge Callinicos, that was the approach adopted by the Court. There's still no weighting. Justice Priestley used the phrase that the principles are just a matter of common sense which need to be looked at because the legislation provides in each case, but there is no weighting.

So, that the decision in the Court of Appeal, and I'll go the relevant passages, have made it that in its view, there is a weighting or priority on some of the provisions in section 5 of the Care of Children Act. Particularly the subsection dealing with safety and particularly the subsection which the Court of Appeal referred to as dealing with continuing relationships with a parent.

Now, at this point of time, and I also added that in the casebook, because of the differing approaches in other jurisdictions in relation to relocation cases, most notably in England, which was set out in *Payne v Payne* (2001) FLR 1052, which was an approach which was rejected by the Court of Appeal in the decision I've just referred to in *D v S*, was that the primary caregiver, who was usually the mother, should be permitted to relocate. They are very strong weightings.

Different states in the United States –

TIPPING J:

It wasn't an absolute though was it?

MR PIDGEON QC:

Not an absolute, no, not an absolute, no, I accept that. It was a weighting. The different states in the United States and I haven't thought it necessary to provide copies of the decision, have differing views, there's no concise approach. Australia has its own very detailed legislation and has an approach slightly different to New Zealand under the legislation, but there has been and I refer to a copy of the Washington Declaration, in which there was this year, a meeting of Family Court, at least Judges who are expert in this field, who met together to endeavour to work out some consistency and they came up with the declaration that I've referred to, the passage of declaration in my submissions, that the ideal was to look in each case at the best interest and the welfare of the child, without any presumptions. It's an individual case that it's wrong to go in with presumptions one way or the other and in the paper I sent early this week through email of Lord Justice Thorpe, he reports of the outcome of the Washington Conference, of course he was a Principal of the Family Court, a Judge of the Family Court in the UK for many years, drawing that point out that there was a need to look at it and the recommendation from the people involved in the Washington Conference, is that this issue be forwarded onto the Hague, with a view to looking at the drafting of a convention, which would be submitted to countries to either adopt or not.

ELIAS CJ:

But Mr Pidgeon, your principal submission is that our Act requires that in any event.

MR PIDGEON QC:

Yes, yes, yes.

ELIAS CJ:

I'm just trying –

MR PIDGEON QC:

What I'm really, sorry. What I'm really floating is, if there is any ambiguity, then it is my submission we should be conversant of the new international approach. I say new, but certainly new to the UK.

MCGRATH J:

But this is not an approach that to date has any backing from states is it?

MR PIDGEON QC:

No.

MCGRATH J:

It is simply an approach from Judges who work in the field?

MR PIDGEON QC:

That's right and I accept that entirely and it's not binding in any shape or form on this Court.

MCGRATH J:

So, it doesn't fit within the type of international material that we would normally look to –

MR PIDGEON QC:

I accept that.

MCGRATH J:

– to have some influence in statutory interpretation.

MR PIDGEON QC:

I accept that.

MCGRATH J:

It's right outside of that?

MR PIDGEON QC:

Yes, it is and I must accept that.

ELIAS CJ:

I suppose there are judgments of the Court of Appeal referring, for example, to the Bangalore principles, which are in the same boat, but they at least have behind them an international convention –

MR PIDGEON QC:

That's right.

ELIAS CJ:

– which has been explored.

MR PIDGEON QC:

Yes, absolutely.

ELIAS CJ:

But certainly Mr Pidgeon, while this is all quite useful, it is as you've really indicated, principally a revelation in the United Kingdom and it's not novel in this jurisdiction and the immediate starting point would seem to be the statute in any event.

MR PIDGEON QC:

Yes, I accept that entirely and the approach in the Washington Declaration has been the approach, that was set out by the Court of Appeal.

ELIAS CJ:

Yes.

MR PIDGEON QC:

And upheld in the Family Court in the past.

TIPPING J:

How are paragraphs 51 and 52 of the Court of Appeal's judgment in this case being applied in the field? Has it demonstrated any actual a priori approach in any case that you're aware of?

MR PIDGEON QC:

Well, this was the reason I've emailed the very recent judgment in July and June of this year and it shows very clearly that there is a differing approach, but that the majority of the family, in other words, there's a little uncertainty as to how it's to be interpreted, I gather, by the reason of differing judgments –

TIPPING J:

Well, I'm sorry, but I haven't read these very recent judgments, you're going to come to them are you?

MR PIDGEON QC:

No, but essentially, they do say that there is a weighting, in respect of sections 5(b) and (e) and they are applying that in respect of their decision.

TIPPING J:

Does that mean that in relocation cases, the Court of Appeal's judgment is being interpreted as having a weighting in favour of non-relocation?

MR PIDGEON QC:

It says that there is a weighting in favour of continuity in arrangements for continuing relationships with the parents.

YOUNG J:

I suppose, perhaps what's happened here is this, that section 4(5)(b) imposes an obligation on a Court by using the phrase, must take into account, to address any relevant principles specified in section 5. Now the principle that's specified in section 5 that tends to contradict or be a contraindication to relocation is maintaining stability of family relationships. There's nothing in section 5 that specifically says, or refers to the countervailing argument and that is that the custodial parents' general happiness and state of contentment will have a reflect affect on the children.

MR PIDGEON QC:

No, no.

YOUNG J:

So, I mean, I find it hard to believe that the legislature intended to give a weighting against relocation, but perhaps on a literal view of the sections it has, because the only principle, is there any, are there any of the principles in section 5 that really go in favour of relocation as strongly as 5(b) goes against?

MR PIDGEON QC:

No, no that's the case, although there are relationships in subsection (d) between the child and members of his family. In this particular case there are two families –

YOUNG J:

Yes. Well you're saying, I mean part of the problem with all of this is that the intense focus on the interests of one child results in a situation where the interests of other children, just as worthy of consideration, slip entirely out of focus?

MR PIDGEON QC:

Yes, that's clear in section 5, that you're entitled to take that into account but not 5(b) so much.

YOUNG J:

But in fact, the trouble is the focus on the child at the centre of the dispute does mean that the best interests of other children tend to be lost sight of?

MR PIDGEON QC:

Yes, yes.

YOUNG J:

And that's your complaint, one of your complaints. We can't do much about that.

MR PIDGEON QC:

Yes and that principle is developed in the article by Associate Professor Tapp and Taylor which I have included, although it's not strictly, I must confess, relevant to the interpretation. It is calling, and I've referred to it in my written submissions, for Courts to have a look at the cases of split families where there's a previous marriage, a mother wishes to return home, that she will parent the children better when she's got contact with both families and referring to the added benefits of Skype and webcams and so forth and in their views, because it's women that tend to be making, I've seen figures of two-thirds to three-quarters of these applications for relocation are by women who when a relationship ends are either returning home or form a new relationship and wish to go with their husband, or partner, wherever he or she may be, so that –

McGRATH J:

The reason for where they are, having disappeared –

MR PIDGEON QC:

That's right.

McGRATH J:

Being where they are having disappeared.

MR PIDGEON QC:

Yes, yes.

ELIAS CJ:

Mr Pidgeon, just carrying on the discussion you were having with Justice Young about the single child focus or the focus on the children who are the subject of the proceedings. I imagine that this legislation must be construed in the context of the international covenants such as the declaration of the rights of the child or the – or is it the declaration, is it declaration or covenant, I've forgotten.

MR PIDGEON QC:

UNCROC.

ELIAS CJ:

Yes –

MR PIDGEON QC:

UN Convention on the –

ELIAS CJ:

Yes, Convention on the Rights of the Child –

MR PIDGEON QC:

– Rights of the Child.

ELIAS CJ:

Yes, thank you. Which would permit the interests of all children not to be excluded?

MR PIDGEON QC:

That's right.

ELIAS CJ:

I mean it might assist in interpreting this legislation and preventing a microscopic view being taken.

MR PIDGEON QC:

Yes I'm grateful for that belief. It does seem that that is the appropriate place and this is what Pauline Tapp in particular in her article was very concerned that the second family seemed to be ignored. Could I perhaps turn directly to the section, section 4 and 5? The subsection (4)(1) makes it clear that the welfare and best interest of the child must be the first and paramount consideration and I don't think there's any dispute with my learned friend that that is the approach and also that was the approach that was adopted by the Courts prior to the enactment of the Act. Subsection (5) says, "In determining what best serves the child's welfare and best interests, a court of a person must take into account – (a)," time frame provisions, "(b) any of the principles," and I note the word "any", "any of the principles specified in section 5 that are relevant to the welfare and best interests of the particular child in his or her particular circumstances."

So in my submission subsection (5)(b) can be read really against any indication that there was to be a weighting or not.

TIPPING J:

I would've thought, Mr Pidgeon, that there was a good point that if the headline test is best interests of 'the' particular child in 'the' particular circumstances, that mandates individualised focus with no a priori weighting in any respect and that that starting point, which is really the ultimate objective –

MR PIDGEON QC:

Exactly.

TIPPING J:

– is not really consistent with a priori weighting.

MR PIDGEON QC:

Yes and the position, of course, is that there are factors such as the quality of contact with the parent, for instance, one case I was involved in, one parent hadn't bothered exercising his rights of access for the last six months. Now if there is to be a

weighting, it wasn't a relocation case, if there was to be a weighting in favour or priority assumption as the Court of Appeal in this case has held of continuing contact. I would argue very strenuously on that type of fact that it was not appropriate to withhold a relocation if it was applied for. You see the –

TIPPING J:

Is it reasonable to infer that the reason the Court of Appeal differed from Justice Courtney was on account of this weighting?

MR PIDGEON QC:

Yes, yes. Well in my submission that's so because the Court of Appeal in commencing its judgment –

ELIAS CJ:

Excuse me Mr Pidgeon, before you get onto the Court of Appeal, can we just finish with the statute because you will have to take us to the how its interpretation affected the –

TIPPING J:

I'm sorry, I thought we had –

ELIAS CJ:

I just wanted to draw attention to section 4(6) which seems to me to also emphasise that there's no priority in terms of any of the factors. Really the point that was put to you by Justice Tipping that the paramountcy is the sole focus really –

MR PIDGEON QC:

Yes. I was actually going to refer to that next, I got sidetracked. Yes. No that is so. Subsection (6) is also consistent with no weighting and prioritises the child's welfare and best interests.

YOUNG J:

I'm still attracted to that view but I'm still sort of stuck on a sort of literal approach to section 4(5). What are we to make of the words "must take into account" in section 4(5)? What are we to make of those words in the context where the things that must be taken into account on their face might suggest an anti-relocation state of mind

because the factor that is always deployed against relocation does get a mention, the specific factor that's always deployed in favour of relocation is left out.

MR PIDGEON QC:

The matters set out in section 5 are very similar to the guidelines that were adopted by the Court of Appeal and I've referred to Justice Fishers' list of factors to be considered and the factors –

YOUNG J:

Just an accident of drafting?

MR PIDGEON QC:

Yes and Justice Priestley said, section 5 is really an expression of common sense. You should look at all these factors in determining relocation.

ELIAS CJ:

Well is it not an answer that the structure by keeping the child's welfare and best interests as paramount means that the countervailing interests, which are not restricted as section 4(6) makes quite clear, must bear on the child's welfare and best interests. And it depends really what "take into account" means.

McGRATH J:

Yes.

ELIAS CJ:

It must be a factor to be considered.

MR PIDGEON QC:

Yes.

ELIAS CJ:

It's a relevant, it's a mandatory relevant consideration, but as to its effect, that's a matter of evaluation and it doesn't depend simply on the identified circumstances, it depends on any circumstances which are relevant to the child's welfare.

MR PIDGEON QC:

Yes. It should also be borne in mind – I accept that – it also should be borne in mind that section 5 is primarily used for the purpose of determining care and custody issues for parenting orders, it doesn't even refer to relocation, but is accepted, and I don't dispute it, that in any decision relating to a child these factors will have to be taken into account. But, for example, in the Bill –

ELIAS CJ:

Excuse me, sorry, is there in fact a provision about relocation?

MR PIDGEON QC:

No.

ELIAS CJ:

Or – no, it's just an order that's made, it's a guardianship order that's made?

MR PIDGEON QC:

Yes, that's right.

ELIAS CJ:

Yes.

McGRATH J:

Mr Pidgeon, as well as this only being a take into account provision, there's the point that's earlier been made, isn't it, under 4(5)(b), there is something of a filter in terms of the provision, the principles in (5) having to have a bearing in terms of the best interests of the particular child –

MR PIDGEON QC:

Yes.

McGRATH J:

– in the particular circumstances?

MR PIDGEON QC:

Yes, yes.

ELIAS CJ:

And the particular circumstances would include the wider family circumstances, including other siblings, other, and parents.

MR PIDGEON QC:

Yes. For example, in this case, the grandparents even.

ELIAS CJ:

Yes.

MR PIDGEON QC:

They are only, in Australia, they're all in Sydney: grandparents, uncles, aunts, brothers, step, half-brothers and sisters are all in Australia. In New Zealand, because the respondent fled from Algeria for political reasons and was a refugee, his family are not in New Zealand, although there is a half-brother born to his wife by marriage, it's an Islamic marriage, in other words, in law, it's a de facto relationship, second wife, in this present case. So it's, in a sense, factually quite a complex issue. Now, in my –

TIPPING J:

Is relocation only necessary when you're going out of the jurisdiction, a relocation order?

MR PIDGEON QC:

No, no, within New Zealand.

TIPPING J:

If you're going from Whangarei to Invercargill –

MR PIDGEON QC:

Yes.

TIPPING J:

– it's still necessary to get?

MR PIDGEON QC:

Yes, and they would still apply the Care of Children Act, section 4 and 5 principles.

YOUNG J:

It's any important decision affecting the life of a child, isn't it?

TIPPING J:

Right.

MR PIDGEON QC:

Yes.

YOUNG J:

Which falls in the guardianship regime –

MR PIDGEON QC:

That's right.

YOUNG J:

– rather than the sort of custody regime.

MR PIDGEON QC:

Yes, yes, that's the position. And where this issue of weighting is crucially important is that a number of cases come before the Courts – and you can see from the number of academic writings on this topic that it's a matter of great debate, these issues of relocation – the Judges are often asked to make a decision where there's a good relationship with both parents, but the mother has a genuine and valid reason for wishing to relocate. And if there's introduced a weighting, that tips the balance in a number of cases.

McGRATH J:

Well, it's distorting in its effect.

MR PIDGEON QC:

It's distorting in its effect, yes, yes.

BLANCHARD J:

Mr Pidgeon, can I just clear one matter out of the way? I take it that you accept that the Court of Appeal in paragraph 51 was correct when it said that section 5(e) makes

it clear that protection of the child's safety is mandatory, that that is a basic, despite the fact that it's simply number five out of six matters?

MR PIDGEON QC:

And that is because of the words, "must be protected" –

BLANCHARD J:

Yes.

MR PIDGEON QC:

– instead of the word, "should."

BLANCHARD J:

Yes.

MR PIDGEON QC:

It –

BLANCHARD J:

Well, also –

MR PIDGEON QC:

It doesn't certainly harm my –

BLANCHARD J:

– it would completely –

MR PIDGEON QC:

– case.

BLANCHARD J:

No, it doesn't harm it.

MR PIDGEON QC:

Yes.

BLANCHARD J:

It really, it would be completely incompatible with section 4(1) –

MR PIDGEON QC:

Yes.

BLANCHARD J:

– if it didn't, if it wasn't to be regarded as an absolute requirement.

MR PIDGEON QC:

Yes.

TIPPING J:

It could equally well have been put "should", it's just –

MR PIDGEON QC:

Yes.

TIPPING J:

– for emphasis, I would have thought.

MR PIDGEON QC:

Yes. Actually –

BLANCHARD J:

It's strange it wasn't –

MR PIDGEON QC:

– I looked at the *Shorter Oxford English Dictionary* and it gives for "must" a meaning "shall or should", and it gives for "shall" a meaning of "must".

