IN THE SUPREME COURT OF NEW ZEALAND SC 36/2006

BETWEEN **THE SECRETARY FOR JUSTICE**

Appellant

AND **H J**

Respondent

Hearing 15 August 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

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

CIVIL APPEAL

10.02am

Elias CJ Thank you

Pidgeon May it please Your Honours Pidgeon and I appear on behalf of the appellant and with me is Mrs Joan Key.

Hart May it please the Court Miss Hart, I appear for the respondent.

Elias CJ Thank you Miss Hart. Yes Mr Pidgeon. Mr Pidgeon there are a few matters that we'd like to clear up at the outset and perhaps if you get your papers arranged you might come up to the lectern and I'll just put a few questions to you. What's the status of the orders made in the Court in Australia? We don't have them before us do we.

Pidgeon No Ma'am, it appears that the position with regard to the order is that it's been left to lie, the proceedings have been left to lie in the Court and in fact were formally dismissed with the view that they will be reinstituted if an order for the return is made under the Hague Convention, because it's pointless proceeding with the application, but

the information the New Zealand Central Authorities had consistently from the Australian Central Authorities that it will be revived once if an order for return is made.

Elias CJ So there's no existing

Pidgeon There's no existing access order.

Elias CJ No, what about the New Zealand custody order, has that not been registered in Australia?

Pidgeon No, not as far as I'm aware.

Elias CJ Well there seems to be some suggestion on the papers that it has been.

Pidgeon Well I'm not aware of that. Perhaps my learned friend could answer that question. I'm of course relatively new to this brief.

Elias CJ Yes.

Blanchard J We've got a copy of the registration. It's exhibit D to Mrs J's affidavit of the 25 October 2005 which was put into the Court of Appeal and there's an order for Mrs J to have custody and that's the New Zealand order and then it says on the outside of it 'registered with the Family Court in of Australia on the 19 January 2005 pursuant to regulation 23 of the Family Bill Regulations'.

Pidgeon Well

Blanchard J So it's been registered under what I imagine as a reciprocal scheme.

Pidgeon The position is with regard to that affidavit of the 25 October 2005, I have seen that for the first time this morning. The position was that, and I've taken instructions from Mr de Jong, who was counsel for the Central Authority, now Judge de Jong, is that at the last minute this affidavit was tendered at the Court of Appeal. He objected to the admission of the affidavit on the grounds of lateness and inappropriateness and the Court of Appeal in delivering its decision failed to rule one way or the other as to whether the affidavit was admissible and it's not really referred to in the judgment, so that when the case on appeal for this Court was prepared under some haste I did not have the complete record and in fact the complete record was supplied to me by my learned friend for the respondent, and the papers that were sent to me did not include this affidavit, so the position seems to be somewhat uncertain as to the status of that particular affidavit.

Elias CJ Well leave aside the affidavit, what about the stamp.

Tipping J I mean we can't proceed as if this clearly authenticated order registered in the Family Court in the Brisbane Registry didn't exist can we Mr Pidgeon. I mean if it's

Pidgeon No, no I accept

Tipping J Never mind all the other stuff in the affidavit but at least from this point of view surely we must accept that the New Zealand order was registered in Australia.

Pidgeon I wonder if I could confer with my learned friend for a moment. Yes, my friend has said those orders had been registered. The position of course adopted by the father in relation to proceedings in New Zealand and is invariably adopted in Hague Convention proceedings is to take no part in the New Zealand proceedings for custody and access to avoid any suggestion being made that the father in Australia has consented to the jurisdiction of the New Zealand Courts. So the advice given always by the Australian Central Authority from past experience is that no steps should be taken by the parent seeking relief under the Hague Convention in this case the proceedings issued in New Zealand because they don't take effect in essence until the Hague Convention proceedings have been determined.

Tipping J So the first step the person in Australia in this case takes is the application under s.105.

Pidgeon Is the application, yes. And in fact that makes it clear that while those appending orders for custody have no effect

Tipping J But the New Zealand order now registered in Australia seems under Australian law to have the effect of an Australian order.

Pidgeon Yes, I've read the text of the orders. The respondent is to have leave to apply for access – no order for access but the respondent will have leave to apply

Tipping J But the point is Mr Pidgeon, perhaps of some importance is that we now face a situation where in effect the Australian Courts have awarded, for all Australian legal purposes, have awarded custody with leave to apply for access, custody to Mrs J. Now that must surely be a significant dimension in the question of whether the children need to go back for such an adjudication, because it's in effect already been made. I mean there's more to it than that but that's the sort of starting point.

Pidgeon Yes, well if I was acting as counsel in Australia what would happen if an order for return is made that I would advise the father to apply for leave to set aside the order – that's one possibility – but there's been no suggestion by the father that he is seeking custody. He has always

issued proceedings to be based on the access or contact with the children so that

Blanchard J But those proceedings have been dismissed for want of prosecution.

Pidgeon The position with those proceedings is that on the advice given by the Central Authority, he took the view that it was pointless continuing with that application until and unless he knew whether the proceedings were to be transferred to

Blanchard J How do we know that?

Pidgeon Well I accept that.

Elias CJ But that means the whole point of this exercise is to enable the father to apply for access orders in Australia.

Pidgeon Yes.

Elias CJ Well I would have thought that was a pretty material circumstance in the determination under s.106. I have to say that it's a long time since I've done one of these cases, but I am surprised that the Central Authority doesn't put before the Court the full Court record in Australia.

Pidgeon I accept that, it should, yes. I was just wondering whether it's appropriate for me to ask for a short adjournment to take some instruction on this situation.

Elias CJ Perhaps you can attempt to take those instructions with the adjournment and we'll proceed with the hearing in the meantime Mr Pidgeon. The other question I have is, and it may be that it's apparent from the material we've got but it's escaped me is why has there been such delay in this matter?

Pidgeon Well I note the decision of the Court of Appeal was reserved for five months.

Blanchard J Well there was a huge gap between the granting of leave and the hearing but

Pidgeon My understanding was that was not the fault of either party. It's quite baffling in view of the statutory requirement to dispose of the matters promptly.

Elias CJ So it wasn't anything the parties had acquiesced in?

Pidgeon No.

Elias CJ No.

Tipping J Well save to this extent that neither party sought to expedite the matter. Both parties just sat on their hands.

Pidgeon I simply don't know the position.

Tipping J Well that's

Hart Ma'am, would it be possible for me to speak to one or two of the issues that have been raised in regard to the Australian

Elias CJ Well can you clarify the questions we've been asking?

Hart I think to some degree that's possible. The situation in Australia was that the father had applied for those access orders and then on a successive number of directions hearings he didn't appear and after a while I asked the Australians whether I could appear at the Court to see whether we could have it dismissed and they eventually did do that because the father didn't appear.

Elias CJ Well why don't we have any information about that in terms of, again it's in terms of, I would have thought the Court record was the way things had to be put before the Court

Hart Indeed, I must apologise for that, when the time came to prepare the case on appeal for this matter it was done in a hurry and I tried to assist Mr Pidgeon by giving him our old case on appeal from the Court of Appeal which seemed to cover most of the requirements and most of the documents we needed, but I did omit to include that information that had gone before the Court of Appeal because it

Elias CJ How did it go before the Court of Appeal and in what form? Was it in the case on appeal or somewhere else?

Hart No it was via an application to admit further evidence and

Elias CJ So we've got it on the Court record have we?

Hart It is on the Court record. Now Mr Pidgeon says that Mr de Jong objected to it at the hearing and that is true, however in the Court of Appeal judgment you'll note at the very end of it there's a paragraph that says that if the case were more finely balanced then they would be inclined to look at the events that have subsequently occurred. Now I take that as a reference to that extra evidence that was submitted at that time.

Elias CJ I see, but not formally admitted?

Hart There was a formal application

Elias CJ Yes.

Hart For it to be admitted.

Elias CJ Objected to and not resolved.

Hart And I wasn't at the hearing so I don't know exactly what took place, but the other thing that I think the Court does need to know which is not in evidence anywhere at the moment is what has happened to the father. He's apparently disappeared.

Elias CJ Well why don't we have any evidence to substantiate that?

Hart I've been unable to locate him and I know that last time checking it in the Australian Court he has not attempted to reactivate any access application.

Elias CJ Alright, well

McGrath J There is an indication Miss Hart isn't there that he wasn't getting any more legal aid for those applications while the Hague Convention proceedings were still pending.

Hart I have no knowledge of that.

McGrath J It was just something I read in the materials and I don't know if Mr Pidgeon can help, but I'm just really wondering whether the reason he hasn't activated access proceedings in Australia or kept them moving was that the whole matter was put into the hands of authority in Australia to deal with the Hague Convention aspects and that the local proceedings were suspended because of that.

Hart Mr Pidgeon may be able to answer that but his address is unknown to the respondent.

McGrath J Yes, thank you.

Elias CJ Thank you. Well Mr Pidgeon I am a little mystified why the Central Authority hasn't provided more information from the publicly available record.

Pidgeon I accept that criticism and would concur with it. The question is what is the most practical method to deal with that absence of information. The position is that this particular ruling of the Court of Appeal irrespective of the facts of the instant case is a matter of some interest and concern as a matter of application of the decision in the Family Courts in the future, so that the Central Authority is very concerned to have that issue established. I could only, as I accept it's relevant to the Court having this information, seek an adjournment to enable that

information to be provided, because I accept the Court should have had it.

Elias CJ Well I think we'll proceed with the appeal but in the adjournment perhaps you can make inquiries as to whether there is further information which is available which could be put before us in an acceptable form.

Pidgeon As Your Honour pleases. There is a further application as I understand it Ma'am to file another affidavit by my learned friend that has been sworn in the last one or two days and I understand it's been filed with the Court

Elias CJ Well is that material contentious?

Pidgeon Well I've had no opportunity as counsel to verify the information referred to in that affidavit.

Elias CJ Well perhaps that's something you can take instructions on in the adjournment as well Mr Pidgeon.

Pidgeon I certainly don't consent to that second one.

Tipping J Without prejudice to what the Chief Justice has put to you would it be acceptable to your position to admit the evidence that appears informally to have been admitted in the Court of Appeal but without prejudice if you like whether we admit this most recent stuff that you obviously haven't had any opportunity to rejoin. I can't see much justification for opposing what everyone thought got into the Court of Appeal but this more recent one raises different issues.

Pidgeon Yes, yes I accept that.

Elias CJ Well it seemed to me that the critical thing in the affidavit really was whether steps were taken in April by the respondent in the Court proceedings in Australia and that again must be able to be substantiated by the record and appears to be on the material that we've got.

Pidgeon Yes steps were taken in Australia but the evidence before the Court was that the father did not know of the whereabouts of the mother until the date that's referred to in his affidavit. In other words the letters of March and April that were in the first case sent to the brother and the second case were substituted service on the brother achieved no response; in other words they weren't replied to, to the solicitors acting for the father as to whether they had been served or whether the children were living in New Zealand or not, but the mother when she saw the papers that would have been served by substituted service, decided to take some steps to oppose that. The finding of Her Honour Justice France on the appeal to the High Court made it clear that in her view the mother had taken no steps in relation to responding and

providing the information in reply. Now if I could just perhaps refer Your Honours to the decision of Justice France. I must apologise that the casebook is not numbered.

Elias CJ I'm sorry Mr Pidgeon what were you taking us to?

Pidgeon The decision of Her Honour Justice France. I apologise for the markings as the only copy I had available was one supplied by my learned friend.

Elias CJ But how does that happen Mr Pidgeon? Because all of this could have been obtained again through the Court registry if there wasn't an unmarked copy. It's certainly been quite distracting.

Pidgeon Yes, there was if Your Honour will recall, this matter was set down quite properly at very short notice. I was caught up with a number of other fixtures, including cases in the Court of Appeal and I contacted Judge de Jong but he wasn't able to locate the file which had clean copies and I accept it could have been done but when my friend offered to supply it I didn't realise at the time that they were marked copies and so that I received them and the bundle was prepared virtually the next day after. The other apology I must make is my secretary who was with me for some 37 years has retired and my replacement is in American and American spellings have popped up which I hadn't picked up in some of the submission and inadvertently I was out of Auckland at the time. The casebook also has not been properly tabulated and in some of the cases truncated versions so that I'm not particularly happy that that is so.

