IN THE SUPREME COURT OF NEW ZEALAND

SC 37/2010
[2010] NZSC 112

	BETWEEN	K Appellant
	AND	B Respondent

Hearing: 12 August 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: C R Pidgeon QC and R S Pidgeon for Appellant
V A Crawshaw and D J Taylor for Respondent

Judgment: 8 September 2010

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The case may be cited, as in the Court of Appeal, as *Kacem v Bashir*.

REASONS

Para No

ELIAS CJ

[1] The appeal concerns a dispute between parents of two young girls about whether their mother should have their care and be permitted to live in Australia when the father of the children lives in New Zealand and may have difficulty in visiting Australia because of his immigration status there. In holding that the children should continue to live in New Zealand, under shared parenting orders made in the Family Court,[1] the Court of Appeal[2] correctly addressed the welfare and best interests of the children in the manner required by the Care of Children Act 2004.[3] Its determination that their interests would be better served by continuing the shared parenting arrangements between the parents and by their continuing to live in New Zealand was not tainted by error of law and was not shown on appeal to be wrong. I agree with other members of the Court that the appeal must be dismissed. Whereas Blanchard, Tipping and McGrath JJ reach that conclusion on the basis that the Court of Appeal's error in interpretation of s 5 of the Act was not material, I consider that it did not misinterpret s 5 or misapply the Act.

No misinterpretation of s 5

[2] Section 5 of the Care of Children Act 2004 provides:

> **5 Principles relevant to child's welfare and best interests**
>
> The principles referred to in section 4(5)(b) are as follows:
>
> (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing:
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> (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whānau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):
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> (c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of

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1 *B v K* FC Auckland FAM-2006-004-1761, 5 September 2008 at [78].

2 *Bashir v Kacem* [2010] NZCA 96 per Glazebrook, O'Regan and Arnold JJ.

3 See, in particular, ss 3(1)(a), 4 and 5 of the Act.

> providing day-to-day care for, or entitled to have contact with, the child:
>
> (d) relationships between the child and members of his or her family, family group, whānau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:
>
> (e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whānau, hapu, or iwi, or by other persons):
>
> (f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[3] The s 5 principles are all directed at the paramount consideration of the welfare and best interests of the child.[4] Section 5 was introduced into the Care of Children Bill following recommendation of the Justice and Electoral Committee of the House.[5] It recommended "guiding principles" to fill a perceived gap in the Bill as introduced, which had given "little indication of the *context* within which the principle of the best interests of the child should be assessed".[6] The Committee acknowledged that the principles drew on a number of the articles of the United Nations Convention on the Rights of the Child. It said of the recommended principles:[7]

> The order in which the principles appear does not affect the weight to be given to them.
>
> The guiding principles encourage the child's parents and guardians to agree to their own arrangements for the child's care, development, and upbringing, wherever possible. We consider the child's parents and guardians should have the primary responsibility in these areas, and that efforts should be made to come to arrangements about the care of children within those families themselves. The principles are also structured in recognition of the fact that an integral part of the context of a child's best interests is the child's family and culture, which may include members of the child's wider family.

[4] The context provided by s 5 makes it clear that family relationships, especially those with parents, are relevant and must be taken into account in

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4 Care of Children Act 2004, s 4(1) and (5)(b).
5 Care of Children Bill 2003 (54-2), cl 4A.
6 Care of Children Bill 2003 (54-2) (select committee report) at 1–2 (emphasis added).
7 Ibid at 3.

assessing the welfare and best interests of the child.[8] Continuity and stability are stressed, both in care and upbringing and in family relationships. These principles apply also in cases where the care of a child is not undertaken by a parent: s 5(b) looks to continuity in arrangements for the child's care, development, and upbringing *and* recognises that the child's relationships with family "should be stable and ongoing". It is in respect of this recognition of stable and ongoing family relationships that the subsection indicates that, "in particular, the child should have continuing relationships with both of his or her parents".

[5] The s 5 principles are important legislative reminders to decision-makers (parents, guardians, and courts) of the context in which the paramount consideration of the welfare and best interests of the particular child must be considered. The principles identified are not entirely distinct. Some stress different aspects of themes to be found in other principles and in the other provisions of the Act. Within s 5 there are expressions of emphasis as well as identification of matters to be considered.

[6] In this Court counsel for the mother argued that the Court of Appeal had misinterpreted s 5 of the Care of Children Act by ascribing different weighting to the various principles the section identifies as mandatory considerations, if relevant, in the assessment of the child's welfare and best interests. The submission is based upon the emphasised passages in [50]–[52] of the decision of the Court of Appeal:

> [50] Section 4(5)(b) provides that, in determining what best serves a child's welfare and best interests, a court must take into account any of the s 5 principles "that are relevant to the welfare and best interests of the particular child in his or her particular circumstances". This wording indicates that a court should consider each of the s 5 principles to determine whether it is relevant and, having identified those principles that are relevant, should take account of them in determining the best interests of the child. Because the analysis must be undertaken in the context of the circumstances of the particular case, the court must evaluate how the relevant principles should be taken into account – the assessment is a highly individualised one which cannot be undertaken in a formulaic way.
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> [51] It is sometimes said that the s 5 principles do not create any presumption and that no one factor has any greater weight than any other. We consider that such statements require some qualification to reflect the fact that first, the wording of s 5(e) makes it clear that protection of a child's

[8] Care of Children Act 2004, s 4(5)(b).

