IN THE SUPREME COURT OF NEW ZEALAND

SC 36/2006
[2006] NZSC 97

BETWEEN	SECRETARY FOR JUSTICE (AS THE NEW ZEALAND CENTRAL AUTHORITY ON BEHALF OF T J) Appellant
AND	H J Respondent

Hearing: 15 August 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: C R Pidgeon QC and J Key for Appellant
A Hart for Respondent

Judgment: 16 November 2006

JUDGMENT OF THE COURT

A. The appeal is dismissed.

B. Costs are reserved.

REASONS

Para No

ELIAS CJ

The appeal

[1] The appeal concerns the basis upon which a court may exercise the power under s 106(1) of the Care of Children Act 2004 to refuse to order the return of an internationally abducted child. The two young children who are the subjects of the proceedings were wrongfully removed to New Zealand nearly two years before the Family Court was asked to return them to Australia. By the time of the hearing, the children were found by the Judge to be "well settled" in their new environment in New Zealand. In those circumstances, under s 106(1)(a) of the Act the Family Court was not obliged to order their prompt return under s 105(2). The Judge could decline to make the order for return. The Family Court Judge made an order for the return of the children.[1] He considered that it would undermine the integrity of the Hague Convention on Civil Aspects of International Child Abduction (on which the statutory provisions for return are based) if the mother were to obtain an advantage by her own wrong-doing in not advising the father she had taken the children to New Zealand. He would have declined the order only if the mother had been able to satisfy him, as she was not able to do, that the father should have known or discovered that the children were in New Zealand before the conditions which precluded mandatory prompt return had arisen. The Family Court decision was upheld on appeal to the High Court.[2] It was however set aside on further appeal to the Court of Appeal.[3] The Court of Appeal considered that the Family Court Judge had wrongly applied a presumption in favour of return. It held that the integrity of the Convention was not undermined by refusing to order return of settled children, at least where the mother had not manipulated the delay and her actions were of "limited moral gravity".

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1 *Secretary for Justice v HJ* (Family Court, Hastings, No 372/02, 15 April 2004, Judge von Dadelszen).

2 *HJ v Secretary for Justice* (High Court, Wellington, CIV 2004-441-263, 15 June 2004, Ellen France J).

3 *HJ v Secretary for Justice* [2006] NZFLR 1005 (William Young P, Glazebrook and Panckhurst JJ).

[2] Further leave to appeal to this Court has been granted on the important question of the correct application of s 106(1)(a). I agree with the Court of Appeal and with the other members of this Court that the Family Court Judge erred in approach. When return of children is not required because a ground to refuse an order for return is established under s 106, there remains no presumption in favour of return. Instead, the court is required to make a determination whether or not to return the children, in application of the purposes and policies of the Care of Children Act. In agreement with the other members of the Court, I would dismiss the appeal against the decision of the Court of Appeal.

[3] I am of the view that, once a ground for resisting mandatory return is made out, whether the children should be returned must be determined principally in accordance with their welfare and best interests, in application of s 4(1) of the Care of Children Act. I am unable to agree with the view expressed by Tipping J in the majority reasons that the decision whether or not to return a child who is found to be settled turns on a "balancing exercise" inherent in s 106(1)(a) which entails weighing the objectives of the Convention against the welfare and interests of the child. Nor do I agree that s 4(7) of the Act requires the welfare and best interests of the child to be modified by a "deterrent" policy of the Convention. I see no conflict between the aims of the Convention and the welfare and interests of the child once a ground to refuse return is established. I consider it clear in the present case that the interests and welfare of the children would not be served by their return to Australia to permit questions as to the father's access rights to be decided in that jurisdiction. In such circumstances, an inquiry into the relative responsibilities of the parents in bringing about the ground to refuse the return of the children (in this case, the settlement ground) strikes me as a wrong approach. I would affirm the decision of the Court of Appeal to decline to make an order to return these children, but on the basis that it would be contrary to their welfare and best interests.

The basis for an order for return of children

[4] Application for return of an internationally abducted child may be made in New Zealand under the Care of Children Act. Subpart 4 of Part 2 of the Act

implements the Hague Convention.[4] The Convention is reproduced in sch 1 of the Act. Its Preamble records that "the States signatory to the present Convention":

> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
>
> Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
>
> Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

The objects of the Convention are identified in art 1 as being:

> (a) to secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[5] Under s 105(2) of the Act, the court must order the prompt return of the child to the jurisdiction from which he or she was wrongfully removed, unless a ground for refusing the order under s 106 is established to the satisfaction of the court. On return, questions of custody and guardianship of the child will then be considered in accordance with the law of the jurisdiction from which the child was removed. The Convention, and the New Zealand legislation which implements it, determine the forum in which questions as to the custody and guardianship of children wrongfully removed from one jurisdiction to another are to be resolved. The Convention is not concerned with the merits of any underlying dispute as to their custody and guardianship. Nor is it directly concerned with the reasons which may have prompted a child's removal. A removal of a child is "wrongful" if it breaches any rights of custody in the country of the child's habitual residence before removal.[5] Those "rights of custody", for the purposes of the Convention and subpart 4 of Part 2 of the Act, are defined to include rights relating to the care of the person of the child and "in particular, the right to determine the child's place of residence".[6]

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4 Part 2 deals with guardianship and care of children.
5 Article 3 of the Convention, applied in the definition of "removal" in s 95 of the Act.
6 Article 5 of the Convention and s 97 of the Act.

[6] The obligation to return in s 105(2) is derived from art 12 of the Convention. Article 12 provides:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[7] Article 12 imposes an obligation to return except where an application is made after 12 months and the child is settled. In other jurisdictions there has been controversy about whether the Convention envisages a residual power to order return when the exception in art 12 has been made out. On its face art 12 does not refer to any such power and may be thought to exhaust the scope of the Convention obligations as to return of children (as is suggested by inclusion in art 12 of the recognition that no obligation continues once children have left the jurisdiction).[7] On this view, the "harmful effects" of wrongful removal, referred to in the Preamble, would be treated as spent once the children are "settled" in their "new environment". In New Zealand, however, the form of the legislation overtakes the controversy as to whether art 12 permits a residual power to return.

[8] The New Zealand legislation splits the obligation to return "forthwith" from its exception (where the application is made after 12 months and the children are settled). The first is expressed in s 105(2), which is made subject to s 106. The art 12 exception is included in s 106, along with the grounds for refusal derived from art 13 of the Convention. Consistently with the language of art 13 (which provides that the court "is not bound" to order the return of a child where a specified ground is

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[7] Although there is authority to suggest that an overriding discretion is envisaged by art 18, that provision seems rather to save any powers of courts to order return outside the procedure for return of children contained in Chapter III (through the assistance of Central Authorities).

made out), s 106(1)(a) provides that the court "may refuse" to make an order for return where a ground is made out.

[9] So far as they are relevant, ss 105 and 106 provide:

> **105 Application to Court for return of child abducted to New Zealand**
>
> (1) …
>
> (2) Subject to section 106, a Court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—
>
> (a) an application under subsection (1) is made to the Court; and
>
> (b) the Court is satisfied that the grounds of the application are made out.
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> …
>
> **106 Grounds for refusal of order for return of child**
>
> (1) If an application under section 105(1) is made to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under section 104(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court—
>
> (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or
>
> (b) that the person by whom or on whose behalf the application is made—
>
> (i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or
>
> (ii) consented to, or later acquiesced in, the removal; or
>
> (c) that there is a grave risk that the child's return—
>
> (i) would expose the child to physical or psychological harm; or
>
> (ii) would otherwise place the child in an intolerable situation; or

> (d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to give weight to the child's views; or
>
> (e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.
>
> …

It is clear from the language of these provisions that although a court is not obliged to return a child who is settled in New Zealand if application for return has been made more than a year after the child's wrongful removal, it may nevertheless do so if it thinks it appropriate.

The history of the proceedings

[10] The appeal concerns two young children who, within the meaning of subpart 4, were wrongfully removed from Australia to New Zealand by their mother. The children were born in Australia in 1999 and 2000 and lived there until their mother took them to New Zealand in February 2002. The mother is a New Zealand citizen, although she had lived for some years in Australia before the birth of the children. The mother and children led a relatively unsettled life, moving a number of times after the birth of the children. The father of the children, an Australian citizen, lived with them only intermittently. The relationship between the father and the mother was unstable, and was affected by the father's drug-taking and violence towards the mother. The removal of the children by their mother from Australia to New Zealand was wrongful because their father, who had joint rights of custody under Australian law at that time,[8] did not consent to the children being removed to New Zealand. Indeed, the father was not told the children were being taken to live outside Australia.

[11] At the time the mother and the children moved to New Zealand, the father seems to have been living an itinerant life. He had stopped having contact with the family after a period of disruption which led to the mother's obtaining protection

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[8] An argument in the Family Court that the father was not actually exercising his custody rights was rejected and is no longer a live issue.

orders against him in three Australian states. The last contact between the father and the children, then aged 2 and 1, was in September 2001. In a letter written to the mother in November 2001, the father said he would consent to the mother having custody of the children. He was willing for them to have passports, but he wanted to know where the children were going outside Australia and stipulated that they must return within 14 days. Of his own contact with the children he wrote, "I will see them again one day. I don't know when I will be back." The mother could have contacted the father through a postal address or through a relative. She made no attempt to contact him and to inform him where the children were after leaving for New Zealand in February 2002. On the other hand, she did not attempt any concealment of the children either in removing them or in living with them in New Zealand. The family was readily traced when the Australian Central Authority became involved.

[12] The father applied to the Australian Federal Magistrates Court in January 2003 for an information order to locate the children and also for orders for contact with them. The application indicated that he was not seeking custody. The application was later transferred into the Family Court of Australia. The father does not seem to have suggested to the Australian authorities that the mother might have returned to New Zealand, despite knowing the children had passports and that the mother had family in New Zealand. Nor does he seem to have suggested attempting to locate the children through inquiries of the mother's brother, whose address he knew. In March 2003, solicitors for the father wrote to the mother care of her brother in New Zealand, advising her that the father had obtained an order from the Family Court at Townsville that an application for contact by the father with his children could be served on the brother. But it was not confirmed that the children were in New Zealand until his solicitors were served in about May 2003 with notice of proceedings for custody and protection orders and orders for interim custody and protection, which the mother had obtained in New Zealand. On 31 October 2003 the mother was granted custody and protection orders in the Family Court. The father had taken no steps in the proceedings but the terms of the custody orders reserved to him leave to apply for access.

[13] In October 2003 the husband approached the Australian Central Authority under the Hague Convention. As a result, the Secretary for Justice (as the New Zealand Central Authority) applied, on behalf of the father, for the return of the children. That application was not brought until 18 December 2003, nearly two years after removal of the children from Australia. It was brought under s 12 of the Guardianship Amendment Act 1991, which has now been replaced by subpart 4 of Part 2 of the Care of Children Act 2004. The parties in the present appeal did not suggest that anything turns on the change in legislation. As the Court of Appeal said, the provisions in the 2004 Act are to the same effect as the corresponding provisions in the 1991 Act. In those circumstances, the appeal in the Court of Appeal and in this Court was treated as if the application had been made under s 105 of the Care of Children Act.

[14] As at the date of the application for return of the children in December 2003, the mother therefore had custody orders in her favour which, being made by the New Zealand Family Court, were enforceable on registration in Australia under Australian legislation. The orders have been registered in the Family Court of Australia. They reserve leave to the father to apply for access in the New Zealand courts. The father's separate proceedings in the Family Court were unresolved at the time of the hearings in the New Zealand Family Court and the appeal to the High Court but had been dismissed before the hearing in the Court of Appeal, apparently on the non-appearance of the father.[9] It is not clear whether the application for contact would have been entertained, given the reservation of leave to apply for access in the New Zealand custody order, which has been registered in the Family Court of Australia.

[15] It was held by the New Zealand Family Court Judge who heard the application under s 105(1), and is no longer in contention, that by the time the application was brought in December 2003, the children were "settled in [their] new environment". That finding, together with the fact that the application for return under s 105 was not brought within 12 months of the wrongful removal of the children, established the ground to refuse prompt return contained in s 106(1)(a).