Elias CJ Yes it's quite difficult finding the authorities.

Pidgeon At para.19 of Her Honour's judgment at page 186(b) of casebook, at least of the case on appeal, sorry. Perhaps turning the page before it starts 'the father says the Family Court was right to exercise the discretion against the mother on the basis that the father did not have knowledge of removal within the one year period. The father notes that while his solicitor did eventually send a letter to the mother's brother in Auckland on 31 March 2003, there was no reply to that letter. Nor was there any reply to the further letter sent to the brother on the 22 April 2003, rather it was when the mother came to arrange service of proceedings for a protection order in New Zealand that the father first learned of the children's location in New Zealand'. Her Honour went on also to refer to the fact that proceedings had been issued in Australia and the mother had taken steps to defend those. And that was adopting the finding of His Honour in the Family Court below.

Elias CJ Yes but what's being said is that in fact there was the formal response to the Court at the end of April.

Pidgeon That's accepted.

Elias CJ It's accepted.

Pidgeon Yes.

Elias CJ Because those Australian proceedings were served on her by substituted service through her brother in New Zealand.

Pidgeon That's right, yes.

Elias CJ And she responded?

Pidgeon Yes, well in fact she probably thought she had little alternative but to respond.

Elias CJ But is the upshot that the father knew from the end of April when those papers were filed that the children were in New Zealand though not at her address?

Pidgeon I wonder if I could speak to my learned junior?

Elias CJ Yes.

Pidgeon My learned junior was counsel in the Court below. This matter was addressed in page 59 on the case on appeal, para.15. On the 17 June

Blanchard J Sorry where are you reading from?

Pidgeon From para.15 on page 59 on the case on appeal.

Elias CJ Some of the numbers can't be read. You'll have to give us a little time, yes.

Pidgeon 'On the 17 June 2003 H filed a response to my application in the Townsville Registry seeking that I have no contact with the children. At point 2 in this application H provided a New Zealand address as her Address for Service however this document was never served on myself or my solicitor'. So the position it's not correct that the father knew in April 2003.

McGrath J Your chronology Mr Pidgeon says that on the 14 June the father was aware for the first time that his children were in New Zealand.

Pidgeon I think it was pointed out by my learned friend in her submissions that in fact that appears to be an error because the evidence of the father was that the

Anderson J Page 60, para.17.

Pidgeon Yes it was July 2003, yes.

McGrath J If you look at the previous page at para.13 it starts 'on or about the 14th May I am now aware that H filed an application for a protection order in the New Zealand Courts at Hastings'.

Pidgeon Yes.

McGrath J And I had thought that in your submissions you acknowledged that that was the date at which the father knew and this has come to be reflected in your chronology.

Pidgeon Yes it is reflected in my chronology and it appears to have

Tipping J I think it's ungrammatical.

Pidgeon A misreading possibly of para.13. It doesn't

Anderson J Paragraph 13 is meant to read 'I am now aware comma and delete 'that'.

Pidgeon Yes, yes

Tipping J The word 'now' gives the game away.

Pidgeon Yes that's right, so that the evidence on behalf of the father wasn't till the 17 July 2002.

McGrath J Thank you.

Elias CJ But in terms of formal steps he says that her response wasn't served on him but she did, and this is one of the things in the affidavit, and indeed it seems to me the only thing that really is particularly material in the affidavit, is that she did take steps at the end of April to oppose his application in the Townsville Court and that will be a matter of public record.

Pidgeon Yes, yes, well she did take steps to oppose but the position really

Elias CJ And then according to the letter that's sent to his solicitors, that fact must have been passed on because a preliminary date was set following that. I don't know where it is in the material because it's all come in in such dribs and drabs but

McGrath J Page 36 I think.

Elias CJ Page 36.

McGrath J Page 36 is the response to the initiating application. It's got a hearing date of the 8 May 2003.

Elias CJ Yes.

Tipping J The address for service was on the document but that document was never served. That's the point, that's what he alleges anyway. Because if you've got no findings of fact on this it's really a wholly unsatisfactory state of affairs.

Pidgeon It is isn't it, yes.

Elias CJ Yes, sorry, but the thing that I'm referring to is a letter from the Townsville Court to the solicitors acting for Mr J giving the preliminary date of hearing. It may be annexed to this last affidavit we've received. Miss Hart can you tell us where it is?

Hart Yes Your Honour, it's exhibit E of that affidavit.

Elias CJ Oh yes. Oh is it?

Tipping J Which affidavit are you referring to? Is that the affidavit of November 2005?

Pidgeon 12 August 2006.

Tipping J Oh the most recent one? It doesn't seem to be the letter that, or exhibit D perhaps?

Elias CJ The thing that I was referring to is the letter from Groves and Clark dated 31 March addressed to Mrs J, c/o her brother in New Zealand.

Pidgeon Yes, and the question Ma'am?

Elias CJ Well isn't that indicative of an understanding that she's in New Zealand?

Pidgeon No, with respect it leaves the matter completely up in the air.

Elias CJ Oh I see.

Pidgeon The brother was the possible method of contacting the mother.

Anderson J The brother's a conduit.

Pidgeon Is a conduit, yes, there's not evidence to suggest even alleged by the respondent that at this time the father knew the mother was in New Zealand but as is quite common with an application for substituted service in the Family Court, an order is made to serve on a relative and the only

Tipping J The fact that the brother was in New Zealand doesn't lead to any inference that the mother was also in New Zealand.

Pidgeon No, no not at all.

Tipping J That's what you're suggesting.

Pidgeon That's what I'm submitting, yes.

Elias CJ When she responded however to the Family Court at the end of April then it was apparent at least to the Family Court that she was in New Zealand.

Pidgeon I accept that.

Elias CJ Yes, I see, alright.

Tipping J But he says, and there's not evidence really to support a secure inference to the contrary, that he only became aware of her being in New Zealand in July, was that date the second date, the paragraph

Pidgeon Yes, yes.

Tipping J There may have been suspicions that she was in New Zealand, putting two and two together and making five, but nothing definite.

Pidgeon That's right, yes.

Elias Well yes except the Family Court had to organise the phone call with her and she had responded to the Family Court from New Zealand. It's a question of what the Family Court communicated to him I suppose and whether he made any inquiry of them.

Pidgeon And presumably the phone call would be between counsel rather than parties.

Elias CJ Well she participated in it at any rate

Pidgeon Yes.

Anderson J I don't know whether this deflecting you from the line that you're pursuing Mr Pidgeon but I'm not quite clear on the evidence as to how she would know where he was in order to disclose where she was going.

Pidgeon There's evidence in, and I think it's addressed in my friend's submission that he gave her his mother's address so that he can be contacted care of his mother.

Anderson J Quite often non-disclosure would amount to concealment but there may be occasions where it's just inertia.

Pidgeon Well it's been my submission that if the respondent is correct in her allegations about the conduct of the father, and mistreatment, and she made it very clear that she wanted to get away from him and out of sight and out of contact and it's with the greatest of respect, and it seems a very clear inference that she concealed her whereabouts. It's interesting that the only addresses we have for the mother now are one in Hawkes Bay and one in Southland

Anderson J N.

Pidgeon N, so she wasn't living anywhere near the brother.

Anderson He was in Huia in West Auckland. Well if I go back to first principles it's a breach of the Hague Convention for a parent to take a child out of the country without the consent in this case of the father. A defence arises and it's the only defence now left, is if the children have been settled for 12 months then the Court has a discretion as to whether or not to order a return. Now there are two approaches to the exercise

Elias CJ I'm sorry Mr Pidgeon because you're embarking on the submissions and I just want to clear up one aspect of the facts before you do that. If we had the material from the Family Court in Townsville we'd know what material he supplied in order to get substituted service.

Pidgeon That's true, yes.

Elias CJ We don't have any of that. It's really highly unsatisfactory.

Pidgeon Well to be frank I certainly have in the past always provided that information to the lower Court, Family Court.

Elias CJ Yes I mean it's quite wrong for the Family Court to have to rely on unsubstantiated assertions, unchallenged in evidence, when there is a public record of what transpired.

Pidgeon Yes I accept that. I can't deny that and this is why I really am wondering whether my proper position as counsel in view of the importance of establishing principle and how a discretion should be exercised, whether the proceedings should not be adjourned.

Elias CJ Well we'd be really reluctant to follow that course Mr Pidgeon. These cases are meant to get priority and there's been huge delay and even though this matter has been set down with short notice it's still been a matter of some weeks and the proceedings have been on foot in New Zealand for years.

Pidgeon Yes well the difficulty of course at the counsel for the appellant level is the appropriateness of adducing further evidence, that's the difficulty I face.

Blanchard J Well in a sense a lot of this would have been updating evidence; perhaps not the material we're now talking about but some of the rest of it was definitely updating material.

Pidgeon Most of it I understand would be material before the hearing, certainly before Justice France and probably before the Family Court Judge.

Elias CJ But the Court records weren't?

Pidgeon No.

Elias CJ No.

Tipping J I think we may be able to do justice to the law; whether we can do justice to the facts without this additional material I think should be left to remain to be seen.

Elias CJ Alright, the Hague Convention requires return unless you come within one of the exceptions. Why do you describe those as defences?

Pidgeon I accept that it's not technically a defence because there still remains the residuary discretion to order a return. It's probably called

Tipping J Why do you call it a residuary? Isn't establishing whatever it is under each of those paragraphs simply gives rise to a discretion?

Pidgeon Yes, yes, it's a discretion. I accept that.

Tipping J I think people have got a bit diverted by this concept of residual quite frankly.

Pidgeon Yes, yes I accept that is so. It's an exception not a true defence and that the discretion is not properly described as a residual discretion. There have been the odd judgment where the word 'residual' has been used but in fact I accept it's not appropriate to be used. I commence perhaps some of my submissions in the issue of law and I submit on a much stronger ground that this particular area.

Tipping J You don't have some bothersome facts to tend with?

Pidgeon Well in my submission despite the dispute as to facts the legal position is still the same and the application of the law to these facts, it's still the same. That would be my submission but I'll come on to the area of discretion later. In essence the Hague Convention was entered into to prevent, as being in the best interests of children, wrongful removal of children from one country to the other. Historically it is noted that the

original reasons for countries entering the Hague Convention were primarily the conduct of the non-custodial parent in refusing to return children after visits overseas from access. It is correct as my learned friend has pointed out in her submissions that the tendency now is for more Hague Convention applications involving return to be brought against custodial parents who are escaping possibly a violent situation and this has been documented on a number of occasions in the papers that have been presented at seminars and soforth and it's generally commonly accepted that this is the basis. I should also perhaps point out to the Supreme Court that at the end of this year there is a major conference in the Hague to review the Hague Convention which all signatories will attend to decide whether there's any need for modification or any changes that should be made. It's not clear from the information I've had precisely what is being looked at but I raise that because it seems to be possibly a factor showing that there are in fact trends which were not within the conception of the countries which entered into the Convention. Now the position is that in this case the learned Family Court Judge who is very experienced in Hague Convention cases, a number of reported decisions, reached the view that the children were now settled in New Zealand but that the mother had not revealed their address, in fact had concealed the address, and that this should be a significant factor in deciding to order a return. He also took the view that following *S and S* and the approaches adopted in the Court of Appeal at first instance by Justice Fisher, there was a presumption in favour of return. Now I wish to make it quite clear that there is some debate about the use of the word 'presumption' at all because in a number of cases, particularly in England, the word 'presumption' is not used quite as such, it's more that in exercising a discretion the Court should have regard to the overriding principles of the Act - namely the children should be returned in exercising its discretion.