ELIAS CJ:

Well –

MR PIDGEON QC:

But I do –

BLANCHARD J:

Well –

MR PIDGEON QC:

I think it's commonly –

ELIAS CJ:

There's probably –

MR PIDGEON QC:

– regarded as a bit extra weight we must though, I must acknowledge that.

BLANCHARD J:

Well, that's the drafting technique that they've adopted in the last 20 years or so.

MR PIDGEON QC:

Yes, yes.

BLANCHARD J:

That when they want something to be regarded as mandatory they use "must".

MR PIDGEON QC:

Yes.

BLANCHARD J:

They stopped using "shall" because of the ambiguity in it.

MR PIDGEON QC:

Yes. An interesting point is in section 6. In a sense it's a side issue, but perhaps not. There was a significant change to the existing legislation in the Guardianship Act as to the child's views, and it might perhaps be helpful just mentioning that. Section 23 of the Guardianship Act 1968 provided that the welfare of the child was to be paramount. It then says in subsection (2), "The Court shall ascertain the wishes of the child if the child is able to express them," that's not – "and shall take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child." Now that isn't carried through. In fact, section 6 says that a child must be given reasonable opportunities to express views, and the views he expresses "must"

be taken into account. Now, that is a far stronger provision and raises some problems, really, because the Courts in practice have still been adding on, depending on the age and maturity of the child, and understandably. But I am pointing out that that actually says "must".

BLANCHARD J:

It probably 20 years ago would have been worded as "shall".

MR PIDGEON QC:

Yes.

ELIAS CJ:

But in any event, again it's "be taken into account". It's part of the dignity of children –

MR PIDGEON QC:

Yes.

ELIAS CJ:

– that their wishes should be acknowledged.

MR PIDGEON QC:

I definitely –

ELIAS CJ:

So, it's quite right for it to be compulsory –

MR PIDGEON QC:

Yes.

ELIAS CJ:

– to that extent, and the Judge will need to explain why the wishes of the children are not being given effect to –

MR PIDGEON QC:

Yes.

ELIAS CJ:

– and that too is fulfilling the dignity of the child.

MR PIDGEON QC:

Yes.

McGRATH J:

But there is a drafting contrast here, Mr Pidgeon, isn't there, between what you've just pointed out in respect of section 6 and section 4(5)(b), whereby even the mandatory consideration of safety is only, must be taken into account where it's raised by the particular circumstances or the best interests of the particular child.

ELIAS CJ:

Yes.

McGRATH J:

So that's – it's not going to make a lot of difference in practice –

MR PIDGEON QC:

No, no.

McGRATH J:

– but that's the drafting contrast, "Must be taken into account if it's relevant."

MR PIDGEON QC:

Yes, yes.

McGRATH J:

Whereas in section 6, "Must be taken into account."

MR PIDGEON QC:

Yes, that does appear to be –

McGRATH J:

Bearing on the point the Chief Justice has made, that –

MR PIDGEON QC:

Yes, that's right.

McGRATH J:

– there's no need to assess if it's relevant, you just take it into account please.

MR PIDGEON QC:

Yes.

TIPPING J:

Well, it suggests that the child's views are always relevant, but that the weight you give them –

McGRATH J:

Yes, that's another way of looking at it.

TIPPING J:

– is another matter. Well, that's what I'd read into it.

MR PIDGEON QC:

Well, I am aware some academics are – but I haven't got an article to point it out – regard child's views as to be more upheld now than they were under the Guardianship –

YOUNG J:

That's also partly under the UN Convention on the Rights of the Child.

MR PIDGEON QC:

Well, that's true too and that's often cited in these cases. This reference to child safety has raised some interesting points. For example, in England, and the Court of Appeal was involved with a case where the child was to be returned to Israel and it was argued that it was unsafe. At that time it was the height of the unrest with the Palestinians. Should not, no order should be made to return the child, this was the Hague Convention International, a child abduction case. The Court actually rejected that, but arguably, if a child was going back to a Taliban controlled area of Afghanistan, clearly that comes into the equation, so it's just it's the place, it's not just the, an abusive parent that's being looked at here.

But in most of the relocation cases, this provision about safety and obviously a Court's not going to place a child in an unsafe situation, because that would clearly not be in the welfare and best interests of the child. So, it maybe just, go round in a circle here, but what is clear, in my submission, that subsection (b), which is not worded, must, but the same phraseology of anywhere else says, there should be continuity. These are principles to be looked at, continuity and arrangements for childcare with the family, family group, but here, of course, it's unusual that there's a family group in both places and it says, in particular, when you're referring to family, the child should have continuing relationships with both of his or her parents.

Now, in my submission, His Honour in delivering the judgment of the Court of Appeal, has actually misinterpreted that reference and parenthesis to in particular and has, in effect, made should a must –

YOUNG J:
But it's complex because there is a must there anyway, back in section 4(5).

MR PIDGEON QC:
Yes, yes.

YOUNG J:
I mean, there's a layer of musts and shoulds and musts and paramountcy.

BLANCHARD J:
But that's only must take into account.

MR PIDGEON QC:
Yes, yes.

TIPPING J:
So what's your point about 5(b) Mr Pidgeon, about the Judge misinterpreting, I didn't quite catch it?

MR PIDGEON QC:
Yes, well, perhaps, if you look at, well, the point I'm making in the subsection is that it is identifying the relationship with family group whanau and so on, that you should

specially look to the position of both parents. There's no weighting there. If there was a weighting, they would have started, there must be continuity in arrangement, because it's exactly the same as (a), (c), (d), (e) and His Honour –

TIPPING J:

It's a subset of continuity.

MR PIDGEON QC:

Yes, it's a subset of continuity, but continuity is only one of a number of principles, there's no particular weighting given to any one of those.

ELIAS CJ:

I'm sorry, are you saying that there's no weighting given to parental relationships, or the child's relationship with his parents, because that is clear I would have thought from subsection (b) and it's consistent with the Declaration, or the Convention of the Rights of the Child also.

MR PIDGEON QC:

But what the Court of Appeal, no, I do differ with respect.

ELIAS CJ:

Why, explain.

MR PIDGEON QC:

Each of these principles, which can be, must be looked at, but any of them can be taken into account, there's, in my submission, apart from the exception possibly of subsection (e), there is no weighting or priority on any of those principles. The Act doesn't say so and that was the approach adopted by the Court of Appeal before. There is no weighting on any principle. The welfare and best interests of the child are looked at.

Now, certainly continuity in relationship with a parent is an important factor to be looked at, and I'm not disputing that, but if you have a situation where the quality of care from the one parent is unsatisfactory, then why should there be a weighting in that case, it's what is in the best interests of the child. If a parent can parent that child better in another environment, that again would go against any kind of weighting and then there's, as Professor Tapp has developed in her article, the continuity can

be through frequent telephone contact, Skype webcam, which in fact has been used in this case, just in the last year, a father allowed –

MCGRATH J:

Just coming back to the statue, just coming back to the statute Mr Pidgeon –

MR PIDGEON QC:

Yes, yes.

MCGRATH J:

– is the point you're making that while the Court of Appeal might have been right to say that 5(b) and the words in parenthesis gives particular emphasis to the maintenance of continuing relationships with both parents, the Court of Appeal's taken a leap without any justification to say this means that there's some priority or weighting.

MR PIDGEON QC:

That is so, that's exactly, yes.

TIPPING J:

Because continuity, if you have a situation where both parents are usefully contributing, then that continuity will be harmed by taking the child into another environment where that's no longer possible and that, that has to be borne in mind, but it's not elevated I wouldn't have thought per se, beyond the other factors that you have to take into it.

MR PIDGEON QC:

Yes, that's exactly my point and I don't quarrel with your summary there. Obviously it's a matter you have to give serious consideration to the effect of the shift. But, I notice in Professor Henaghan, one of his articles said, and I was quite amazed by this, he said that in the years, I think 2007, 2008, for overseas relocation applications, 75 percent were granted. So that it is going to make a difference on the ground, if the interpretation of the Act is not as upheld by the High Court Judges, Justice Priestley, Harrison and Courtney, who interpreted the Care of Children Act, if the Courts are now giving that a weighting. In the article I've just –

YOUNG J:

Mr Pidgeon, can I just stop and pause you there because I've maybe, I've misinterpreted what Justice Arnold said para 51. He has said, I think, uncontroversially, that 5(e) is particularly important.

ELIAS CJ:

Where relevant.

YOUNG J:

Yes, because it's a, it's got a must, but we can sort of put that aside because it's not material to the case. What he seems to be saying in relation to 5(b) is that within the constraints of that section, it's relationships with parents that are given particular emphasis over the relationships with other members of the family.

MR PIDGEON QC:

Well, in my submission, that's not how, not only myself, but the Family Court Judges are reading that.

YOUNG J:

It would be a bit odd if he meant anything else wouldn't it? Because what he's saying is, might be thought to be implicit, both as a matter of common sense and in terms of what 5(b) says.

MCGRATH J:

I understand Mr Pidgeon's complaint, that your analysis relates to the penultimate sentence and Mr Pidgeon's complaint relates to the last sentence.

TIPPING J:

Yes, I think the essential problem here, if there is one, is that the second, the last sentence doesn't follow from the previous one.

YOUNG J:

So what, what, this is the last sentence in paragraph 51?

TIPPING J:

This, as we see it, this means that there is some priority. That's the key point in this case, does it mean that?

ELIAS CJ:

As between the various principles, so all the principles.

TIPPING J:

And I think the in particular is simply highlighting an aspect of continuity.

MR PIDGEON QC:

Yes.

TIPPING J:

That is an important part of continuity and the debate is whether that highlighting leads logically to the premise in the final sentence in the paragraph. It's a little hard to see how it does.

MR PIDGEON QC:

Yes, I'm quite happy to but I probably would be wasting the Court's time to go through the five decisions of Family Court Judges in the Courts below but –

TIPPING J:

I'd be more interested in –

MR PIDGEON QC:

– they take the second paragraph, the last sentence as well as the preceding sentence as saying that 5(b) and – there is a weighting.

TIPPING J:

Yes. Well if that's how it's been interpreted that obviously suggests that that meaning is being taken out of it.

MR PIDGEON QC:

That's so.

TIPPING J:

And therefore it becomes very important as to whether the second – last sentence logically follows from the previous one.

MR PIDGEON QC:

That's right. Or in any event is correct really.

TIPPING J:

Yes. But they're reasoning, what I'm suggesting is that the reasoning for this priority is under attack by you, Mr Pidgeon, on account of the lack of a sequitur. It's a non-sequitur, you're saying.

MR PIDGEON QC:

That's right.

YOUNG J:

Well –

MR PIDGEON QC:

And it's not –

TIPPING J:

I'm not taking –

MR PIDGEON QC:

– laid down in the legislation.

TIPPING J:

I'm not taking sides here Mr Pidgeon, don't misunderstand me, I'm just trying to tease out the essence of this problem.

MR PIDGEON QC:

Can I just try and unpick it? The second to last sentence of 51 is presumably a reference to the "in particular" words in section 5(b).

ELIAS CJ:

The in parentheses words?

MR PIDGEON QC:

Yes.

YOUNG J:

So if the paragraph stopped with both parents, didn't have the last sentence, will you have a problem with it?

MR PIDGEON QC:

Yes I do because the way it's expressed, it may have been what he was – is the wording of section 5(b) gives particular emphasis to the maintenance of continuing a relationship with both parents but when you look at 5(b) that reference is really clarifying, within the concept of family, that preceding words of "should take into account" are particularly emphasising within the family within that subsection that those parents' views are important.

ELIAS CJ:

Well it's not talking about parents' views. It's talking about relationships.

MR PIDGEON QC:

Relationships sorry.

YOUNG J:

But you – it does say the word "both" which may give some, give a bit of an indication that there is an idea there that if possible a child should have a continuing relationship with both parents.

MR PIDGEON QC:

But that doesn't necessarily mean in the same country.

YOUNG J:

Of course it doesn't. Of course it doesn't.

ELIAS CJ:

Well that is wholly consistent that emphasis on the importance of the parent/child relationship to the child is wholly consistent with the UN Convention on the Rights of the Child also?

MR PIDGEON QC:

Well the Convention looks at it more from the point of the child rather than the parent.

ELIAS CJ:

Well I'm trying – I think the Act does too but the Act is really based on the legislative judgment that it is of benefit to children to maintain contact with both parents.

McGRATH J:

Sorry can I just suggest to you that paragraph 51 doesn't purport to be a detailed discussion of section 5(b) or the words in parentheses in section 5(b). It's really concerned with the question of whether there needs to be some qualification on the general proposition that no factor has any greater weight than others and that 5(b) is only being considered to the extent that it throws light on that proposition.

MR PIDGEON QC:

In my submission section 4 rather makes it or helps to make it clear that there is to be no weighting, because it talks about any of the principles. Which means, in effect, the presiding Judge may not particularly give weight to 5(b), although in practice I'm sure that they would. But that's what it says and to support the narrow interpretation is they would – wanting to change the law with regard to relocation and both my learned friend and I have searched through *Hansard* and so on, and relocation isn't actually discussed in the Bills or in Parliament.

ELIAS CJ:

Well that's because these are general principles applying to all guardianship determinations.

MR PIDGEON QC:

But the only mention in the Bill, and that's in the agreed bundle, that went to Parliament is that the order of the section 5 principles does not give any weighting. In other words that because (a) is first and (b) is next but that's the only comment that's made on the issue as to the order in which they are set. I can give you the – perhaps I should give the reference.

ELIAS CJ:

I wonder really whether that last sentence in paragraph 51 just doesn't lead into paragraph 52 and although it might have been expressed in slightly different terms, I can't see that there's anything very wrong with paragraph 52 because the Court is emphasising that ultimately it's an evaluative judgment taking into account all factors relevant to the particular case.

MR PIDGEON QC:

I agree that 52 isn't – is really very traditional approach that's been adopted by the Court of Appeal but 51 –

TIPPING J:

But 52 must be read in the light of 51 I would have thought –

MR PIDGEON QC:

Yes.

TIPPING J:

– by those administering the Act.

MR PIDGEON QC:

Yes it is and it's those two paragraphs of the judgment that are being put together to determine that there is a weighting.

ELIAS CJ:

But I accept –

MR PIDGEON QC:

A child's welfare should be above a weighting.

ELIAS CJ:

I accept that the use of the language of "weighting" may not be helpful and it may be that we need to concentrate on that but if these two paragraphs are read fairly all they're talking about is that an emphasis on there being – on all factors being equal, is clearly an exaggeration because the context will make some factors more relevant than others and the wording of the section 5 factors does, as they say, indicate that some qualification needs to be made to that principle because of these indications such as that where there are questions of safety they must be addressed. I mean that's common sense really and similarly if you take the view that the section indicates that generally speaking the child's relationships with both parents is very important, then there has be some countervailing factor which permits you, in your evaluative judgment, from not giving that full effect. So I don't really see – it does seem to me that people are getting very precious.

TIPPING J:

That's what happens when you codify.

ELIAS CJ:

Well it's maybe what happens when you specialise but really paragraphs 51 and 52 are particularly in the light of the discussion we've been having. Maybe some clarification is desirable but I can't see, for myself, that they're really so astray.

TIPPING J:

I think the problem is that this is being interpreted as giving some a priori weight as opposed to case specific weight.

ELIAS CJ:

Yes.

MR PIDGEON QC:

Yes, that's right.

ELIAS CJ:

Well I don't think that's what –

MR PIDGEON QC:

And it's been case specific weight that's been the way it's been done up until now.

TIPPING J:

But the reasoning, if I may respectfully say so, does tend to give some support for that interpretation because the reading of the bracketed "in particular" provision has been lifted to do a job that, with respect, I very much doubt it was ever intended to do. That's what I'm – in other words it's not a wholly unrealistic reading that's being attacked but the key issue is, is this the right approach to the legislation?