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9 As is recorded in the Court of Appeal judgment at para [8].

Because the exception was established, the New Zealand court was no longer obliged to return the children. It had to decide whether or not to order their return.

[16] Judge von Dadelszen, the Family Court Judge who heard the application, decided that the children should be returned to Australia, despite his finding that they were by then settled in their new environment. He expressed the view[10] that "a parent should not be given the benefit of a discretion in circumstances where he or she cannot be said to come to the Court with clean hands". The approach adopted by the Judge was:

> [20] If the mother cannot satisfy me on the balance of probabilities that, within the one year period after she left Australia, the father would have known, or could have found out, that she and the children were in New Zealand, then it is open to me to decline to exercise the discretion to uphold the [s 106(1)(a)][11] defence.

[17] The Judge considered that it could not be said "with sufficient certainty" that the father should have known that he could make contact with the mother through her brother:

> [25] On the evidence I am satisfied that the mother left Australia for New Zealand without advising the father and it cannot be said with sufficient certainty that he should have known that contact with her and the children could be made through her brother. Although one might pose the question: why the father did not contact the brother sooner?, I do not consider that that is sufficient to satisfy me to the required standard of proof that there was appropriate opportunity within the one year period for the father to exercise his rights under the Hague Convention. I am supported in this view by the knowledge that the mother did not tell him that she was leaving the country and that she did not contact him herself when she arrived in New Zealand. There is a further point, one made by Mr Thornton; there is no certainty that the brother would have been prepared to assist the father by disclosing the children's whereabouts.
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> …
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> [30] Let me return then to the discretion under [s 106]. As ss.(1) says, "the Court may refuse to make an order … for return" if any one of the 3 grounds in (1)(a), (b)(i) and (c) is satisfied (those in (b)(ii), (d), and (e) are not relevant here).
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> [31] Whenever this discretion is to be exercised, it is important to acknowledge that the integrity of the Convention should be preserved. That

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10 At para [19].

11 In the original, the section referred to is s 13(1)(a) of the Guardianship Amendment Act 1991.

> this must be so is confirmed by what the Courts have said in such cases as *Clarke v Carson* and *KS v LS*.
>
> [32] In this case it is very tempting to exercise that discretion in the mother's favour. The children are well settled in New Zealand after what must have been a difficult time when they were in Australia, largely, it appears, as a result of their father's behaviour.
>
> [33] However, it cannot be right to permit the integrity of the Convention to be undermined in circumstances where a defence is only available as a result of this mother's own actions.
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> [34] The mother left Australia without advising the children's father. She failed to let him know where she was for more than a year after leaving. As I hope has been made clear, I am not satisfied that it was reasonable for her to expect the father to find out the children's whereabouts through her brother.
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> [35] In these circumstances, the [s 106(1)(a)] defence should not be available to the mother.

[18] The decision of the Family Court ordering that the children be returned to Australia was upheld on appeal by the mother to the High Court. Ellen France J agreed with the Family Court that "the discretion has to be viewed against the objectives of the Convention". Those objectives included the "normative" function in demonstrating to "potential abductors" that "there is no future in interstate abductions", thus promoting the future of "other children".[12] The Judge said that the appellant had not satisfied her that the Family Court Judge was wrong in his approach to the discretion. The factual findings he had made about the father's knowledge and whether he should have contacted the brother were "open to the Judge". So, too, was the conclusion that the s 106(1)(a) defence had only become available to the mother because of her actions in "lying low".[13]

[19] The mother was given leave to appeal to the Court of Appeal on 18 November 2004. The appeal was not heard until 23 November 2005. The delay in setting it down is not explained on the material before us. The hearing was not concluded in the day and a further hearing was held on 14 December. The Court of Appeal allowed the appeal and quashed the order for return of the children. William Young P, for the Court, accepted that s 106 and art 18 reserve a "residual discretion"

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12 At para [32], in application of views expressed by Fisher J in *S v S* [1999] 3 NZLR 513 at p 519 (HC).

13 At para [33].

to the court to return a child who is settled even though an application for return has not been made within one year of the wrongful removal:[14]

> To confer an absolute defence on abducting parents who conceal the whereabouts of children for long enough to be able to invoke s 106(1)(a) would encourage abduction and concealment. As well, we can hardly ignore the way in which s 106(1)(a) of the 2004 Act is expressed. The legislation gives the Court a discretion in a case such as this and it would be a strong step for this Court to say that such discretion may not be exercised in favour of an order for the return of a child in respect of whom the defence has been made out.

[20] The Court of Appeal rejected the idea that a period of concealment or manipulative delay which extends the 12 month application period should be deducted from its calculation.[15] In that conclusion, the Court relied on the reasoning of Thorpe LJ in the English Court of Appeal in *Cannon v Cannon*.[16] The Court of Appeal pointed out that, where an abducting parent is living on the run, it will be difficult for the parent to establish that the child is settled. Like Thorpe LJ in *Cannon*, the Court of Appeal in the present case saw the discretion to return a child, preserved under s 106 and art 18, as being "residual". There was accordingly no scope for any presumption in favour of return, such as had been applied by the Family Court Judge:[17]

> Leaving children in New Zealand who are "well settled" does not undermine "the integrity of the Convention" – given that an order to return children in these circumstances depends upon the exercise of a "residual discretion" and is provided for in art 18.

Indeed, the Court of Appeal suggested that:[18]

> Once an application for return falls to be determined on the basis of art 18, it might be thought that the best interests of the child are at least a relevant and perhaps a controlling consideration.

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14 At para [43].

15 At para [53], rejecting the "equitable tolling" approach adopted in US cases such as *Furnes v Reeves* 362 F 3d 702 (2004) and the approach applied by Bracewell J in *Re H (Abduction: Child of Sixteen)* [2000] 2 FLR 51 (EWHC (Fam)).

16 [2005] 1 WLR 32.

17 At para [59].

18 At para [57].

The Court concluded that the mother could not be said to have been "guilty of manipulative delay". Her actions were of "limited moral gravity" in the context of the history of violence and the limited part the father had played in the upbringing of the children.[19] There was no policy reason for ordering return of the children. Accordingly, the appeal was allowed and the order for the return of the children was quashed.

The proper approach to the power to return under s 106

[21] Counsel for the Secretary for Justice argued that the purpose of the Convention required a presumption of return, especially where the 12 month limitation had been exceeded because the mother had withheld from the father the fact that the children were in New Zealand. This was effectively the approach taken by the Family Court Judge in imposing an "onus" upon the mother to satisfy him that the father should have known that the children were in New Zealand. I am unable to accept that the Judge's approach was correct. Neither the legislation nor the Convention on which it is based supports a presumption of return when a ground in s 106 is established. Such presumption where grounds are established under s 106(1)(c) (grave risk of harm in return) or s 106(1)(e) (return contrary to fundamental human rights principles) would be unaccountable, given the evident concern to protect children and the high threshold implicit in those grounds. It would also be contrary to the emphasis in the Preamble to the Convention and in s 4(1) of the Care of Children Act upon the interests of children. The same concern for the interests of children lies behind the exception in s 106(1)(a) where children are "settled". It may be expected that the "harmful effects" of wrongful removal, which the Preamble records as a principal concern of the Convention, will often have dissipated with the readjustment implicit in "settlement" and that further upheaval will itself be harmful. Against these policies, any presumption of return of "settled" children is unwarranted.

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[19] See paras [60] and [64].

[22] The Judge was also I think wrong to view the s 106(1)(a) ground as a "defence", able to be invoked by the abducting mother only if she could demonstrate "clean hands". In the context of s 106(1)(a) an inquiry into the extent of concealment or the reasons why a party has not made application earlier will generally be irrelevant. In the first place, I agree with the views of Thorpe LJ in *Cannon* that in many cases the time frame provided by s 106(1)(a) and art 12 will be exceeded without concealment on the part of the abducting parent or fault on the part of the parent left behind:[20]

> Many potential plaintiffs are entirely ignorant of the existence of the Convention. They may be unable to afford legal advice. They may seek the aid of local lawyers who are incompetent, slothful or generally unfamiliar with remedies in this specialist field. Accident or illness may disrupt the pursuit of the Convention's remedies. Furthermore there are many jurisdictions without fully effective central authorities. Not all central authorities are as experienced, well resourced and effective as the central authorities of the three jurisdictions of the United Kingdom.

More fundamentally, it is hard to justify the suggestion that an established ground to decline return is an advantage to an undeserving parent of which he or she should be deprived apparently for reasons of deterrence. Discouragement of cross-border abductions is achieved through prompt return of children without inquiry into their circumstances, unless a ground for declining return is established. But once such a ground is made out, making an example of the parents will usually be the wrong focus under the legislation.

[23] Once the settlement exception is established and mandatory return is not required, the decision to return the children or not is not properly to be viewed as a "discretion to uphold the [s 106(1)(a)] defence".[21] It is a judicial determination as to whether the children should be returned, which is to be made in application of the Act. It was not sufficient to compare, as the Judge did, the relative responsibilities of the mother and father for the delay in bringing the proceedings. Nor was it adequate to take the view that the mother should not be permitted to benefit from her "wrong-doing". A broader inquiry was necessary which included, most importantly, an

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20 At para [49].
21 As the Family Court Judge described it at para [20].

assessment of where the welfare and best interests of the children lay. That inquiry was precluded by the approach adopted in the Family Court. Because of the approach adopted, the Judge did not consider the interests of the children in making the decision that they should be returned to Australia.

[24] In considering the decision whether or not to order the return of children found to be settled in New Zealand, I am of the view that the "primary and paramount consideration" is the welfare and best interests of the children affected, as s 4(1) provides. I do not think that approach is affected by s 4(7) of the Act, which provides that s 4 "does not limit" subpart 4 of Part 2. The policy of subpart 4, to provide prompt return after summary consideration, would clearly be limited by a need to ascertain the welfare and best interests of the child. In particular, the requirement in s 105(2) that the court "must" make an order for return of a child "promptly" would be impeded if the court had first to determine whether the return of the child was consistent with the child's welfare and best interests. That is the reason why s 4(7) provides that the overarching principle contained in s 4(1) does not "limit" subpart 4. Section 4 is not however excluded from consideration under subpart 4. It applies to the extent that it does not "limit" subpart 4. Although treating the welfare and best interests of the child as the "first and paramount consideration" would "limit" the requirement of prompt return under s 105(2), I do not consider that the same conclusion follows in respect of the application of s 4(1) to the determination whether to decline to return a child once a ground under s 106 is established.

[25] The basis upon which the power to decline to order return must be exercised is not specified in subpart 4. The settlement ground in s 106(1)(a) and art 12 is itself based upon concern for the interests of the children affected. The interests of such children are no longer conclusively treated as best served by prompt return (as they are under s 15(2)), because of the lapse of time and the finding that they are now settled in their new environment. The "harmful effects of their wrongful removal", which the Convention seeks to address, will generally have receded with the adjustment implicit in "settlement". Because the exception is directed at the interests of the children, applying s 4(1) to the decision to order non-mandatory return does

not "limit" subpart 4. Its application is consistent with "the paramount importance" of the interests of children emphasised in the Preamble to the Convention.

[26] Section 4(1) does not displace other policies of the Convention, as implemented in the Care of Children Act. Even if "prompt" return cannot be achieved under s 105(2), the need to respect the rights of custody and guardianship under the laws of the country from which the children have been wrongly removed remains relevant. It may be decisive if return of the children would not be detrimental to their best interests and welfare. Nor does a finding that the children are settled in the country to which they have been removed itself determine that their best interests and welfare lie in declining return. A court may conclude that their longer-term interests are better served by short-term disruption. That may be the view, for example, if decisions about the future custody and guardianship of the children cannot be properly undertaken in the jurisdiction in which they are now settled. It may, for example, be the view taken when there is doubt that the country to which they have been removed will remain their country of residence when matters of custody and guardianship are determined. In that case the delay while the substantive proceedings are heard may risk greater disruption to the children than the earlier return to enable the questions to be resolved in the jurisdiction from which they were wrongly removed. The power to decide whether to decline return is not therefore predetermined by a decision that the children are settled, even in application of s 4(1). The starting point must, however, be the welfare and best interests of the children, as s 4(1) requires. Relevant, too, is s 4(3) which provides that a parent's conduct may be considered "only to the extent (if any) that it is relevant to the child's welfare and best interests". If the welfare and best interests of the children are the starting point, it could only be if their return would not be adverse to their best interests and welfare that the conduct or knowledge of the parents could assume any real significance.