Elias CJ That's part only of the principles of our Act isn't it? I mean it seems to me that all this talk of presumptions and onuses is quite misconceived. The scheme of s.105 and 106 is that there's an obligation to send the children back unless a ground is made out and if a ground is made out then the Court may send them back, obviously. The principles behind the Hague Convention are a factor to be taken into account but so too I would have thought are the other principles of the legislation which aren't excluded explicitly on the legislation, so that for example sections 4 and 5 enter into the matter and there's some acknowledgement of that I would have thought in the Hague Convention itself in this exception and the requirement to look to see whether the children are settled.

Pidgeon Traditionally the New Zealand Courts have adopted the approach, both under the Guardianship Amendment Act 1991 and already under the Care of Children Act because there was a matter argued before the Court of Appeal last week where the same issue was raised in which I sought to make an argument where in my case I was opposing return

and the child objection and I raised the basis that there may in fact be a change, a slight change in the wording in the Hague Convention proceedings and in the wording of the Care of Children Act to the old position under the Guardianship Amendment Act where the traditional approach was that you regarded the section of the Guardianship Act which deals with Hague Convention as not governed by any of the principles relating to best interests and welfare of the children and the comments that were coming from Their Honours in the Court below last week was that they didn't see any reason to incorporate the best interests statutory provisions into a determination. Now I want to be very clear here. The policy over the years has been and cases such as *Delabarca and Christie* have established it, is to endeavour to interpret the Convention in the same way from country and country so that the fact that New Zealand has provisions such as the Guardianship Act, or now the Care of Children Act which deals with the care of the children, has nothing whatever to do with how the Hague Convention provisions are interpreted. Having said that I accept that in the exercise of the Court's discretion, there are a number of facts that are taken into account. The cases seem to say that the overriding purpose of the Convention is major and indeed that's clearly established in *S and S*. The cases also indicate that the Court can look at what is in the best interest of the children in deciding whether or not to order a return. In other words the discretion is unfettered, it's not limited. There are also indications that if a situation is brought by the wrongful actions of the abducting parent that that should also be a factor in the exercise of the discretion.

Tipping J You mean some conduct beyond the original act of wrongful removal.

Pidgeon Yes, yes, such as concealment.

Tipping j Yes.

Pidgeon And indeed I've referred in my submissions to a number of authorities which deal with the issue of concealment, and indeed the Court of Appeal below in this matter seemed to acknowledge that if there had been concealment then they probably should exercise the discretion in favour of return. They rejected the findings of the Family Court Judge and the finding of the High Court Judge who took the view that it was open to the Family Court Judge to hold that there was concealment on the evidence before him and in my submission that was perfectly appropriate so that

Tipping J Sorry, what was perfectly appropriate?

Pidgeon To hold that there had been concealment on the evidence before the Family Court Judge. So the Court of Appeal really took a rather unusual step in this case of despite there being evidence to support concealment and despite its acknowledgement that if there had been concealment it really shouldn't exercise it's discretion in favour of

return because it's the actions of the mother who has by concealing the whereabouts of the children caused the situation, have taken the view that there was no criticism to be placed on the mother except possibly for the removal. The concern however of the New Zealand Central Authority, and it's a concern I would say of the Australian Central Authority, is a real danger that it will create that Court of Appeal decision a situation where abducting parents who may feel that they've every reason to flee Australia can fail to reveal their address, let the time run for 12 months and say 'well the child's settled, accept that the child's settled; you're out of time and it's best for the child to be here in New Zealand'.

Tipping J How much out of time were they in this particular case?

Elias CJ Well it depends on the facts which is really why the facts are so important.

Pidgeon Yes, and it's always a difficulty, the Hague Convention procedures are essentially summary proceedings

Elias CJ which is why

McGrath J Mr Pidgeon can I just suggest to you that when you say how the authorities indicate these various factors are relevant, hasn't the stage been reached in New Zealand really where the decision of Justice Fisher which appears to have supported a presumption of return and which emphasised what he called 'the normative factor, that is discouraging generally abduction of children, no longer really has the importance that it had when he decided it because of the intrusion of these other factors concerning the welfare of the children in the particular circumstances. In other words although you seem to be saying that *S and S* is consistent with the subsequent development of authority in New Zealand and overseas, I wonder whether *S and S* hasn't now been departed from in New Zealand by the Family Court and certainly by the Courts overseas including Australia?

Pidgeon The position with regard to *S and S* is that it has been rigidly applied in the Family Courts in New Zealand up till the present time and indeed a computerised would indicate that it's probably one of the most frequently cited cases in the Family Court. Now if I accept the approach by the Court of Appeal has tended to modify this and probably in several of the recent Court of Appeal decisions not only this one did take the trouble because I thought it would be of assistance to the Court to endeavour to obtain some statistics

McGrath J Just before you get to that can I perhaps just suggest to you where I'm coming from was an extract that you quoted from the textbook – *Lovebook and de Jong* where it discusses discretion and you see from those decisions that in many cases return is not ordered because of

particular features. It seems to me it would not have impressed Justice Fisher at all at the time he decided *S and S*.

Pidgeon Well I'm not certain that that would be the case with respect.

McGrath J Right.

Pidgeon *S and S* was a decision – I was counsel in *S and S,* and His Honour placed great emphasis on the fact that the children wished to return.

McGrath J Yes.

Pidgeon And he based his decision on the fact that marginally the Judge's finding might have just scraped through of the finding of grave risk and it wasn't a 12 months situation, but the children who were all older children were very strongly of the view that they return to Australia and he referred and relied in some detail on the United Convention of the Rights of Children and the fact that in his views the increasing tendency to give greater responsibility and for rights generally to children was an important factor in his decision to order a return. And that really was the decisive front but he did say there's a presumption that the Act favours a return and then implying the facts on this particular case

McGrath J Well he called it a strong presumption didn't he?

Pidgeon Yes, yes.

McGrath J And he went on to say didn't he that the 31(c) exception would only really apply in an exceptional case.

Pidgeon Yes.

McGrath J Now how the spirit of those observations really survived the subsequent Family Court treatment. I mean it seems to me that often there was a passing reference to *S and S* and how it's still good law but in fact the focus quickly moves away from the general policy of the Convention to the circumstances of the particular children, in particular whether they've settled if more than 12 months has passed.

Pidgeon Well the policy that's been adopted on the grave risk exception, and indeed it's addressed in my friend's submission when she quotes a paper presented by Chief Family Court Judge Boshier is that and the authority for this approach is in the central authority which was in the 1990s Court of Appeal decision and that is in determining grave risk the position is that in most cases where Courts of the other country have a judicial system which provides protection orders and soforth, it's very difficult for such an exception to succeed in fact and so orders are consistently, sorry, it's very rare rather for findings not to return even where there's elements of risk because of course the order for

return is not made to the custody of the other parent but a return to the country and in most cases the mother returns with the child to Australia. It's a question of the forum that should deal with these cases. However if there is grave risk which can't be protected by the judicial system, such as for example breaches of protection orders, then it wouldn't be appropriate to order a return so that the grave risk in itself – you don't submit a child to grave risk. The question therefore really is, and it's not an easy one to resolve, is do you have a common approach to each of the exceptions? Do you give way to weight for example to a defence where a child objects and is old enough for objection to be taken into account? Do you give greater weight where there's acquiescence which is another defence? What do you do if it was an intolerable situation for the child?

Elias CJ But isn't there, I mean I know our legislation runs together the post-12 months child settled ground and the other grounds, but those two provisions can overlap. I mean they are distinct grounds and in the Convention themselves they're treated separately and it seems to me that if you look at the Convention, what is provided for is peremptory prompt removal with power under Article 11 for the Central authority to make inquiries if decisions aren't given within six weeks, all of that, and against that background it's quite understandable that there is a very heavy burden to be passed before you could come to, and the language also, grave risk and the other exceptions. But under the Convention Article 12 makes it clear that this whole peremptory arrangement is not appropriate where 12 months have elapsed and the child has settled and it may be that there is a different approach that's required for that case because it doesn't really fit within the philosophy of quick return so that the matter can be sorted out in the appropriate forum.

Pidgeon I'm aware that there is an argument that can be mounted to that effect and one of the features which would be of assistance in regard to the future operation of this Act is for this Court to indicate in whatever decision it makes as to whether it's restricted to the 12 months defence or applies to all presumption. My learned friend in her submissions suggests that it applies to all, sorry exercise of discretion, rather than presumption, exercise of discretion. Article 12 of course is not part of the text of the Statute and one of the difficulties New Zealand faces unlike some of the other countries is it's not specifically

Elias CJ Well it's scheduled to the Act.

Pidgeon It's a schedule. It has not specifically followed the exact wording of the Convention in the substantive provisions of the Act, because you have other Article 12 and Article 18 which read together. Now Article 12 is somewhat ambiguous because the wording of Article 12 is 'that they shall be returned'. It doesn't say how you exercise discretion. In my submission in Article 12 if you don't fit within the terms of Article 12.

Tipping J I couldn't find the Convention when I was looking at these papers last night. Is it somewhere in these papers?

Pidgeon Sorry, no it isn't. It's a schedule to the Care of Children Act.

Tipping J Schedule to the Care of Children Act?

Pidgeon Yes, I'm sorry.

Tipping J Right thank you. I'll dial it up.

Pidgeon And in fact the way this provision has been interpreted and I refer to *Cannon and Cannon* provisions is that it is just another exercise of the discretion. The only judicial, the only Judge I'm aware of is the absolute decision of Justice Kay who appears to be out on a limb

Elias CJ Oh yes, which is out on a limb.

Pidgeon Saying that the effect of that article is that you've got to order a return.

Elias CJ I don't have any problem with, the Court is empowered to make a decision as to return notwithstanding the fact that 12 months have elapsed and the children are settled. I don't have any problem with that. The question is what is the scope of that inquiry and whether you start with the presumption of return when the Convention itself seems to at that stage import greater concern for the welfare of the children and that is really what the settlement ground provides. It's a pointer that the Convention is not seeking to be cruel or disruptive to children who are settled. It's not an empty exercise. Once you're outside that one-year period in which there is a judgment that it's right to be peremptory and the normative importance has to be very much to the fore.

Pidgeon You could also throw into the balance the specific finding of Judge von Dadleszen, which was in his view, it was cruel and unfeeling behaviour and he used those words not to disclose where the child

Elias CJ Oh well he was picking up language in an entirely different case and to apply that unthinkingly without grounding it on the specific facts seems to me to be quite unhelpful.

Pidgeon Well he did ground it on the facts in the sense that in his view there could be no greater distress to a parent in having a child removed to which country you no not and no nothing about whether the child's dead or alive, so that he was strongly of the view that in looking at this 12 months if there's been an element where the father had no opportunity of knowing where the child was in this 12 months, it would be quite unfair he viewed in my submission to give the offending parent the opportunity

Elias CJ But that sort of a priori reasoning is not mandated by the Convention which does express concern for children who are settled once the period of one year has expired. But I think that is really where the nub of the legal issue is in this case Mr Pidgeon.

Pidgeon Yes, well if I might rhetorically put the question that what is the legal basis for having a different approach to a different exception. In other words with respect Your Honour is giving far greater weight to the 12 months settled provision than such matters as child's objection and in my submission there's nothing in our Act which justifies that at all and in my submission the Articles don't require that to be done. In fact Article 18 gives quite a reserved power for the Courts to order a return and particularly if you accept that there has been concealment.

Elias CJ But even if you say that they have to be lumped together because s.106 has lumped them together, they're manifestly different in their own terms because you have a grave risk of significant harm. Those are the sort of measurements in the other exceptions, whereas this is simply a temporal requirement which is reached here plus the children being settled. And that implements the Convention pretty faithfully and I'm not sure that that then requires you to do other than make an assessment on the facts of the particular case. Though I don't see that you start with presumptions.

Pidgeon Well I'm not certain that I differ from Your Honour with the fact that you always have to make an assessment on the facts of a particular case.

Tipping J Mr Pidgeon could I just ask for this help? As one sometimes finds in international instruments there's not exactly sort of complete harmony if you like between the individual. Article 18 is it, the one that says you can send them back at any time, doesn't fit very easily with Article 12 which the whole purport of which seems to me that if a year has gone by and the children are now settled, you don't send them back.