MR PIDGEON QC:

Yes.

TIPPING J:

Never mind how the Court of Appeal expressed itself.

MR PIDGEON QC:

Yes.

TIPPING J:

Because I can't see how the in particular, particularly with the word relationships in the bracketed provision, which clearly picks up the child's relationships in the second line, is doing other than sharpening the focus of what is the most important aspect of that relationship. It's not family group et cetera, it's in particular with the parents.

MR PIDGEON QC:

Yes, it focussing on –

TIPPING J:

Yes, and that's the natural reading of it and what and what they've done –

MR PIDGEON QC:

– what family is, it's clarifying really the, the legislative provision. But the problem I have is that the Court of Appeal is not, in this case, looking at the factual situation where before it, as say, on this case some principles are greater than the other. In essence, what they are saying is, this is the statutory interpretation.

TIPPING J:

Can you demonstrate that they've actually carried this, what you argue to be a misinterpretation through into their actual case specific decision?

MR PIDGEON QC:

Well, I think if you read the decision, that was the weighting, that was the reason why –

TIPPING J:

But when you come to –

MR PIDGEON QC:

– the lack of continuity.

MCGRATH J:

When you come to the particular decision though Mr Pidgeon I think you are going to have to take into account that paragraph 52 does emphasise the importance of a valuation and weighing of all factors. Now, I understand and see a certain force, subject to what the respondent says in your criticisms of paragraph 51, in particular the leap in the last sentence, but the Court may have brought itself back in a way that's, that is, not caused any problem in this case in the end after, so you will no doubt, when you've finished on the statute and you're looking at its application, show us those parts of the judgments which indicate that in your submission the mistake, if there is one, had a bearing.

MR PIDGEON QC:

Well, paragraph 62(c) of the judgment of the Court of Appeal, which was on page 21 of the casebook.

MCGRATH J:

62(c), right.

MR PIDGEON QC:

Yes, 62(c), yes. In relation to section 5(b), "If the girls were to relocate to Australia, there would inevitably be a significant loss of relationship," and goes on to that and it's clear that this issue was really the prime reason for the refusal of the application for relocation.

BLANCHARD J:

I think that's perhaps even more indicated in paragraph 63, because the words, in particular, are used. "In particular, the need for the children to have a meaningful relationship with her family and his family."

MR PIDGEON QC:

Yes, thank you, yes.

BLANCHARD J:

Mr Pidgeon, do we get any assistance about what the Court of Appeal meant in the final sentence of paragraph 51 from the footnote, referring to an article by Professor Henaghan. Have you been able to identify in that article something which the Court of Appeal was intending to refer to?

MR PIDGEON QC:

Yes, if I could refer the Court to page 536 of the agreed casebook, volume 2.

YOUNG J:

Sorry, what page, I'm sorry, I lost that.

MR PIDGEON QC:

536.

YOUNG J:

536.

MR PIDGEON QC:

And it's under the left-hand column, the last full paragraph which says, "Judges across both the Family Courts and High Courts, consistently assert that in determining what is in the welfare the best interests of the child, all factors are weighed up without prominence being given to a particular factor." That's what he says. This article was written after *D v S* before the case under appeal, at the Court of the Appeal.

BLANCHARD J:

Well, plainly, otherwise it couldn't have been cited.

MR PIDGEON QC:

Yes, yes, however, closer analysis of the case, it seemed to indicate that the effect of relocation on the child's relationship with the non-relocating parent, carries more weight than other factors. This is really the point raised by the Chief Justice and go to the second column, the second paragraph –

ELIAS CJ:

Just interestingly, he says that the trend in New Zealand for relocation applications is for them to be denied, I thought you just said –

MR PIDGEON QC:

Yes, I did and it says article -

ELIAS CJ:

– to us, it was, it was to the opposite effect.

MR PIDGEON QC:

Yes, yes, yes.

TIPPING J:

Is this a later article that, it's gone from denial to 75 percent success?

MR PIDGEON QC:

Yes, it's an article –

TIPPING J:

Well, don't distract yourself from the present.

MR PIDGEON QC:

I'll try and find, see, I'm not sure whether I put it in the bundle or not, but, yes, that was written in 2008 –

BLANCHARD J:

Well, I was going to ask.

MR PIDGEON QC:

– and he was referring to the figures for the year 2008, yes.

BLANCHARD J:

I was going to ask next whether there's anything in cases which have appeared, or cases determined since the Court of Appeal decision, which indicates that the Judges are being, as you would no doubt see it, misled by paragraph 51?

MR PIDGEON QC:

Yes, I will, I'll just finish this reference in this article. I will go to that.

BLANCHARD J:

I'm sorry.

MR PIDGEON QC:

The second paragraph on the right-hand column talks about the wide discretion than some and then a fact that generally results in the location, relocation, application been denied. That is not necessarily prescribed by COCA, in other words this reference to weighting, but it gives the lawyer for the child the context which they enter, a factor for the child, wishes to relocate.

MCGRATH J:

Well, Professor Henaghan's concern, goes, starts a bit further up doesn't it?

MR PIDGEON QC:

Yes.

MCGRATH J:

It appears that in New Zealand eminence is given to the bond between the child and non–relocating parent.

MR PIDGEON QC:

Yes.

MCGRATH J:

That's the factor he says for the majority of applications –

MR PIDGEON QC:

Yes, well, the figures for relocation in the article I read from Professor Henaghan, was overseas relocations –

ELIAS CJ:

Oh, I see.

MR PIDGEON QC:

– deemed them to be granted. But it was approximately 45 percent for internal relocations were granted, which seems odd, it seems odd, yes. I'll –

BLANCHARD J:

You can't go to Invercargill, but you can go to Ireland.

MR PIDGEON QC:

Yes, yes.

ELIAS CJ:

But you say that was an overseas study, was it?

MR PIDGEON QC:

No, he did a study himself.

ELIAS CJ:

Oh, I see, it's a New Zealand study.

MR PIDGEON QC:

It's a New Zealand study of New Zealand Courts.

ELIAS CJ:

Yes, I see.

MR PIDGEON QC:

I'll perhaps try and locate it in reply on that article.

TIPPING J:

Is this the study that's referred to immediately following the passage you've just read, on the right-hand side of page 5 –

MR PIDGEON QC:

No, it was after that –

TIPPING J:

After, it's another one.

MR PIDGEON QC:

– because it quoted the 2008 figures and that article was written during 2008.

MCGRATH J:

I think it may be a continuing study, in fact –

MR PIDGEON QC:

Well, that might well be the case, yes.

MCGRATH J:

If checkpoint last night has anything to contribute to this.

MR PIDGEON QC:

Yes, well, perhaps I should return now to the cases that have been dealt with.

ELIAS CJ:

Sorry, just in terms of a map of where you're taking us Mr Pidgeon, you're going to take us, what, to cases which have applied this decision of the Court of Appeal –

MR PIDGEON QC:

Court of Appeal decision, yes.

ELIAS CJ:

– and then you'll come back to the question that I think is still left dangling as to how the Court of Appeal applied the statute to its evaluation in this case?

MR PIDGEON QC:

Well, I thought that I'd address that by those two paragraphs, one of which is on the Justice Blanchard, which shows that it did –

ELIAS CJ:

I just wondered whether Justice McGrath had been answered from that, whether you had been answered on the application to this case, because –

MCGRATH J:

On paragraph 63 is the point, the main point that's made.

ELIAS CJ:

Yes.

MCGRATH J:

And as I understand it, I think that that's, that is a point that I want to hear the respondent on and –

ELIAS CJ:

Yes.

MCGRATH J:

– Mr Pidgeon wants to elaborate on anything further in the judgment, fine, but paragraph 63 is certainly a point that's, that has to be answered.

ELIAS CJ:

Yes.

BLANCHARD J:

Yes, although of course, one would have to see it in context that this case does have the unusual facet that it may well be that the father is inhibited from visiting the children in Sydney.

YOUNG J:

Has that been explored? I mean, is it really the case that the Australians want him back?

MR PIDGEON QC:

Well –

ELIAS CJ:

Well, won't have him back, you mean?

MR PIDGEON QC:

Yes.

YOUNG J:

No, that if he went back he –

BLANCHARD J:

I wasn't intending to get us into a discussion of the resolution of the case. I was just indicating that that may have been a particular reason why that element was stressed.

MR PIDGEON QC:

Well, it certainly was raised before the Court by my learned friend. The position was – and neither my learned friend nor I were counsel in the Family Court – the argument was advanced on behalf of the father in that Court that because he had only a residency permit, that if he left New Zealand, to live in New Zealand, that he left New Zealand he wouldn't be able to return. Now, I sought leave in the High Court to have an affidavit sworn by the Immigration Department to say, "No, that's not the case, he can get a residency –

BLANCHARD J:

I didn't think that was the point, but I may have misunderstood it.

MR PIDGEON QC:

No, no, sorry, I'm just going on with it. And he then place greater emphasis on the fact that he had fled from an Australian jail –

BLANCHARD J:

Which is presumably a criminal offence in Australia.

MR PIDGEON QC:

Yes, yes, presumably, well, I'm sorry, jail is wrong –

BLANCHARD J:

It usually is.

MR PIDGEON QC:

It's a refugee camp he fled from.

McGRATH J:

It's a detention centre.

MR PIDGEON QC:

Detention centre.

BLANCHARD J:

Well, fleeing from somewhere where you've been ordered by the State to remain –

MR PIDGEON QC:

Yes, yes, that's so.

BLANCHARD J:

– is usually an offence.

MR PIDGEON QC:

And he said he used a false passport to flee from Australia to New Zealand, which I would have thought –

TIPPING J:

So, he –

MR PIDGEON QC:

– was more an offence under New Zealand law.

TIPPING J:

So certain consequences might follow if he arrives in Australia.

MR PIDGEON QC:

That's the argument that he has put forward. I have tried valiantly to get a ruling from the Australian embassy and the consul, and they've indicated that they'll look at each case on its own as to whether they get a permit within. But certainly the issue is – I've even gone to Interpol –

TIPPING J:

Well, he might get a permit and then certain other consequences might follow.

MR PIDGEON QC:

Yes, yes, and it just – yes, that's right. The only thing I've established is there's no warrant out for the arrest.

McGRATH J:

Mr Pidgeon, if your argument were successful, what's the relief you're seeking? You're presumably wanting the matter referred back to another Court, but which Court?

MR PIDGEON QC:

Well, in my submission there's going to need to be further evidence, because, and this is the question of the child's views, one of the children will be eight in not very long. In the Family Court – this is a report from a psychologist – indicated that the children at that stage wanted close contact with each parents. And lawyer for child abided the decision of the Court actually, in the Family Court. The matter went to the High Court and there was no updating report. The Court of Appeal, in granting leave to appeal, required an updating psychologist's report, and the situation had changed from the children's point of view. And, in fairness to the respondent, the animosity between them that was terrible on changeovers has lessened to the extent that he has allowed the mother to have at least two and possibly three holidays since the High Court decision, which was against him, to Australia. They returned, the arrangement was worked out well, the Skype, webcam, both acknowledge the children have contact almost daily with the father. But the preference of the older girl was that she wanted to live in Australia, and it may have been emphasised by the fact that she met all the relatives, grandparents, friends, or so on, I don't know. Because one of the factors in the Family Court, Judge, is that he wasn't, said he wasn't confident that if the children went to Australia the mother's view of the father would be such that she wouldn't co-operate in exchange of communications, so –

McGRATH J:

Are these the sort of matters, in your –

MR PIDGEON QC:

Family Court.

McGRATH J:

– submission or assessment, that would normally be regular in any matter going to the Court of Appeal in which there'd been some delay, or are they wanting some further elements of rehearing and evaluation of facts?

MR PIDGEON QC:

Well, as the facts on which the Family Court judged the matter seem to have been changed in a couple of fairly significant points, it needs –

McGRATH J:

You have no complaint with the High Court decision?

MR PIDGEON QC:

No, I haven't.

McGRATH J:

Now, have matters changed since then significantly enough to say that it's not appropriate for the matter to go back to the Court of Appeal if your argument is successful, given that the Court of Appeal can have updating evidence?

MR PIDGEON QC:

I'm sorry to pause there. It certainly probably needs to have updating evidence.

McGRATH J:

Yes.

MR PIDGEON QC:

The question was that is better done in the Court of Appeal or in the High Court, I really don't think I can advance a preference.

McGRATH J:

Right, but can I just emphasise I am not making any –

MR PIDGEON QC:

No.

McGRATH J:

– not any assessments of how this case should be decided. I just thought I should hear you on that before the respondents make submissions.

ELIAS CJ:

Mr Pidgeon, it seems that other members of the Court are satisfied. I wouldn't want you to think that I am satisfied that the Court of Appeal view of the statutory provisions has led it into error, and it seems to me that what is most significant in its own evaluation is the updating evidence that it had and the conclusions it comes to that the significant loss of relationship with the father against the background of how the relationship had developed, shouldn't be countenanced. And what I would like, even though paragraph 63 is a conclusionary paragraph, really, the reasons they have for coming to that conclusion are set out in section 62 –

MR PIDGEON QC:

Yes.

ELIAS CJ:

– do you disagree with that? If you disagree with that evaluation, or, why do you say that error in interpreting the statute led them to error in this evaluation?

MR PIDGEON QC:

Well, here, as the Court of Appeal said in the very opening sentence of the judgment, this was a difficult – I've forgotten the actual wording now, I'll just get it – "Relocation disputes are widely regarded as one of the most controversial and difficult issues of the Family Court. This case involves a relocation dispute and it highlights the dilemmas such disputes pose." What I am submitting is because, in their interpretation of the statute in a case which was relatively borderline, it has been decisive.

ELIAS CJ:

Why do you say it's borderline?

MR PIDGEON QC:

Well, I'm saying that the Court has indicated in its opening paragraph that it's a difficult situation, this particular judgment. In fact, judgments –

McGRATH J:

It's always going to –

BLANCHARD J:

All relocation disputes are difficult.

ELIAS CJ:

That's what they're saying.

TIPPING J:

Mr Pidgeon, I would like to put to you that paragraph 63 is not as much in your favour as might at first sight appear. They don't start from any a priori position there, they simply say, "We've addressed the facts in the light of the principles without giving any one any particular stress. Overall assessment is that the factors which favour relocation are outweighed by those against it and those against it, I would have thought, the "in particular" is a case specific assessment, not an a priori weight.

MR PIDGEON QC:

With respect I don't see how that interpretation is consistent with the last sentence in paragraph 51.

TIPPING J:

Well it may not be but that's the whole point. The question is whether they let their slip, if it was a slip, actually influence them and I'm suggesting to you that when you look at paragraph 63 you don't see any echoes of the last sentence in paragraph 51 coming through in the reasoning and I think that's the point you've really got to address to get the supposed legal error biting.

MR PIDGEON QC:

Well in my submission the words "in particular" have been taken directly from –

TIPPING J:

Well maybe –

MR PIDGEON QC:

– section 5(b).

TIPPING J:

But the structure of this paragraph is not a priori. It is, in terms, case specific. It does not, in my view, subject to further argument, say they've come at it with any leaning and the "in particular" words are perfectly apt in the context that they see that as a particular feature of this case.

BLANCHARD J:

Which they did refer to in the middle of subparagraph (c) of paragraph 62 and it is a strikingly unusual feature.

TIPPING J:

It would be hard, in the facts of this case, not to refer to it as a point of real significance. They could have said significantly the need for the children. I think the "in particular" language while conveniently coincidental is not to be seen as determinative of an allegation of a priori reasoning.

MR PIDGEON QC:

Well of course the High Court Judge listened to him and discussed this problem about the father not being able to go to Australia and reached a decision to grant relocation.

TIPPING J:

I know but what I'm concerned about is, is there enough here, you've referred to 62(c), and then my brother Blanchard referred you to 63, is there anything else that you can invoke to suggest that the reasoning was skewed by an a priori weighting? The reasoning in these facts.