> safety is mandatory and second, the wording of s 5(b) gives particular emphasis to the maintenance of continuing relationships with both parents. *As we see it, this means that there is some priority or weighting as between the various principles.*
>
> [52] What s 5 does, then, is provide a structure or framework for consideration of what best serves a child's welfare and best interests, *with a partial indication of weighting as between principles*. While the principles are not exhaustive, s 5 should assist in achieving some degree of consistency and transparency in decision-making, as well as promoting informed decision-making. But that cannot disguise the fact that the assessment is an evaluative one, involving the identification and weighing of all factors (whether referred to in s 5 or not) relevant to the particular case. These include, of course, the views of the affected child. (emphasis added and footnotes omitted)

[7] I do not think the Court of Appeal was in error in pointing to the emphasis in s 5(b) on the relationship of the child to both parents. Even if it might have been more accurate in [51] of its judgment for the Court to have acknowledged that the internal emphasis in that subsection is in relation to wider family, s 5(b) does express the value to the child of the parental relationship, which is also reflected in s 5(a) (primary responsibility of parents and guardians for the child's care, development, and upbringing), s 5(c) (facilitation of co-operation between parents and guardians and those exercising day-to-day care), s 5(d) (preserving and strengthening family relationships), and arguably s 5(f) (if the parental connection is seen as important to the child's identity). The importance of the child-parent relationship is also to be seen throughout the Act.[9] Section 5(e) imposes a check on the general theme contained in s 5 of the value to the child of family contact by insisting (both as a stand-alone value and in relation to family members specifically) that "the child's safety must be protected and, in particular, he or she must be protected from all forms of violence".

[8] I find it difficult to understand the criticism made of the Court of Appeal reasoning. Paragraphs [50]–[52], read in full, do not suggest that the principle in s 5(b) which recognises the importance of the parental relationship is more important than other principles in s 5. It seems unlikely that [51] was intended to contradict the general proposition in [50] that the s 5 principles are not ranked and that no one principle has greater weight than another. There is certainly no basis in the Act for a

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[9] See, for example, ss 3(2)(a), 16 and 17 of the Act.

ranking of the principles, although s 5(e) *must* be fulfilled and so may displace other principles in a particular context, as the Court of Appeal rightly recognised. Apart from the question of safety, the Court's view that it was necessary to identify and weigh all principles in a "highly individualised" assessment does not suggest priority between the identified principles or error in approach.

[9] In a case where one parent proposes to take a child to live at a distance from the other parent (or other family members of importance to the child[10]), the statutory context provided by s 5 in practice will require consideration of whether the relationship with the other parent (or other family) will be disrupted or adversely affected. If so, and depending on the degree of disruption or adverse effect, it is likely that there will have to be other factors which could permit the conclusion that, notwithstanding the disruption of the relationship, the welfare and best interests of the child favour the change. Similar assessment will be required in cases where a change will disrupt "continuity in arrangements for the child's care, development, and upbringing" (s 5(b)), inhibit co-operation among and between the parents and guardians (s 5(c)), or strain relationships between the child and other family members (s 5(d)). Change that would disrupt settled arrangements and important relationships prompts justification by other considerations if the paramount consideration of the welfare and best interests of the child is to be fulfilled.

No error in determination

[10] It is clear that the Court of Appeal came to an intensely contextual assessment (after careful consideration of all relevant principles) that the best interests of the children were served by not disrupting the shared parenting arrangements and the contact between the father and the children. The shared parenting of the children had been in place for almost 38 months at the time of the hearing in the Court of Appeal. Before that, the elder daughter had been cared for by the father and his wife for 27 months (a period when the mother was living in

[10] For example, in the factual circumstances of this case, such family members include three half-siblings of the girls on their mother's side and one half-brother on their father's side.

Australia with the younger daughter, who had been born in Australia after the estrangement between the parents). Any change in the shared parenting arrangements in force had to be assessed against the s 5(b) principle, which upholds "continuity in arrangements for the child's care, development, and upbringing" and favours, "in particular", continuity of parental relationships. The elder daughter's strong links to her paternal family, and the relationship the younger daughter was developing with that family, were also properly weighed by the Court of Appeal as relevant under s 5(b) in coming to its conclusion that the interests of the children were best served by their remaining in New Zealand. The Court also recognised that the shared parenting regime, into which the girls had "settled well", offered the greatest prospect of fulfilling the principles contained in s 5(a) and (c).[11]

[11] I am unable to see any error in approach in the careful way in which the Court of Appeal considered the application of the s 5 principles at [62]–[63] (which are set out in full in the reasons of Tipping J at [38] and [41]). The Court of Appeal considered that the countervailing suggested benefits – the avoidance of conflict between the parents and the greater support the mother would have in Australia – did not overcome the disruption in the relationship with the father. It assessed the conflict between the parents as one that could be expected over time to reduce "particularly once the present drawn out proceedings are resolved" and given expert evidence that the parents were making efforts to minimise their conflict for the sake of the children.[12] Although there was potential for the mother's parenting to be affected by her relative isolation in New Zealand, particularly without the family support she could call on in Australia, the Court considered that the mother would be able to overcome any personal difficulties to facilitate her daughters' best interests.[13] The regular contact with her family in Australia could be expected to continue and would provide support. The Court also acknowledged the children's views, as s 6 of the Act requires, but ultimately considered that those views were outweighed by other factors.[14] On balance, the interests of the children were better served by their

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11 At [62](d).
12 At [62](e).
13 At [62](f).
14 At [64].

remaining in New Zealand.[15] That well substantiated conclusion is one which there is no occasion to disturb on appeal to this Court.