Pidgeon I don't read it like that.

Tipping J You don't read it like that?

Pidgeon And in fact

Tipping J You say that you're not bound to send them back?

Pidgeon Sorry.

Tipping J You say that you're not bound to send them back?

Pidgeon That's right, yes.

Tipping J Yes.

Pidgeon And in fact that's the distinct line of authority internationally and some of the decisions I've referred to, particularly perhaps *Cannon and Cannon* and the primary judgment of the Court of Appeal by Lord Justice Thorpe who as a matter of interest is the Judge, Liaison Judge on Hague Conventions in England and is the UK delegate to these conferences and he makes it quite clear that there is a residual discretion, sorry a discretion, I shouldn't use the word residual, and it's not an automatic return so it would be dangerous for this Court to adopt a

Tipping J Well I don't deny that under our set Statute there is clearly a discretion, but when one's looking at the flavour, and I'm just doing this in an exploratory way Mr Pidgeon, when one looks at the flavour of Article 12 it seems to be that once the year's gone by you shall order the return of the children even though a year has gone by unless the child is settled. That's the way it's couched which although it's not a direct prohibition if you like on return once there's settlement, there seems to be a strong suggestion just reading that that settlement is going to be not a decisive but a close to decisive reason for not ordering them back after a year.

Pidgeon Well it depends on the facts of a particular case. If you have a situation where the father knows that the mother has shifted to N and takes no steps to seek a return and 12 months elapses, I would accept clearly that in that case it would be highly unlikely if the child is settled for an order for a return to be made. Because in a sense it's almost like acquiescence which is another separate defence. I mean if the father knows the child's overseas and doesn't take any step and the child is settled, well why on earth should the Court grant its discretion of ordering a return.

Tipping J Is the idea of settlement that it is settled both in itself and settled vis a vis the father or the other parent, has anyone explored, I mean you've got to really work it in under the concept of settlement haven't you? Are they truly settled when the father doesn't know where they are?

Pidgeon Well there's been two different approaches – the American approach, and I've referred to the *Lops and Lops* decision is that they adopt the philosophy that time doesn't start running

Tipping J Well we can't do that under our Act.

Pidgeon And I'm not inviting Your Honours to do that but that's the approach the American Courts deal with, in other words time doesn't run until the father knows where they are. The approach adopted by the Courts generally in the Commonwealth and particularly the United Kingdom and Australian with the exception of Justice Kay is that whatever's

been concealment that's a powerful factor in refusing to exercise the discretion.

Elias CJ Well it may be a factor. I certainly wouldn't see it excluded as a factor and in the particular circumstances it may be entitled to greater or lesser weight, but doesn't the Convention and s.106 in our Statute effectively provide that when the one year period has passed the focus is the children. It's not the rights and wrongs of what the parents have done and after all there are the mechanisms for example the Article 11 mechanism to keep things hurrying along and that itself will be a factor and what has the father been doing during this period? But the focus then it seems to me arguably comes principally to the children.

Pidgeon With the greatest of respect in my submission that is not the case. The decisions clearly indicate that one of the major focuses is to prevent international abductions and that if the Court for a moment lowers the barrier and enables a parent who has concealed the whereabouts of a child so that an application can't be made within 12 months should not be permitted because of the influence on other children.

Tipping J It's a perverse incentive.

Pidgeon That's exactly right, yes.

Elias CJ But that's an inference and it may well be a powerful inference which is entitled to a lot of weight in the particular circumstances but what I'm talking about is not an inference it's a specific explicit requirement in both the Convention and the Section and effectively what you're putting to us and really I think what the Family Court did was trump that by the prophylactic approach and my query is whether that's appropriate, whether a more nuanced assessment should not have been made.

Pidgeon With respect I don't read the Family Court judgment as avoiding an assessment of all factors. He took some care for example to point out that the efforts of the father did make to try and track the mother down, including obtaining an order which we don't seem to have in our Family Court system whereby the Court directs in effect the Social Welfare Authorities to provide any information it has as to the possible whereabouts of the mother and the information he was given, and it's referred to in the affidavit, is an address in Queensland and he was unable to follow that up because she no longer was in Queensland. So that there is clear undisputed evidence of the fact that the father did take steps to try and locate the mother. Now the Court of Appeal has in my submission with hardly any evidence to support it said that he could have contacted the brother who would have given him the information. Now one of the factors I wish to draw to the attention of the Court is that the letter sent to the brother, the March one that is referred to did not produce a response from the brother saying this is where the mother is living, this is where the children are living

McGrath J It was sent to the mother at the brother's address.

Pidgeon Yes.

McGrath J It might have just been forwarded on to her.

Pidgeon Yes that's possible but it didn't produce the information.

McGrath J So there's no response from either the brother or her, is that your point?

Pidgeon Yes, except that she did file proceedings in Australia to defend, so there's simply no evidence that the brother would have passed on that information and it's stretching it far too far to make a finding that the learned Judge was wrong in saying that he's not satisfied that the father could have obtained the information from the brother. So we have a father who's been looking for the mother, doesn't know where the children are and has been hit over the head with a 12-month

Elias CJ He looks from January 2003, well that's almost a year after the children have left and it's about what 18 months since the father's had no contact with them?

Pidgeon Yes, I accept that.

Elias CJ I mean that seems to me as part of the circumstances that the Family Judge might have taken into account. Where is the assessment in the Family Court Judge's decision as to the effect on the children of removing them for what is likely to be a temporary move to Australia when he finds that they are settled here and when it's clear that the father is not seeking custody?

Pidgeon I'm not aware of any case in the Commonwealth which has held that if there has been concealment you then go on to look at the best interests of the children. You certainly do look at those kind of factors, if there hasn't been concealment in a 12-month statutory defence then you can. But the approach seems to be that you must discourage at all costs this concealment of the whereabouts of children.

Elias CJ Well wasn't the father concealing his whereabouts? Where's the evidence that in that 18 months before he sought to find out about where the children were that there was any

Pidgeon Well the evidence of the mother was that she had been told by him that he could be contacted through his mother. It's actually a very bizarre set of circumstances here because of course the father of the children is the mother's son-in-law and clearly there is interfamilial involvement which is rather tricky but the mother doesn't suggest anywhere in her evidence that she's tried to contact the mother and not been given the

contact address and with great respect in my submission there is nothing to suggest that's the case

McGrath J Mr Pidgeon can I ask you is it the case that the overseas Courts are bringing the Convention general policy against abduction to bear by taking a fairly rigorous attitude to when a child has settled if there has been concealment? That's something I gathered

Pidgeon That I accept, yes.

McGrath J And that is I think coming through in Lord Justice Thorpe's decision. In other words there is a passage I've read somewhere that the Courts will be most reluctant to find a child as settled if basically there's concealment in some form or other. And I'm just really wondering is that the way the Courts have moved to try and bring the Convention general policy to bare rather than doing it in terms of the ultimate discretion?

Pidgeon There's authority both ways in England but the end result is an order for return is made. If there are certain ways of getting at it where there's concealment you could say that the child is not settled because the father hasn't accepted the situation or that the mother is shifting from place to place to hide and it seems that the Court of Appeal in this case has said well there's no evidence that the mother shifted from place to place, although interestingly enough they do, the President in making reasons for the Court said the father might perhaps be somewhat critical of the finding of the Family Court Judge that the mother had settled.

McGrath J Isn't that your problem here. There is not only a finding by the Family Court Judge that the child had settled but there was no challenge to it.

Pidgeon Yes I accept that there was a finding and there was no challenge to it.

McGrath J Maybe leave wasn't given to challenge, I'm not sure, but if that it seems to me is really one route by which the Convention could be brought to bare which simply isn't open for consideration to you in this case, for argument on your side in this case.

Pidgeon Yes, the approach is also, the situation is also addressed by the exercise of the discretion. In other words some Judges have said well if you're shifting from place to place you're not settled, other Judges have said well you're settled but because your whereabouts has been concealed in the exercise of our discretion we'll order a return and what I'm trying to get at is there's two approaches that the Courts have adopted on the issue where there's concealment.

Tipping J Could I ask one question before we adjourn Mr Pidgeon? On the basis that there is a discretion in all circumstances provided you get through the door of establishing a ground for refusal of the order of return,

would there be any merit in endeavouring conceptually to balance what you might call the strength of the perverse incentive, that you've got to be careful not to send out, against the particular interests of these particular children – in other words you're trying to be faithful to the need not to send out a perverse incentive but in some circumstances the needs or bests interests of these particular children must predominate.

Pidgeon Well I'm not aware of any authority where the Court has held there's been concealment and ordered a return.

Tipping J I'm aware of that, you've told us that but perhaps after the adjournment. It just seems to me that there's an awkward balancing here between keeping faith with the basic thrust of the Convention, against the whole point is trying to not cause damage to children.

Pidgeon Yes

Tipping J And I just wonder whether this thought may or may not get any traction.

Pidgeon Well of course when you're dealing with the Convention, one of the distinct features of it, and I'm not referring to the exercise of the discretion, I'm putting that to one side, is it the best interests if children do not come into account and that's been cited universally.

Tipping J But it must do after the 12 months. I mean

Pidgeon Well, you can in the exercise of discretion but whether there should be an order for return or not

Tipping J But we're only talking about a 12-month plus case.

Pidgeon I accept that and my comments weren't really addressed to that, but in other words there may be a situation where a person looking objectively would say 'it certainly is not in the best interest of children to be sent back but because they fit in and haven't established an exception then they must be returned back'.

Tipping J Well so be it, so be it, that's what the law mandates, but if you're not in that bind what you're trying to do is not send out the wrong signal but at the same time look after these particular children. I mean

Pidgeon Well the points clash in the sense the principles clash and I accept that but what I'm submitting is that if you accept, and I say if you accept that there's been concealment then in my submission it's inappropriate and inconsistent with authority to fail to make an order for return.

McGrath J Would you add to that if there's been a concealment which has prevented the applicant from moving within the 12 month period.

Pidgeon Yes, yes

McGrath J That that's a necessary qualification isn't it?

Pidgeon Yes, yes I accept that.

Elias CJ Just before we go, does the Central Authority have powers to make inquiry of New Zealand agencies, welfare agencies, Social Welfare and so on to try and locate children?

Pidgeon The position is that, take New Zealand, they will not accept an application for the return of the child to in this case Australia unless it has evidence that the child is within New Zealand. If it has evidence that the child is within New Zealand, the situation is yes the Central Authority does and I have acted counsel in other cases have also been asked to assist. I can for example recall a child who had been taken from Australia by the mother, had her name changed, her hair shaved off and settled in a lesbian community on Waiheke Island. It was possible by picking up from the Car Registration Authorities that we were able to obtain an address for the mother and locate the child. But the father in that case knew that the child had been taken to New Zealand but didn't know where so the Central Authority which is in essence really no more than a Government department just says well unless we've got some evidence that the child's in New Zealand we don't make inquiries. We have to have formal application for the return, but if there is evidence then yes it does make inquiries.

Elias CJ I see, thank you.

Court adjourned: 11.37am
Court resumed: 11.57am

Elias CJ Thank you. Yes Mr Pidgeon.

Pidgeon Dealing with one or two matters that you asked me to make inquiries about. The first is I have contacted the New Zealand Central Authority and they simply did not have the information to address the issues. They are going to ring the Australian Central Authority but of course there wasn't any time to do that. The second thing was with regard to the reasons for the delay in obtaining a fixture in the Court of Appeal. I am advised by my learned junior that senior counsel for the New Zealand Central Authority on a number of occasions had requested the Court of Appeal staff to see if they could get an earlier fixture and that's probably as far as I can take it.

Elias CJ Yes thank you.