[27] I am therefore unable to agree with the view expressed by Tipping J that s 4(1) is modified in its application to the power to decline to order the return of children found to be settled so that the court can have regard to the welfare and best interests of the particular child only "in a manner that is not inconsistent with the

policies and purposes of the Convention".[22] In determining whether to return children found to be settled in New Zealand, I see no conflict between the application of s 4(1) and the policies and purposes of the Convention, and no need for its modification. The best interests and welfare of such children are not in my view to be balanced against concerns not to "send the wrong message to potential abductors".[23] "Wrong messages" would only be relevant if this Court could conclude that return of the children to Australia would not be adverse to their welfare and best interests.

[28] In determining whether to return a child where grounds for refusing an order are established under s 106, the "first and paramount consideration" must be the interests of the child. The Family Court Judge did not address the welfare and interests of the children in declining to refuse the order for their return. He made no assessment of the likely impact on the children if an order was made for their return beyond the acknowledgement implicit in his finding that they were "settled". I am of the view that his approach was contrary to the legislation.

Should an order be made returning the children?

[29] If the Family Court Judge had first addressed the welfare and best interests of the children, I am satisfied that he could not have concluded that an order for their return to Australia should be made. On the approach I prefer it is unnecessary to consider whether the father should have known earlier that the children were in New Zealand. Nor is it necessary for me to consider whether the mother had so concealed them that it would be appropriate for the Court to take the concealment into account in deciding whether to order their return. On the last point, I prefer the view of Thorpe LJ in *Cannon*[24] that such concealment is principally relevant to the question of "settlement". It is unnecessary for me to consider questions of the knowledge and culpability of the parents because I am of the clear view that the return of these children would be contrary to their best interests and welfare. The reasons can be stated briefly.

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22 Majority reasons at para [49].
23 Majority reasons at para [50].
24 At para [61].

[30] The children were never settled in Australia. They had moved around in circumstances of some considerable disruption. The mother has no support systems in place in Australia and no base to which she could return. Her financial circumstances appear limited and would inevitably be strained by even temporary resettlement. In those circumstances, the dislocation inevitable in return of children who are now settled would be greatly exacerbated for these children. The delay in returning them to Australia (for which it is unnecessary in my view to attribute blame) together with their very young ages at the time of removal mean that they can have no attachment to Australia and no context in which to be reconciled to the further disruption. Custody is not in dispute and will inevitably remain with the mother. The father had limited contact with the children even before their removal from Australia and took almost no part in their upbringing. He is unlikely at least in the short-term to be able to pick up a significant role in the day-to-day care of the children. That will mean that the responsibility for the physical and emotional care of the children will fall almost entirely on the mother. Her stability is therefore of critical importance to the children's welfare. She too is settled in her new environment. The terms upon which access will be granted to the father require resolution but, given the gap in contact with the children, it is likely that the relationship will have to be built up over some time. The orders made in New Zealand and registered in Australia provide a mechanism for establishing the contact. Given the history of mobility of both parents while in Australia, it cannot be assumed that providing access will be more difficult if the children remain in New Zealand. Removing the children from their "well settled" life in New Zealand to live in uncertain conditions in Australia while formal decisions are taken in that jurisdiction entails risk to their welfare and best interests which is not offset by likely commensurable benefits to them. I would therefore affirm the decision of the Court of Appeal to decline to order their return.

BLANCHARD, TIPPING AND ANDERSON JJ

(Given by Tipping J)

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Introduction

[31] This case concerns two young children, a girl and a boy then aged 2 and 1, who were wrongfully removed by their mother from Australia to New Zealand. The ultimate issue is whether they must be returned to Australia to enable the Australian courts rather than those of New Zealand to decide whether their father should have contact (access) with them, and, if so, where and on what terms.[25] The children were brought to New Zealand in February 2002 in breach of their father's rights and the principles inherent in the Hague Convention.[26] The father's proceedings for an order that the children be returned to Australia were commenced in December 2003, nearly two years after their removal to New Zealand. The reason for and effect of this delay is a significant aspect of the case.

[32] On hearing the father's application in April 2004, the Family Court found that the children were now settled in New Zealand. Nevertheless the Judge made an

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25 For reasons which will emerge below, their father does not seek custody (day-to-day care).

26 More fully known as the Convention on the Civil Aspects of International Child Abduction, adopted by the Fourteenth Session of the Hague Conference on private international law and signed on 25 October 1980.

order for their return to Australia.[27] The issue is whether the Judge erred in making that order. Had the father applied within 12 months of the children's removal from Australia, the Family Court would have been obliged to order their return.[28] But the combination of the fact that the application was made outside the 12 month period, and the Judge's finding that the children were now settled in New Zealand, meant that the Family Court was no longer obliged to order their return. Whether to do so became a matter of discretion pursuant to s 106(1)(a) of the Care of Children Act 2004 (the Act).[29]

[33] The mother appealed to the High Court from the Family Court's order requiring the children to be returned to Australia. Her appeal was dismissed.[30] Her further appeal to the Court of Appeal was allowed and the order for return was set aside.[31] The father, whose interests have been represented throughout by the Secretary for Justice, as New Zealand's Central Authority,[32] challenges the Court of Appeal's determination.[33]

[34] The issue whether the Family Court exercised its discretion properly has two dimensions. The first concerns the nature of the discretion vested in the Family Court when more than 12 months have elapsed between wrongful removal and application for return, and the children are settled in their new environment. The second concerns whether the mother can be said to have concealed the children from their father after bringing them to New Zealand and, to the extent she did, what bearing this factor has on the correct exercise of the discretion.

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27 *Secretary for Justice v HJ* (Family Court, Hastings, No 372-02, 15 April 2004, Judge von Dadelszen).

28 Other grounds for refusing such an order having been rejected.

29 At all material times the relevant provision was s 13(1)(a) of the Guardianship Amendment Act 1991. As it was in identical terms to s 106(1)(a), it is convenient to refer throughout to the current legislation which implements the Hague Convention in New Zealand.

30 *HJ v Secretary for Justice* (High Court, Wellington, CIV 2004-441-263, 15 June 2004, Ellen France J).

31 *HJ v Secretary for Justice* [2006] NZFLR 1005 (William Young P, Glazebrook and Panckhurst JJ). The delay of nearly two years from the hearing in the High Court is unexplained.

32 Established under s 100 of the Act, in terms of art 6 of the Convention.

33 Leave to do so having been granted on 27 June 2006: [2006] NZSC 47.

The Hague Convention

[35] The twin objectives of the Hague Convention,[34] as set out in art 1, are to secure the prompt return of children wrongfully removed to or retained in any Contracting State,[35] and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. The first paragraph of art 12 of the Convention states that where a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings for the return of the child, less than one year has elapsed from the date of the wrongful removal, the judicial authority of the country where the child now is shall order the return of the child forthwith. The purpose of return is to enable the courts of the country of the child's habitual residence rather than the courts of the country to which the child has been wrongly removed to decide matters of custody and access.

[36] Hence the primary rule is that if, following wrongful removal, the application for return is made within 12 months, an order for return forthwith must be made. The primary rule is, however, subject to the exceptions set out in art 13.

[37] Article 12 goes on to provide in its second paragraph[36] that if the application for return is made after the expiration of the period of one year from removal, the relevant authority (here the Family Court) shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment. Hence the duty to order return, if the application is made within 12 months, becomes a discretionary power to do so when the application is made after 12 months and the settlement requirement is satisfied. That a power to order return still exists in the latter case is reinforced[37] by art 18 which provides that the general rules, as just outlined, do not limit the power of the relevant authority to order the return of the child at any time.

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34 The English text of which is sch 1 to the Care of Children Act.

35 Both Australia and New Zealand are Contracting States.

36 Often conveniently referred to as art 12(2).

37 Some would say created, but it is not necessary to go into that question here, as New Zealand's domestic legislation renders the debate academic.

[38] Article 13 creates exceptions to art 12 by saying that, notwithstanding the latter article, the requested State is not bound to order the return of the child if the person opposing return establishes one of the grounds which art 13 specifies. They are, in short, the non-exercise of custody rights; consent to or acquiescence in removal; grave risk to the child or an intolerable situation if return were ordered; and that the child, being of sufficient age and maturity, objects to being returned. Article 13 also provides that, in considering the specified exceptions, the relevant authority in the requested State must take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[39] It is desirable to enter a caveat at this point about the various grounds upon which an order for return may be refused. Statements in judgments or other writings about one ground should not be applied automatically or uncritically to another. General statements about these grounds, or exceptions as it may be convenient to call them, should be treated carefully, recognising their generality. They may not apply to all grounds and may need to be modified when a particular ground is being considered. When examining judgments and other publications it is important to be clear which particular exception is being addressed. Each exception has its own features and the court's approach must be tailored to the particular purpose and requirements of that exception.

[40] This said, all the exceptions must be approached with an understanding of their shared context, within a Convention that has the general purpose of deterring child abductions.[38] That is achieved by ensuring prompt return in cases where no ground to refuse return is established. When such a ground is established the Convention envisages an inquiry into whether its deterrent purpose should prevail over the interests of the particular child or children.

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[38] See, for example, the comment of Wilson J in *Re L (Abduction)* [1999] 1 FLR 433 at p 442 (EWHC (Fam)) that an order for return, when appropriately made, contributes to the welfare of "those numerous other children who live in the Contracting States across the world and whose parents would be deterred from abducting them … by a growing public awareness that what would then happen would, in all probability, be an order for return".

[41] The core working provisions of the Convention illustrate these matters. The States parties wished to provide a mechanism by means of which children wrongly removed from one country to another were ordinarily to be subject to prompt return. As we have already indicated, the purpose of that return is to enable the relevant authority in the country of habitual residence, rather than the authority in the country to which the child has been removed, to decide what is best for the child's future. The States parties recognised, however, that in some circumstances it might not be appropriate to order return. The proposition that prompt return was generally the best course to take was therefore made subject to the exceptions described above. The Convention nevertheless provides for a general discretion to order return, even when an exception is established. This requires the judicial authority in the requested State to balance against the interests of the children any feature in the case which might require those interests to yield to the deterrent purpose and other policies of the Convention.

The domestic legislation

[42] Subpart 4 of Part 2 of the Act is designed to give effect to the general framework of the Convention.[39] The most relevant provisions for present purposes are ss 105 and 106. Section 105 provides:

> **105 Application to Court for return of child abducted to New Zealand**
>
> (1) An application for an order for the return of a child may be made to a Court having jurisdiction under this subpart by, or on behalf of, a person who claims—
>
> (a) that the child is present in New Zealand; and
>
> (b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and
>
> (c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and
>
> (d) that the child was habitually resident in that other Contracting State immediately before the removal.

[39] As recognised in s 3(2)(f) of the Act.

(2) Subject to section 106, a Court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—

(a) an application under subsection (1) is made to the Court; and

(b) the Court is satisfied that the grounds of the application are made out.

(3) A Court hearing an application made under subsection (1) in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a court of that State, or a decision of a competent authority of that State, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State, and may adjourn the proceedings for that purpose.

(4) A Court may dismiss an application made to it under subsection (1) in respect of a child or adjourn the proceedings if the Court—

(a) is not satisfied that the child is in New Zealand; or

(b) is satisfied that the child has been taken out of New Zealand to another country.

[43] Section 105 reflects the Convention's general objective which is to achieve prompt return following wrongful removal. The court must make an order for the prompt return of the child to the country from which it was removed unless one of the grounds for refusing to do so, as set out in s 106, is established.