BLANCHARD, TIPPING AND McGRATH JJ

(Given by Tipping J)

Introduction

[12] This appeal arises in what is customarily called a relocation case. More specifically, it concerns the approach that should be taken to ss 4 and 5 of the Care of Children Act 2004 in a case involving an application by one parent (the mother) to relocate two children from Auckland to Sydney against the wishes of the other parent (the father). The proposed relocation was refused by the Family Court,[16] allowed by the High Court,[17] and then refused again by the Court of Appeal.[18] The mother's appeal to this Court raises the issue whether in its judgment the Court of Appeal erred in holding there was some priority or weighting in favour of principles (b) and (e) set out in s 5 of the Act. If the Court of Appeal did err in that respect the further question arises whether that error was material to the Court's determination of the appeal.

The background in outline

[13] The appellant is the mother of two girls now aged 7½ and nearly 6, whose welfare and best interests are at the heart of this case. The respondent is their father. He is a Muslim originally from Algeria. He married his wife, who is not the mother of the children, in 1994. They have one child of their own born in 1995. They were, however, unable to have more children. In 1998 the father and his wife and child

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15 At [63].

16 *B v K* FC Auckland FAM-2006-004-1761, 5 September 2008. The Judge ordered that the shared parenting regime was to be subject to a condition that the children live in the Auckland district.

17 *K v B* (2009) 27 FRNZ 417 (HC).

18 *Bashir v Kacem* [2010] NZCA 96.

fled from Algeria to Australia where they were interned in a detention centre for some years. The mother of the two children is Lebanese and also a Muslim. She emigrated to Australia with her family when she was about 12 years old. Her parents, four sisters and five brothers all live in Sydney. She was married in Australia and had three children of that marriage. She met the father in 2000 or 2001 when she was visiting the detention centre where he and his wife and child were living. The mother separated from her husband in 2001.

[14] Later that same year the father and his wife and child escaped from the detention centre with the help of the mother's family. They came to New Zealand in 2002. They used false passports and were ultimately granted refugee status. As they were unable to have further children, the father and his wife had invited the mother to become the father's "second wife". This was to enable the father to have more children. He would also become a father figure for the mother's existing three children.

[15] The father and mother underwent an Islamic marriage ceremony and entered into a marriage contract. The mother followed the father to New Zealand. Their first daughter (X) was born in February 2003. Their second daughter (Y) was born in September 2004. But in the meantime the parties had separated in January 2004, with the mother returning to Australia in March 2004 while pregnant with the second daughter. The three children of her first union went back to Australia with her. But her one-year-old daughter X did not, as a passport could not be obtained for her. X remained in New Zealand in the care of the father and her stepmother (his wife). In January 2005 the mother and father underwent an Islamic divorce. The mother returned to New Zealand for a month in July 2004, prior to the birth of Y, and for a week in June 2005 after the birth of Y in Australia, so that she could see her daughter X. The mother came back to New Zealand in July 2006 for the purpose of pursuing the relocation proceedings and has lived in New Zealand with X and Y since then. She was accompanied by the youngest of her earlier three children, now a teenage boy.

[16] It is not surprising, in the light of these most unusual and difficult circumstances, that the resolution of the mother's application to relocate with X and Y to Sydney has given rise to differences of judicial opinion.

The key legislative provisions

[17] Sections 4 and 5 of the Act are in the following terms:[19]

> 4 **Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of the child must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
>
> (2) The welfare and best interests of the particular child in his or her particular circumstances must be considered.
>
> (3) 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.
>
> (4) For the purposes of this section, and regardless of a child's age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person's sex, best serve the welfare and best interests of the child.
>
> (5) In determining what best serves the child's welfare and best interests, a court or a person must take into account—
>
> (a) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
>
> (b) any of the principles specified in section 5 that are relevant to the welfare and best interests of the particular child in his or her particular circumstances.
>
> (6) Subsection (5) does not limit section 6 (child's views) or prevent the court or person from taking into account other matters relevant to the child's welfare and best interests.
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> (7) This section does not limit section 83 or subpart 4 of Part 2.

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[19] These sections are consistent with arts 9.3 and 18.1 of United Nations Convention on the Rights of the Child (UNCROC) but nothing in the Convention assists in determining the present issue.