Pidgeon It might be helpful in emphasising the approach that I wish to take to actually refer in a little detail to *Cannon and Cannon* which is regarded as probably now the leading authority on this 12-year defence. It's in the bundle of documents, it's in the appellant's casebook, it's the second to last decision and I want to pick up at para.49. And just to set the background, a child had been wrongfully taken by the mother to England in breach of father's rights of custody. The child's whereabouts was concealed. The Judge on the basis of Article 12 of the Convention reached the view that there was no, and I use the words 'residual' power or discretion to order a return of the child. In other words he interpreted Article 12 as to prevent that. Now on the father's appeal, the Court of Appeal said quite clearly after examining overseas authorities and discussing these that that approach which it described as unorthodox was wrong and I want to pickup, oh the text of the Articles 12 and 18 are included in para.11 of the judgment.

Tipping J Are we still in the *Cannon* case?

Pidgeon Sorry.

Tipping J Still in the *Cannon* case?

Pidgeon In the *Cannon* case, para.11 of the judgment. The *Cannon* case sets out Articles 12 and 18. And I want to pick up at para.49 and Lord Justice Thorpe who delivered the decision of the Court said "I reject Miss Ball's submission that Article 12, and for some reason there's subsection 2, was drafted specifically if not exclusively to deal with concealment cases and thus inferentially did not intend Judges to use the fact of concealment to override the provisions of Article 12. In my experience there have been many cases where the Article 12 time limit has been breached without any acquiescence on the part of the plaintiff or concealment on the part of the defendant. 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 field. Accident or illness may disrupt the pursuit of the remedies.' I'll pick up again at para.50. "There must be at least three categories of case in which the passage of more than 12 months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating for whatever reason a delayed reaction short of acquiescence on the part of the left behind parent. In that category of case the Court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances including the extent of the plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant besides the wrongful removal or retention itself." He then refers in para.51 "In other cases concealment or other subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers those Articles." He rejects the American tolling approach and then picking

up at para.53 “A broad and purposive construction of what amounts to ‘settled in its new environment’ will properly reflect the facts of each case, including the very important fact of concealment or subterfuge.” Then para.54 “Concealment or subterfuge in themselves have many guises and degrees of turpitude. Abduction is itself a wrongful act in that it breaches rights of custody, but the degree of wrong vary from case to case.” Then picking up para.56 “This brings me to the second factor namely the impact of concealment or subterfuge on an assertion of settlement within the new environment.” He then picks up at para.58 “There will often be a tension between the degree of the abductor’s turpitude and the extent to which the 12 month period has been exceeded.” At para.59 “The third category, oh no perhaps if I go back to 58, picking up the second sentence. “Of course an injustice to the deprived father that the longer the deprivation extends the less his prospect of achieving a return. The other side of the same coin is that the longer the mother persists in her deceit the more likely she is to hold her advantage. Not only does she increase her chances of resisting an application for a return order but she also complicates the process of reintroducing the father into the child’s life and reduces the prospects of ever restoring the relationship that might have been between father and daughter but for the lost years.” Then he goes on to refer to “The third category of case which might be termed manipulative delay by which I mean conduct on the part of the defendant which has the intention and effect of delaying the issue of proceedings over the 12 months.” And then perhaps the last sentence “Such an approach is consistent with that taken to a defence under Article 13(b): an abducting primary carer cannot create a defence by relying on circumstances that flow from his or her refusal to return with the abducted child.” Then in the summary he points at para.60 he discusses the fact that there’s a common approach on most of these issues of dealing with this 12-month period in the common law world. He then says in para.61 “Departure from that current of authority by the Judge was in his judgment unwarranted. I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2). It is not enough to have regard only the physical characteristics of settlement.” And then in the next missing sentence “In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased. Judges in the Family Division should look critically at any alleged settlement that is built on concealment and deceit.” But then he goes on at para.62. “Even if settlement is established on the facts the Court retains a residual discretion to order a return under the Convention. The discretion is specifically conferred by Article 18. “But for Article 18 I would have been inclined to have inferred the existence of a discretion under Article 12, although I recognise the power of the contrary arguments.” “Even if there was no Article 18 he would still infer an exercise of discretion presumably because there’s no wording it says it shall return if you fit in. “Justice Singer’s rejection of the discretion is not only contrary to UK authority but viewing global authority and academic writing rests on weaker

foundation that his more literal construction of settlement." "While these judgments may seem to be significant in that they settle issues arising under Article 12(2) definitively, at least at this appellate level I doubt that more than a handful of cases each year world-wide will be directly affected by our conclusions." So that he says you look and can take into account concealment in determining whether there's settlement but even if you determine there is settlement you still have the overriding discretion and there's nothing in Article 12 which takes that overriding discretion away. Now I'd like to turn now to the judgment under appeal. Now there is some discussion of the *Cannon* decision in para.56 of the judgment but in effect the Court has determined well there's no concealment, then we don't need to worry too much about that decision. Now the judgment of the President at para.61 said "On the assumption that the s.106(1)(a) defence is made out, we can see no basis upon which the resulting discretion (based as it must be primarily on Article 18 of the Convention could appropriately be exercised in favour of return." In other words they said no basis. "One it is recognised that the case is not subject to the duty to order return created by Article 12 and that Henry J has not been guilty of manipulative delay, there is no policy reason for ordering return. In the particular circumstances of this case there is no other reason which could fairly warrant return. It may be that Judge von Dadelszen's approach to the discretion was affected by his approach to settlement which was not as rigorous as *Cannon* would suggest was appropriate."

Elias CJ Sorry what paragraph are you?

Pidgeon 62.

Elias CJ Yes thank you.

Pidgeon "So we are conscious that there may be some element of unfairness to TJ if we leave intact the Judge's conclusion as to settlement, which although not challenged on appeal, my conceivably have been too generous to Henry J but at the same time interfere with his exercise of discretion." Para.64 "Henry J's conduct if any was of limited moral gravity. She certainly did not tell TJ where she was. This however is not altogether surprising given the history of violence and the limited part that TJ had played in the upbringing of the children. Further, she did not go to ground in New Zealand. In that context her actions in abducting the children and not telling TJ where they were do not have much local correlation to the settlement issue." Now in my submission that approach ignores or gives very little weight to the situation that the Court faces in the present case, that is there had been concealment, in other words the address was not revealed. The policy of ordering a return and the issue of the discretion shows in the greatest of respect no balancing up of the relevant discretionary factors in reaching the decision, and this is surprising because in para.45 of the judgment, this is at page 233 of the casebook they mention that if abducting parents

are permitted to rely successfully of defence this would tend to reward perhaps the worst abductors, namely those who kidnap children and disappear and thus may generally serve to encourage the abduction of children.

Tipping J So when they said in paragraph, no other reason that paragraph, 61, no other reason, do you say there was a reason and that was the policy of the Convention?

Pidgeon Exactly.

Tipping J Is that it in a nutshell?

Pidgeon Exactly, yes.

Elias CJ Well of course in the situation they postulate in para.45 – 'It's most unlikely the children would be settled'.

Pidgeon Yes, yes. Well at the beginning of para.45 the Court says application for return often made after the expiration of one year. 'The abducting parent will often be able to argue plausibly that the child has become settled in his or her new environment. Indeed in most cases it would be surprising if a child wasn't. Although the better view is that this remains a discretion to order the return of the child, the language of the Convention itself does not suggest that such return ought to be anything like automatic'.

Elias CJ Well do you disagree with that?

Pidgeon No I don't and I want to make it quite clear that the Central Authority is not submitting that in exercising the discretion there's an automatic return, because clearly it's not. There is a discretion and

Tipping J What do you say about, I'm sorry, I was going to ask for your assistance on para.57 of the judgment where there's this suggestion where they say it may be that the reverse applies. Now this suggests sort of competing presumptions or onuses and so on, which we've already had some discussion on. Do you wish

Pidgeon I was actually going to that next but it's very important that passage from the point of view of the appellant because in para.57 the Court said in discussing the discretion 'there is no scope for a presumption in favour of return whether defence is made out'. And then, and this in my submission has no authority to support it, 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, which is the appellant, seeking such an order should be expected to show good reason why the discretion should be exercised in his or her favour. So in other words they've completely turned tables and say it is for the Central Authority to show good reason once this defence has been

made out, and they use the word defence, and this is why I carried through that in my submission, but it's really an exception, the onus switches around. Now it is a common ground that the burden is on the authority to establish the factors in s.105 that give jurisdiction to order a return, but in s.106 the onus is on the abducting parent to establish an exception. And then the

Tipping J Could we refine that slightly? Your submission is that the abducting parent has to both demonstrate the facts of the exception and that the discretion should be exercised against return. Is that it?

Pidgeon That's right, yes, I am submitting that, yes.

Tipping J Both.

Pidgeon Both, definitely both.

McGrath J Mr Pidgeon can I just interrupt you there for the moment. Do you prefer to put it that way rather than to say there's a presumption at all and I'm just wondering how Justice Fisher's strong presumption stands now in terms of your position?

Pidgeon I must acknowledge that the term 'presumption' is not used overseas. They don't use the word. The effect of the overriding purpose of the Convention probably gives great weight. It's probably much the same but in my submission the word 'presumption' is not adopted extensively overseas. It's rather based on the fact that in exercising the discretion often primary consideration is given to the policy of the Convention.

McGrath J So you would not support Justice Fisher's strong presumption proposition in *S against S*?

Pidgeon The word presumption I wouldn't support but I would say it's a strong factor that in interpreting the provisions, which is basically to prevent the wrongful taking of children from one country to another.

McGrath J Right thank you.

Pidgeon This is important and a general reason the best interests of children and actually the Convention says so is to prevent abductions and that it is a overriding but not automatic policy consideration that should be taken into account in interpreting or considering the application of the law to a particular case. And there have been occasions

Elias CJ Sorry, overriding sounds pretty like a presumption.

Pidgeon Well it is pretty like a presumption but that's what I'm trying to say, the word 'presumption' is not used but the approach adopted is very similar to a presumption, yes.

McGrath J But you don't say it's overriding do you because you want to have balancing?

Pidgeon Yes, no I accept it's not overriding in the sense that other matters can be taken into account.

Anderson J So more like a prima facie position?

Pidgeon Yes I think that's probably a good way of expressing it, yes.

Elias CJ Well looking at the matter as one of statutory interpretation within the corners of the Care of Children Act, how do you reconcile that with sections 4 and 5?

Pidgeon Well the position is that the Hague Convention has nothing to do with sections 4 and 5 and these arguments were raised under the Guardianship Act when the first Hague Convention cases were brought forward and say that you've got to take into account the interests of the children. Now the Courts have said no, we're dealing with a discrete provision

Elias CJ Well that may well be so in terms of considerations within the 12 month period but why do you say just on the fact of the Statute that once you've past 12 months and you've reached the statutory qualification that the children must be settled, that all matters under the Act are not then at large in the decision?

Pidgeon There is authority that in the exercise of a discretion the Court could take into account all relevant matters. In other words it's an open-ended discretion.

Elias CJ Yes.

Pidgeon And at that stage one of the matters that you could take into account in the Courts, and there's authority to that effect, is the welfare of the children, or put another way, best interest of the children only where it operates in the discretionary factor.

Elias CJ Yes, but you're saying

Pidgeon But I don't with respect say that you can purport statutory provisions, I'm saying that it is a matter which you can take into account in the exercise of discretion.

Elias CJ Yes but if you're taking it into account and there are a number of factors which are relevant, how can you say that the policy of the Hague Convention becomes overriding when you have considerations which are emphasised in the Care of Children Act itself? And there is no explicit

Pidgeon In my submission we can't really when you're dealing with an International Convention flavour the approach that should universally be adopted, and that's the aim, by the terms of in effect unrelated legislation and I know it's in the same Act but it's quite unrelated to the Hague Convention in interpreting the Act. In other words each country, no other country may have such a provision – who knows. Some will have similar provisions but I've never seen, and you won't find in reported cases, local legislation looked at in interpreting an International Convention.

Blanchard J And s.4 actually concludes with cross-reference – 'this section does not limit sub-part 4 of part 2 which the Hague Convention'.

Pidgeon Which is the Hague Convention, which is the point really I should have drawn the attention of the Court to that.