[44] Section 106 provides:

106 Grounds for refusal of order for return of child

(1) If an application under section 105(1) is made to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under section 104(2)[40] for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court—

(a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) that the person by whom or on whose behalf the application is made—

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody

[40] This appears to be an obvious misprint for s 105(2).

rights would have been exercised if the child had not been removed; or

(ii) consented to, or later acquiesced in, the removal; or

(c) that there is a grave risk that the child's return—

(i) would expose the child to physical or psychological harm; or

(ii) would otherwise place the child in an intolerable situation; or

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to give weight to the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

(2) In determining whether subsection (1)(e) applies in respect of an application made under section 105(1) in respect of a child, the Court may consider, among other things,—

(a) whether the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees or political asylum:

(b) whether the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

(3) On hearing an application made under section 105(1) in respect of a child, a Court must not refuse to make an order under section 105(2) in respect of the child just because there is in force or enforceable in New Zealand an order about the role of providing day-to-day care for that child, but the Court may have regard to the reasons for the making of that order.

[45] Section 106(1)(a) states the ground with which this appeal is concerned. The court may refuse to make an order for the return of the child if the person opposing the making of such an order establishes two things to the satisfaction of the court: first, that the application was made more than one year after the removal of the child, and second, that the child is now settled in his or her new environment. The settlement ground can exist only if more than one year has elapsed between the date of wrongful removal and the date when the application for return is made. None of the other grounds for refusing an order for return necessarily involves the passage of time from the date of removal and the consequent inability to order prompt return.

This seems to be the reason why the Convention kept the settlement ground separate from the other grounds, it being contained in art 12(2) whereas the others are contained in art 13. The New Zealand legislation has all the grounds together in s 106(1).[41]

[46] Other grounds for refusal set out in s 106(1), including the ground that the children's return would expose them to a grave risk of physical or psychological harm or would otherwise place them in an intolerable situation, were considered and rejected at an earlier stage of the litigation and are not in issue in this Court.

[47] There is another feature of the legislative environment which should be mentioned at this point. Section 4(1)[42] of the Act provides that the welfare and best interests of the child must be the first and paramount consideration in the administration and application of the Act; for example, in proceedings under the Act and in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child. Day-to-day care and contact are the current equivalents of custody and access.

[48] The section goes on to deal further with the welfare and best interests of the child and then, materially for present purposes, provides in subs (7) that what is stated in s 4 does not "limit" subpart 4 of Part 2. This means that the statutory mandate that in proceedings under the Act the welfare and best interests of the child must be the first and paramount consideration, often called the paramountcy principle, must not be taken as limiting anything in the provisions dealing with what the heading to subpart 4 calls "International child abduction". Clearly, therefore, the paramountcy principle cannot limit the duty to order return in terms of s 105 when no ground for refusing to do so can be invoked. The court's duty to order return in

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41 The Hon W P Jeffries, then the Minister of Justice, explained the drafting of the legislation when introducing the Guardianship Amendment Bill on 15 May 1990 by saying:

> "The Bill implements the convention in New Zealand by setting up a statutory regime that reflects the provisions of the convention. It has been drafted in this form to ensure that interpretation difficulties raised by the language of the convention are avoided."

42 Of which the counterpart in the Guardianship Act 1968 was s 23(3), introduced by s 35 of the Guardianship Amendment Act 1991.

s 105 circumstances is not in any way "limited" by what is best for the individual child. The rationale is that the deterrent policy of the Convention must prevail.-

[49] By contrast, the statement that the paramountcy principle must not limit the s 106 discretion cannot be regarded as meaning, as it must in relation to s 105, that the welfare and best interests of the child are not to be taken into account. The word used in s 4(7) is "limit" and, in this context, its use is not entirely straightforward. The only Convention context in which the same word appears is art 18; but in that context the connotation of the word is easier of application. Section 4(7) does not provide that the paramountcy principle "shall not apply" to subpart 4 of Part 2. But, on the other hand, to allow the paramountcy principle to mandate the answer to a s 106(1)(a) question would amount, in context, to a limiting of the discretion vested in the court by that provision. Once a case moves from s 105 to s 106 the principle is relevant but it must not be applied so as to limit the s 106 discretion. The statutory direction in s 4(7) can only be construed as requiring the court to have regard to the welfare and best interests of the particular child in a manner that is not inconsistent with the policies and purposes of the Convention. -

[50] Hence, what is in the best interests of the particular child in terms of s 4(1) cannot be the only or indeed the dominant factor in the exercise of the s 106 discretion. To take that view would be to "limit" the discretion contrary to s 4(7). In particular, the best interests of the particular child must be capable of being outweighed by the interests of other children in Hague Convention terms, if to decline return would send the wrong message to potential abductors. As we will develop below, striking the right balance between the best interests of the child or children on the one hand, and the deterrent policy of the Convention on the other, lies at the heart of the exercise of the s 106(1)(a) discretion. Waite J put the point well in *W v W (Child Abduction)*[43] when he said that it was implicit in the general operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases.

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[43] [1993] 2 FLR 211 at p 220 (EWHC (Fam)).

[51] This approach to the discretion, and the interrelationship between s 105 and s 106(1)(a), is supported by the Explanatory Report on the Hague Convention written by Professor Elisa Pérez-Vera.[44] Referring to art 12(1),[45] as Rapporteur, she says:[46]

> In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it – something which which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

[52] And, writing about art 12(2), she states:[47]

> The second paragraph answered to the need, felt strongly throughout the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

[53] The general tenor of these observations is that when an application for return is made more than 12 months after wrongful removal, and the children are settled in their new environment, the focus materially shifts. The very nature of the exception**,** quite apart from s 4(1) of the New Zealand Act, means that what is in the best interests of the particular children now plays an essential part. In addressing that

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44 Then Professor of International Law at the University of Madrid.
45 The first paragraph of the article.
46 At para [107].
47 At para [109] (footnotes omitted).

issue, the underlying merits of the competing custody or access issues can properly be considered. This shift of focus must, however, accommodate the need, greater or less in the particular case, to take into account what might be a perverse incentive, in Hague Convention terms, if the court allowed a parent who had wrongly removed a child to benefit from the passing of time brought about by concealing or not disclosing the whereabouts of the child.

[54] Against that background we will address more specific "settlement" issues before considering further the nature of the s 106(1)(a) discretion and the application of the relevant principles to the circumstances of the present case.

[55] Although the conclusion reached in the Courts below that the two children were now settled in their new environment is not in issue in this Court, it is useful to review briefly the purpose and content of this exception. Whether a child is now settled in its new environment involves a consideration of physical, emotional and social issues. Not only must a child be physically and emotionally "settled" in the new environment, he or she must also be socially integrated.[48]

[56] It is for this reason, if no other, that the scope and depth of the inquiry will usually be significantly greater in a case involving s 106(1)(a) (and probably other exceptions) than the fairly summary process envisaged if no exception can responsibly be asserted. In this respect we agree with what Hale J said in *Re HB (Abduction: Children's Objections) (No 2)*:[49]

> Once the time for a speedy return has passed, it must be questioned whether it is indeed in the best interests of a child for there to be a summary return after the very limited inquiry into the merits which is involved in these cases.

[57] A further issue which can arise in a s 106(1)(a) case concerns the date envisaged by the word "now" in the phrase "is now settled". The cases have

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[48] Obviously the age of the child will be relevant to all aspects of the settlement question and the evidence may require a reasonably detailed examination in order to reach a proper conclusion.

[49] [1998] 1 FLR 564 at p 568 (EWHC (Fam)).

identified two competitors; the date when the proceedings for return are commenced and the date when they are heard.[50] Ordinarily there should not be much, if any, practical difference between them because of the requirement[51] that proceedings under s 105 be given priority in order to ensure they are dealt with speedily. In so far as it may sometimes be material which date is addressed, we consider that the proper focus should usually be on the date of hearing the application. This best accommodates the necessary consideration of the best interests of the child and avoids the artificiality of declining to consider recent developments in the child's life. There may be cases when it is not appropriate to allow the respondent to an application for return to benefit from the delay between the filing of the application and its hearing, but in general terms we consider the court should consider all relevant circumstances as at the date it hears the application. It is not necessary in the present case to consider the relevance of events or developments during the lapse of time inevitably occasioned by the appeal process.

[58] It is worth pointing out that the expectation deriving from s 107 is that ordinarily a s 105 application will be heard within six weeks of its commencement. If the application is not determined within that period, an explanation must be given on request. This should mean that the time slippage will be relatively small and there will be no opportunity for the respondent to delay in order to create a better case on the settlement issue. There are obvious logistical challenges in such a short time frame, particularly when an exception is in issue.

The nature of the s 106(1)(a) discretion

[59] There is a useful discussion of the settlement exception in a recent publication by Nigel Lowe, Mark Everall QC and Michael Nicholls.[52] The authors

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50 See *Re N (Minors) (Abduction)* [1991] 1 FLR 413 (EWHC (Fam)), where Bracewell J stated obiter that "now" refers to the date when the proceedings were commenced and also *Director General, Department of Community Services v M and C* [1998] Fam LR 168 at para [91] where the Full Court of the Family Court of Australia doubted the absoluteness of Bracewell J's approach and indicated that "now" could refer to the date of hearing if necessary in the particular case.

51 Set out in s 107(1).

52 *International Movement of Children: Law Practice and Procedure* (2004).

note[53] that art 12(2) is a recognition that return to the country of habitual residence may no longer be desirable once a child has spent more than 12 months in its new environment. Hence return should not be ordered without a close examination of the merits of doing so. We have already referred to the difficulty of doing that within the anticipated time frame, which, in opposed cases, may deserve some re-examination.

[60] After referring to para [107] of the Pérez-Vera Report, Lowe, Everall and Nicholls go on to distinguish between cases of summary return in the immediate aftermath of wrongful removal, and cases where return is sought after the lapse of more than 12 months from removal. They cite Thorpe LJ's statement in *Re C*[54] that the Convention remedy is designed to be one of hot pursuit. They then helpfully survey the background to the adoption of art 12(2), stating:[55]

> During early discussions on the drafting of the Convention, a dual time limit was proposed. The proposal was that where the location of the child is known, there should be a mandatory return if the application is made within 6 months; where the location of the child is not known, there should be a return if the application is made within 12 months. However, a single time limit was favoured and in due course a consensus emerged for the 12-month limit. What became Art 12(2) was introduced so as not to exclude the possibility of a return even after the 12-month limit had elapsed; the power to order a return, provided that the child has not become settled, is, on its face, indefinite in time.

[61] Lowe, Everall and Nicholls consider next the nature of the discretion to order return when the child is settled in its new environment. It is unnecessary to refer to their consideration of the debate which has taken place in some countries concerning whether there is any discretion at all in these circumstances.[56] Section 106(1)(a) undoubtedly gives the New Zealand Family Court a discretion, couched as "may refuse to order return". This reflects the drafting of art 13 which states that if an exception is established, the relevant authority "is not bound to order the return of the child". It should be recognised, however, that the Convention deals with the settlement exception in art 12(2), not in art 13. Our legislature's inclusion of it within s 106(1), based as that section is on art 13, masks this difference of

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53 At para [17.6].
54 *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 2 FLR 478 at p 488 (EWCA).
55 At para [17.7] (footnotes omitted).
56 As the final sentence in the extract cited in para [60] might suggest.

presentation in the Convention. The point is a subtle but significant one of terminology and emphasis. Whereas art 13 says that if one of the exceptions stated therein is established, the relevant authority "is not bound" to order return, art 12 states that even in the case of an application made after 12 months, return shall be ordered "unless" the child is settled in its new environment.

[62] The word "unless" has been construed by some courts, but by no means all, as mandating that if there is settlement, return cannot be ordered.[57] Despite the lack of unanimity in the international community on this point, the implication for present purposes must at least be that if the settlement exception is established the framers of the Convention anticipated that some countervailing feature of the case (such as concealment) will be necessary before an order for return is made in respect of a child now settled in its new environment. Those who simply seek to invoke the "integrity" or "policy" of the Convention in these circumstances should bear this aspect of it in mind.

[63] In *Re L*, to which reference has already been made,[58] Wilson J stated that the discretion should be exercised "in the context of the approach of the Convention". This leads Lowe, Everall and Nicholls to state[59] that the welfare of the children is not paramount but is a relevant factor. We would say a most important factor. In *Re L* itself the circumstances were that the mother had gone into hiding in England for 10 months and the children had no other connection with England. If he had reached the point, Wilson J would have exercised the discretion in favour of return.