5 Principles relevant to child's welfare and best interests

The principles referred to in section 4(5)(b) are as follows:

(a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing:

(b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whānau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):

(c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:

(d) relationships between the child and members of his or her family, family group, whānau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:

(e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whānau, hapu, or iwi, or by other persons):

(f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[18] The relocation issue raised in this case clearly comes within the reach of s 4(1). Hence the court must regard the welfare and best interests of the two children involved as the first and paramount consideration. By its references to "particular child" and "particular circumstances", s 4(2) underlines the case-specific nature of the inquiry. That inquiry must focus on the particular circumstances of the individual case with no presumption of what the welfare and best interests of the child may require or what influence the s 5 principles may have on that question. Section 4(5) makes it mandatory for the court to take into account, in a case-specific way, those of the principles specified in s 5 that are relevant. Section 4(5) also emphasises again that the focus must be on the particular child or children and his, her or their particular circumstances. Section 4(6) makes it clear that the s 5 principles are not exhaustive of the matters that may be relevant to the welfare and

best interests of the child or children involved. Nor does s 5 limit s 6, which is concerned with the child's views on the matters at issue.

[19] It can therefore be seen quite clearly that the ultimate objective is to determine what outcome will best serve the welfare and best interests of the particular child or children in his, her or their particular circumstances. In making that determination the s 5 principles must each be examined to see if they are relevant, and if they are, must be taken into account along with any other relevant matters. It is self-evident that individual principles may have a greater or lesser significance in the decision-making process, depending on the circumstances of individual cases. If, for example, principle (e) (concerning the child's safety) is engaged it is likely to have decisive weight, not because of any presumptive legal weighting, but because of the crucial factual importance of protecting the safety of children when compared with the objectives at which the other principles are aimed.

[20] Principle (b) sets out the objective of having continuity in the arrangements for the child's care, development and upbringing. It is also concerned with promoting continuity in the child's relationships, to the end that they should be stable and ongoing. Various familial and other relationships are referred to, of greater or lesser breadth. By means of the bracketed words the court is, in the context of that breadth, enjoined to have regard in particular to the child's relationships with both of his or her parents. This focus on both parents is designed to give that aspect of the child's various relationships particular emphasis, no doubt on account of the special and vital part parents generally play in the wider family context.

[21] There is nothing in the language of principle (b) or in the structure of s 5 as a whole to suggest that principle (b) or any of the other principles there set out should have any presumptive weighting as against other principles referred to in the section. That could hardly be so when the principles must be considered in all the many and varied proceedings and circumstances in which the welfare and best interests of children come into issue. Relocation is only one of a number of such contexts.

[22] All the principles, save for (e), are couched in the language of "should". In principle (e) the word used is "must". As we have already indicated, principle (e), if relevant, will generally carry decisive weight in the factual assessment. That is probably why this principle is couched in terms of "must" rather than "should". "Should" signals a desirable objective, the fulfilment of which, and by what method, will depend on the presence of other desirable objectives and the facts of individual cases. "Must" signals an essential factual requirement. The ultimate point is that principle (b) cannot be read as having any presumptive precedence over the other principles, or indeed any presumptive precedence of a stand-alone kind.

[23] At the highest level of generality the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. Put in that way, it is difficult to see how any presumptive weight can properly be given to either side of those competing but necessarily abstract contentions. To do so would risk begging the very question involved in what is necessarily a fact-specific inquiry.

[24] Everything will depend on an individualised assessment of how the competing contentions should be resolved in the particular circumstances affecting the particular children. If, on an examination of the particular facts of a relocation case, it is found that the present arrangements for the children are settled and working well, that factor will obviously carry weight in the evaluative exercise. All other relevant matters must, of course, be taken into account and given appropriate weight in determining what serves the child's welfare and best interests, as s 4(5) puts it. The key point is that there is no statutory presumption or policy pointing one way or the other. All this seems to us to follow from ss 4 and 5 of the Act as a matter of conventional statutory interpretation.

[25] Courtney J put it well in the High Court in the present case:[20]

> Of course, whilst there are certain factors that occur commonly in cases of relocation, the task of identifying and weighing up the relevant factors must

[20] At [8].

> be done on a case-by-case basis, recognising the infinite variety in family circumstances.

She then added:

> That is especially so in the present case because the circumstances of this family [have] some features that are not commonly found.

The approach of the Court of Appeal in the present case

[26] The Court of Appeal gave leave to appeal from the decision of Courtney J in the High Court with particular reference to the following two questions:

> (1) The relevance of conflict between the parents in relocation decisions; and
>
> (2) The role of the principles set out in s 5 of the Care of Children Act 2004 in relocation decisions and in particular those set out in s 5(b), (c), (d) and (f).

[27] Mr Pidgeon QC, for the mother, submitted that certain statements made by the Court of Appeal at [51] and [52] of its reasons for judgment were in error. It is appropriate to set out those paragraphs in full, together with the immediately preceding [50], emphasising the passages in contention:

> [50] Section 4(5)(b) provides that, in determining what best serves a child's welfare and best interests, a court must take into account any of the s 5 principles "that are relevant to the welfare and best interests of the particular child in his or her particular circumstances". This wording indicates that a court should consider each of the s 5 principles to determine whether it is relevant and, having identified those principles that are relevant, should take account of them in determining the best interests of the child. Because the analysis must be undertaken in the context of the circumstances of the particular case, the court must evaluate how the relevant principles should be taken into account – the assessment is a highly individualised one which cannot be undertaken in a formulaic way.
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> [51] It is sometimes said that the s 5 principles do not create any presumption and that no one factor has any greater weight than any other. We consider that such statements require some qualification to reflect the fact that first, the wording of s 5(e) makes it clear that protection of a child's safety is mandatory and second, the wording of s 5(b) *gives particular emphasis* to the maintenance of continuing relationships with both parents. *As we see it, this means that there is some priority or weighting as between the various principles.*