MR PIDGEON QC:

Well with respect I can't read section 51 in any other way.

TIPPING J:

I'm not –

MR PIDGEON QC:

Because looking at the –

TIPPING J:

With great respect, Mr Pidgeon, I'm not concerned about paragraph 51. I'm tentatively with you on that being an unfortunate way of putting it, at least, but what I'm concerned about is whether they allowed that to influence them in their actual decision in this case.

MR PIDGEON QC:

Well they, obviously, have said that there is a weighting and appear to have reached the view that the High Court Judge, without specifically saying so, and this is the difficulty, it doesn't mention the paragraph, in fact one of the points I was going to raise on the question of leave for appeal is that there's nowhere that it says that the High Court Judge was wrong or in error.

ELIAS CJ:

Well they come to a different evaluation –

MR PIDGEON QC:

They've come to a different evaluation.

ELIAS CJ:

– on the basis of later information.

MR PIDGEON QC:

Oh no the later information supported our client.

McGRATH J:

But Mr Pidgeon this is, in effect, a general appeal under section 105.

MR PIDGEON QC:

Yes, yes, I accept that, yes.

McGRATH J:

But if I – I think really what's being put to you can be summed up by saying that in paragraph 63 they do say they are making an overall assessment and that the "in particular" part is just an elaboration of one aspect of the factors being balanced and that that overall assessment must be seen actually, I think, in context of paragraph 52 not 51 where they emphasised it has to be an evaluative function involving the

identification and weighing of all factors. Now does that remove, if you like, any of the blot on the judgment that's a wrong assessment of the law, if there has been one, on a priori weighting is concerned. That's the – you've got to persuade us, I think, that that's not the case.

MR PIDGEON QC:

Yes well the position is when you talk about overall weighting they have already decided that the continuity issue is to be given a weighting or priority and the latter stages of the judgment must be read in that light. So in doing an overall assessment, in my submission, you can't arbitrarily say abstract their view that they had to in giving an overall assessment give priority to the continuity principle because that's what they earlier said.

ELIAS CJ:

Well if you're right in that, that would suggest that the correct approach, if we're minded to allow the appeal, is to send it back to the Court of Appeal on the basis that we can't be satisfied that they would have come to the same result if they had correctly applied the law.

MR PIDGEON QC:

Yes.

ELIAS CJ:

Is that right?

MR PIDGEON QC:

Yes.

McGRATH J:

Mr Pidgeon, can I say, what you're really saying is that the Court of Appeal, having seen some priority or weighting, as it says in 51 in these matters, how can we possibly decide what the impact was when they conduct an overall evaluation. You're suggesting we can't?

MR PIDGEON QC:

That's right.

TIPPING J:

Then they must be taken as doing what they said should be done.

MR PIDGEON QC:

Yes.

TIPPING J:

Well that's a fair point. I mean if they say this is the way to do it and then they go ahead and do something one might reasonably assume they're doing what they say.

ELIAS CJ:

Well that's what I'm saying.

BLANCHARD J:

In words that they would have done it anyway.

TIPPING J:

The problem in this case is the new material.

ELIAS CJ:

If that's convenient we'll take the morning adjournment and I thank you.

MR PIDGEON QC:

I wonder if I could ask Your Honours, I'm quite happy to go through the recent decisions of the Courts applying the principle if it's thought of use. On the other hand, it's probably there to be read, it's just –

BLANCHARD J:

If you could do it briefly without taking us directly to the particular paragraphs, I think that would be helpful but certainly I wouldn't want a lengthy trawl, on my part.

TIPPING J:

No, I agree.

ELIAS CJ:

Thank you. We'll take the adjournment.

COURT ADJOURNS:11.28 AM

COURT RESUMES: 11.44 AM

MR PIDGEON QC:

I have found, in the break, the article by Dr Taylor, Megan Gallop and Professor Mark Henaghan on the research into the number of relocation orders made. It's in volume 1 of the agreed casebook and the relevant passage is at the foot of paragraphs 98 and 99.

BLANCHARD J:

Is this the article starting at paragraph, at page 132?

MR PIDGEON QC:

No, it's the article starting at page 97.

BLANCHARD J:

Right, so what was the paragraph number?

MR PIDGEON QC:

Well, the page number is 98 and 99, at the foot.

BLANCHARD J:

Thank you.

MR PIDGEON QC:

And it starts off doing a breakdown from 1999/2000 the success rates declined 48% and the matter I addressed earlier, the last sentence, "Applications to relocate overseas have generally been more successful from 30 percent in 2005, to a high of 70 percent in 2008," and the sentence before is talking about the local applications for relocations –

ELIAS CJ:

These presumably, these overseas ones would be quite small numbers, which would, which would account for the fluctuations?

MR PIDGEON QC:

I'm not.

ELIAS CJ:

Don't worry.

MR PIDGEON QC:

Yes, yes, well, there would be less overseas ones, certainly, than domestic applications, I accept. Now, turning to the effect of the decisions and I'll go very briefly through the cases. The first one and these are in the loose material, a judgment of Judge Russell in *PAH v RJR*,

BLANCHARD J:

That's the one you took us to previously?

MR PIDGEON QC:

I may have, I can't recall. It's paragraph 61, in which he says, "Section 5(b) recognises the importance of a continuing relationship with both of these parents. The Court of Appeal in *Bashir v Kacem* have indicated some weight or priority be given to this issue," and for that matter on paragraph 57(c) of the same judgment he repeats that statement, where he analyses the *Bashir v Kacem* decision.

MCGRATH J:

Sorry, what was that last paragraph you mentioned?

MR PIDGEON QC:

57.

MCGRATH J:

57 seems to be going backwards.

MR PIDGEON QC:

Subsection (c), yes, I'm sorry. In *AMH v SH* 4/5/10 FMAC Napier 2009-041-369 a decision of Judge von Dadelszen, paragraphs –

ELIAS CJ:

Sorry, it's just a bit difficult to locate.

MR PIDGEON QC:

Yes, I'm sorry and the reference is from, to the decision, is from paragraph 54 to 56, possibly, although the whole passage could be looked at, the, he's adopted that paragraphs 49, 50, 51 from the decision. In 56 he says, -

ELIAS CJ:

I'm sorry, mine aren't in the order in which they're meant to be, I'm still behind, but anyway carry on and I'll listen.

MR PIDGEON QC:

And says, "Section 5 provides structural framework for consideration of what best serves a child's welfare and best interest, with a partial indication of waiting as between principles. In the context of this present case, the particular emphasis in 5(d) on preserving and strengthening relationships with both parents, gives that principle some priority." I think he means 5(b) actually there.

McGRATH J:

Yes.

MR PIDGEON QC:

Yes. The point I'm making is that the way the Family Court Judges have been interpreting the decision is that there has to be weighting or priority to that. I accept on a particular factual case that that may be the approach to take in a specific case, but each case is individual. The *Figgs v Figgs* (FAMC New Plymouth, FAM-2009-043-798, 6 May 2010, Judge Murfitt) decision, paragraph 22, "The Court of Appeal in *Bashir v Kacem* has since observed at paragraph…

AUDIO STOPS: **11.50.52**
AUDIO RESUMES: **11.59.11**

McGRATH J:

Back on.

ELIAS CJ:

We're under way, all right. Thank you, Mr Pidgeon, I'm sorry about that.

MR PIDGEON QC:

The submission I want to make in relation to these cases is they have interpreted the Court of Appeal in this present case as laying down a policy in regard to the interpretation of section 5, they are not interpreting the decision as a case-specific individualised decision. They are taking from it as, in my submission, is correct, that there is to be a weighting in, for example, borderline cases, weighting or priority to the continuing relationship of the children with the father and, in my submission, that priority is not established under the Act.

TIPPING J:

I see in the *New Zealand Law Journal* a Dr Caldwell, a well-known scholar in this field –

MR PIDGEON QC:

Yes, a Cantabrian.

TIPPING J:

– summarised it by saying that, "Overall this judgment does leave the multi-factorial child-centred approach of *D v S* unchanged in its fundamental aspects, and there are still to be absolutely no starting points or presumptions. Nevertheless, one cannot help but feel the scales may have ever so slightly been tipped against an applicant for relocation."

MR PIDGEON QC:

Yes, I did put that forward for that last sentence.

TIPPING J:

Yes.

MR PIDGEON QC:

Yes.

TIPPING J:

So he's saying –

MR PIDGEON QC:

And the scales have been tipped –

TIPPING J:

– Nothing's changes, but it may have very slightly?

MR PIDGEON QC:

Well, it just – there is a change –

BLANCHARD J:

Nothing's changed much.

TIPPING J:

Yes, nothing's changed much, yes.

MR PIDGEON QC:

It shouldn't be. Well, there's no legislative – if we look at it – there's no legislative intention as far as can be determined from all the papers, *Hansard,* to alter a presumption except, clearly, in the issue of safety. And in some cases it will be very important and in other cases it may not, depending on the quality of relationship, child and the remaining home parent.

So, unless Your Honours have any further questions, those are my submissions.

ELIAS CJ:

No, thank you, Mr Pidgeon.

YOUNG J:

Can I perhaps just ask you one question, Mr Pidgeon?

ELIAS CJ:

Oh, I'm sorry.

YOUNG J:

While we were waiting for the sound system to be revived I looked at Sir Mathew Thorpe's paper – have you got that?

MR PIDGEON QC:

Yes, I have.

ELIAS CJ:

Where is it?

YOUNG J:

It's amongst the new material that came in.

ELIAS CJ:

Oh, the new material.

YOUNG J:

It's a paper delivered only at the end of June.

ELIAS CJ:

Yes.

YOUNG J:

And I'm looking at page 6, and he's referring there to the United Nations Convention on the Rights of the Child, and particularly Article 9(3). Do you see that?

MR PIDGEON QC:

Yes, I see it.

YOUNG J:

Now, he's talking about that in the context where, I think he's beginning to think that a move away from the *Payne v Payne* approach might be appropriate.

MR PIDGEON QC:

Yes.

YOUNG J:

Whereas he's not really, I think, saying that an anti-relocation starting point is appropriate. But is there anything significant in this Article 9(3) that might lend some weight to the respondent's case?

MR PIDGEON QC:

I've read the article but, in my submission, it doesn't. It traverses the English situation and –

YOUNG J:

No, I'm looking at page – sorry – I'm looking at Article 9(3) of the United Nations Convention on the Rights of the Child.

ELIAS CJ:

It's concerned with taking children –

MR PIDGEON QC:

That United Nations Convention has been referred to in a number of cases, even before the Care of Children Act, in relocation decisions.

YOUNG J:

It says, "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

MR PIDGEON QC:

Yes, well, I have always interpreted this Convention as focusing on the child's rights. If we take, for example, this particular case, the child is saying, "I want to live in Australia and visit my father on holidays." She didn't say that at the time of the Family Court hearing. Now, I don't see anything whatever in that article that should say, should interpret the decision in a contrary way. And, indeed, the article goes on to say, –

ELIAS CJ:

Article 9 –

MR PIDGEON QC:

– "Favourably refer to the Washington Declaration," at page 9 and at paragraph 3 –

YOUNG J:

And item (i).

MR PIDGEON QC:

– where it says, "Determination shall be made without any presumptions for or against relocation," and that's the approach I'm advocating for, so it shall be applied in New Zealand.

ELIAS CJ:

Well, Article 9 is principally about separating children from parents, by the State –

YOUNG J:

I'm not sure that it is, actually.

ELIAS CJ:

– but I don't think, but I think the principle is still one which may be helpful in this context, and I have been surprised that we haven't been referred to the Convention, which is why…

MR PIDGEON QC:

Well, it's a relevant principle, but what I'm saying –

McGRATH J:

But it doesn't go into the extent of personal contact.

MR PIDGEON QC:

No, it doesn't.

McGRATH J:

It's made as a point, isn't it?

MR PIDGEON QC:

Exactly.

YOUNG J:

It is the first of the criteria that's listed on page 10 of Sir Mathew's paper.

ELIAS CJ:

There is also the wider background of the Universal Declaration of Human Rights and the ICPPR, all of which recognised rights of family, which attach to everybody, including parents.

MR PIDGEON QC:

Well, just picking up the point, that passage of the list, he starts however, at the top of page 10, "The weight to be given to any one factor will vary from case to case," which is the point I am making, and he is making, and he lists issues that relate to safety and the need for contact, that kind of situation. Certainly that, I wasn't intending to refer Your Honours to, but there was a paper, I refer to it in paragraph 12 of my written submissions, and this is a paper presented in a South African university by a Professor Freeman, who is a London professor who has involved herself in relocation and national abduction issues. She delivered the paper before the New Zealand Court of Appeal decision had been delivered, and she added this in a footnote to the paper, and the paper is in the bound volume, "Since this paper was delivered the New Zealand Court of Appeal has handed down judgment in *B v K*, which considered the relevance of conflict between parents and relocation decisions and the role of the principle set out in section 5 COCA in relocation decisions." The Court found – paragraph 51 was the one she highlighted, "That there is some priority or weighting as between the various principles," especially in relation to section 5(e) which makes it clear that protection of a child's safety is mandatory, and section 5(b), which gives particular emphasis to the maintenance of continuing relationship between both parents, and this is the interpretation being adopted by –

YOUNG J:

What page is this?

MR PIDGEON QC:

I'm sorry, it's page 89 in the bound volume, right at the foot of page 89 –

YOUNG J:

Yes, yes.

MR PIDGEON QC:

– in parentheses, "Since this paper was delivered."

McGRATH J:

The paper actually also is quite a good discussion of what are the, of variety of reasons why a parent may wish to locate, earlier on.

MR PIDGEON QC:

Yes, yes, it is. So, my final submission is that because of the effect this decision is having, it should not be allowed to stand, in that it's not justified by the legislation.

ELIAS CJ:

Thank you. Yes, Ms Crawshaw.

MS CRAWSHAW:

Thank you, Your Honours. I'll just get my papers.

Your Honours, rather than taking you slavishly through my fairly lengthy submissions, I thought it might be useful if I just provide a bit of an overview of the case as I see it.

As a general proposition, children are of course probably the most vulnerable sector in our community, and that has made them, certainly made more vulnerable in the context of family breakdown. In the passing of the Care of Children Act it's reasonable to assume that Parliament has taken some care in the use of words and structure, both at the select committee stage and through the various readings. A careful assessment of the text is needed, without any assumption that Parliament did not appreciate the complex issues related to providing a framework for decision-making about the best interests of a child. There is an obvious tension between the overarching need to ensure that each case is resolved on its facts, but that's because of the diversity of human relationships of course, and also the need to ensure that decision-making is transparent and principled. That more objective and disciplined approach, which I think the section 5 principles assist with, should result in both consistency in decision-making to some extent, and rigor in the reasoning process, and that can only assist the community when they attempt to negotiate settlements of these sorts of things, if they can have a bit more of an idea of how things are going to go. But, nevertheless, Parliament has retained the specific individualised assessment of best interests.

I just want to begin by saying I think we need to focus here on what the Court of Appeal did not do, as much as what it did do. Contrary to

my learned friend's submissions, in my submission the decision did not impose a hierarchy of principles, and neither did it impose a hurdle to leap or a presumption to cross against relocation. The Court of Appeal did not – and I think this is very important – veer away from *D v S.* The *D v S* approach, as Your Honours will be well aware, just requires an all-factor child-focused inquiry, without any a priori assumptions. But neither did the Court of Appeal ignore the impact of the new legislation that followed *D v S.* The approach, in my view, is now an augmented or value added *D v S.*

ELIAS CJ:

Why do we even need to go there though, if we have a statute which sets out all of these and which says that you can take into account any other consideration that is relevant? Why don't we just start and end with the statute?

MS CRAWSHAW:

And put aside *D v S*?