[64] In *Director-General of the Department of Community Services v Apostolakis*[60] Moss J found the settlement ground established. He described this as having a "direct and fundamental relevance to the situation of the children", and declined to order their return from Australia to Crete, because to do so would undo what they had achieved in Australia.

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57 Although the point is not a live one in New Zealand because of the way our domestic legislation is framed, reference can usefully be made to the helpful review by Kay J in "The Hague Convention – Order or Chaos?" (2005) 19 AJFL 245 of the differences in the international community on this point.

58 At fn 38 above.

59 At para [17.34].

60 (1996) FLC 92-718 (Family Court of Australia).

[65] In *Director-General, Department of Families, Youth and Community Care v Moore*[61] the Full Court of the Family Court of Australia made the obvious but significant point that the policy of the Convention is not that wrongfully removed children must be returned in all circumstances. The exceptions are there to permit the welfare and best interests of individual children to be taken into account in specified circumstances. The Full Court upheld the judgment of Warnick J, who had observed that after an exception is established it is not to the point that unless the child is returned the "wrong-doer" will profit from the wrong-doing, save in the sense that to discourage such "wrong-doing" is a purpose of the Convention. Warnick J had emphasised that this purpose could not "override" the exception.

[66] Mr Pidgeon's basic submission for the father was that the Court of Appeal had failed to apply appropriate Hague Convention principles to the case. In particular, he argued that there was "a presumption of return in exercising a discretion in keeping with the purpose of the Convention" and that the Court of Appeal had not recognised this. Counsel also argued that the Court of Appeal had wrongly dealt with what he submitted was concealment by the mother of the fact that the children had been taken to New Zealand, this resulting in the father being unable to issue proceedings for their return within 12 months. Ms Hart adopted and supported the conclusions and reasoning of the Court of Appeal. Her submissions are reflected in what follows.

[67] In support of his first point Mr Pidgeon drew to our attention the decision of the Court of Appeal in *S v S*,[62] in which Keith J for the Court said:[63]

> The provisions of the Act and convention also make it clear that the issue before the Court is not the best interests of the children as such, but rather the choice of the forum where those interests are to be determined. The general principle or presumption of the convention and the implementing statute is that the children are to be returned to their place of habitual residence; it will be for the Courts of that place to make any determination about the best interests of the children. The legislation is to be interpreted so as not to undermine that presumption.

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61 (1999) 24 Fam LR 475. This case also contains a detailed discussion of the "settled in new environment" criterion.

62 [1999] 3 NZLR 513 (Keith, Blanchard and Tipping JJ).

63 At para [9].

[68] This passage must be read in its context, which was to provide a broad introductory overview of the purpose of the Convention. It is not appropriate to speak in terms of a presumption of return in a discretionary situation.[64] This is because the exercise of the discretion must recognise, and seek to balance, both the welfare and best interests of the child and the general purpose of the Convention. Indeed in *S v S* the Court recognised this by saying, two paragraphs after the passage cited above, that the trial Judge, having found a ground for refusal established, had to consider whether as a matter of discretion the children should "nevertheless" be returned to their country of habitual residence. That terminology clearly shows that the Court was not approaching the discretion in terms of there being any presumption of return after the establishment of a ground for refusal.

[69] We refer finally on this topic to the decision of the Court of Appeal in England in *Cannon v Cannon*.[65] Thorpe LJ gave the leading judgment with which the other members of the Court[66] expressed their agreement. Thorpe LJ first examined what matters had to be considered when deciding whether a child was now settled in its new environment. He held that judges should look critically at any alleged settlement that was based on concealment or deceit. We would prefer to deal with the policy implications of not letting a parent gain an advantage from concealment or deceit as a facet of the exercise of the discretion. Obviously the circumstances of the concealment or deceit may be relevant in a purely factual way to the settlement issue but we do not consider the need to deter concealment or deceit should otherwise influence the settlement assessment. The policy objective is better achieved by means of the exercise of the discretion rather than indirectly via the settlement assessment.

[70] There is, however, an aspect of Thorpe LJ's judgment in *Cannon* which we would respectfully endorse. He said that:[67]

> the exercise of a discretion under the Convention requires the court to have due regard to the overriding objectives of the Convention whilst

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64 Indeed, even when there is no discretion, the concept of a presumption is not really apt either. In that situation there is a duty to order return.

65 [2005] 1 WLR 32.

66 Waller and Maurice Kay LJJ.

67 At para [38].

> acknowledging the importance of the child's welfare (particularly in a case where the court has found settlement) …

That formulation seems to us to support the approach which we would, in any event, have taken to the balancing exercise inherent in our s 106(1)(a).

The decisions of the Courts below

[71] We move now to examine the basis on which the Courts below approached the discretionary decision which had to be made under s 106(1)(a). We will do this initially without reference to the facts of the case. In the Family Court, Judge von Dadelszen said[68] that the mother had a "heavy onus" to persuade the court that the children should not be returned to Australia. For that proposition he relied on *Damiano v Damiano*[69] and *KS v LS*,[70] both "grave risk" cases. As is inherent in what we have already written, we consider that the Judge was in error in putting such an onus on the mother. There was an ordinary onus on the mother to establish the existence of the s 106(1)(a) ground. But it was not appropriate to say that having established that ground the mother had an onus, let alone a heavy onus, of persuading the court not to order return. It is important in this respect to keep conceptually separate whether a ground for declining to order return has been established, on the one hand; and, if so, whether return should or should not be ordered, on the other. The first is an issue of fact; the second involves an exercise of discretion.

[72] Despite the fact that the mother satisfied the Judge that the children were now settled in their new environment, he directed himself that it was important to exercise the discretion so that "the integrity of the Convention should be preserved". He then added the following:

> [32] In this case it is very tempting to exercise that discretion in the mother's favour. The children are well settled in New Zealand after what must have been a difficult time when they were in Australia, largely, it appears, as a result of their father's behaviour.

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68 At para [14].
69 [1993] NZFLR 548 (FC).
70 [2003] 3 NZLR 837 (HC, Full Court).

> [33] However, it cannot be right to permit the integrity of the Convention to be undermined in circumstances where a defence is only available as a result of this mother's own actions.
>
> [34] The mother left Australia without advising the children's father. She failed to let him know where she was for more than a year after leaving. As I hope has been made clear, I am not satisfied that it was reasonable for her to expect the father to find out the children's whereabouts through her brother.

[73] It is thus apparent that the Judge's order for return was made, despite the mother's establishment of the s 106(1)(a) exception, primarily on account of the mother's actions which the Judge saw as having improperly gained her the benefit of the exception. That, and the initial heavy onus, is what appears to have led the Judge to favour return, contrary to what he seems to have regarded as the best interests of the particular children.

[74] In the High Court, Ellen France J said that the mother had not satisfied her that the Family Court Judge was wrong in his approach to the discretion. She continued:[71]

> Further, while the Family Court Judge did have some sympathy for the position in which the mother found herself, I agree with him that the discretion has to be viewed against the objectives of the Convention. It is relevant in this regard that the Convention has as Fisher J put it, a "normative" function (*S v S* [1999] 3 NZLR 513 at 519). Fisher J noted that the future of other children "will be promoted by demonstrating to potential abductors that there is no future in interstate abductions." (At 519, and see discussion by the Court of Appeal in the appeal from that decision, at 532.)
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> The mother did, as respondent's counsel put it, lie low and the Family Court Judge found that the s 13(1)(a) defence only became available because of her actions in that regard. That conclusion was open to the Court on the evidence.

[75] The Court of Appeal discussed[72] the present issue in terms of a question framed as "Does a Convention informed approach to s 106(1)(a) require the dismissal of the application in this case?"

[76] Their Honours commenced by observing that art 12 does not expressly address the circumstances, if any, in which the return of "settled children" should be

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71 At para [32].
72 From para [35].

ordered, if proceedings are commenced after the expiration of the relevant one year period. The Court then noted there was support for the view that the Convention does not envisage the return of a child now settled in the new environment when proceedings are commenced outside the one year period. That view cannot, of course, be taken in any absolute way in New Zealand because, as we have seen, s 106 clearly gives a discretion to order return in such circumstances.

[77] The Court of Appeal moved next to discuss the relevant considerations in determining whether to order return when the s 106(1)(a) exception is established. Their Honours recognised[73] that if parents who wrongfully remove children are permitted to rely successfully on s 106(1)(a), this would tend to reward "perhaps the worst abductors, namely those who kidnap children and disappear, and thus more generally serve to encourage the abduction of children".

[78] The Court of Appeal then discussed the criteria for establishing settlement and the potential inter-relationship with concealment issues, and concluded its examination of the s 106(1)(a) discretion by saying:

> [56] It will be recalled that in *Cannon* Thorpe LJ described the discretion to return a child in circumstance in which s 106(1)(a) applies as being "residual" and saw it as primarily based on art 18 of the Convention. It will likewise be recalled that this provides:
>
> > The provisions of this Chapter [which includes arts 12 and 13] do not limit the power of a judicial or administrative authority to order the return of the child at any time.
>
> [57] Once the discretion is seen in this light, it is perfectly clear that there is no scope for a presumption in favour of return when the s 106(1)(a) defence is made out. Indeed, it may even be that the reverse applies, that cases in which an order for return will be made will be the exception and not the rule and that the applicant seeking such an order should be expected to show good reason why the discretion should be exercised in his or her favour. Once an application for return falls to be determined on the basis of art 18, it might be thought that the best interests of the child are at least a relevant and perhaps a controlling consideration

[79] Their Honours then set out paras [32], [33] and [34] of the Family Court's judgment[74] and added:

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73 At para [45].
74 As set out in para [72] above.

> [59] In light of what we consider to be the appropriate approach to s 106(1)(a), these reasons do not provide an appropriate basis for ordering return of the children. Leaving children in New Zealand who are "well settled" does not undermine "the integrity of the Convention" – given that an order to return children in these circumstances depends upon the exercise of a "residual discretion" and is provided for in art 18.
>
> [60] Importantly [the mother] did nothing which could be regarded as "manipulative delay" as discussed by Thorpe LJ in *Cannon* at [59] of his judgment. We do not see her actions as causing the critical delay in the commencement of proceedings which has enabled her now to invoke s 106(1)(a).

[80] On this basis the Court allowed the appeal, quashed the order for the return of the children and dismissed the application for their return.

Other New Zealand material

[81] Before stating our conclusions on the correct approach to the s 106(1)(a) discretion, we mention two further New Zealand discussions of the topic. The first is in an article written by Principal Family Court Judge Boshier entitled "Care and Protection of Children: New Zealand and Australian Experience of Cross Border Co-operation".[75] The author speaks[76] in terms of a strong presumption of return to which there are a number of exceptions. But, as we have already indicated, without the presence of an established exception there is more than a presumption of return; there is a duty to order return. This duty must be distinguished from the s 106(1)(a) discretion which is not subject to any presumption of return, strong or otherwise. After setting out the exceptions, the author states that only one of them "has the potential to open the case to a hearing on the merits rather than forum". He identifies that exception as the exception constituted by grave risk of harm or intolerable situation on return.[77] That, with respect, does not do justice to the settlement exception constituted by s 106(1)(a). As we have already indicated, that exception very much engages the best interests of the child. Questions of underlying merits are capable of featuring in that respect.

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75 (2005) 3 NZFLJ 1.
76 At p 7.
77 Section 106(1)(c).

[82] Our second reference is to *Care of Children in New Zealand* by Ludbrook and de Jong[78] which contains a helpful discussion of the basis upon which the s 106 discretion should be exercised. The authors refer to the decision of Judge Boshier in *Secretary for Justice v Penney*.[79] There the Judge held that the circumstances leading up to the wrongful removal can be taken into account in exercising the discretion. Ludbrook and de Jong also make reference to the decision of Elias J in *Clarke v Carson*,[80] in which the Judge regarded it as relevant that the discretion fell to be exercised in a case in which the dispute between the parties concerned only access and the children were more than likely to end up living in New Zealand. In declining to make an order for return in the circumstances of that case, Elias J observed:[81]

> Even placing great emphasis on the policy of the Act and the Convention, once the welfare of the children is brought into the balance it seems to me that returning the children is likely to entail a shuttle which is relatively empty. It will disrupt the family and cause substantial emotional and financial stress quite disproportionate when the likely outcome is considered. It would be punitive and unnecessarily damaging to the welfare of the children for them to be taken back to have the matter resolved in the Washington Court in such circumstances.