> [52] What s 5 does, then, is provide a structure or framework for consideration of what best serves a child's welfare and best interests, *with a partial indication of weighting as between principles*. While the principles are not exhaustive, s 5 should assist in achieving some degree of consistency and transparency in decision-making, as well as promoting informed decision-making. But that cannot disguise the fact that the assessment is an evaluative one, involving the identification and weighing of all factors (whether referred to in s 5 or not) relevant to the particular case. These include, of course, the views of the affected child. (emphasis added and footnotes omitted)

[28] It follows from our earlier discussion that the related propositions that there is "some priority or weighting as between the various principles" and that s 5 contains "a partial indication of weighting as between principles" are, at least on their face, erroneous. They must be read in the light of the first sentence in [51], to which they are said to be qualifications. They therefore may appear to qualify the observation by the Court that "the s 5 principles do not create any presumption and that no one factor has any greater weight than any other". In that light the last sentence of [51] does not follow from the previous sentence; and that previous sentence does not correctly reflect the tenor of principle (b)'s reference to particular emphasis being given to the maintenance of continuing relationships with both parents. The bracketed portion of principle (b), containing as it does the words "in particular", creates internal emphasis within principle (b). It does not signal that any aspect of principle (b) has presumptive emphasis or priority as against the other lettered principles in s 5.[21]

[29] What the Court of Appeal may have been intending to say is that intrinsically principle (b) is likely to be of particular factual significance in relocation cases. But that does not mean applicants for relocation start off facing some presumption

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[21] It follows that the view expressed by the Principal Family Court Judge Peter Boshier in his article entitled "Relocation cases: an international view from the bench" (2005) 5 NZFLJ 77 cannot be supported. The Judge considered that the terms of principle (b) indicated "parents should not relocate if to do so would have a detrimental impact on the [child's] relationship with the other parent" (at 79). With respect, most relocations are likely to involve some detrimental impact on the relationship with the other parent. The suggested approach would constitute a strong presumption against relocation. This is not the right reading of principle (b).

against relocation on account of principle (b). That is a conclusion that can be and has been taken out of what the Court of Appeal said.[22] It is fair to record that Ms Crawshaw, for the father, did not seek to support any such interpretation of the Court of Appeal's remarks. She rightly accepted that there was no basis in the Act for any kind of presumptive approach to determining what outcome would best serve the interests and welfare of the children. It is significant that both before and after the problematical passages the Court of Appeal correctly emphasised the "highly individualised" nature of the inquiry and the need for "identification and weighing of all factors". These observations do not fit easily with the concepts of "some priority or weighting as between the various principles" and "a partial indication of weighting as between principles". It is not easy to see how these problematical references came to be included in the Court's reasons.

Related matters

[30] Our reasons to this point have been given with a sharp focus on the key issue raised by the appeal. It may be helpful to refer briefly to some associated matters.

(a) Appellate approach

[31] The Court of Appeal discussed the application of the decision of this Court in *Austin Nichols & Co Inc v Stichting Lodestar*[23] to the present kind of appeal. The Court correctly observed that on a general appeal of the present kind the appellate court has the responsibility of considering the merits of the case afresh. The weight it gives to the reasoning of the court or courts below is a matter for the appellate

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[22] See for example *PAH v RJR* FC Nelson FAM-2005-006-300, 5 May 2010; *Figgs v Figgs* FC New Plymouth FAM-2009-043-798, 6 May 2010; and Marilyn Freeman "Relocation and the child's best interests" (paper presented to Miller du Toit Cloete and University of Western Cape Conference, Cape Town, March 2010). It is fair, however, to record that this understandable interpretation has not been adopted universally: see *TLC v CJH* FC Dunedin FAM-2009-012-56, 13 April 2010; *MRT v AH* FC Dunedin FAM 2009-012-413, 26 July 2010, particularly at [21]; and John Caldwell "*Bashir v Kacem*" [2010] NZLJ 179, albeit the author considered that "the scales may have ever so slightly been tipped against an applicant for relocation" by the Court of Appeal's partial weighting remarks. That was against a background where the author rightly observed that "there are still to be absolutely no starting points or presumptions".

[23] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

court's assessment. We should add here that if the appellate court admits further evidence, that evidence will necessarily require de novo assessment and consideration of how it affects the correctness of the decision under appeal. The Court of Appeal was right to say[24] that Courtney J had rather overstated the effect of *Austin, Nichols* when she indicated she should approach the appeal to the High Court "uninfluenced" by the reasoning of the Family Court. The High Court was required to reach its own conclusion, but this did not imply that it should disregard the Family Court's decision. What, if any, influence the Family Court's reasoning should have was for the High Court's assessment.

[32] But, for present purposes, the important point arising from *Austin, Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment.[25] In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.[26] The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court.

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24 At [39].

25 *Austin, Nichols* at [16].