ELIAS CJ:

Well, I think that you can likely say that it's the approach that was in place at the time the statute was enacted. But I just really wonder whether it's helpful to keep harking back and say it's an augmented approach.

MS CRAWSHAW:

Well, certainly that could be an approach to take, you just simply look at the statute and you ignore the way jurisprudence has developed on relocation. I just don't have any difficulty with the two sitting quite neatly side by side, because they're certainly not contradictory, and the *D v S* approach had led us to a nice sort of neutral starting point, which I think there's some international support for.

ELIAS CJ:

Can it ever be entirely neutral though, because of the factor that maintaining relationships is so important?

MS CRAWSHAW:

Well, "neutral" is probably the wrong word.

ELIAS CJ:

Yes.

MS CRAWSHAW:

I think that's right. It's just, instead of it being as it is with the *Payne v Payne* approach, where you look at whether the primary caregiver's application to relocate is reasonable, we focus on the child's best interests, which is consistent with what was section 23 in our Guardianship Act –

ELIAS CJ:

Yes.

MS CRAWSHAW:

– and consistent with section 4. I think there has been some resistance on the part of the Courts to apply the statute, and they've resisted giving sections 4 and 5 full and proper effect. In my submission, that is of itself a concern, because the section 5 principles are mandatory, it is mandatory to consider them, just as it's mandatory, as my learned friend pointed out, to give a child an opportunity to express their views and to take them into account. In my submission, this isn't a matter of ideally considering them and, as was suggested in *Brown v Argyll*, those were the words used by His Honour Justice Priestley in that case, section 4(5)(b), in my submission, couldn't be clearer. The enactment of the section 5 principles was an attempt, in my submission, on the part of the legislature to provide that framework or lens or prism, however you want to view it, through which best interests are to be viewed. It was also for that expressed purpose that I've mentioned of disciplining the approach to the best interests evaluative assessment, and the select committee report does reveal that. In my submission, it's not for the Courts to sidestep it or finesse away those principles, but rather to consider and, where necessary, to apply them. In that way, it could be said that there is a framework or a formula, but that's quite a different thing from a formulaic decision-making exercise, as was mentioned in the *S v L (Relocation)* case by Justice Harrison and in the *Brown v Argyll* case, quite different exercises, in my submission.

The principles really are just a menu of important considerations, to which the Courts must have regard in the evaluative exercise. But, despite that, consideration is not a matter of rigidity and it's not a one-size-fits-all approach, and the Court of Appeal, in my submission, recognised that. It did so by three quite important observations

which, in my submission, are the qualifications to the emphasis that they later provided. Now, firstly, the relevance filter, and the Court of Appeal absolutely acknowledged that in the decision. Secondly, that the principles are not exhaustive, and again it's acknowledged that. And, thirdly, and probably most importantly, the individualised assessment which arises from the statute, and, in my submission, that is thematic throughout the judgment. The Court of Appeal acknowledged all those qualifications to ensure that the section 4 best interests evaluation was tailor made to ensure that the best interests of the particular child in his or her particular circumstances was assessed. It took section 5 seriously and, I suppose, in that sense the judgment is seminal, because it really is the first judgment to really give full effect to the principles and ensure that the –

TIPPING J:

How could you not do so?

ELIAS CJ:

Yes.

MS CRAWSHAW:

Well, I couldn't agree with you more, Your Honour, but in fact they have been a little bit sidestepped, and I think that's unfortunate. I mean, the Court of Appeal said, "Well, look, surely they're not meaningless," it just didn't even –

ELIAS CJ:

Well, without inviting you to trawl through all the cases that have been decided since the Act was enacted, are you saying that that is what happened in the first instance decision here, in the High Court?

MS CRAWSHAW:

Yes. Well, it happened, and I think this is why the principles weren't being applied prior to *Bashir v Kacem*, because the *Brown v Argyll*, *S v L, Downing v Stanford* line of decisions had really, there was really almost an attempt to relegate the principles to something of a common statement of common sense, "Ideally you'd consider them but don't forlornly hope that by going through a checklist you'll get the decision right." Well, that of course, that statement's correct, you can't, you have to actually make a decision, you have to consider that particular child in their circumstances. But the

section 4(5)(b) requires that relevant considerations be taken in to account, and that was a little bit dampened down by the earlier High Court authorities, and in fact in –

ELIAS CJ:

What did they say? That relevant considerations weren't to be taken into account?

MS CRAWSHAW:

They said, ideally you would, but don't worry about it too much, was the flavour of those decisions, Your Honour.

McGRATH J:

So, you're saying this idea they're just common sense is really attempting to sort of demean the importance of the principles?

MS CRAWSHAW:

It certainly is, Sir.

McGRATH J:

Now, that came out of Priestley J's judgment?

MS CRAWSHAW:

It did, yes.

McGRATH J:

In which decision?

MS CRAWSHAW:

In *Brown v Argyll.*

BLANCHARD J:

Are you going to take us to that?

MS CRAWSHAW:

Yes, I'm happy to take you to that.

ELIAS CJ:

Yes, I think you better take us to it, because it's a fairly –

TIPPING J:

Yes, a fairly startling proposition.

ELIAS CJ:

– startling submission, yes.

MS CRAWSHAW:

It is a startling submission, I'll take you to it in my submissions, Your Honours.

TIPPING J:

Well, the cases would be, you know, what actually are you building this on in the cases themselves?

ELIAS CJ:

Where do we find…

MS CRAWSHAW:

If I can take you to –

ELIAS CJ:

Oh, I see, fine, 42.

MS CRAWSHAW:

– my submissions at page 18, at paragraph 5.0.

TIPPING J:

Before you go to that, I was particularly, my mind was particularly drawn to the reference from the Australian case at the top of your page 18, where the Court said, "It is important to recognise that the miscellany of considerations is no more than a means to an end," i.e. a means to the end of deciding what is in the best interests of the child. I mean, it's a blinding statement of the obvious in one sense, but it does highlight that these are just factors that you must, and important factors, that you must consider, with any others that might be floating around.

MS CRAWSHAW:

That's absolutely right, and really that's what the Court of Appeal has said similarly in *Bashir v Kacem.* You've got the relevance filter, they're not exhaustive, but nevertheless you do need to consider them. But if I can just take you to the *Brown v Argyll* decision –

YOUNG J:

Where is that in the casebook?

MS CRAWSHAW:

In the casebook it's at –

TIPPING J:

Tab 5.

MS CRAWSHAW:

Number 5,

TIPPING J:

In volume 1.

ELIAS CJ:

Page 42.

MS CRAWSHAW:

In my submissions I've –

ELIAS CJ:

Have you got tabs?

TIPPING J:

No, no, I'm sorry.

MS CRAWSHAW:

It's page 42, and in that decision that was really one of the first High Court decisions that came before the Court following the enactment of the Care of Children Act. And really I think what was behind this decision was, and Justice Priestley quoted from a paper given by the Chief Family Court Judge, Judge Boshier, who had, perhaps

somewhat intemperately, suggested that relocations were going to be harder under the new Act, and I suspect that *Brown v Argyll* was something of a reaction to that suggestion.

TIPPING J:

Does he refer to that in here?

MS CRAWSHAW:

He does.

TIPPING J:

Could we be taken to the passage?

MS CRAWSHAW:

Certainly, Your Honours. Paragraph 26 of the decision, in that he refers to the paper delivered by His Honour Judge Boshier on relocation cases, *An International View from the Bench,* where he had suggested that perhaps it may be more difficult to relocate because of principle 5(b).

TIPPING J:

We've got that article in the books, have we?

MS CRAWSHAW:

You have.

TIPPING J:

Yes, right.

MS CRAWSHAW:

Further in the decision –

ELIAS CJ:

What's the difference between a holistic approach and the principle-based approach? I'm not sure…

MS CRAWSHAW:

I think that Justice Priestley was attempting to clear up any misunderstandings that relocations were going to be more difficult under the new Act. But what the effect of this judgment really has been is to try to dilute the principles, because he says at paragraph 40, "It would be equally wrong, in my judgment, to conclude that a failure to embark on a section 5 recital somehow renders the section 4 assessment suspect," and then, "Ideally," at paragraph 41, "the section 5 principles merit some brief reference against which to check the discretionary orders which emerge at first instance."

ELIAS CJ:

Well, that's no more than the Court of Appeal said about Justice Courtney in this case, that it would have been ideal if she had gone through the checklist, but in substance she had.

MS CRAWSHAW:

They said in substance she had –

ELIAS CJ:

Yes.

MS CRAWSHAW:

– and that her failure to go, to look at the checklist, wasn't material in that case.

ELIAS CJ:

Yes. Was it material in this case? I'm just wondering that you're stressing Justice Priestley saying, "Ideally, there should be some brief reference," but –

MS CRAWSHAW:

Well, what he –

ELIAS CJ:

– was there a failure to engage with those that were relevant in this case?

MS CRAWSHAW:

In that case, I don't think the section 5 principles were really looked at particularly clearly, but that wasn't actually a ground –

TIPPING J:

That puts a premium on how tidy a mind the Judge has, rather than on whether the Judge has actually addressed the necessary issues. I mean, the idea that you've got to sort of routinely and ruthlessly tick off each principle, if you like, in a chronological sense, surely may be seen as ideal. But the Judge isn't saying, he can't be read as saying, "Forget 'em."

MS CRAWSHAW:

Well, I think unfortunately the impact of *Brown v Argyll* was that nobody then took much notice of the principles.

TIPPING J:

Oh, for goodness sake.

MS CRAWSHAW:

And that's why *B v K* and *Bashir v Kacem* has been so significant, because it has emphasised the mandatory nature of consideration of the principles. And I think you'll see from the Court of Appeal decision at paragraph – if I can just take you to it on this point, when they talk about the mandatory nature of the principles –

ELIAS CJ:

Sorry, where are we going?

MS CRAWSHAW:

Sorry, back to *Bashir v Kacem.* They mention – and this is at paragraph 48, which was in response to my submissions about the *Brown v Argyll* and *S v L* decision – that there had been this warning against a tendency, which they perceived, to treat the list of factors in section 5 as a checklist. And then the response of the Court of Appeal was that plainly Parliament did not engage in a meaningless exercise in including section 5 –

BLANCHARD J:

I think you were being a bit rough on poor Justice Priestley, because he clearly refers at paragraph 34 to the mandatory nature of it, and I think all he's saying is that you don't have to do a complete recital of them if some aren't relevant.

MS CRAWSHAW:

Well, he says also that the principles are broad and nebulous and are just a re-statement of common sense, and I think possibly Justice Priestley didn't intend –

TIPPING J:

Well, they are.

BLANCHARD J:

Well, they are, in both senses, they are very broad and they are common sense, they're none the worse for that.

MS CRAWSHAW:

Well, I think what's happened is that that has been interpreted in a slightly pejorative manner, which resulted until the *Bashir* decision, where there wasn't a real focus on the principles in all cases.

ELIAS CJ:

Well, that can't be taken from Priestley J's decision. Look at, look at paragraph 39, just not suggesting that they not be taken into account. But they were only taken into account to the extent that they are relevant in the particular case.

MS CRAWSHAW:

Oh, absolutely Your Honour, that's correct, but I suppose when he's describing a section 5 recital, it's as though it is a –

BLANCHARD J:

But he's just saying you don't have to go through every one if they're not relevant.

TIPPING J:

You have to tick them off.

ELIAS CJ:

And para 40, "Some Judges may feel less vulnerable if they clear out all section 5 principles," that's what he's –

BLANCHARD J:

Yes, he's just suggesting that's unnecessary.

MS CRAWSHAW:

I think though, that the problem with that judgment is that the emphasis isn't on the fact that the focus of the best interests inquiry, ought to be on the principles and I think that is the really, in terms of a broad brush assessment of the *Brown v Argyll* decision, that is the difficulty with it. It is almost saying, look this is a list for those who really can't do the judging right and that's been, that point was taken up in the *S v L* decision which was Harrison J's decision.

MCGRATH J:

Just before we go to that, is there anything in paragraph 63 that you draw on?

MS CRAWSHAW:

Paragraph 63 –

MCGRATH J:

63.

MS CRAWSHAW:

– of *Brown v Argyll* Sir or?

MCGRATH J:

Yes, the second half of that paragraph anyway.

MS CRAWSHAW:

63.

MCGRATH J:

63, where he says that he, "Doesn't consider that the section 5 principles alter in any substantive or qualitative way the section 4 assessment," centre stage is the section 4(2) requirement.

MS CRAWSHAW:

Yes, and the suggestion that, "The Act has in some way altered the required assessment of a relocation case, or skewed in advance its outcome, is in my judgment untenable." I think that's correct.

MCGRATH J:

Well, he's rejected that actually earlier at 61, but he's then saying, focus on section 42 and –

MS CRAWSHAW:

We'll focus on section 4(2).

MCGRATH J:

4(2), sorry, yes.

MS CRAWSHAW:

And –

MCGRATH J:

The five principles don't alter in any substantive or qualitative way the section 4 assessment.

MS CRAWSHAW:

Yes.

MCGRATH J:

He may be moving a little away then from the fact that the five principles are the way you do the section 4(2) assessment.

MS CRAWSHAW:

Yes, there's certainly a very –

ELIAS CJ:

But not exclusively –

MS CRAWSHAW:

Not exclusively.

ELIAS CJ:

– because section 4(6) or whatever it is makes it quite clear.

MS CRAWSHAW:

But they're an integral part of the process and you may have read at the conclusion of my submissions, I mean, the process for considering best interests has to be, use a relevance filter, consider the principles as they are relevant, it's not exhaustive, so consider other matters and then reach your conclusion. So, there isn't, I'm afraid, an emphasis on that and that has changed the approach because there were no such principles or guidelines under section 23.

YOUNG J:

Can I take you, because this sort of, I think the argument that, or the line of thinking that Mr Pidgeon is opposing, is set up fairly clearly in Judge Boshier's article, which is referred to and it's at page 557 of volume 2. In the article he is dealing with relocation. He deals with the *Payne v Payne* principles. Comes to the Care of Children Act, sets out the principles and then, after all the sizzle, we get to the steak, at page 557, where, in the first complete paragraph.

MS CRAWSHAW:

Yes, he, certainly that's his view and Priestley J was critical of that in *Brown v Argyll* –

TIPPING J:

But he clearly held it to be untenable.

MS CRAWSHAW:

It can't be, upheld that view, I agree with that.

ELIAS CJ:

Sorry, is this the addition of principles for previously –

YOUNG J:

Yes.

ELIAS CJ:

– unregulated, yes, thank you.

YOUNG J:

But I suppose that the complaint about the Court of Appeal judgment is that it's effectively picked up on this line of reasoning.

MS CRAWSHAW:

I, I would have to take issue with that and I will take you through why I think the Court of Appeal judgment's sound, with the emphasis it gives.

TIPPING J:

Well, I thought your basic argument Ms Crawshaw was that perhaps it could have been a little better worded, but that in essence it was sound.

MS CRAWSHAW:

That is correct.

TIPPING J:

Yes.

MS CRAWSHAW:

And I think –

TIPPING J:

And do you accept that it has given rise to some, perhaps unjustified, confusion?

MS CRAWSHAW:

Not as much confusion as my learned friend suggests and I don't know whether you've had an opportunity to read it, but there's a very good judgment of His Honour Judge Coyle in the Dunedin Family Court, where he takes a very sensible view, in my submission, of *Bashir v Kacem* and says, "That does not result in presumption or –

TIPPING J:

Well, obviously not all have been seduced.

MS CRAWSHAW:

I think the thing is we could probably all find some Family Court decisions where various decisions might have been misinterpreted, but I think, I suspect that confusion is great.

TIPPING J:

But you don't differ from Mr Pidgeon in the essence of what the law ought to be do you?

MS CRAWSHAW:

I don't really differ.

TIPPING J:

No.

MS CRAWSHAW:

No.