Elias CJ Yes which is not to say it's irrelevant.

Blanchard J It's not irrelevant.

Elias CJ This question is directed at your suggestion that there is some override.

Pidgeon Well I accept as a matter of statutory interpretation there's nothing in the Act or indeed in the Convention that talks about overriding principle and indeed it probably is my duty to point out the provisions. A decision of the High Court of Australia in *DP and Central Authority* which is referred in passing in the Court of Appeal judgment, and I'm sorry, perhaps I'll leave my learned friend here to give the Court the reference but it's in the Court of Appeal judgment. It was a very controversial decision of the High Court of Australia and what it did was adopt the approach of statutory interpretation, or in Australia it's actually regulatory interpretation, and said in effect made the point that Your Honour has made that you should give full weight to each provision of the legislation and has in effect said although the policy of the Act Convention should be taken into account, it discouraged any suggestions of presumption. There was a strong dissenting judgment by his Honour Justice Kirby to that judgment

Blanchard J What a surprise.

Pidgeon Yes, and there has been strong criticism by the English Court of Appeal to the approach adopted by the decision which caused some consternation in the Family Court in Australia, in fact if I was invited to a conference of Central Authorities in Australia which was attended by representatives of the different States. Each State has it's own Central Authority and some Judges, including incidentally Justice Kay, and I was invited to present a paper as to whether I thought that New Zealand would be likely to follow the approach of *DP* and it was very clear from the Convention that people were very unhappy about the

decision, and as I said you will find text criticising the approach and said

Tipping J Were they basically saying that everything, including the Hague Convention, is determined by the best interest of the child

Pidgeon In effect. It's not quite as bluntly but that's really

Tipping J Not quite as blunt as that.

Elias CJ But that wasn't dealing with this provision.

Pidgeon No it wasn't, it was a grave risk provision.

Elias CJ It was dealing with a grave risk provision which is quite different, yes.

Pidgeon It was dealing with a grave risk provision but it had opted a very pragmatic approach in the sense that, and we've got a piece of legislation here, it really seemed to ignore the weight of how other countries had interpreted the provision and said well this is an exception. If we find the exception is made out then the best interests of the child must be the determining factor. And the reference is *DP v the Commonwealth Central Authority* (2001) 180 ALR 402.

Tipping J That's referred to at para.32 of the Court of Appeal decision.

Pidgeon Yes that's right, yes.

Elias CJ I must say when I had a look at the reference to that and it's in the *Cannon* case isn't it, that it's criticised by the English Court of Appeal?

Pidgeon I didn't pick it up.

Elias CJ Well it's one of the cases you've given us.

Pidgeon I remember a decision, a very strong decision of Lord Justice Ward in another case which I haven't got at my fingertips.

Elias CJ But it didn't seem to me to be quite on point at all and indeed I remember thinking that the High Court decision was strange so I'm not sure that I'd accept that it was what I had been putting to you Mr Pidgeon, but I'll check it.

Pidgeon Well I wonder whether it was, yes, sorry Your Honour but it seemed a similar approach. So that in conclusion unless your Honours have further questions, what in essence I am submitting is in general terms that there is a discretion even if settlement is established that the discretion in my submission should not be exercised against return where there has been concealment. Secondly that in exercising the discretion weight should be given to the policy of the Act and thirdly in

exercising discretion the Court must be aware of the public policy factors that in giving its decision it should not be seen in anyway as giving abducting parents a loophole to escape the provisions of the Convention. Now in this particular case I'm referring to the fact that if a parent can escape the Convention by fleeing a violent parent and go into hiding for 12 months where a person may be, as Justice Thorpe said, slothful in enforcing of rights, unaware of enforcing their rights or not quite sure what to do, getting some kind of advantage by reasons of that factor and applying that to the present case in my submission the parent here knew she didn't have the consent of the father to live permanently in New Zealand; she was able to contact the father through his mother; she acknowledged that.

Anderson J Is that his mother or his sister, K isn't it?

Pidgeon Your Honour may be correct; it was a named person.

Anderson J It was his sister.

Pidgeon It was his sister. No my junior who was in the Court below said although there is a reference to the sister it was actually the mother that was the contactable person.

Anderson J He says K. According to the pre-sentence report earlier on K is the sister. And the mother has a rather unusual name.

Tipping J Contact through a family member.

Pidgeon Through a family member. That the father did take steps to find the location of the mother was given address in Queensland and there's no evidence to suggest that the brother would have given the address if the father had contacted the brother.

Anderson J I'm looking at page 1 of the case, para.1.2 'to establish the background number of people were interviewed. These included L F (mother), K J (sister).

Pidgeon Yes I see that, yes.

Anderson J There's certainly not a L F mentioned is there in the letter of 15 November, page 116 of the case – send it to C/o K J.

Pidgeon Yes, yes I see that, that does seem quite clear. He gave the contact address; yes it was his sister, yes, exactly. And there's no suggestion that the mother did try and contact the sister to find out where the father was. Those are my submissions if it pleases the Court.

Elias CJ Yes thank you. Yes Miss Hart.

Hart Your Honours in the position of the new evidence, the affidavit, am I allowed to speak to that evidence?

Elias CJ Well do you really think it advances things very far? There is this issue about the matters to be taken from the public record Miss Hart but it doesn't' really seem that the issues of principle that we're concerned about turn very closely on some of the matters traversed in the affidavit, some of which really are pretty argumentative.

Hart I don't need to focus on those aspects of it but perhaps just the one point that was hinging around the 8th May or when the father first could be proved to be aware of the fact that the respondent was in New Zealand in that she does say the mother in that affidavit, that both parties attended the directions conference on the 8th May, so to that extent it is submitted that it does assist the Court to establish that, the timing of that first probable contact. At Exhibit A of that affidavit there is an email there from the respondent and she says

Elias CJ Well again, I mean this is quite irregular getting it in in this sort of form which is a communication with you. It must be a matter of public record. I would have thought that it can be clarified and that Mr Pidgeon can simply confirm when the inquiries have been made that both attended the telephone conference. That does seem to provide at least the outside benchmark.

Hart Well if that's the case I accept that Your Honour.

Elias CJ Otherwise there's only a matter of a couple of weeks in it because even on her material she's saying that she made contact with the Court at the end of April.

Anderson J For my part I don't see how her evidence can displace his sworn statement that he didn't realise what was happening until July, but it's all about the same time anyway really, middle of the year.

Elias CJ Well in the Family Court they don't have to admit only sworn evidence.

Anderson J Well she says T attended that hearing also, well he may have but that doesn't mean to say he was made aware of where she was. It was a telephone link, not a video link with the Southern Alps in the background.

Hart Your Honours I have three main submissions. The first one really goes to the essence I think of the legal argument today about the presumption. The second one is the trend that my learned friend refers to and the third one is in regard to the issue of concealment. Did the respondent really conceal the children? In terms of which order I deal with those I'm inclined to begin perhaps with the trend issue and then

Elias CJ Well I don't know whether anyone's bothered by any trends, we just want to know what the correct answer is really.

Hart Alright, in that case I'll get on with it. The respondent submits that the Court of Appeal made a correct decision in regard to holding that once an exception is made out the presumption falls away and the onus possibly then falls to the other party to show a good reason why these children should still be returned. The presumption of return is a butterball presumption and it seems a matter of common-sense that once it's been rebutted the discretion deals with what's left over, that's why it's referred to as a residual discretion. In terms of what my learned friend spoke about in the purpose of the Convention, I think it was correct to draw attention to not just Article 1 but the preamble to the Convention where it is stated more fully what the Convention is intending to do. Unfortunately the casebook doesn't have that print out of the preamble but somewhere

Elias CJ Well do you want me to read it out? 'The State's signatory to the present convention', is that the part you want to read out or the aims?

Hart Yes Your Honour, the very first part about

Elias CJ 'Firmly convinced that the interests of children are of paramount importance in matters relating to 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 prevention to this effect etc'.

Hart So there's an emphasis right at the start it's submitted on the paramountcy principle the best interests of the children and to protect them from harm, so although Article 1 is more specific and it's talking about preventing abduction, it's preventing the harm that may result from the abduction that it is submitted mustn't be forgotten in that. In terms of the case of *S and S* which is relied upon to support the contention that there is a strong presumption in favour of return even after an exception is made out

Tipping J I don't think *S and S* can possibly be regarded as standing for a rule to that effect. I don't think Mr Pidgeon is suggesting as much.

McGrath J Well in the Court of Appeal.

Tipping J Well in the Court of Appeal, yes.

Hart Well the question then arises if that's so what

Tipping J Well it's the emphasis on the strong I think

Hart Yes.

Tipping J There is an argument if you like, ignoring terminology, there's still some presumption continue with that word even though an exception is made out. That much I think you have to face, but not that there's a sort of strong presumption.

Hart Yes Sir it was difficult to ascertain from my learned friend's submissions exactly how strongly he regarded that factor that when the exception is being made out whether it's overriding at that point or simply another factor to take into account, but in terms of

Tipping J Well never mind Mr Pidgeon what do you say it is?

Hart Well I say that once that exceptions made out presumption falls away. It's been rebutted.

Tipping J So it's a level playing field then. No tilt either way?

Hart Well I would go so far as to say that at that point the onus does fall back to the other party, the left behind parent.

Tipping J So there's an uneven playing field but tilted the other way.

Hart That's my submission Sir.

Elias CJ I take it you have a fallback position that at least it's level?

Hart Quite correct Your Honour. So I did look at *S and S* though quite closely to see whether perhaps there has been a development with this, what could be perceived as an overriding policy that's arisen out of cases like *S and S* because I think it is important to note that in case there was no finding made. There was no separation, there was no two-stage process between satisfying the elements of the exception, in that case the grave risk exception, and the second aspect of how the discretion is to be exercised and I wonder whether the language of some of the cases that talk about strong presumption and exercise of discretion whether they are actually referring to one entire decision where the discretion is coming into play in the whole single decision. In that regard it's submitted that there's a danger of denying a party resisting return really a right to a fair hearing, that if there's an exception available one is entitled to have a finding before the discretion is exercised.

Elias CJ But don't you have a finding? You have a finding children are settled.

Hart Certainly, in our case we do but I just

Tipping J I think the elision that was suggested by the Court in *S and S* was only for pragmatic grounds, if it was quite clear that it was all definitely going to go that way. I think with respect you may have become a

little bit overwhelmed by that point which isn't going to be despositive here and I think you may possibly have elevated a bit more than is really helpful.

Hart Well nevertheless Sir it is accepted what you say but the idea of having to make a finding it is submitted is important and I know it's not an issue in this case but

Tipping J Isn't the crunch in this case 'having found an exception where do you go from there? That's the crunch.

Elias CJ Well I must say I can't see that natural justice is engaged at all Miss Hart. I didn't understand that part.

Hart Well perhaps as I elucidate a little more on some of the issues that I see as important, there might be some acceptance that it is actually relevant here.

Tipping J You don't suggest for a moment that your client hasn't had natural justice. Are you concerned about natural justice for the other party?

Hart The natural justice argument will come in if the Court holds that the Court of Appeal was wrong, then what it is submitted as being held is that the presumption, if it's going to come into play again in the exercise of discretion as an overriding kind of policy, then that is an interference in the right to a fair hearing, because once you have rebutted a presumption to then impose another second hurdle seems to run the risk that the policy is becoming fixed to the point where it's a rule, and if

Anderson J And just a question of conditions being met which trigger the availability of a discretion that wasn't there before. It just makes it available.

Hart Sir, I just didn't quite appreciate the comment.

Anderson J If the conditions met, and in this case 12 months and settled, that renders available a discretion to be exercised which wasn't previously available, absent the conditions. It just opens the bag in which the power can be produced if necessary.

Hart Yes I see and I accept what you're saying.

Anderson J And then the issue is well what informs the exercise of the discretion? And what Mr Pidgeon says is that the starting point really is that there should be a return but there may be countervailing factors in a particular case.