26 See *May v May* (1982) 1 NZFLR 165 (CA) at 170; and *Blackstone v Blackstone* [2008] NZCA 312, (2009) 19 PRNZ 40 at [8].

[33] The Court of Appeal was seized of a general appeal despite the need for leave to be granted to appeal to that Court from the High Court in terms of s 145(1) of the Act. Once leave was granted the Court of Appeal had power under s 145(2)[27] to rehear the whole or any part of the evidence and to receive further evidence. That power is a classic indicator of a general appeal. It is also worth pointing out, by way of example, that s 145(2) contains language which clearly indicates that the Court of Appeal, when determining whether or not to rehear evidence or to receive further evidence, is exercising a discretion. Hence any appeal from such a determination would not be a general appeal but an appeal from a discretion.

(b) Predictability and "discretion"

[34] Some of the writings to which the Court was referred seem to lament the unpredictability of decisions in relocation cases and also the width of the "discretion" given to Judges in deciding such cases. For example, Professor Mark Henaghan has written:[28]

> Winkelmann J [in *LH v PH* [2007] NZFLR 737] emphasises that because of the child's welfare and best interests being the first and paramount consideration, the inquiry is intensely fact specific with little assistance to be derived from decisions in other cases. This contention further highlights the freedom Judges have to use their discretion in the particular case at hand, rather than being tightly bound by past cases, and such freedom arguably has led to the lack of clarity and predictability in this area of law.

[35] These and other concerns identified by the Professor[29] are inherent in the exercise in which judges administering ss 4 and 5 of the Act are involved. Lack of predictability, particularly in difficult or marginal cases, is inevitable and the so-called wide discretion given to judges is the corollary of the need for

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[27] **145 Appeal to Court of Appeal**
...
(2) The Court of Appeal may, in its discretion, if it thinks that the interests of justice so require,—
(a) rehear the whole or any part of the evidence; or
(b) receive further evidence.

[28] In his article, published before the decision of the Court of Appeal in the present case, Mark Henaghan "Doing the COCAcobana – Using the Care of Children Act for your child clients" (2008) 6 NZFLJ 53 at 56.

[29] See also Pauline Tapp and Nicola Taylor "Relocation: a problem or a dilemma" (2008) 6 NZFLJ 94.

individualised attention to be given to each case. As we have seen, the court is not in fact exercising a discretion; it is making an assessment and decision based on an evaluation of the evidence. It is trite but perhaps necessary to say that judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessments which the courts must make. The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme.

(c) Policy

[36] The literature suggests that there are at least two competing schools of thought about relocation cases generally.[30] There are those who consider relocation should generally be approved, and there are those who think that generally it should not. It is not our purpose, nor would it be appropriate, to express any preference. What is clear is that if there were to be any presumptive approach to relocation cases, it is contestable what that approach should be. This is very much a policy issue for Parliament, not judges. At the moment the New Zealand legislature has not opted for any presumptive approach. That is the way cases must be approached by the courts unless and until legislative change dictates otherwise.

Materiality of error

[37] Mr Pidgeon submitted that the erroneous approach evident in [51] and [52] must have influenced the Court of Appeal's reasoning when it decided to reverse Courtney J's decision which had allowed the proposed relocation to take place. At least, counsel argued, it could not confidently be held that the Court had not been influenced by what it had said in those paragraphs. Mr Pidgeon contended that, in what was a difficult and finely balanced assessment, the presumptive approach could

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30 Ibid at 95–97.

well have tipped the scales. Ms Crawshaw contended that, when the Court dealt with the circumstances of the present case, it had clearly adopted the correct approach and had not been influenced by the way the relevant parts of [51] and [52] were expressed. To resolve this issue, and thereby determine whether the matter should be remitted for reconsideration on the correct basis, it will be necessary to examine the Court of Appeal's dispositive reasoning in some detail.

[38] After discussing certain aspects of Courtney J's approach, the Court of Appeal turned to its own evaluation of the competing considerations.[31] Reference was made to an updating report from the psychologist involved in the case, Ms Wali. This, the Court said, had been of "considerable assistance" to it in undertaking its assessment. The Court then said that, in terms of the s 5 principles, it seemed from the material before the Court:[32]

> (a) There is no basis for concern about the physical safety of the children arising from their care arrangements, whether they remain in New Zealand or go to Australia. Nor is there a concern about psychological abuse being directed at them (as opposed to any psychological effects they might suffer from observing conflict between their parents). Accordingly, there is no issue under s 5(e).
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> (b) While they have different parenting styles, there seems no doubt that both parents are capable of providing good parenting to the children. Ms Wali expressed this view, and Courtney J agreed with it: at [45]. However, as we discuss at (f) below, the mother is concerned that the quality of her parenting will be adversely affected if she is not permitted to relocate with the girls to Australia.
>
> (c) In relation to s 5(b), if the girls were to relocate to Australia there would inevitably be a significant loss of relationship with their father. They would lose the regular face to face interaction they now have with him and his family (which includes their half-brother) as a result of living with them for several days a week. The nature and quality of their interaction will be significantly reduced even if their mother facilitates regular webcam and similar communications. We accept that it seems unlikely that the father will be prepared to visit Australia given the circumstances in which he left that country. While it is true that in Australia the girls would have the benefit of closer relationships with members of the mother's extended family, it is the relationship with their parents that should be given particular emphasis in this context. According to Ms Wali, at their young age, the loss of a close relationship with their father could have a significant detrimental effect on the girls' development. Further, the girls will be able to keep up their links with their extended family in Australia through regular webcam contacts and visits, as has been occurring.