[83] Elias J's reference to the likely outcome of the proceedings was of course a reference to the likely decision on the substantive merits as opposed to which country's courts should make that decision. There is support for her Honour's view that where a facet of the substantive decision is not in issue, or is incapable of realistic debate, the forum decision can properly be influenced by that factor. In *H v H*[82] the trial Judge's failure to consider the likely outcome of the substantive proceedings was one reason Waite LJ gave for the Court's conclusion that the trial Judge had not properly exercised the discretion. The context was a situation in which it was very likely that the mother of young children would retain their custody. It was also very likely that she would continue living in England, where she had fled from most unhappy circumstances in Israel.

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78 (2005), para [CC 106.08].
79 [1995] NZFLR 827 (DC).
80 [1995] NZFLR 926 (HC).
81 At p 933.
82 [1996] 2 FLR 570 at p 577 (EWCA).

[84] The circumstances regarded as germane in these cases, namely the reasons for the wrongful removal and the likely outcome of the substantive proceedings, have distinct relevance in the present case.

The correct position in New Zealand

[85] Drawing all these threads together, we consider the way in which the New Zealand courts should approach the s 106(1)(a) discretion can be stated in the following way. The discretion requires the judge to compare and weigh two considerations. One concerns the welfare and best interests of the child or children involved in the case. The other concerns the significance of the general purpose of the Convention in the circumstances of the case. These two considerations will not necessarily be in conflict.

[86] When undertaking this exercise the judge should consider whether return would or would not be in the best interests of a child who has necessarily already been found to be settled in its new environment. That very settlement implies that an order for return may well not be in the child's best interests. Matters relevant to the assessment include the circumstances in which the child is now settled; the circumstances in which the child came to be wrongfully removed or retained; and the degree to which the child would be harmed by return. Other factors capable of being relevant will be the compass and likely outcome of the dispute between the parties, and the nature of any evidence directed to another ground of refusal, whether or not that ground is made out. In short, everything logically capable of bearing on whether it is in the best interests of the child to be returned should be considered.

[87] If the judge considers that return is not in the best interests of the child, the issue becomes whether some feature of the case, such as concealment by the party responsible for the wrongful removal, nevertheless requires that the s 106(1)(a) discretion be exercised in favour of return so as to avoid the perverse incentive inherent in refusing to order return. Unless the court finds that such competing factors as may exist clearly outweigh the interests of the child, return should not be ordered.

[88] It follows that the approach taken in the Family Court and upheld in the High Court was not a correct exercise of the discretion. The Family Court Judge was wrong to place a heavy onus on the mother and to give the weight he did to what he saw as her concealment of the children and the consequent need to preserve the "integrity" of the Convention. How the correct approach should be applied in this case involves an examination of the facts of the case and to that we now turn.

Facts of present case

[89] In 1998, the mother, who was then a 37 year old New Zealander living in Australia, commenced the sexual relationship with the father which gave rise to the birth of the children. He was then aged 19. Their daughter was born on 2 May 1999. The father, who had had problems with alcohol and drug abuse for some time, started to become violent towards the mother soon after her birth. The son was born on 29 May 2000.

[90] The parties separated in July 2000 but seem to have resumed their relationship in September for a short period, until the mother took out an apprehended violence order against the father and a little later a protection order. She had found it necessary to resort to women's refuges and domestic violence accommodation because of the danger she felt she and the children were in as a result of the father's behaviour.

[91] While she was living in Canberra, the father threatened further violence and wrote to her saying that if he did not get his kids "I will flip my lid". Around Easter 2001 the mother allowed the father to visit the children. She claims that he tried to take them with him on departure, but she was able to prevent this. On 9 May 2001 the mother wrote to the father setting out the problems she saw in the relationship and why it could not continue. She concluded by saying that she would give the children the best life she could.

[92] In June 2001 the mother took the children back to Queensland where they had originally been living. The parties lived together again for a short time before finally separating on 20 September 2001. The mother went to a refuge in another

town where the children received counselling for the trauma they had been experiencing.

[93] The father was arrested for breaking into the refuge where the mother and the children were living. This was his last physical contact with the children. His last contact with the mother came in November 2001 when he wrote her a letter dated 15 November, in which he apologised for his behaviour in September. In his letter, which was addressed to the mother and the children, the father said that by the time the letter was received "Dad will be gone!". He added "when I find a place to settle down I will write again". He indicated he would "sign custody over" to the mother. He also said "I will sign passports but when you go I want to know where you are. And you have 14 days to return." From this it can readily be inferred that the father knew the mother was planning to take the children out of Australia. In context, his reference to "when you go" can only be read in this sense. The mother's most likely destination was New Zealand. New Zealand was the mother's country of birth and she had two brothers living in New Zealand. The father made reference towards the end of his letter to his wish that the mother should retain a post office box in Bowen saying "that way I can send stuff to you and the kids". The father concluded his letter by saying "Well hope to catch up with you one day", and in a postscript he added that if the mother wanted to write to him, as he hoped she would, she could send her letter to a family member at the address which he gave.

[94] The mother brought the children from Australia to New Zealand on 4 February 2002. She did not expressly inform the father that she was leaving or where she was going. He, in the meantime, had disappeared into the outback with another woman. The mother did not take any steps subsequently to inform the father where she and the children were living. She did not know his whereabouts, but could have tried to make contact through his family. In an affidavit, the mother described the involvement of the Australian police in her leaving Australia in these terms:

> The police, who had had experience with the children's father in criminal matters, strongly advised me to get as far away as possible, even out of the country, saying that the situation would "inevitably end in bloodshed". I was told that the safest thing was to get away from the children's father and "lie low". They said I should consider using a different name.

[95] Nearly 12 months after the mother left Australia the father applied to the Federal Magistrates Court in Australia for an information order to locate the children. He also applied for access. The application for access was transferred to the Family Court of Australia and was live at the time of the proceedings in New Zealand up to the point when the Court of Appeal gave leave to appeal from the High Court, but was subsequently dismissed for non-prosecution. On 31 March 2003 solicitors engaged by the father in Australia sent a letter to the mother care of one of her brothers at his Auckland address. The father had had this address throughout and had probably also had the brother's telephone number. During the whole of the intervening period he had not endeavoured to contact the mother or the children by these means.

[96] The purpose of the March 2003 letter was to achieve substituted service on the mother of the application for access which the father had made in Australia. In May 2003 the mother applied for protection and custody orders in New Zealand. The mother's solicitors contacted the father's solicitors to serve these applications and, from then on, whatever may have been the earlier position, the Courts below rightly considered that the father must have been fully aware that the children were in New Zealand. Despite this, it was not until October 2003 that the father approached the Queensland State Central Authority under the Hague Convention. This was 20 months after the children's removal from Australia.

[97] On 31 October 2003 the New Zealand Family Court made custody and protection orders in the mother's favour. Leave was reserved to the father to apply for access. These orders were subsequently registered in Australia. The effect was to make the New Zealand orders equivalent in all respects to Australian orders in the same terms.

[98] The father's application for an order for return of the children to Australia was made on 18 December 2003, nearly two years after the children had been removed from Australia and about six months from the date when the father was certainly aware that the children were in New Zealand.

Concealment - general

[99] Neither the Hague Convention nor subpart 4 of Part 2 of the Care of Children Act deals directly with the issue of concealment. The drafting history of the Convention sheds some light on this topic and there are also pointers in our domestic legislation. As we have already seen, an early draft of the Convention would have distinguished in time terms between cases where the whereabouts of the children were known and those in which they were not. The period for applications under the Convention was to be six months in the former case and 12 months in the latter. In the Convention's final form these two periods were coalesced into a single period of 12 months. This history might have given some credence to the proposition that after 12 months the intention was that settled children should not be disturbed whether there had been concealment or not. But the presence of art 18, and the general policy of the Convention, as it was perceived, despite this drafting history, led to the view adopted in the New Zealand legislation that even after 12 months and settlement in a new environment it should still be possible to order return. While concealment does not mandate return, it may be a factor in how the s 106(1)(a) discretion is exercised. We therefore turn to those features of our domestic legislation which have some bearing on the concealment issue.

[100] Section 103 places a statutory duty on the Secretary for Justice, as New Zealand's Central Authority, to secure the prompt return of a child to another Contracting State, if the Secretary receives an application claiming that the child is present in New Zealand and otherwise qualifies for return. It is significant that the Secretary's duties are triggered by an application claiming that the child is in New Zealand. The application does not have to establish that this is so. The claim must have a reasonable basis, but the applicant does not have to go beyond that to invoke s 103. The provisions of that section are subject to ss 104 and 123. The former empowers the Secretary to seek further information and the latter allows the Secretary to take no action in respect of an application if it is manifest that the applicant has not fulfilled the requirements of subpart 4 or the application is otherwise not well founded.

[101] Subject to those matters the Secretary must, pursuant to s 103(3)(a), take or cause to be taken all appropriate measures "to discover where the child is". Clearly, therefore, Parliament has contemplated an application being validly made when the applicant reasonably claims the child is in New Zealand but does not know its precise whereabouts in New Zealand. The significance, for present purposes, is that there is nothing to stop an application being made in these circumstances.

[102] It is appropriate to consider how this starting point fits with the Secretary's power under s 104 to seek further information. That section empowers the Secretary to return the application to the applicant or the Central Authority by which it was transmitted with a request that further information or documents be made available if the application does not contain the specified information or is not accompanied or supplemented by the specified documents. In order to be justified in sending the application back for those reasons, the Secretary must consider the absence of the information or documents is likely to seriously impair the ability of the Secretary to carry out the prescribed duties in respect of the application. The specified information is information concerning the identity of the parties involved, the date of birth of the child, the grounds on which the claim for return is based, and, significantly for present purposes, "information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be". The reference to the person with whom the child is presumed to be reinforces the fact that that person need not be identified with any certainty. This is consistent with the fact that the whereabouts of the child need not be identified with any certainty either.

[103] It is next necessary to reconcile the Secretary's duty to take all appropriate measures to discover where the child is with the Secretary's ability to seek further information relating to the child's whereabouts and to take no action in the meantime. Parliament has contemplated that there will be circumstances in which the Secretary will have to look for the child.[83] For this reason also, an applicant cannot be under any absolute obligation to state exactly where the child is. If the Secretary were allowed to decline to take action on the application unless and until

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[83] This is consistent with the duty placed on Central Authorities by art 7(a) which requires them to "take all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained".

that information was supplied, the duty to look for the child might be rendered illusory. The fact that Parliament has made s 103(1) subject to s 104 cannot have been intended to have that consequence.

[104] The appropriate way to harmonise ss 103(1) and 104 is to regard the applicant as obliged to supply only such information as the applicant has or can reasonably obtain. We do not consider it would be in accordance with the proper implementation of the Convention[84] for the Secretary in effect to delegate the duty to take steps to discover the precise whereabouts of the child to the applicant or another Central Authority. They are necessarily in a much less advantageous position to carry out the necessary inquiries.

[105] The purpose of this discussion is to show that a lack of knowledge of the whereabouts of a child within New Zealand should not be regarded as an impediment to the making of an application under s 103 and the consequent stopping of time running for the purpose of s 106(1)(a). The applicant or the overseas Central Authority should make all such inquiries as are reasonably within their ability to discover the child's whereabouts, but they cannot be expected or required to do more than that, before being able to invoke the assistance of New Zealand's Central Authority along the lines envisaged by s 103 and in particular s 103(3). The New Zealand Central Authority cannot, in terms of s 104, refuse to take action on an application by reason of the absence of information which it is not reasonably within the ability of the applicant to supply.