Hart My submission to that is that to approach the discretion as the starting point imposes too great a burden on the respondent. The respondent is

already past the threshold of having made out an exception but to then say that the discretion is a starting point seems to be a double hurdle.

Anderson J Well it's not really, it's not really. There was a closed gate up to the point where the condition was shown to be satisfied; after that the gates opened and there was a hurdle behind it which may or may not be leapt. The issue is what weight is to be given to the purposes of the Convention.

Hart It is submitted that at that point the interests of the children, those particular children, must come into play and must be sharp focus and in my submission the interests of the children become paramount at that time.

Elias CJ Well was there evidence really before the Court about what impact there would be on the children of a temporary removal to enable the process to be undertaken in Australia?

Hart I wasn't involved in the Family Court decision and I'm not aware of whether those issues were traversed because they certainly would have

Tipping J You were asked whether there was evidence. Was there any specialist evidence or

Elias CJ I mean presumably we've got the evidence before us; I haven't gone through it all.

Tipping J I got the impression there wasn't because if there had been the Judge would presumably have referred to it.

Anderson J It's just the affidavits

Tipping J Yes, just the two affidavits.

Hart Yes, I've never seen any evidence from the Family Court. I believe I was given everything with a whole file from the original lawyer in Hawkes Bay but

Tipping J Was the evidence ever transcribed do you know?

Elias CJ There wasn't any oral evidence.

Tipping J No oral evidence at all?

Elias CJ I think there isn't in these things is there; it's all done on papers? Which is why Lord Justice Thorpe says 'the appellant Court is in as good a position to draw the inferences of fact. But really this does strike me as a most unsatisfactory case to have come before the Supreme Court to determine some of these issues of principle, because there are all sorts of loose threads.

Hart It's totally agreed that, that's why I think it's important that the updating evidence from the Court of Appeal is relevant in this situation.

Tipping J I think Mr Pidgeon's effectively accepted that so if there's anything specific in there I'd appreciate your assistance as to what specifically you rely on in relation to material in front of the Court of Appeal that wasn't before the trial Judge, the Family Court Judge. What do you say is the crucial dimension of that, because if there had been a material change of circumstance between Family Court and Court of Appeal, that is highly significant.

Hart Well what transpired after the Family Court and High Court judgments was that the father appeared to have lost interest in gaining access to the children – at least that's the only conclusion one could draw from the fact that he didn't turn up at hearings and he seemed to be uncontactable and

Elias CJ Well we just don't have evidence of any of that Miss Hart. We don't have any evidence of that do we?

Hart We do Your Honour. In that affidavit of 25th October, it was attached to my memorandum to the Court of Appeal. I've only got the first page of it, it's been missed, but in that affidavit the respondent talks about how she hasn't had any contact from the father at all. He hadn't phoned or sent any letters or attempted to contact the children in any way even though he must have known where they were.

Tipping J What about this business of the New Zealand order being registered in Australia? Can you develop or shed further light on that point?

Elias CJ Can I just interrupt. We need to take the adjournment promptly today.

Tipping J Alright sorry, I didn't realise.

Elias CJ No sorry. I would invite you to come back to that after the adjournment but also Mr Pidgeon I am very interested in finding out what the position is in terms of the custody arrangements with the registration of the New Zealand order in Australia, but I wonder if that's convenient unless you want to respond very briefly on that it may be a matter you'd come back to.

Hart I'm happy to come back to it Your Honour.

Elias CJ Alright we'll

Tipping J Section 23 of, I'm not sure what legislation this is, but section 23 of some Family Court legislation

Blanchard J It's Regulation 23 of the Family Law Regulations.

Tipping J Is that what it is. It seems to equate a registered New Zealand order in Australia as if it were an Australian order to the same effect.

Hart That's my understanding Sir.

Tipping J Well we're obviously going to adjourn now, but we need to explore that I think.

Hart Yes.

Elias CJ Good, thank you, we'll take the adjournment.

Court adjourned: 1pm

Court Resumed: 2.18pm

Pidgeon May it please Your Honours during the lunch interval I have obtained the relevant information concerning the registration of overseas children's orders taken from the Australian Family Law and Practice Report. I have six copies Madam Registrar, and in summary the effect of it is that the order has the effect of an Australian custody order and there are in fact relatively limited powers to vary the terms of the order and the introductory section gives you the background – that's 24-600 paragraph and then paragraph 24-613 talks about the consequences of registration of an overseas child order. It appears there's only a provision with a few countries, New Zealand being one of them, for registration under this particular regulation 23 the other States are the United States, Austria, New Zealand, Papua New Guinea and Switzerland. That's an interesting collection of countries.

Tipping J Where do you find that Mr Pidgeon please? Where do find that list of countries?

Pidgeon On top of page 18,803.

Tipping J Oh thank you, yes.

Pidgeon So in this particular case the registration of the custody order in favour of the mother reserving the right or the father to apply for access. It appears that that is an order which unless the welfare of the child demanded it would remain extant; that is the custody order, but of course the Australian Court would be free to deal with any application for access. And perhaps while I'm standing on my feet there is perhaps one point I should point out to the Court and that is with reference to

the protection orders made both in Australia and New Zealand. Of course it's a provision of the protection order and the conditions are set out in page 43 of the case on appeal that a person against whom an order is made cannot make any contact with the protected person whether by telephone, correspondence or otherwise, so it would have been a breach of the protection order for the father to have made any contact with mother or children.

Tipping J Would that apply to the children insofar as, it encompasses children does it?

Pidgeon Yes because the protection order has in page 42 includes mother and the two children. It wouldn't if the two children weren't named in the order.

Elias CJ Thank you Mr Pidgeon. Mr Pidgeon sorry to you want to make any submission off what bearing this has.

Pidgeon I've actually conferred with my learned friend and I think a common view is that it doesn't have any bearing on the question this Court has to determine. One argument I suppose could be that the mother had submitted to the jurisdiction of the Australian Court and therefore the children should be returned but that may be pushing it a little too far. In other words the mother has by this action given jurisdiction concerning the children to the Australian Courts.

Anderson J So it could determine the question of access in her absence and in the absence of the children.

Pidgeon Yes well that would be very rare and the other factor is that under the Family Law procedure in New Zealand, a New Zealand Court has power to make custody orders in respect of children under certain circumstances who are outside the jurisdiction, but there's been several cases on that and generally the Courts refuse to make orders where the children are not within the New Zealand jurisdiction although they have the power to do so in practice, it's very seldom done. The Court takes the view, and I've had one case myself recently where there was a dispute between the father who was living in Australia and the mother was living in New Zealand. The father had applied for custody in Australia and the mother separately commenced proceedings in New Zealand for custody and the decision of Judge Adams was that "I do have the power to make such an order but in the exercise of my discretion, particularly as the child and the original custody procedure was started in Australia, I defer my power to the Australian Court. So the problem of course could be that when the Australian Court comes to deal with it, it may itself as there is a New Zealand order, also decide possibly to say that this matter could go back to New Zealand, and of course in the case of the application for protection orders etc, both in Australia and in New Zealand, it appears they were not defended by the father so they were put through unopposed. So it's not a very

satisfactory situation really. No Court has looked at the real merits of the provisions regarding the welfare of these children. But it is very common to find custody orders floating around in the background in Hague Convention proceedings, quite often done. In New Zealand of course there's provision once proceedings have been brought in New Zealand under the Hague Convention the Court does not have power to make custody orders, other than interim orders or emergency orders needed for the welfare of the children. So if there's current proceedings for custody the fact that an application under the Hague Convention is made stays any further orders being made. But here of course these orders were made in Hastings before the application was filed under the Hague Convention.

Elias CJ But there's specific provision also in the legislation isn't there that notwithstanding the existence of any custody order these applications can be dealt with?

Pidgeon Oh yes, there's no doubt that that is the legal position, yes.

Elias CJ Has the father given any instructions in the appeal? Has he participated in the appeal?

Pidgeon Yes, In have I have received a copy of, this is a little difficult, an email from the Attorney-General's Department which is the Australian Authority, saying, well it's a bit difficult

Elias CJ Well perhaps you shouldn't go into it.

Pidgeon But in effect it does say, it is clear there has been contact with Mr J and his partner.

Elias CJ He wants to maintain this.

Pidgeon He wants to maintain this, he does, yes.

Elias CJ Yes, that's really what I was interested in.

Pidgeon There are other explanations as to what happened with regard to the Family Court proceedings and I can confirm, the email confirms that the custody order and the protection order was registered on the 19th January 2005. I haven't checked but presumably that's the order and that the position was that the Central Authority was advised there was a particular reason for advice given, and I won't say what the advice was, to Mr J why he didn't appear at the hearing when the proceedings were struck out. It was his understanding from his counsel that the proceedings had been adjourned and there was no further appearance necessary until the outcome of the Hague Convention in Australia.

Elias CJ Were you able to confirm over the adjournment the telephone appearance

Pidgeon No, no I haven't been and the Australian Central Authority didn't have that information on its files but is prepared to investigate. Because of course the Australian Central Authority does not act on behalf of the resident partner in connection with Australian proceedings so that he would have to have got in this case legal aid and employed his own solicitor so they would have to get that information.

Elias CJ I see.

Pidgeon But I'm sure it could be obtained.

Elias CJ Yes Miss Hart.

Hart Your Honours it's the respondent's contention that once the s.10(1)(a) dispense is made up that the best interest of the children become a controlling consideration. I'd like to refer the Court to the case of *Pennello and Pennello*, which is in the respondent's authorities at tab no.12. You need to put your finger underneath it rather than on top, it's not done quite correctly. At para.45.

Tipping J This is the Supreme Court of a South African Province is it?

Hart That's correct Sir. There's an extract there from another case called *Re M* and the Lord Justice stated there, this is to do with this idea that the welfare of the children is important once an exception has been made out and he says there "the Convention nonetheless exceptionally makes provision for specific consideration of the welfare of the particular child with whom the requested State is concerned, where the threshold has been crossed and the needs of the child require the Court to take another course than summary return under Article 12." It is submitted that this approach would constitute a proper exercise of discretion and in a manner consistent with the purpose of the Convention. Section 4 of the Care of Children Act that was referred to earlier today I just point out in passing that in that para.7 the paramountcy principle section, the wording of that says 'this sections does not limit s.83 or sub-part 4 of part 2, which is the Hague Convention section. It is submitted that it could have been written more strongly if the drafters had wanted to subjugate that section to the Hague Convention, they could have written that that section was subject to the Hague Convention principles. They haven't done that. They've said 'does not limit' which should have submitted makes a difference.

Elias CJ Well it doesn't limit the requirement that the children must be returned unless an exception is made out, so it doesn't arise unless one of the exceptions is made out, but an exception having been made out you submission is that the wording of s.4 doesn't preclude consideration of the best interests of the child.

Hart Indeed Your Honour and that once an exception has been made out it allows for the welfare of the children and their best interests to be a controlling consideration as the Court of Appeal held. It's also submitted that the wording in Article 13 supports the consideration of the welfare of the children, where Article 13 says 'in considering the circumstances referred to in this Article the judicial and administrative authorities shall take into account the information relating to this social background of the child provided by the Central Authority or other competent Authority of the Child's habitual residence, submitted that the imperative in that wording shows a clear intention to consider the particular circumstances of the subject children. It is accepted that there is sometimes a conflict between the policy of the Convention wanting to protect the interests of children generally, and that can conflict with the interests of particular children, but on that there is evidence to suggest that what used to be the general children are now becoming in the minority so to speak. For instance the article on, I won't refer you to it, but that article that Catriona MacLennan wrote suggests that the proportions are all changing. That what used to be the access parent abducting a child and denying the rights of the primary caregiver, and now 70% of the abductions are caregivers who are leaving the country of habitual residence. Just on that I would like you to look at the respondent's authorities at an excerpt from an authority used by my learned friend. It's an English textbook and that's called International Movement of Children. It's a recent publication. That's at tab 4, or behind 3, at page 23 of the book, and at para.17.134 it says that "Since the Convention was initially drafted upon the assumption that abductions were commonly carried out by non-primary carers (mainly fathers), whereas it is now clear that 70% or more of abductions are carried out by primary carers (principally mothers)..