TIPPING J:

That there isn't any a priori, there may be a de facto extra weighting when you look at the facts of individual cases. This particular principle may be very, very determinative.

MS CRAWSHAW:

And you could create your own hierarchy –

TIPPING J:

Exactly.

MS CRAWSHAW:

– when making a decision

TIPPING J:

Well, you do either expressly or implicitly, because you must compare all the factors pointing one way and the other and decide which prevail, but the essential point is that there's no a priori or presumptive extra weighting to one factor or another, but there may very well in a relocation case, be extra emphasis given, in most cases at least, to this continuity point.

MS CRAWSHAW:

And it's going to depend entirely –

TIPPING J:

Entirely on the facts.

MS CRAWSHAW:

– on the facts. But, if I can take you back to the statutory –

TIPPING J:

I'm just trying to clear the decks Ms Crawshaw, as to what –

MS CRAWSHAW:

I think you can.

TIPPING J:

– actually is in dispute.

MS CRAWSHAW:

I think you can safely clear that deck, yes. But I will take you through where I think my learned friend and I differ on that.

TIPPING J:

Yes fine, fine I just wanted to listen to you, knowing, you know, what was on the table and what wasn't.

ELIAS CJ:

Well, is this statement of Boshier J at 79 part of your argument, or part of anyone's argument?

MS CRAWSHAW:

No, no it's not.

ELIAS CJ:

The crucial point for relocation. Because what he's saying is that the crucial difference in the statute is, the emphasis placed on the child having a relationship and parenting input from both parents.

MS CRAWSHAW:

I think what he's trying to do is put a gloss really on the statute that isn't there and trying to say that that will inexorably make relocation more difficult.

ELIAS CJ:

Well, he says more than that, because he says that parents should not relocate, "If to do so, would have a detrimental impact on the relationship with the other parent."

TIPPING J:

But other factors might outweigh that.

MS CRAWSHAW:

There will be other factors that might –

ELIAS CJ:

Well, I don't –

TIPPING J:

No, he's not, no, I'm just saying that.

ELIAS CJ:

Yes, yes.

MS CRAWSHAW:

That's the problem, they're not acknowledged and there's a sort of a, there's multitudes of other factors that might be those countervailing factors that Your Honour mentioned, which would actually result in a relocation taking place, despite that continuity of relationship.

TIPPING J:

He would have an onus on the relocator of quite a large size, to show why it should be allowed.

MS CRAWSHAW:

Indeed. That's possibly how he might have wanted the legislation to be drafted. In fact it hasn't been and then you can get caught up in this sort of terrible bind of

rebuttable presumptions and so on that the Australian legislation has and it's just awful. It makes the whole thing very convoluted.

TIPPING J:

I don't know why we've got ourselves into this, you know, there are the factors, there is the case, apply them.

MS CRAWSHAW:

Indeed, if they're relevant.

TIPPING J:

Yes.

MS CRAWSHAW:

And there will be other factors you might be interested in looking at.

YOUNG J:

I suppose within the social scientists who are interested in this, have divergent views as to whether on the whole relocation, international relocation is a good thing or a bad thing. Obviously, in the individual case, it's going to depend on the circumstances, but some rather think it's good and others tend to think it's normally bad.

MS CRAWSHAW:

I suppose the difficulty Sir is that we're really lacking empirical evidence about how it impacts on children in the long term and that's what Professor Marilyn Freeman says in her article and I don't know if Your Honours have had an opportunity to look at that.

YOUNG J:

Well, she refers to the two sort of proponents of the competing schools of thought in her article.

MS CRAWSHAW:

Yes, and she does talk about the former principle, which was a happy mother equals happy child and a person she interviewed who said, "Perhaps the really correct way of looking at it is, happy child, happy parent." So, turning it round a bit, because the

happy mother, happy child, is the *Payne v Payne* approach, very simplified of course. But that paper she has written is quite interesting, because it just talks about the fact that we don't know how children are affected by potentially the loss of the parent, the stay-behind parent.

TIPPING J:

But the key point, I would have thought, is that our Parliament hasn't taken any a priori approach to that issue.

MS CRAWSHAW:

I think that's correct.

YOUNG J:

Well, I was going to just pick up, if she thinks that that New Zealand Courts have adopted a particular position, not because of what the legislature said but rather because they buy into the Kelly school of thought as to relocation.

ELIAS CJ:

What's that?

TIPPING J:

Which way is that?

YOUNG J:

Against relocation

TIPPING J:

Again.

ELIAS CJ:

Oh, you mean Professor Freeman does?

YOUNG J:

Yes, where's her paper? I'm sorry, I've –

MS CRAWSHAW:

Yes, she does talk about the Kelly school of thought, but I don't thing *D v S*, in my reading of it, was influenced –

YOUNG J:

No.

MS CRAWSHAW:

– by the Kelly school of thought at all.

YOUNG J:

No, well –

TIPPING J:

Never heard of it.

MS CRAWSHAW:

Your Honour will know, of course –

ELIAS CJ:

Is that to your credit?

TIPPING J:

I think my brother Blanchard and I were not sort of overwhelmed by the Kelly school of thought in *D v S.*

BLANCHARD J:

No, and perhaps, if I do have a criticism of Justice Priestley's judgment in *Brown v Argyll,* it's what he attributes to me, in paragraph 51, which is wrong.

TIPPING J:

51? Must look at that.

BLANCHARD J:

He says I neither approved nor disapproved of *Payne.* I thought I pretty clearly disapproved.

MS CRAWSHAW:

You disapproved of it in your dissenting judgment, from my reading of it, Sir.

TIPPING J:

You were just – you were with us on the law but agin us on the facts.

BLANCHARD J:

Exactly.

MS CRAWSHAW:

Yes, yes, not a material error.

ELIAS CJ:

Anyway, we don't need to consider –

BLANCHARD J:

Having settled that score, we can now move on.

MS CRAWSHAW:

I had referred – I was just still at my submissions at pages 18 and 19, because I thought this was a useful time to go down this particular track. There was another decision of MacKenzie J saying that the section 5 principles did have an impact and then Judge Callinicos got a little bit stamped on in his view of how the principles might affect matters. He thought there was a sharpening or shifting of focus and Priestley J then went on in the *Downing v Stanford* decision to suggest that that was an incorrect approach because, he said, "The focus and primary inquiry remain unchanged," so that was just, there's a little bit of judicial –

ELIAS CJ:

To-ing and fro-ing.

TIPPING J:

Sparring, sparring.

MS CRAWSHAW:

To-ing and fro-ing, a little bit of sparring we can't detect from these decisions, and then –

ELIAS CJ:

Too much refinement, perhaps, on…

MS CRAWSHAW:

Specialisation or something of that nature. But then we have Justice Harrison saying, "Don't use this checklist again, just in case you were thinking of ticking boxes." But then Justice Rodney Hansen says, "Look, it's sometimes quite helpful because it can avoid unnecessary argument, a signpost is always helpful, but you've got to effectively go down the same, the right road."

ELIAS CJ:

It is really rather horrifying to think that anything that we might say could be pored over to this extent. We'll have to be very careful.

MS CRAWSHAW:

Indeed, indeed, and it is horrifying to think that the, you know, already *Bashir v Kacem* has been pored over to some extent, into a, a not inconsiderable extent. But, as I say, and I may as well just refer you to it right now, because we've got my submissions open, I'm going to go back to my overview. But if you look at page 22, paragraph 6.5, there, that's a really recent decision of His Honour Judge Coyle, just 26th of July. I think – well, of course, I know it behoves me to say so, but I think it's a sensible interpretation of *Bashir v Kacem*. He says, "He rejected a proposition that there was a presumption against relocation," he said, "There is little indication, other than in section 5(e), that the various principles have an internal hierarchy, I do not apprehend the Court of Appeal as having elevated the section 5(b) principle to be presumptive against a Court allowing a relocation." And then he talks about the context of the judgment.

ELIAS CJ:

Well, what – is there something missed out of this? Does this quite make sense? "Unless an applicant is able to show…

MS CRAWSHAW:

"Is able to show that relocation is going to ensure continuing relationships with both parents," so that's what his judgment's saying, he doesn't think there's a presumption against it unless –

TIPPING J:

Presumptive unless.

MS CRAWSHAW:

– you can show…

ELIAS CJ:

Oh.

MS CRAWSHAW:

I have checked the wording. It didn't initially read well, but that is it.

ELIAS CJ:

So, it's presumptive against, if an applicant is unable to show that relocation is going to ensure. So that is actually quite a significant –

MS CRAWSHAW:

No, he says he didn't apprehend.

BLANCHARD J:

No, there's a double negative in there.

ELIAS CJ:

Is there?

MS CRAWSHAW:

A double negative.

BLANCHARD J:

"I do not apprehend."

MS CRAWSHAW:

"I do not apprehend." He said there's no presumption, effectively.

ELIAS CJ:

Oh, right, yes, sorry, yes.

TIPPING J:

He's got it right.

MS CRAWSHAW:

He's got it right.

ELIAS CJ:

Yes, he has got it right, yes.

MS CRAWSHAW:

He says there's no presumption, and he says, "Look at the context of the judgment," because they've emphasised the particularised assessment.

TIPPING J:

It's a bit hard to know what they actually were meaning, in this rather rogue couple of sentences. But anyway, you're going to come on to that.

MS CRAWSHAW:

I will come to that. And then, in that decision, he talks about the relevance filter and the non-exhaustive nature, but to the top of page 23, I think is a useful excerpt from Judge Coyle's judgment. He says, "I see *Bashir v Kacem*" – and this is a process, this is a process I summarised – "as requiring me to mandatorily consider the relevant principles in section 5, to weigh them as I see fit, in accordance with the facts to this particular case, and then to consider those principles and weigh their importance as part of the overarching weighing and balancing of all the evidence required under section 4."

ELIAS CJ:

Well, I must say, I don't see that that is any different from what Justice Priestley was saying, and it just seems to be self-evident.

MS CRAWSHAW:

Well, I think there are some passages in the *Brown v Argyll* judgment which are just a little bit unfortunate, because I think they have perhaps been taken as –

ELIAS CJ:

Well, I think it's the over-refinement really.

MS CRAWSHAW:

It's perhaps relegating them to something less important than they are. Anyway, it does come down to some judicial sparring about sections 4 and 5, and I think the *Bashir v Kacem* decision has been helpful to just state the obvious: they're not meaningless and they are mandatory. I mean, it's not rocket science, that concept. If I can come back to where I –

ELIAS CJ:

They're mandatory when relevant.

MS CRAWSHAW:

Mandatory when relevant, yes. But you have to consider whether they're relevant.

ELIAS CJ:

Yes. And the checklist approach is really to try to discourage people from considering the principles where they're not relevant.

MS CRAWSHAW:

Oh, absolutely, although one would think that that would take up one sentence in a judgment.

ELIAS CJ:

They're just, they're not relevant, yes.

MS CRAWSHAW:

I think it's –

TIPPING J:

It's far too simple.

MS CRAWSHAW:

I think this whole aversion to checklists is quite interesting, when you look at the English principles equivalent, because they talk about it as the checklist in their judgments, colloquially refer to it as "the checklist", and I don't – I can take you to that part in the principles, but they don't seem to have such a sort of a, as I say, an aversion to that, because they think it's quite useful, and useful for the rigor and decision-making process. It's not –

McGRATH J:

I think the concern though, really, is just as long at the notion of a checklist is not going to get in the way of a robust factual analysis, that I think is really those who are concerned about checklists.

MS CRAWSHAW:

That's the essence.

McGRATH J:

There is a superficial connotation sometimes to the process, if you're talking about a checklist.

MS CRAWSHAW:

That it's a synthetic decision-making, rather than one of substance, indeed, and that obviously has to be avoided. But I suppose what the English approach seems to do is to acknowledge that, just for the reason that it's important to show how that best interests evaluative assessment has come to, that there's no harm in addressing the principles that they have to guide their best interests section, and I think that is quite useful. It's very useful for, if I can refer to them colloquially as "the punters", to see that they have been given a fair run, because that whole best interests inquiry is just so amorphous. And what's really interesting is the acknowledgement in the *D v S* decision that there's such a subjective element to the consideration of best interests, and they refer to the Frankfurter quotation, which is quite useful, and they then, they were asked to provide guidelines of course in *D v S,* and politely declined that request, because they said, "Well, it's a matter for Parliament," and then we have –

TIPPING J:

We had an instinctive worry that if we did that we'd be in this mess that we're in now.

BLANCHARD J:

We might as well have got on and done it.

MS CRAWSHAW:

That's right, exactly. Well we had the *D v W* checklist of course so you can see where it's all sort of arisen from but these, this checklist, these statement of principles they have, to some extent, arisen through UNCROC I think.

TIPPING J:

Well it may be that it's got to be done for international reasons but it has led to an awful lot of refinement, to use the Chief Justice's word, an awful lot of angels dancing on the heads of pins.

MS CRAWSHAW:

I think that's right and so we need to remove the pins and keep the angels and have it clarified. I think that is really useful.

YOUNG J:

Just going back, do you say 5(1) the section 5(1)(b) is based on and implements Article 9(3) of the Convention on the Rights of the Child?

MS CRAWSHAW:

If I might just come to that because I'm just going back to my overview, if you don't mind, and I'm happy to go through specific aspects of the submissions. In my submission paragraphs 51 or paragraph 51 in particular can't just be plucked out of the judgment and read in isolation otherwise the judgment becomes internally contradictory. I say that the Court hasn't made any such error of logic. The context of the decision makes it entirely apparent that the court was not suggesting, even for a moment, that there was a presumption against relocation order, it was a ranking of the principles and that's because of the emphasis on the principles not being exhaustive. The emphasis on the individualised evaluative assessment and the emphasis contained in the statute of the relevance filter I've talked about.

McGRATH J:

Are you at some stage just going to give us there – you're back now to these three principles but are you going to give us the paragraphs that you particularly –

MS CRAWSHAW:

Yes I am.

McGRATH J:

– rely on for that because that's really, you're telling us to read section 51 in context, well we need to know the context.

MS CRAWSHAW:

Yes, if I might. Paragraph 30 of the decision, there's an emphasis on the principles not being exhaustive.

McGRATH J:

Just a minute, let's just have a look at that. Right.

MS CRAWSHAW:

Paragraph 28 with reference to the relevant principles.

McGRATH J:

Yes.

MS CRAWSHAW:

Paragraph 30 also refers to the "all-factor child-centred approach" in *D v S* so I'm just emphasising the Court didn't go away from that. Paragraph 50 requires that, "A Court should consider each of the section 5 principles to determine whether it is relevant and, having identified those principles that are relevant, should take account of them in determining the best interests of the child." Further the Court says, "The Court must evaluate how the relevant principles should be taken into account." It's common sense that it does add context to these, to paragraph 51.

TIPPING J:

They do start, "It is sometimes said" –

MS CRAWSHAW:

That's right.

TIPPING J:

It's not a hugely promising observation because it sort of suggests that this isn't going to be, that this isn't quite right.

MS CRAWSHAW:

Yes and I wasn't quite sure who sometimes said it either.

TIPPING J:

Sorry, where are we?

MS CRAWSHAW:

That's at paragraph 51.

TIPPING J:

It's the first sentence in 51.

BLANCHARD J:

Well it's identified. It's *S v L (Relocation)*, that's 27, given there's an –

MS CRAWSHAW:

That was the checklist case.

TIPPING J:

Well they don't say that's completely wrong. They say that we consider that such statements require some qualification –

MS CRAWSHAW:

Just require some qualification. So they don't say it's completely wrong and I think that's very – that is important.

TIPPING J:

I'm with you on the law because you don't differ from Mr Pidgeon. The real issue here is whether they let this slip, if it was a slip or sort of awkward language affect the result.