Concealment – this case

[106] The Family Court found[85] that the first clear evidence of any attempt by the father to make contact with the mother was the letter from his solicitors dated 31 March 2003 addressed to the mother care of her brother in Auckland. He had obtained an order for substituted service of his access application on the mother's

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84 That being the purpose of subpart 4: see s 3(2)(f) and s 94(a) of the Act.
85 At para [9].

brother. While the mother did not tell the father she had taken the children to New Zealand, she has deposed that the father would have been well aware that she had relocated to New Zealand. He has denied that, but, as we have said earlier, it must have been highly likely that the mother had gone to New Zealand, as opposed to any other country. We also consider it highly likely that the father must have realised that he could at least attempt to contact the mother and the children through her brother. It is significant that he did not do so for over 12 months and then only to serve his access papers. We find it very difficult to accept the Family Court's conclusion that it could not be said "with sufficient certainty" that the father should have known that contact could be made or, we interpolate, at least attempted, through the children's uncle.

[107] The Family Court Judge's observation that the first clear evidence of any attempt by the father to make contact with the mother was the letter of 31 March 2003 is a fair reflection of the father's evidence. In his affidavit in support of the return application sworn on 22 December 2003, the father deposed that he attempted to contact the mother "through various means". He mentioned specifically "an old [Australian] post office box and friends". No other detail was given. He then said that as a result of "exhausting all avenues" he decided to apply for an information order which he obtained on 23 January 2003. Then, without further elaboration as to whether this avenue had been tried before (and if not, why not), he said that his solicitors had written the letter of 31 March 2003 to the mother's brother in Auckland.

[108] When the Australian Central Authority became involved at the end of 2003 it took its officers only a short time to ascertain from the Australian Immigration Department that the children had left Australia on 4 February 2002 on a flight from Brisbane to New Zealand with their mother. New Zealand Passports had been issued to them in Sydney on 31 December 2001, the father having consented to that course in his letter of 15 November 2001.

[109] It is clear from the evidence of the mother's brother that in his view the father was "well aware" of his address in Auckland and of the fact that he was in regular

contact with his sister. The brother's evidence demonstrates that no attempt was made to contact the mother or the children through him until the letter of 31 March 2003. He has deposed that he would have communicated with his sister if any such attempt had been made.

[110] We return to the Family Court judgment in the course of which the Judge directed himself in this way:[86]

> If the mother cannot satisfy me on the balance of probabilities that, within the one year period after she left Australia, the father would have known, or could have found out, that she and the children were in New Zealand, then it is open to me to decline to exercise the discretion to uphold the s.13(1)(a) [now s 106(1)(a)] defence.

This reference to balance of probabilities highlights the Judge's later reference to "sufficient certainty". In any event, other issues aside, we consider the mother did satisfy the Judge's balance of probabilities standard.

Conclusions

[111] All in all we do not consider the Family Court dealt with the "concealment" issue appropriately either in law or in fact. This case can hardly be described as one of concealment at all. The mother wrongly removed the children from Australia. She failed to advise the father she had taken them to New Zealand and where she was living. Beyond that failure, which hardly amounts to a form of concealment, the mother did little, if anything, which can reasonably be regarded as concealment. It is not a case in which concealment issues added any significant weight to the case for return.

[112] The High Court should not have endorsed the Family Court's approach. By reference to the judgment of Thorpe LJ in *Cannon*, the Court of Appeal concluded that the mother did nothing which could be regarded as "manipulative delay".[87] Nor

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86 At para [20].

87 See his Lordship's discussion of concealment and its various manifestations, with their varying consequences for s 106(1)(a) purposes, at para [54] of *Cannon*.

did the Court see the mother's actions as causing the critical delay in the commencement of the proceedings which has enabled her to invoke s 106(1)(a). The Court was in effect saying that the mother's conduct was not causative in any significant sense of her ability to rely on s 106(1)(a). The Court thus saw no policy or other reason which would outweigh the children's settlement in New Zealand.

[113] Even if there had been some otherwise significant concealment on the mother's part, we agree with the Court of Appeal's view that it was not shown to be causative of the delay in the making of the application for return. There is no evidence, and no apparent basis for any suggestion, that but for the mother's "concealment" an application would have been made within the 12 month period. Indeed there is little, if anything, in the materials before the Court to explain in any persuasive way why the application was not made within 12 months. As we have earlier indicated, it could have been made within that time, even though the precise whereabouts of the children within New Zealand were not known. The father's contention that he did not know or have any reason to think the children were in New Zealand is unpersuasive. It is significant that even when the father knew beyond doubt that the children were in New Zealand, a further period of about six months elapsed before he took action. Had an application been made in time, inquiries of the Auckland brother by the appropriate authorities would have been the first and obvious step to take in looking for the children.

[114] We move now to examine the settlement dimension and other related aspects. The children were rightly found to be settled in their new environment. The evidence[88] demonstrated that they were now settled, both physically and emotionally, and that they had effectively become integrated into their new and much more stable social environment. It is relevant also that there is no issue concerning custody of the children. The only question to be decided by the courts (whether it be those of Australia or New Zealand) is whether the father should have contact and, if so, on what terms.

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[88] The evidence included a persuasive letter from a doctor who had professional knowledge of the children and their circumstances.

[115] While we acknowledge the importance of the general rule that it is for the courts of the country of habitual residence to make that kind of decision, we regard this case as involving an exception, which, on the balance of all the relevant factors, takes it well outside the general rule. It is far from being a case of hot pursuit, as Thorpe LJ put it. We do not find convincing the proposition that it is necessary for Convention reasons to unsettle these children again, simply on account of a concern that their non-return may constitute general encouragement of wrongful removal. The potential harm to the Convention, and thereby to children generally, must be compared with the potential harm to these two children. We can readily accept that they and their mother would greet the news they are to return to Australia with considerable apprehension. With custody not being in issue, it seems likely that the children will continue to live in New Zealand with their mother. In all the circumstances New Zealand had become the appropriate forum for the resolution of the outstanding contact issues.

[116] Before parting with the case, there is a point to which we thought it would be desirable to refer. The New Zealand custody order,[89] which the father did not oppose, reserved leave for him to apply for access. When the order was registered in Australia it became, in effect, an order made by a competent Australian Court.[90] Hence, for the purposes of Australian law, there is an order granting custody to the mother with leave reserved to the father to apply for access. The question is whether this state of affairs has any bearing on the exercise of the discretion under s 106(1)(a). The reservation of leave to the father is not dispositive or even indicative of what, if any, access may be granted to him. Hence we consider the point is neutral and we have not taken it into account either way in coming to our conclusion.

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89 The order was final rather than interim: see *Secretary for Justice v Duncan* [1993] NZFLR 870 (DC) in this respect.

90 Under s 70H of the Family Law Act 1975 (Cth). If the order had been interim or made ex parte it could not have been registered – s 70G.

Formal orders

[117] We would therefore dismiss the appeal with costs reserved. Memoranda should be filed if the parties require a costs determination.

McGRATH J

Introduction

[118] The general policy of the Hague Convention on Civil Aspects of International Child Abduction is to require States that are parties to the Convention promptly to return a child who has been wrongfully removed to or retained in a Contracting State. The central issue in this appeal concerns the basis on which the Family Court should exercise its statutory power under the Care of Children Act 2004 to order the return of a child who has been wrongfully removed to New Zealand where an application for return was not made until more than 12 months had elapsed from the date of removal. In those circumstances both the Hague Convention, and the New Zealand statute which implements it, permit the responsible judicial authority to refuse to make an order for return if it is shown that the child is now settled in his or her new environment; although the judicial authority also retains a power to order the return of a settled child. The Family Court Judge exercised that power in this case.

[119] On an appeal by the mother, who had brought the children to New Zealand from Australia, the High Court upheld the decision of the Family Court.[91] The mother was then given leave to appeal to the Court of Appeal on the question of whether the Family Court had correctly exercised its discretion to order the return of the children under s 106(1)(a) of the 2004 Act. The Court of Appeal held that in circumstances where the children had become settled in New Zealand and where the

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[91] *HJ v Secretary for Justice* (High Court, Wellington, CIV 2004-441-263, 15 June 2004, Ellen France J).

mother had not set out to cause the delay in the application made on behalf of the father for their return, there was no basis for the Family Court to exercise its power to order return. The mother's appeal was allowed and the order made in the Family Court for the return of the children was quashed.[92]

[120] This Court gave the New Zealand Central Authority for the Hague Convention leave to appeal on behalf of the father, who is resident in Australia, on the question of whether the Court of Appeal was right in concluding that the Family Court Judge had been in error in exercising the Court's power to order the return of the children. The argument advanced on the father's behalf by Mr Pidgeon QC was in essence that the Family Court Judge had correctly decided that, in light of the mother's conduct in removing the children to New Zealand without the father's permission, or disclosing thereafter what she had done and where the children were, it would be an affront to the integrity of the Hague Convention to do other than order their return.

The Hague Convention on the Civil Aspects of International Child Abduction

[121] The Hague Convention has been described as a "groundbreaking" instrument, providing a "mechanism for the summary return of wrongfully removed and retained children and … establishing channels of co-operation between contracting States to facilitate and expedite return applications".[93] The main object of the Convention is to ensure the prompt return of children wrongfully removed to or retained in any Contracting State.[94] A removal will be "wrongful" where it is "in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone…".[95] "Wrongful" thus means that a removal is contrary to the applicable custody law, and takes no account of particular reasons for the abduction, such as domestic violence. The rights of custody with which the Convention is concerned are defined to include rights to the care of the child and to determine the child's

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92 *HJ v Secretary for Justice* [2006] NZFLR 1005 (William Young P, Glazebrook and Panckhurst JJ).

93 Beaumont and McEleavy, *The Hague Convention on International Child Abduction* (1999), ix.

94 Article 1(a).

95 Article 3.

place of residence.[96] These rights may of course be enjoyed by a parent who does not have custody of the child.[97]

[122] The further object of the Convention is to ensure mutual respect by Contracting States for rights of custody and access under each others' laws.[98] To these ends, art 12 of the Convention, so far as presently relevant, provides:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

[123] The first paragraph of art 12 is the core provision of the Convention, which reflects both of its stated objects. The scheme for securing prompt return is to require Contracting States to provide a process which will result in the return of a wrongfully removed child "forthwith", whenever a complying application is made during a period of less than one year following the wrongful removal and none of the defined grounds for refusal to order return are established.[99] Overall, the scheme of the Convention assumes that it is in the interests of children generally for issues of their welfare to be determined in the courts of the country in which they are habitually resident. This is so notwithstanding that for particular reasons it may not be in the interests of the individual children for this to be the situation.[100] The Convention does not permit a domestic court to exercise any jurisdiction it might have in respect of the merits of the underlying custody dispute.[101] It attempts, so far as possible, to reverse "the ill effects of the abduction … by restoring the status quo

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96 Dicey Morris and Collins, *The Conflict of Laws* (14th ed, 2006), para [19-098].

97 *Chief Executive of the Department for Courts v Phelps* [2000] 1 NZLR 168 at para [20] (CA).

98 Article 1(b).

99 The grounds for refusal are specified in art 13 which is incorporated in s 106(1)(b) to (e) of the 2004 Act.

100 Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four* (1999) International Journal of Law, Policy and the Family 191, p 195.

101 Schuz, *The Hague Child Abduction Convention: Family Law and Private International Law* (1995) 44 International and Comparative Law Quarterly 771, p 780.

before the abduction without any investigation into the merits of the situation".[102] The Convention accordingly deals solely with the appropriate forum for determination of the merits.

[124] Those framing the Convention recognised, however, that if no steps were taken following the wrongful removal of a child to a new country, eventually a point would be reached when the return of the child to the environment from which he or she was taken might not achieve the results they were seeking. Indeed the return might well cause further disruption and distress to the child that accentuated the harm caused by the original wrongful relocation.[103] Some more flexibility would then be required in relation to assessment of the needs of individual children.

[125] As a result there was a discussion during the Convention concerning the period of time following a wrongful removal that was likely to lead to a significant degree of integration of a child in the new country. It proved too difficult, however, to specify principles. An arbitrary time limit was accordingly decided on within which Convention procedures should be invoked if the policy of obligatory prompt return, subject only to art 13 exceptions, was to apply. Initially it was to be six months from removal, where the location of the child was known, and otherwise 12 months. Ultimately a single time limit of 12 months was preferred.[104]

[126] The second paragraph of art 12 was then included in the draft Convention to cover what would happen if an application for return was made after the 12 month period had elapsed. This paragraph, generally referred to as "art 12(2)", provides that the obligation on the Contracting State to order return of the child continues to apply, unless it is established that the child has now become settled in its new environment. This additional ground calls for an assessment of whether a wrongfully removed child has become integrated into his or her new environment and is a different basis for refusal from the narrowly framed grounds which might be raised under art 13 if a timely application for return had been made.