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31 At [61].
32 At [62].

(d) Ms Wali's updating evidence indicates that the girls have settled well into the shared parenting regime. The older daughter has strong links to both her maternal and paternal families. The younger daughter's relationship with her paternal family is still developing, but according to Ms Wali there are positive signs in that respect. We consider that it would be wrong in the circumstances of this case to disrupt those relationships now. This also is relevant to the s 5(b) analysis. Further, the present arrangement seems to us to offer the greatest prospect in the long term of encouraging the parents to co-operate in making arrangements for their daughters' upbringing: s 5(a) and (c).

(e) There is ongoing conflict between the parents of the girls, which has the capacity to affect the girls adversely. While that is likely to be the position whatever country the girls are in, it is likely to be worse in New Zealand, given the need for the parents to remain in regular, direct contact. However, we expect that over time that will reduce, particularly once the present drawn out proceedings are resolved. We take some comfort from the fact that Ms Wali considers that the parents are making greater efforts to shelter their daughters from exposure to their hostility for one another. Undoubtedly both parents have their daughters' best interests at heart. Accordingly we expect that they will continue in their efforts to minimise their conflict, for the sake of their children.

(f) The mother is likely to face some difficulties from having to remain permanently in New Zealand, without the immediate support of her extended family. She may well face difficulties in establishing and maintaining a support network within the local Muslim or wider community. This does, we accept, have the potential to affect her parenting skills. Further, we are conscious that this Court recognised in *D v S* (2002) that freedom of movement is an important value in a mobile community. However, the primary consideration is the best interests of the children – a parent's freedom of movement is relevant only within that overall context. We consider that the mother will be able to overcome any personal difficulties which she faces so as to facilitate her daughters' best interests. We note that to date the mother has been able to maintain regular contact with her family, and to make or receive visits reasonably regularly. We expect that that will continue. Although we acknowledge that the mother suffers real stress as a result of feeling isolated, particularly in view of her single status, regular contact with her extended family by way of webcam, visits and such like should provide her with some support. (footnote omitted)

[39] What is significant in this analysis is the absence of any suggestion, either express or implicit, that principle (b) carried any presumptive weight. The discussion in paragraph (c) is entirely neutral in that respect. The reference to the relationship of the girls with their parents as against their extended families contains a correct appreciation and application of the internal emphasis within principle (b), namely that, among the relationships referred to, particular importance should be attached to the child's relationships with his or her parents. This view is supported

by the Court's reference in paragraph (c) to particular emphasis being justified "in this context", that is, on the facts of the case.

[40] Paragraph (d) also contains an appropriate reference to the circumstances of the present case which is expressly linked to the principle (b) analysis. Hence the Court specifically reminded itself of the need to address the matters referred to in principle (b) against the particular circumstances of the case. This is the antithesis of giving principle (b) factors some presumptive weighting. No question of the children's safety arose in this case.

[41] The conclusions set out above under the individual lettered subparagraphs were then followed by the Court's "overall assessment":

> [63] In the forgoing paragraph we have addressed the facts in light of the principles contained in s 5(a), (b), (c), (d) and (e). Our overall assessment of the principles is that the factors which favour relocation (the mother's wishes and the possibility of parental conflict) are outweighed by those against it (in particular, the need for the children to have a meaningful relationship with their father and his family). We consider that the principle contained in s 5(f) is neutral – under either option, the cultural identity of the children is likely to be maintained.

[42] The approach evident in this passage shows an appropriate appreciation of the need to compare and weigh the factors raised for and against relocation in the particular case. The need for the children to have a meaningful relationship with their father and his family is identified as the principal factor against relocation. This factor is set against the factors identified as supporting relocation. There is no suggestion of any presumptive weight having been put in the scales against, or indeed for, relocation. Again, the approach adopted is clearly case-specific, and contains no presumptive influence.

[43] The Court next observed that, given the "desirability" of preserving continuity for the children and the "importance" of strong child/parent relationships, it did not consider certain risks, which it identified, justified disturbing the shared parenting arrangements that had become a good, working solution for the children.[33] The Court concluded that "[i]n these circumstances" it was in the best interests of the

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[33] At [66].

girls that they remain in New Zealand.[34] The Court's use of the word "desirability" was, in context, clearly a case-specific reference which was then balanced against the risks involved in declining to approve relocation.

[44] For these reasons we are satisfied that the Court's erroneous statements in [51] and [52] were not carried into its reasoning when the Court evaluated the facts of this particular case. We should revert here to the Court's acceptance that it seemed unlikely the father would be prepared to visit Australia "given the circumstances in which he left that country".[35] This was obviously a reference to the father's escaping from the detention centre and what might well happen to him if he returned to Australia. That very unusual and case-specific factor was naturally influential in the Court's consideration of the competing contentions. It must also be borne in mind that the Court of Appeal's evaluation was obviously and appropriately influenced by the updated psychological evidence. In the light of these considerations, were the matter to be remitted to the Court of Appeal for reconsideration, the outcome would clearly be the same.