MS CRAWSHAW:

And I can take you to that and I – in my submission they didn't let it affect the result. They carried out their own –

TIPPING J:

Any explanation of what you suggest they were actually trying to achieve by this paragraph would be useful but –

MS CRAWSHAW:

I wonder, because we're going to take the break shortly, but I wonder if I can say this. I think what the Court of Appeal did was no more than reflect the threads of emphases which are contained within the section 5 principles. In the case of section 5(e) it's just too obvious. That's just a use of the word –

ELIAS CJ:

Do you mean the internal emphases?

MS CRAWSHAW:

The internal emphases but section 5(e), which is the safety principle –

ELIAS CJ:

Yes.

MS CRAWSHAW:

Because it's the only principle which has the use of the word "must" there's a reasonable argument that perhaps, unless it's irrelevant, that that does have more emphasis –

McGRATH J:

Of course.

MS CRAWSHAW:

– and I don't think there's too much trouble with that suggestion.

McGRATH J:

No, that's the first suggestion in 51 but there is a second one too.

MS CRAWSHAW:

Yes. Yes and I think – and I've referred to the *White v White* [1998] 2 FLR 310 case where Thorpe LJ says that, when he was referring to a matrimonial property statute and he was talking about the principles in that statute and he talked about how some principles are going to be more magnetic than others and that's, I think, quite a useful sort of metaphor because when we come to the wording in section 5(b) the question which was discussed by you fully before, with my learned friend, was whether the use of the words "in particular" is there to convey specific guidance as it is in 5(e), in my submission, because if you got to 5(e) the wording "in particular" is used in that section or, and I think this is the correct approach to 5(b), the words "in particular" are used for emphasis and in my submission it's very likely that the words "relationships with parents" are likely to have emphasis because they – that has that obvious magnetic factor and it is also reflected in Article 9.

TIPPING J:

Isn't it really that the "in particular" is highlighting a feature of the generic that is most likely to be encountered?

MS CRAWSHAW:

Not necessarily so –

TIPPING J:

No?

MS CRAWSHAW:

– in my submission, it could just as well be read to emphasise when you look at principles (a), (b) and (c), that collection of principles, there is an emphasis within these principles of the relationship with parents, which was consistent with the UNCROC Article 9, the right not to be separated from –

TIPPING J:

Well isn't (e), the general proposition is child safety must be protected, a generic proposition?

MS CRAWSHAW:

Yes.

TIPPING J:

And then to sharpen it up the child must be protected from all forms of violence et cetera.

MS CRAWSHAW:

Yes.

TIPPING J:

Now I would have thought all you're dealing there is simply particularising something from the general that is worth actually pointing out or thought to be worth pointing out.

ELIAS CJ:

It is also in the context of a very expansive view of family connection, which is expressed in (b).

TIPPING J:

In (b) I agree.

MS CRAWSHAW:

Yes.

YOUNG J:

What would the section mean if the words "in particular" weren't there and what does it mean with them there?

MS CRAWSHAW:

Well I suppose there'd be a risk –

YOUNG J:

Is there a difference?

MS CRAWSHAW:

– wouldn't there?

YOUNG J:

I would have thought there is a difference.

ELIAS CJ:

Yes.

MS CRAWSHAW:

Yes. I think there is a difference without the words "in particular" not just to give specific guidance but to give emphasis because otherwise there's a risk –

YOUNG J:

To remind Judges.

TIPPING J:

Yes.

MS CRAWSHAW:

Otherwise there's a risk –

YOUNG J:

You can say cousin is as good as a mum.

MS CRAWSHAW:

Yes, a cousin can rock on up now with an application for leave –

TIPPING J:

But it's an internal –

MS CRAWSHAW:

– and apply for care of the child.

TIPPING J:

It's an internal emphasis as the Chief Justice aptly put it. It's not an inter se emphasis.

YOUNG J:

Do you mean as between (a), (c) –

TIPPING J:

As between the –

McGRATH J:

As between the principles to use the language of 51, yes.

TIPPING J:

Yes.

MS CRAWSHAW:

And I suppose that's where the use of this word is a partial indication of weighting which of course is, in itself, the qualification to the, "it is sometimes said". If it had just simply said that there are different threads of emphases within the subsections I think that would be an entirely correct and accurate and uncontroversial reflection of the words of the section. I wonder if this is a suitable time –

ELIAS CJ:

Yes Ms Crawshaw, just to summarise. It does seem to be the case that on the law you and Mr Pidgeon are not in disagreement, is that how you see it?

MS CRAWSHAW:

Well in terms of the Court of Appeal's –

ELIAS CJ:

In terms of, no, in terms of the interpretation of sections 4 and 5?

MS CRAWSHAW:

I don't think we are that far apart.

ELIAS CJ:

No.

MS CRAWSHAW:

Because I say relevance filter must look at the principles as the relevant ones. Conduct the evaluative assessment. Make your own internal ranking. Consider other factors that might also be relevant and then no a priori assumptions and make your decision and I don't take my learned friend to be saying anything different.

YOUNG J:

I think he is, with respect. I think he says section 5(1)(b) should be read as if it didn't have the "in particular" because that's just a statement of the obvious and adds nothing to its meaning whereas you say it gives it a bit of a tweak and that's about the only difference I could perceive.

TIPPING J:

How big a tweak.

MS CRAWSHAW:

I think it gives it – does underscore it and does underline it so that's where we take – that's where we're apart.

ELIAS CJ:

Well you can't overlook the relationship of children and parents and the importance to children of that relationship.

MS CRAWSHAW:

And that is the probably after physical need that is the most fundamental need a child has.

TIPPING J:

Is it a relevant tweak? If it's not said to affect the between themselves ranking, is it a relevant tweak?

MS CRAWSHAW:

I'd say it was a relevant use of a highlighter, yes. A tweak.

ELIAS CJ:

All right so when we come back you're going to take us to how the Court of Appeal didn't get its evaluation wrong, is that right?

MS CRAWSHAW:

I will take you to that. I might just quickly finish where I have gone in terms of my overview and then I will take you to that.

ELIAS CJ:

Yes, that's fine, thank you. We'll take the adjournment.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.18 PM

MS CRAWSHAW:

Your Honours, just in terms of a bit of a roadmap of where I was going to go. I was just going to finish up by addressing you as to how section 5(b)'s underscoring affects relocation cases, then I was going to go straight to the paragraphs in the judgment. Then I was going to take you thirdly to how the Court of Appeal undertook its evaluative assessment and then finally I was going to take you through very, very briefly, a synopsis of those extra cases Your Honours received, as well as the two cases I'd referred to in my submission. Is that all right if I do it in that order?

ELIAS CJ:

Yes, yes, I was just wondering, that's fine, yes, go ahead Ms Crawshaw.

MS CRAWSHAW:

In my submission, the cumulative effect of sections 5(a) (b) and (c) is that there is an emphasis on the parental relationship and that Parliament must have intended that emphasis. However, the extent to which it is emphasised in any one case still rests with the trial, or Family Court Judge or indeed, the Appeal Judge now with the *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 decision applying when the Appeal Court then conducts its evaluative assessment. It's not a matter of ranking and that's merely a matter of the Court of Appeal's orthodox observations from the legislation.

Where there is a relationship between parent and child well established prior to the relocation issue, section 5(b) does underscore an implication or expectation of the continuity of that relationship, but nevertheless the relocation may still be permitted. For example, if there is a relationship, that it's characterised by disappointment and unreliability and in addition, perhaps a power and control dynamic of an overhang from the relationship itself. All of those would have an effect of undermining the primary carer of the child and a reasoned, well thought out application for relocation could result in an enhancement of that child's overall wellbeing. And it's interesting because the two cases of Judge Murfitt, which are the recent ones, applying

Bashir v Kacem have almost strikingly similar facts. They've, both of them were mothers wanting to relocate from the Taranaki area to the Bay of Plenty area, drugs were involved, methamphetamine and children who were very attached to both parents. Different results. In one case, the mother could relocate. In the other case, the mother couldn't relocate and they're very fact specific, individualised assessments, same Judge, same Court of Appeal decision being applied and no presumption against relocation at all, in those Judge Murfitt decisions. But those –

ELIAS CJ:

So what is the point that you make, do you take from that?

MS CRAWSHAW:

The point that I take from that is that the two Family Court decisions of Judge Murfitt are examples of the *Bashir v Kacem* decision being applied, but not leading to a presumption against relocation –

ELIAS CJ:

I see, thank you.

MS CRAWSHAW:

– and doing exactly what was contemplated by the Court of Appeal, which was an individualised assessment which is very fact specific.

I think, if there was to have been a formal presumption, that the Court of Appeal would have said so and the Court of Appeal hasn't said so in my submission, in the judgment because of the non-exhaustive nature of the principles, the relevant filter and the individualised assessment. All of those ameliorate the threads of the emphases within the subsections and they enable the Court to take a different pathway, certainly not steered incorrectly and hamstrung by the threads of emphasis within the subsections in my submission.

MCGRATH J:

They may not have said that there was any presumption, I think it's clear, but they have said that a weighting, or some weighting, some priority or weighting between principles. I think that's what we've got to focus on, what they meant by that.

MS CRAWSHAW:

And I think if one simply substitutes the word "emphasis" to the word "weighting" there's no problem and I think the difficulty is that weighting is usually used by the trial Judge when applied to evidence, or in fact sometimes the child's views, weight is not necessarily accorded to a child's views because of extraneous factors, such as parental alienation, or something of that nature. So weighting is probably not the best word to use, but if you substitute the word "weighting" for simply "emphasis" I think that's correct.

MCGRATH J:

Well, I think that weighting is part of a metaphor of a balancing process and when they come to paragraph 63, they're undertaking a balancing process, so I don't know if we're going to get, do any better by saying, all they meant is emphasis. I think we've got to stick with the metaphor and see whether in fact it made any difference to, say, in 52, in 51 and 52, there is some weighting as between the principles, apparently including principle 5(b) –

MS CRAWSHAW:

Well –

MCGRATH J:

– when they came to do the weighting and balancing, call it what you like, in 63.

MS CRAWSHAW:

Well, I would, I would just beg to differ because I think there's two points there. Firstly, that when they went on to do their evaluative assessment they were entitled to place whatever weight they wanted to on whatever principle or other factor they considered to be a standout factor.

MCGRATH J:

Yes.

MS CRAWSHAW:

So, that's the first point. But secondly, if I can go back to the words, weighting. They have, of course, qualified that again in paragraph 52, by saying it's a partial indication of weighting, which is probably quite a lot softer than simple priority or weighting. I think when they talk about that slightly vexed sentence at paragraph 51, if what they

meant by that was that 5(3) is a standout, I don't think there's any difficulty with that. That can't be wrong because it is stated in different terms from the others.

There's, in my submission, a very respectable argument that there is internal emphasis in section 5(b) as well and there is certainly a flavour of emphasis on parental relationship, which is consistent with Article 9 on the relationship with parents and I don't think there's any error in that emphasis of the Court of Appeal. I think that paragraph 52 clarifies and contextualises that there is no presumption, there is no hierarchy and it is entirely up to the trial Judge to create its own hierarchy and its own emphasis on the particular facts of the case. That's my submission in respect of paras 51 and 52.

When we go further into the judgment, I think it's quite apparent that the Court of Appeal was not fixated or mesmerised by an incorrect ranking of the principles, because it spent quite some part of the judgment in some depth, looking at the role of parental conflict and that's obvious from paragraphs 57, right through to paragraph 60. That, of course, had trumped other considerations in the High Court and very prudently, it was useful to obtain the updated report from the psychologist because these sort of facts are real, real moveable feast in Family Court matters and it is quite interesting to note that the Family Court hearings in May 2008, by which stage the Family Court Judge had noted that the conflict which had been present at changeovers was already diminishing by then. Then the High Court hearing, which was in February 2009, there was no update from the psychologist and by October 2009, this was the fourth report of the psychologist. So, the Court of Appeal had quite fresh and updated evidence.

It was interesting, by the time of that report, the children had gone and visited the wider family three times. They've now visited the wider family five times since the Family Court decision, which is well in excess of the orders that the Family Court Judge made, which was one a year to visit the wider family and of course, in between times is the ability for the webcam and the indirect contact that my friend eluded to, could be substituted for the direct contact that the father enjoys.

I only say that because the extent to which the Court of Appeal focused on the role of parental conflict is exemplary in my submission of it looking at other factors, other than the section 5(b) principle which they emphasised. But then when you go to paragraph 61, which is headed, our evaluation, they refer to the updated report from

Ms Wali, who conducted all four reports. Incidentally, Ms Wali had done an earlier report, when the mother brought her older children over to New Zealand in breach of the Hague Convention and the Central Authority was appointed then. Now, that's extraneous only in one sense, because those children are now in their late teens and early 20s and when my learned friend addressed you and said, oh, well, now the older children are separated from the younger children, I think that it is peripheral to the matter at hand because we're looking at a statutory interpretation point, but with my own children and I've got an 18-year-old in Paris at the moment that just an incident of the mobile communities in which we live, and so intact families, often you will have older children travelling, doing OEs and going to university in different countries. I think that we can't be overly influenced by those sorts of matters.

When they go to the evaluation they talk about the report from Ms Wali. Now obviously influenced by that update but then they talk about the section 5 principles at paragraph 62. On the material before us, and in my submission that means on the evidence before them, this is the individualised assessment that the Court of Appeal goes on to consider. At paragraph 62(a) say there is no issue under section 5(e) and of course conflict is a continuum because if it is at an extreme level, and children are overtly involved, one might say that was psychological violence within section 5(e) and it might be necessary for the Court to take a risk assessment akin to the sort of assessment one takes under section 60. But obviously the Court didn't consider, by this stage, that it was of that ilk.

Then there's an analysis of the parenting styles, at 62(b). Then at 62(c), in this case, there's an analysis of the relationship between the children and the father and I'm not sure whether it's apparent from the reading of the Court of Appeal judgment but this wasn't a situation where the father was a shadowy, peripheral figure. This is a situation where the father had solely cared for the older child for nearly two years. So they were thoroughly involved, both thoroughly involved in the children's care. And Ms Wali addressed the grief the children might go through, particularly the older child, if that relationship were lost. That really is effectively an analysis on these particular facts and an emphasis on these particular facts for these children. And similarly in paragraph 62(d) but the emphasis in paragraph 62(d) is on the effect of the children of disrupting the relationships.

Paragraph 62(e) talks about the conflict issue again and how the updated evidence shows that there's a greater ability on the part of the parents to shield the children from the conflict.

Paragraph 62(f) involves an assessment of the mother's ability to parent and the freedom of movement. Again that's not in the principles but of course the Court was in no error in considering other matters.

Then paragraph 63 is the summary and in my submission there is no error revealed. In this it is a very case specific assessment so I think the general statement about what I say could more properly have been described as emphases, threads of emphases within the subsections has not led the Court of Appeal to overemphasise the relationships. This was a case where the facts called out for an emphasis on the parental relationships because of the facts, because of the way in which these children have been brought up, separately originally but together more recently.

Paragraph 66(2), the Court talks about how the children have settled. That's another, that's of course loosely describing the status quo. They haven't said it is a presumption. They just referred to the evidence, again, the updated evidence of Ms Wali that the children have settled and that in this case there is a desirability to preserve continuity for the children. And then further they did refer to the research literature that Ms Wali referred to. The latest report from Ms Wali is on the Court of Appeal file and I must admit to having scribbled all over my copy but I actually think it would be useful to understand this part of the decision to see that.

ELIAS CJ:

Well I don't think we need it because the point that you're making is that this is a factual evaluation that the Court of Appeal applied rather than a presumption and that's the issue, really, for us.

