**NOTE: ANY PUBLICATION OF A REPORT OF THESE PROCEEDINGS MUST COMPLY WITH S 139 OF THE CARE OF CHILDREN ACT 2004**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 42/2007**
**[2007] NZSC 56**

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| BETWEEN | KMA<br>Applicant |
| AND | THE SECRETARY FOR JUSTICE<br>Respondent |

Court: Elias CJ, McGrath and Anderson JJ

Counsel: A Hart for Applicant
G S Collin for Respondent

Judgment: 20 July 2007

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B Costs are reserved.**

[1] The applicant applies for leave to appeal to this Court against orders made for the return of two of her children to Australia under the provisions of subpart 4 of Part 2 of the Care of Children Act 2004. The orders concerned were originally made by Judge Strettell in the Family Court. They were upheld on appeal to the High Court and the Court of Appeal has refused an application for leave to appeal against that judgment. The Family Court has, since the Court of Appeal's judgment, rejected a further application for a stay and directed that a warrant for the return of the children now be issued.

[2] The amended application seeks leave to appeal to this Court against each of these judgments. We have considered the parties' written submissions and do not consider it necessary to hold an oral hearing. This Court has no jurisdiction to give

leave to appeal against a decision of the Family Court, there being no provision in any statute which confers such jurisdiction. Nor does this Court have jurisdiction to give leave to appeal against the judgment of the Court of Appeal. Section 7(b) of the Supreme Court Act precludes any appeal against a decision of that Court involving a refusal to give leave to appeal. In those two respects the application must be dismissed. That leaves for consideration the application for leave to appeal directly to this Court against the decision of the High Court.

[3] Section 14 requires that this Court must not give leave to bring a direct appeal against a decision of a Court other than the Court of Appeal unless satisfied that there are exceptional circumstances to justify taking the appeal directly. Mr Collin, in his submissions on behalf of the respondent Secretary for Justice, submits that where, as in this case, leave to appeal has been refused by the Court of Appeal the policy underlying the prohibition under s 7(b) should preclude the Court from permitting a direct appeal under s 14. Acceptance of that submission, as Mr Collin recognised, would require the Court to overrule *Burke v Western Bay of Plenty District Council*.[1] We are not prepared to revisit that decision and will apply the approach then taken by the Court which it expressed as follows:[2]

> [W]hen an appeal from the Court of Appeal to this Court is precluded by s 7(b), it cannot be right, save perhaps in very exceptional circumstances, to allow that embargo to be circumvented by a direct appeal from the High Court. While there is no express statutory provision preventing an appeal directly from the High Court to this Court following a refusal of leave to appeal to the Court of Appeal, the policy behind the embargo in s 7(b) suggests that the circumstances in which such a direct appeal could be brought would have to be extremely compelling.

[4] This case has no special features that would meet this high threshold. Three grounds are put forward on behalf of the applicant in support of counsel's proposition that a substantial miscarriage of justice may occur unless leave to appeal is given. The first, which involves the defence provided for in s 106(1)(c)(ii) of the Care of Children Act, is that there was a grave risk that the children would be placed

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1 [2005] NZSC 46.
2 At para [4].

in an intolerable situation if required to return to Australia because they would be without adequate funds or accommodation. In the High Court Panckhurst J accepted that there were uncertainties in relation to the applicant's ability to return to Australia with the children, and the living circumstances she would face if she was there, but the Judge was not satisfied that the statutory test of a grave risk was satisfied. The applicant invites us to revisit what was essentially a factual judgment by undertaking our own review of the evidence. No issue of principle arises on the material we have been asked to consider. We have considered everything the applicant's counsel has put before us and are satisfied that the *Burke* test of extremely compelling circumstances is not made out.

[5] The position is the same in respect of the second proposed ground of appeal, which invokes the defence under s 106(1)(b)(ii) of the 2004 Act, that the father of the children consented to or acquiesced in the applicant bringing them to New Zealand. In particular no point of principle arises from the way the Judge dealt with the elapse of time before the Hague Convention application was initiated.

[6] The third ground concerns the refusal of an interim stay order. In the absence of any sound basis for granting leave to bring an appeal, there is no basis for continuing the stay.

[7] The application for leave to appeal is dismissed and the stay order made on 3 July 2007 now ceases to have effect. The respondent seeks costs and in the normal course would be entitled to an award. The applicant may, however, file any submissions on that question within 14 days to which the respondent may respond within the same period.

Solicitors:
Parnell Law, Auckland for Applicant