Result

[45] We do not therefore consider it is necessary or appropriate to remit the case to the Court of Appeal, despite the erroneous statements made in [51] and [52]. The matter of relocation is, furthermore, something which can always be considered again on the basis of contemporary circumstances. The appeal should therefore be dismissed, but without any order for costs.

WILLIAM YOUNG J

[46] I agree that the appeal should be dismissed. In my opinion the required evaluative exercise was carried out by the Court of Appeal appropriately. To that extent I agree with the reasons given by the Chief Justice and Tipping J. But in respectful disagreement with Tipping J, and in company with the Chief Justice, I do

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34 At [67].
35 At [62](c).

not accept that the Court of Appeal made the error which has been attributed to it. These reasons are confined to addressing the latter issue.

[47] I consider that the legislature has placed greater emphasis on the s 5(e) principle than the other s 5 principles, as signified by the use of the word "must". As well, in the context of s 5(b), I am of the view that the legislature, by the use of the words "in particular", has emphasised the significance of parent/child relationships where no similar statutory emphasis is given to the other family or kin relationships referred to within s 5(b). So in that sense there is a weighting which is internal to s 5(b), albeit that the s 5(b) principle has no greater legal weight than any of the other s 5 principles.

[48] Against that background, is it right to conclude that the Court of Appeal made the error which has been attributed to it?

[49] This is what the Court said:

> [50] Section 4(5)(b) provides that, in determining what best serves a child's welfare and best interests, a court must take into account any of the s 5 principles "that are relevant to the welfare and best interests of the particular child in his or her particular circumstances". This wording indicates that a court should consider each of the s 5 principles to determine whether it is relevant and, having identified those principles that are relevant, should take account of them in determining the best interests of the child. Because the analysis must be undertaken in the context of the circumstances of the particular case, the court must evaluate how the relevant principles should be taken into account – the assessment is a highly individualised one which cannot be undertaken in a formulaic way.
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> [51] It is sometimes said that *the s 5 principles* do not create any presumption and that *no one factor* has any greater weight than any other. We consider that such statements require some qualification to reflect the fact that first, the wording of s 5(e) makes it clear that protection of a child's safety is mandatory and second, the wording of s 5(b) *gives particular emphasis* to the maintenance of continuing relationships with both parents. *As we see it, this means that there is some priority or weighting as between the various principles.*
>
> [52] What s 5 does, then, is provide a structure or framework for consideration of what best serves a child's welfare and best interests, *with a partial indication of weighting as between principles*. While the principles are not exhaustive, s 5 should assist in achieving some degree of consistency and transparency in decision-making, as well as promoting informed decision-making. But that cannot disguise the fact that the assessment is an evaluative one, involving the identification and weighing of all factors

> (whether referred to in s 5 or not) relevant to the particular case. These include, of course, the views of the affected child. (emphasis added and footnotes omitted)

[50] The critical paragraph is [51] albeit that it takes colour from [50] and [52].

[51] I think it helpful to set out, despite the reiteration, the three sentences in [51] and to comment on each:

(a) First sentence: "It is sometimes said that the s 5 principles do not create any presumption and that no one factor has any greater weight than any other."

This is uncontroversial. To be noted, however, is the way in which the words "principles" and "factors" are used interchangeably, a point to which I will revert.

(b) Second sentence: "We consider that such statements require some qualification to reflect the fact that first, the wording of s 5(e) makes it clear that protection of a child's safety is mandatory and second, the wording of s 5(b) gives particular emphasis to the maintenance of continuing relationships with both parents."

As is apparent, I agree with what was said.

(c) Third sentence: "As we see it, this means that there is some priority or weighting as between the various principles."

If this means that the s 5(b) principle is more important than other s 5 principles, I agree that the Court was in error. But if it is merely a summary of what has gone before, namely that the s 5(e) principle is specially weighted and that within s 5(b) there is particular emphasis on children's relationships with both parents, then it is correct, albeit ambiguously expressed.

[52] In my view, Court of Appeal did not erroneously state the law in [51]:

(a) The third sentence in [51] is a summary of what has gone before (particularly in the second sentence) and as such is most sensibly construed as not going beyond what was said in the second sentence.

(b) In the first sentence of [51], the judgment referred to "factors" and in a way in which that word plainly bore the same meaning as "principles" as used in that sentence. Had the third sentence used the word "factors" instead of "principles" there could have been no ground for complaint (because the importance of a child/parent relationship is itself a factor which is given emphasis within s 5(b)). I see this as elegant variation which has resulted in ambiguity, rather than error.

(c) The alleged error of the Court of Appeal (namely that the internal emphasis in s 5(b) on child/parent relationships means that the s 5(b) principle is specially weighted) involves a spectacular non sequitur and thus an error of a kind which the Court is unlikely to have made.

(d) If that Court had been of the view that the section 5(b) principle was more important than the s 5(a), (c), (d) and (f) principles, I would have expected that to have been carried into its assessment of the case. But there is no trace of such a view in the evaluative section of the judgment.

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