MS CRAWSHAW:

Indeed and all it is, is that you can see the genesis of that part of the evaluation when you read the Wali report, the fourth one, but certainly I take that point Your Honour. There was a question at one stage about where the Court of Appeal might have got this emphasis on 5(b) and I just referred to my submissions that I made in the Court of Appeal because it is Professor Henaghan and what – I haven't referred to this article because it's almost restated in the COCAcobana article but he presented a

paper to the, in Australia following their family law amendments and he said that the words 5(b), "In particular the child shall have continuing relationships with both parents," he thought that was significant and he said this is not quite the same as making meaningful relationship with both parents an important consideration, which is what the Australian legislature did. But the words "in particular" which are not used for other considerations in the New Zealand section, well that's not quite correct because they are in section 5, are chosen to signify this consideration as being a primary or important consideration. A large number of Family Court Judges in New Zealand have taken this as a signal that relocation is likely to be more difficult past this change of law. He said that again in the COCAcobana article and that was right at the beginning of the article and unfortunately in the case the correct page, it's actually page 2 of the article, it doesn't seem to have –

ELIAS CJ:

Where do we find the article?

MS CRAWSHAW:

Yes, it seems to have been omitted from the case, the correct page.

ELIAS CJ:

Oh I see.

MS CRAWSHAW:

I'm sorry.

McGRATH J:

This is page 54 is it?

MS CRAWSHAW:

Page 533.

McGRATH J:

And what's omitted?

MS CRAWSHAW:

If you see page 533 it starts at page 54, it doesn't start at the beginning of the article, so you're missing the important part, I think, of the article. It is –

McGRATH J:
Well I've got it here.

MS CRAWSHAW:
You have got it there?

McGRATH J:
That page there.

MS CRAWSHAW:
Yes well I'm reading from –

ELIAS CJ:
Well what do we do? Do you want us to look at this article or are you going to tell us what we're missing?

MS CRAWSHAW:
I'm just going to tell you what you're missing.

ELIAS CJ:
Yes.

MS CRAWSHAW:
Because all it is, is that he says in that article that safety of the child is mandatory and ongoing consideration, contact between parents and child is given particular emphasis. That's all he says and I think that's where the Court of Appeal have then gone onto this partial indication of weighting. Just so Your Honours were aware of that, the basis for their slight turn of events. Finally, Your Honours, can I –

ELIAS CJ:
This is really (b), if one looks at it without all of this explanation, (b) is about continuity and stability. It's a good, in itself, it's recognized by this provision and it's particularly – well and it is true in relation to the child's relationships with his family, particularly in terms of the relationship with his parents. That's all it says.

MS CRAWSHAW:

It is. The continuing relationship with both of his or her parents, yes.

ELIAS CJ:

But it's not, it's not simply about relationships, it's about continuity and stability and in that context relationships with family and especially parents.

MS CRAWSHAW:

Yes, and it could even be said to be about continuity of such things as schooling and kindergarten and wider community too, which of course are always relevant considerations in a relocation case, because you are, by definition, seeking to disrupt a child's continuity of care in the widest sense.

Finally, and I think it probably would be useful, rather than Your Honours having to trawl through all of those decisions that came through, because I know this is recorded, but I just wanted to give you an overview of those cases because, in my view, it's not quite the way in which my learned friend has portrayed the skewing of the *Bashir v Kacem* decision. In the *Figgs* decision, which was the Judge Murfitt decision, para 22 talks about, "An implication of prioritisation," but then he goes on further in the decision and considers the principles in that individualised assessment.

The *Collins v Stanley* (FAMC New Plymouth, FAM-2008-021-261, 16 April 2010) decision of Judge Murfitt, he says, "Section 5(b) is underlined in the legislation." Then he goes on, in the individualised assessment, to allow the relocation.

AMH v SH, which is the Judge von Dadelszen decision, para 56 emphasises the individualised assessment, which he then goes on to make. In the context of that particular case he does give emphasis to section 5(b). There's no error, in my submission, by a Judge giving emphasis to that in a particular case.

CJC v CJC simply says, at para 27, that the Judge is required to look at the principles. That's fairly unstartling. In *TJC v CG,* similarly, para 94, "Must consider the principles." In *PAH v RJR,* which is the Judge Russell decision to which you referred earlier, the Judge says that, at paragraph 57(c), that section 5(b) is given some weight, but then goes on at paragraph 58 to go through the *D v W* checklist, which he's not prohibited from doing of course, and makes an individualised assessment as part of the *D v W* checklist, which he finds is more pertinent. I don't

think that the section 5 principles prohibit the Court from doing that, as long as the principles themselves are looked at, and he does that at paragraph 61.

In the *Re Wah* (HC Auckland, CIV-2007-404-7415, 9 July 2010) decision of Courtney J, which was July this year, she talks, post-*Bashir v Kacem*, of the principles being desirable social norms, but then goes on to say that section 5(e) has greater weight because of the use of the word "must". In that case, which did involve serious safety issues, that seems to have flavoured her decision, as it ought to have in that case.

I have already referred you to the Judge Coyle decision in my submissions, and also in my submissions I referred to a decision of Clifford J, which was a relocation which was allowed in Tauranga by Her Honour Judge Somerville, and on appeal there was an argument raised about the application of the *Bashir v Kacem* decision. It wasn't successful and the relocation, it was allowed on the particular facts. And Justice Clifford's consideration of *Bashir v Kacem* certainly didn't lead him to conclude there was any presumptions intrinsic or implicit in the decision itself.

Those cases, of course, all just go to the effect of the Court of Appeal's decision, and what is important is really what it said and what it didn't say and, in my submission, there wasn't a material error on the part of the Court of Appeal, and that is evident from the assessment that was undertaken by them and the three qualifications that they made, which ameliorate any of those threads of emphases within the subsections.

Those are my submissions, unless Your Honours have any further questions?

ELIAS CJ:

No, thank you, Ms Crawshaw.

MS CRAWSHAW:

As Your Honours please.

ELIAS CJ:

Mr Pidgeon, do you want to be heard in reply?

MR PIDGEON QC:

Very briefly, Ma'am.

Where my learned friend and I differ is the significance to be given to section 5(b), and it was crucial in this particular case, and perhaps another paragraph to the judgment could be referred to as indicating the detrimental impact on the relationship with the parent of the move to Australia was the crucial element of the decision, and that's in paragraph 64 of the Court of Appeal's decision, where he says, "We have available through Ms Wali's updating report information concerning the children's wishes. The older child supports relocation to Australia. The younger did not express a view, but Ms Wali considered that she probably supported relocation. We have taken the children's views into account, but consider that they are outweighed by other factors, in particular the nature of the relationship that the girls increasingly have with their father and his family and the likely detrimental impact on that relationship of a move to Australia." So, this was the key reason for refusal of relocation, and it's set out there clearly. And it's also set out in, paragraph 51, that there is priority and weighting to section 5(b). And, although I understood just before the lunch adjournment my friend was coming to the view that there was similarity in our approaches that there should be no weighting, after the break she has come out in support of the principle that section 5(b) has a weighting. Now, I'm not for one minute suggesting the importance of relationships with the parent isn't important, it of course is important –

TIPPING J:

I didn't understand Ms Crawshaw to be saying that there should be presumptive weighting.

MR PIDGEON QC:

Yes.

TIPPING J:

I understood her to be saying that it will be a frequent feature of relocation cases –

MR PIDGEON QC:

That's right.

TIPPING J:

– that this factor requires significant weighting.

MR PIDGEON QC:

Yes, and that's not what the Act says, particularly when you read it with section 4. It says there should be continuity in relationships and in each of the other matters that are listed: there should be identity, culture, language should be preserved, and so forth, "D should be encouraged to participate." Now, if the interpretation that my learned friend is indicating, and clearly the interpretation adopted by the Court of Appeal is correct, 5(b) should have said either, "There must be continuity in arrangements," or possibly even if they used the word "in particular" at the beginning of subsection (b). Because I take the point made by His Honour Justice Tipping that what is in parenthesis there is just a focus, a subset of the generic group of family and, in effect –

ELIAS CJ:

But you couldn't –

MR PIDGEON QC:

Sorry?

ELIAS CJ:

Sorry, no, carry on.

MR PIDGEON QC:

In effect, implying that parents are more important than cousins or other members of the family. But it doesn't give it a greater weighting as compared with (a), (c), (d), et cetera.

ELIAS CJ:

But, in the end, the Court of Appeal in paragraph 66 weighs everything up and, in context, it says, the desirability of preserving the continuity and the stability that they have, the working – what do they say? The working – a good working solution for the children isn't outweighed by the two factors of risk which were assessed. Where's the presumption being applied there wrongly?

MR PIDGEON QC:

Well, they have already applied it in paragraph 51 saying, there must a weighting or priority to not affecting the relationship between the parents the – a father. They've had the central focus on that because they've said so. In other words, there is a

priority and that's what the statute they say requires. It's not an individual case assessment by the time they were dealing with the issue in sections, in paragraphs 51 and 52. They were looking at the legislative approach required.

ELIAS CJ:

In 66 they're not, they're just talking about the desirability. They're not talking about it as being anything higher than that and surely the desirability of that maintenance does come out of the statute, all other things being equal, nothing outweighing that?

MR PIDGEON QC:

Well, that is one of the matters that you should take into account. But they're approaching the problem, even in paragraph 66 from the brief inception that there must be, that there is a priority or weighting, they've said that and I, it's completely artificial to say, with respect, in paragraph 66, they've just done a comparative in the same levels in this particular case. And as proof of that, it's the way the Courts have interpreted the decision since. They have expressly said, there's a weighting and priority and in my submission, that is in error and indeed –

TIPPING J:

What would you say Mr Pidgeon to paragraph (d), sorry subparagraph (d) of 62, where, they're saying the same thing in several different ways in this reasoning, but in (d) they say, in the middle of that, "We consider that it would be wrong in the circumstances of this case, to disrupt those relationships now." Now, they're speaking, in a way, with two voices. I agree with you that 51 is capable of being read in the way you're asserting, but it seems to me that they're going out of their way in the application, somewhat inconsistently perhaps, coming back to the proposition that everything's equal in theory, but of course, it won't be equal in practice, ie in the circumstances of the case. I understand your point, but ordinarily you would think that if a Judge directs himself in a particular way, they will apply it in that way, but in this case there seems to be, perhaps unusually, that that isn't actually the same. Because they seem to go out of their way to emphasise the circumstances of the case. "We consider it would be wrong in the circumstances of this case," and that's the fulcrum finding. It's said in many different ways actually as you go through this, but that's the essence of it, for me. Now, can you show anything that linguistically cuts back on that? In other words, have they anywhere reverted to the sort of, someone hasn't overcome the presumption, or hasn't established the onus, or anything like, of that sort of ilk?

MR PIDGEON QC:

But there's nothing that directly departs from the priority or weighting that's been given in section 51.

TIPPING J:

Well, I think that, in the circumstances of this case does. They –

MR PIDGEON QC:

And in particular in paragraph 63, where they use the word, and I know it could be interpreted in two different ways, in particular the need for the children to have a meaningful relationship and of course, that could be interpreted either way, that that's the direction in particular, or –

TIPPING J:

"Our overall assessment of the principles."

MR PIDGEON QC:

Yes, of the principles.

TIPPING J:

Yes, that doesn't look like anything a priori to me. I'm putting you to the challenge.

MR PIDGEON QC:

Yes.

TIPPING J:

Because I think you've got to identify how they've actually applied it, in terms of that paragraph 51, because frankly the indications, such as they are, suggest otherwise. For me, anyway.

MR PIDGEON QC:

In paragraph 51, the passage, "As we see it this means there is some priority or weighting as between the various principles," and it's adopting a passage by Professor Henaghan in an article. There's no actual detailed explanation as to why they have approached it in that way, other than that reference to the article. Why do they find there is a priority or weighting? They refer to the wording of section 5(e) and it's accepted that that has been given a priority of weighting, but there is no

reasoning process for giving a priority of weighting in section 5(b) and in my submission, it's inappropriate, where as I've mentioned in paragraph 64, they've made clear that this is the key rationale behind their decision, having taken the position that there is a priority of weighting, they've carried it into effect.

TIPPING J:

Well, I honestly don't know what a partial indication of weighting actually means. It must mean, I agree construed literally, that there is some sort of legal extra weight in that scale, but what they may have been trying to say was, that in particular cases there may be a de facto weighting.

MR PIDGEON QC:

Well, of course there may be a de facto weighting, but that's not what they say in section 51. They're clearly directing their attention, not to the specific case at that time, but to the legislature and they have said, "This means that there is some priority or weighting as between principles," and it's my submission that all here will probably take the view that apart from section 5(e), there is no weighting, and that must affect the decision.

BLANCHARD J:

I think they're trying to indicate that there is some weighting in (b) and there's no weighting in (a), (c), (d) and (f) –

ELIAS CJ:

But there is.

BLANCHARD J:

– I think that's what the reference to partial means.

ELIAS CJ:

But there is a weighting in (a). We haven't actually looked at (a), but it says that parents and guardians have the primary responsibility.

TIPPING J:

But we're straying, let's just assume Mr Pidgeon that your argument has to be, doesn't it, that having said that, we can't be sure that it didn't influence them, even though their language doesn't adopt it. Is that the essence of –

MR PIDGEON QC:

Well, I would go probably a little stronger than that.

TIPPING J:

Yes.

MR PIDGEON QC:

Having stated that there is a priority in weighting, they do not depart from that view in the rest of the judgment.

TIPPING J:

Yes, I understand. The question is, do they depart from it? Do you say they don't? It's open to the view that they have.

MR PIDGEON QC:

Yes, yes. I probably can't take that matter any further.

TIPPING J:

Well, thank you, that's very helpful because that I think is the knife edge of this case.

MR PIDGEON QC:

Yes, yes.

MCGRATH J:

Mr Pidgeon, if you've finished with that matter, can I just ask you what the, if there are any statutory provisions we should be conscious of, in relation to the nomenclature we use when we issue judgment in this case? Is there anything that would restrain us, for example, from using the correct names of the parties and what has the practice been?

MR PIDGEON QC:

Well the practice had been recently in the Family Court for fictitious names to be used, but I don't think either my friend or I specifically asked for that and I have no intentions –

MCGRATH J:

That's what we've got in this case obviously, because everyone's talking about the case –

MR PIDGEON QC:

Yes, it would have to stay there –

MCGRATH J:

– with two names that have no relationship.

YOUNG J:

We can't release the names can we?

MR PIDGEON QC:

– but the practice now in the Family Court is to do –

YOUNG J:

We can't release the true names?

MR PIDGEON QC:

No, no.

MCGRATH J:

But under what principle?

MR PIDGEON QC:

It was very confusing. They went through a period of initials –

MCGRATH J:

Yes.

MR PIDGEON QC:

– and that was found very difficult to remember and cross-reference when referring to cases and it's then moved on and supported by the Court of Appeal in a number of decisions, to creating names which are not the parties and it's much more easy to recall *Bashir v Kacem* than *B v K*, when there's probably three or four cases of *B v K*.

TIPPING J:

You have to have names made up that have some relationship to the parties.

MR PIDGEON QC:

Yes.

TIPPING J:

You can't call them Smith and Brown for example.

ELIAS CJ:

Well, I don't know, *Fairfax* didn't have much relation to the parties did it?

YOUNG J:

Well, I think it's meant to reflect broadly the ethnicity of the parties.

MCGRATH J:

So they've been, we're into culturally appropriate names?

YOUNG J:

I suspect, were these names checked with counsel or not?

MS CRAWSHAW:

Section 11(d) I think it is of the Family Courts Act does prohibit publication where there is a vulnerable party, which would be a child or a party in a domestic violence context, so.

ELIAS CJ:

Yes.

MR PIDGEON QC:

That's right, yes, I'm grateful to my friend.

ELIAS CJ:

Thank you, thank you counsel. We'll take time to consider our decision in this matter. I think we're suitably warned that whatever we say needs to be very clear.

MR PIDGEON QC:

I must say that I've had greater feedback from academics, Judges and practitioners in this case than I've ever had in my life. I've been inundated.

ELIAS CJ:

That doesn't make me feel any more cheerful. Thank you Mr Pidgeon, thank you counsel for your assistance.

COURT ADJOURNS: 3.01 PM