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102 Schuz, p 775.

103 Beaumont and McEleavy, p 203.

104 Beaumont and McEleavy, p 203 and Lowe, Everall and Nicholls *International Movement of Children: Law Practice and Procedure* (2004), para [17.7].

[127] Although the obligation to return a wrongfully removed child continues in force after 12 months has elapsed, there is no longer a duty under the Convention to return the child "forthwith". The absence of any stipulation of immediacy in art 12(2) confirms the acceptance by the Convention of the need for more intensive judicial investigation of the circumstances in order to establish whether the settlement ground is made out.[105] Thereafter, once the fact of settlement has been established, there is no longer an obligation under the Convention to return the child. Return becomes a matter for the discretion of the receiving State.

[128] As the Chairman of the Drafting Commission for the Hague Convention has pointed out, art 12(2):[106]

> does not sit easily with the other provisions which, being designed to deal essentially with the status quo after a recent abduction, give considerable advantages to the applicant.

In contrast, art 12(2) is concerned with the return of a child who has spent a substantial period of time away from the environment from which he or she was removed. Later I shall consider the significance of the particular nature of the settlement ground for refusing an order for return to the exercise of the court's residual power to order that a child be returned, even if this ground has been established.

Incorporation of the Convention

[129] The current legislation incorporating the Convention into New Zealand statute law is the Care of Children Act 2004.[107] Section 105(1) sets out the circumstances in which an application may be made for the return of a child who has been wrongfully removed to New Zealand. If an application meets the formal requirements of that section then, under s 105(2), the Family Court is obliged to

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105 This is supported by the observation in para [109] of the Explanatory Report concerning art 12(2) that "proof … of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph".

106 Anton, *The Hague Convention on International Child Abduction* (1981) 30 ICLQ 537, p 549.

107 The relevant current legislative provisions are identical to those in the Guardianship Amendment Act 1991 which were applied in the Family Court. For convenience I refer to the current legislative provisions.

make an order for prompt return to the State of habitual residence of the child, subject only to s 106.

[130] Section 106(1) of the 2004 Act sets out the specific grounds which, if established, allow the Family Court to refuse to make an order for return. In the present case the s 106 grounds which were raised unsuccessfully by the mother in the Family Court were that the father was not actually exercising rights in respect of the children at the time of their removal, that the father had acquiesced in the removal of the children, and that there was a grave risk that the children's return would expose the children to physical or psychological harm or would otherwise place them in an intolerable situation.[108] The final ground raised by the mother for refusal of an order for return, and the sole ground at issue in this appeal, was under s 106(1)(a) of the Act, reflecting art 12(2) of the Convention. So far as it is relevant to this ground s 106(1) provides:

> **106 Grounds for refusal of order for return of child**
>
> (1) If an application under section 105(1) is made to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under section 104(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court—
>
> (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment.

[131] Overall it must always be borne in mind that, in cases in which an application for return is made in accordance with the Convention, the judicial task is to decide the appropriate forum for determination of the child's interests, rather than to undertake a thorough investigation of those interests.

Background

[132] The mother took the children with her from Australia to New Zealand in February 2002. From that time until April 2004 the children remained in New Zealand, living in a house in Havelock North which the mother said she had

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[108] Grounds specified in art 13 of the Convention which are specified in s 106(1)(b) and s 106(1)(c) of the 2004 Act.

purchased to provide the children with a secure environment. Even accepting that the hearing was conducted without cross-examination, there was extensive affidavit evidence from the mother, supported by others who had regular contact with her and the children, concerning their physical establishment in the local community and the apparent stability of their position in relation to their schooling, friends, activities and social opportunities.

[133] The mother made no attempt to inform the father that she had taken the children to New Zealand. In fairness, however, it must immediately be said that she had reasons for what she did. While I am conscious of the need to be cautious, in the absence of any opportunity for cross-examination, of the detail of her description of the father's previous conduct, it is plainly established from official records that she was the victim of domestic violence during their relationship. This factor clearly contributed to her decision to leave Australia, taking the children, and thereafter not to take any steps to cause the father to be informed of their whereabouts.

[134] There is nothing in the father's description of his difficulties in locating the mother and children to indicate that while she was in New Zealand the mother took any steps to live in hiding. She did not, for example, set up any impediments to discovery of her whereabouts by government officials. Had the father thought to look in New Zealand earlier, there seems little doubt that he would have been able to locate her. It cannot be said, in other words, that the mother and the children led a furtive existence in New Zealand, such that the fear of discovery would be disruptive of what was otherwise over time becoming a settled existence.

[135] The Family Court found that the children in this case had become settled in their new environment, holding that, since their arrival in New Zealand over two years earlier, they had become established in the New Zealand community and environment in which they were secure and stable. Judge von Dadelszen accepted the mother's evidence that the children were much more settled than they had been in Australia, where in the months prior to their removal she and the children had been moving from home to home and experiencing a difficult time, largely as a result of the father's behaviour. The impact of their move to New Zealand cannot in all the circumstances be said to have resulted in psychological or emotional pressures

that might have impeded their settlement in the New Zealand environment. Although the question is not in issue in the appeal, there was a substantial amount of evidence to support the Judge's finding on settlement and it is clear that it was correct.

The shifting policy of the Hague Convention

[136] International opinion differs on whether art 18 of the Hague Convention confers a power to refuse to return a child once the settlement ground for refusal has been established.[109] In New Zealand this question has been resolved by Parliament, which, in what is now s 106(1) of the 2004 Act, has used permissive language to confer a power on the Family Court to order the return of a child even if any grounds for refusal are made out, including the settlement ground.[110] As is the case with art 13 of the Convention, Parliament has not stipulated any mandatory or permissive considerations according to which the Family Court is to exercise the discretion. The legislation is nonetheless designed to give effect to New Zealand's obligations under the Convention. The starting point, in considering the basis on which the power to return is exercised, is that the legislative purpose is that the power to return a child in circumstances covered by s 106(1) is intended to be exercised in the context of the Convention, having regard in particular to what would give effect to the Convention's purposes in relation to this provision.[111]

[137] For the reasons indicated, the principal objects of the Convention clearly have much less relevance to decisions on whether a wrongfully removed child should be returned once 12 months have passed. Instead, current surrounding circumstances, including ascertaining and meeting the child's best interests, become

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109 The difference has arisen in part because the language of art 13 makes it plain that, on the establishment of one of the grounds for refusal, the requested State "is not bound" to return the child, whereas art 12(2), read on its own, does not explicitly state that the receiving State may still order return in its discretion. See the discussion in Lowe, Everall and Nicholls, paras [17.30] – [17.33].

110 The statutory approach is consistent with the view taken of art 18 of the Hague Convention in the Explanatory Report of Elisa Pérez-Vera at para [112]. Article 18 provides: "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

111 *Clarke v Carson* [1996] 1 NZLR 349 at p 351 (HC); *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 at pp 137 – 139 (CA).

important. The integration of the child in his or her new community is a critical component of those circumstances.

[138] I do not, however, accept that these become the overriding consideration in the exercise of powers under the Convention. The general objects still have relevance to the exercise of the discretion. Nor do I consider that the use of the word "limit" in s 4(7) of the 2004 Act causes the paramountcy principle to apply to the exercise of the discretion. I find no warrant in the international jurisprudence for adopting that approach. I prefer the view that once settlement has been established, the judicial authority exercises the discretion with a blank slate, taking account of all the relevant circumstances and considerations, in light of the shifting policy of the Convention.

The present case

[139] The policy of the Convention once the settlement ground has been established is a factor pointing strongly against the exercise of what is a residual discretion in the context of s 106(1)(a) to return the children. On the other hand, the conduct of the abducting parent may amount to a special circumstance which makes the general objects of the Convention an important consideration in deciding whether the children should, as the Family Court decided, be returned.

[140] The mother's wrongful conduct was unilaterally to take the children to New Zealand, an action which was compounded by her failure to inform the father she had done so or, subsequently, where they were. As mentioned, however, this was not a case in which the abducting parent was trying to put off the time of discovery of their whereabouts in order that an application for return would not be made until over 12 months had elapsed. Having regard also to the factor of domestic violence which influenced her decision to move to New Zealand, while the wrongfulness of the removal of the children is not to be excused, her culpability is not at the serious end of the range. It was not such as to require the Family Court to consider whether failure to return the children would undermine the policy of the Convention and in that sense threaten its integrity. It was not, in my view, open for the Judge to find that it did.

[141] The father says he did not learn that the children and their mother were in New Zealand until the middle of 2003. There is no reason to disbelieve his statement. It is clear that a number of factors contributed to the delay in the father becoming aware of the removal of the children from Australia, the main one being that he was not told of it. A further factor was the father's decision to remove himself for an indefinite period from his children's lives. This was conveyed in a letter from the father to the mother dated 15 November 2001 in which he said that he would "see them again one day" but did not know "when I will be back". While he gave a forwarding address, these actions led to a loss of contact and clearly had a considerable impact on the effectiveness of his subsequent search. He was aware that his wife had been moving where she lived within Australia around the time that he last saw her and this appears to have reinforced his impression that she was somewhere in that country. Other factors may have contributed to the father's delay in applying for return, such as the legal advice he received and the suspension at one stage of his legal aid, but it would be speculative to try and assess them. Overall, I would not attribute any blame to the father for the fact that more than 12 months passed before he applied for return of the children, although it must be said that his own actions, including choosing to distance himself from them for a period, were a reason for the delay.

[142] I do not consider that the purposes of the Hague Convention are well served by domestic courts comparing the relative responsibility of parents for delay when an application for return is made under the settlement ground in circumstances where the court is satisfied that there was no attempt to manipulate delay to enable this ground to be raised. Once the conclusion has been reached that this is not one of those cases which involve significant culpability of the abducting parent, the exercise of the residual discretion not to order return under s 106(1)(a) will usually become straightforward.

[143] In this case there is no dispute that the mother is to have custody of the children. The issues to be decided will concern access by the father and where the mother and children are to reside. It has now been decided that the children were settled in New Zealand by the time of the Family Court hearing. That had come about over the lengthy period which ended at the time of the hearing before the

Family Court. Together these circumstances point to New Zealand as being the more appropriate jurisdiction to determine the outstanding questions concerning their welfare. To require that they return to Australia for those matters to be resolved would be disruptive of the children's settled state without serving the objects of the Convention in relation to children whom there is no longer any obligation to return.

[144] The reality in this case is that by the time of the Family Court hearing it was no longer possible for the Court to return the children to their situation prior to their wrongful removal. Furthermore, the Convention requires that the interests of the children weigh heavily in the exercise of the power whether to order return. As earlier indicated the Convention's object of early return carries only limited force in the exercise of the discretion at this point.

[145] For the reasons given, the contributions of the mother to the delay that has led to settlement of the children, through their wrongful removal and her failure to acquaint the father with their whereabouts, are not of such a kind that would indicate an intention to evade the Convention's procedures. The circumstances do not amount to the type of concealment of the whereabouts of the children for a lengthy period which would warrant invoking the integrity of the Convention. On balance I do not consider that the circumstances of the present case favour the discretion being exercised to return the children. The policy of the Convention at this point is best served by allowing the children to remain here and to have all questions concerning their future welfare decided by New Zealand courts.

[146] This assessment does not involve any infringement of New Zealand's obligations under art 1(b) of the Convention to respect the authorities of Australia whose courts, I believe, would have taken a similar approach.[112] It is, rather, a straightforward application of the policy of the Convention at the stage when it has been established in a case covered by art 12(2) that the children who were wrongfully removed are now settled.

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[112] As indicated in the discussion by the majority of decisions of the Family Court of Australia in paras [64] and [65] above.

[147] For these reasons I would dismiss the appeal.

Solicitors:
Parnell Law, Auckland for Respondent