Tipping J I'm sorry, what page are you at - 24?

Hart Page 23 Your Honour.

Tipping J Oh yes 17.134 para. 2?

Hart That's correct Sir.

Tipping J Yes, thank you.

Hart "It has become outdated such that it may no longer be correct to assume that children's welfare is generally best served by being returned to their country of habitual residence. So the submission is that whereas in the past the policy of the Convention was, the presumption of returning at all costs to protect children generally and protect children of 'would be' abductors, these days those children may well be in the minority. So it's the respondent's submission that once a defence is made out it is legitimate to consider the best interest of the particular children who become subject to the Hague Convention legislation and jurisdiction of the Court. It is

Tipping J You've shifted your focus. You said originally that once the defence is made out the interests of the children was a controlling factor. You are now saying that it's a relevant factor.

Hart Sir, I still hold by the initial assertion that it's a controlling consideration, I'm simply using this material to show that the

Tipping J Are you saying it's controlling that if we don't accept that it's at least relevant?

Hart That is my stance Sir, but it's not the only one point I am trying to draw out of the changing circumstances. It's more to reassure the Court that The Hague Convention purpose is not going to be undermined by considering the individual subject children.

Anderson J What publication did Miss McLennan's article appear in? It's not apparent from the table of contents.

Hart Sir I cannot answer that question.

Elias CJ It was re-published in the 'Northern News' or the 'Law Journal' I seem to recollect, but it was originally a speech.

Hart That's why I've got it confused because I originally read it in the 'Law News' but I apologise that this is not correctly, that the background is not referred to.

Tipping J Is it an Auckland District Law Society seminar because it's got ADLS/Hague Convention Poses Problems for Women Abductors Fleeing Violence by Catriona MacLennan.

Hart It may well have been Sir, but I can't confirm that.

Tipping J Oh well.

Hart The other point I would like to make about the exercise of the discretion once an exception has been established is that it doesn't seem to be disputed that the discretion is residual. It is left over and that would seem to suggest that at that point there could not be an overriding presumption of return at that point. If there is an overriding presumption there's a danger it is submitted that that presumption of return can lead to what would become a fixed rule that it doesn't matter what other circumstances you look at

Tipping J Well it would fetter the discretion and that's the British Oxygen case, I mean you must be right here and Mr Pidgeon doesn't so that's suggesting it's overriding because that would eliminate the discretion which he acknowledges, so with respect I don't know that this really takes you anywhere does it? You're arguing a proposition that isn't

put up against you, unless I've completely misunderstood Mr Pidgeon's

Hart Yes well I must say I took the same out of what my learned friend said this morning that he wasn't asserting there is an overriding presumption

Tipping J Well it can't be, I mean that would be to say there is no discretion.

Hart Yes but my submission is that to have the presumption there at all at that point is running the risk that it does head in that direction of becoming overriding.

Elias CJ Well I think the factor that Mr Pidgeon would put into it is concealment, so if there is concealment then the presumption would apply.

Hart My submission is that the concealment issue would be one of the factors to be taken into account looking at the discretion but that in line with the Court of Appeal decision, the concealment would be the satisfaction by the left-behind parent of the obligation to show a good reason why the children should be returned. That the onus has shifted on to the left-behind parent. An illustration of the concept of the presumption becoming so clearly in focus that it's overriding I submit could be shown in the case of, it's called *T and T* in some references but I noticed when I got the decision it's actually referred to as *The Secretary for Justice and MF te N.* If that's in the respondent's casebook at tab 5, para.96

Elias CJ Is that the right?

Hart No.

Elias CJ Oh it's above tab 4, thank you.

Hart These tabs aren't right; it's the one behind. This was a case where the issue of grave risk, the defence of grave risk was raised and in that case grave risk was made out but the discretion was still used to order the children back to Australia and at para.96, this is Judge von Dadelszen. He explains why he exercised his discretion in favour of return, even though he'd made a finding of grave risk. He says there are a number of reasons. The main one is that such an approach is in keeping with the intent of the Convention. Australia is the appropriate forum to determine the best interests of the child. So it's accepted that grave risk is extremely difficult to make out. He's made a finding as to grave risk and he still returns the children.

McGrath J Sorry, what paragraph are you at now?

Hart 96 Sir.

Tipping J Is that equivalent to a proposition that even if there is a grave risk it's still the intent of the Convention to send them back to face that grave risk. It seems a rather extreme

Hart No that's not the proposition at all Sir from the respondent's point of view.

Tipping J No I'm saying is that the Judge's proposition?

Hart Indeed. It would appear so.

Tipping J I know it's not your submission but that is what the Judge is in effect saying that even if there is a grave risk the Convention policy is to send them back to face that grave risk.

Hart Yes.

Elias CJ He imposes conditions which suggests there's some slightly, I was going to say muddled thinking, but I don't mean to sound like that, but the grave risk that s.106 is concerned with is the risk in the return, that is the return for the procedural steps to be taken, it's not the risk in any return to custody and it may be that if the Judge felt that conditions could be imposed, he would satisfy that in fact they made the risk not great or they remove the risk.

Hart But you can see that it doesn't quite fit logically does it, because on the one hand he's found that there's grave risk and on the other he's still using this overriding policy reason to send them back and that is submitted as what the risk is in allowing the Court of Appeal decision to be overturned. In para.99, which is over the page, he says I accept that there appears to be an inconsistency in approach. On the one hand, I have said that there is a grave risk if the child is returned, on the other hand I have nevertheless determined to return the child in the exercise of the residuary discretion enabling me to do so. He goes on to say there are two explanations for this. First there is the need to consider the defence first and make a finding on that and secondly the return order comes with conditions. The concept of making undertakings and having conditions has been criticised in other judgments but notwithstanding that that would appear to make a nonsense of the defence itself or the exception, whatever it's called. Judge Boshier in his Family Law presentation, he said that the defence is virtually redundant as between Australia and New Zealand. Now that's in the New Zealand Family Law Journal, it's tab 2 at page 11 of the casebook, oh wait on, yes that's it. Two thirds of the way down the page he says "New Zealand has the highest respect for the Family Court of Australia, sot he defence of grave risk of psychological harm is all but redundant in any situation where a child has been abducted from Australia to New Zealand. This recognises that Australia is fully capable of protecting the rights of children within its jurisdiction, and

that the harm of greatest concern in cases of abduction between our two States is that caused by the abduction itself." It was submitted that that, there's a risk there.

Elias CJ Yes will the risk follows on from the view that the party must show that the Courts of a state of habitual residence are incapable of protecting the child from the risk of harm which I suppose gets translated to the Courts of the country that the child is being sent back to which I suppose you would say is not the statutory or Convention approach. It's not a question of faith in the Courts.

Hart No that's accepted but what is interesting about that is that the grave risk is accepted as a very difficult thing to make out and it's accepted it seems that the discretion is residual. The English Authorities in the International Movement of Children, which I'll refer you to in a moment, the author there says that when grave risk is made out, he says there's never been a known case where the discretion has been exercised in favour of return and yet we have in New Zealand a situation where grave risk is made out and that's it, the children are returned.

McGrath J But isn't the difference though really as the Chief Justice says that in the New Zealand paper by Judge Boshier is contemplating that grave risk will include an assessment of the capacity of, in this case, the Australian Courts to protect the child. So grave risk won't be made out unless the State to which the child might be returned is not capable of protection in the particular circumstances?

Hart Yes it is accepted that that is his point.

McGrath J Whereas Judge von Dadelszen I think approaches the matter slightly differently and he leaves that factor out, but brings it back in when he's considering the ultimate, his discretion.

Hart Indeed, that's true.

McGrath J But both are really on the same thing.

Hart Nevertheless and the Court will be aware that the threshold is at times criticised for being too high.

Tipping J But Judge von Dadelszen in the other case, the *MF te N* case seems to have thought that there would be a grave risk without the conditions which is a sort of hybrid, two-bob each way sort of approach.

Hart Exactly and I haven't read the case totally closely but it appears that the child is going back to the mother in a custody situation. She's got a drug problem and they believe she's not capable of

Tipping J It's going back to the State rather than to the parent isn't it? It may de facto be that it will be in the care of the mother in the meantime, but I think we've got to be very careful haven't we here not to slide into merits. It's a question of which State adjudicates, not which parent wins the custody access battle.

Hart That's true, that's accepted.

Elias CJ That's what it facilitates but the inquiry as to the grave risk to the children must be a factual inquiry as to what risk the children are at if subject to the return to enable the Courts to deal with them. I do think for myself that there is a substantial point that you make here, that there is some abdication in simply saying it's a question for the Courts of the country to which the children are to be removed. Although there may be some cases of course where all that is being said is that there isn't sufficient legal protection in place for children and then it would be appropriate to look at the legal system and its protections.

Tipping J But we're not a grave risk case so I'm not quite sure why we're going into all of this in such depth.

Hart Well I do appreciate your patience in this because clearly it isn't under consideration, but it is important because this goes to how discretion is exercised when a defence has made out.

Tipping J You don't have to have a 'one size fits all' approach to this discretion do you? You could have one approach for grave risk and another approach for 12 months in settlement.

Elias CJ But we're in a case where the exception is made out. In the grave risk there may be elements of what sort of institutional protections there are so it's in the context of that assessment that these cases are looking at the matter but here we have an established exception and the question is how the discretion nevertheless to return is to be exercised.

Hart But that's exactly my point on the grave risk one that the exception is comparable even more so because of the grave risk. The English don't return at all once it's made out, so they're saying yes there is a discretion but it's never been exercised and

Tipping J What do you draw from that that is relevant to our inquiry?

Hart That the discretion is so small at that point that there's no scope for a presumption of return.

Anderson J There's a qualitative difference between grave risk to a child and upsetting a settled environment.

Blanchard J The very nature of grave risk means that there isn't much room for manoeuvre once you found grave risk, but the prior question is what is

a grave risk and obviously the New Zealand Courts, vis a vis Australia, are factoring in the institutional protections.

Hart Yes but if Judge von Dadelszen is saying it's okay to send them back even though

Blanchard J I don't think he is saying that actually. I think it's not very well expressed but it seemed to me that what he's doing is saying well if the child went back straight to the mother with no strings attached then there's a grave risk because she's got a drug habit, but overall conditions can be attached. He doesn't then actually say and that will mean there isn't overall a grave risk but I can't really sensibly read here any other way.

Hart Effectively doesn't it then mean that there can't be a grave risk or is that subsequent?

Blanchard J Well what he's effectively saying is overall there isn't a grave risk here because the Australian's can put in place the necessary protections.

Elias CJ He hasn't expressed it like that and I suppose your point is that it's another example of excessive deference to the overriding aim of the Convention but in circumstances where the Convention actually creates an exception and that the Courts should be exercising a wider assessment of the individual circumstances.

Hard That's exactly what I'm trying to express. Just to finish off that point could you please refer to the tab 4 which is the International Movement of Children, that's the volume that my learned friend also quoted in his submissions at page 22 right down the bottom at 17.132. So he says "although as with all the Article 13 exceptions, establishing a grave risk does not automatically mean that the Court will refuse to return the child in practice, given the generally rigorous test that is applied, a refusal is virtually inevitable. At any rate there are no known examples of a Court exercising its discretion to return notwithstanding the establishment of a grave risk.

Blanchard J If you don't have a comparably rigorous test to use that language in the exception that we're considering.

Hart Nevertheless Sir it's submitted that the Court can still look at what happens after the exception is made out and that it is possible to say that the presumption at that point has been put aside as it were.

Blanchard J Well putting it another way could it be said that you balance the relevant factors which include perhaps as a starting point the fact that there's been a finding that the children are settled and you balance against that the general considerations relating to the Convention and not wanting to subvert the Convention and such other factors as may be relevant to the particular case.

Hart That's true Sir yet does that really deal with what the Court of Appeal is saying when they say that once an exception is made out there is no scope for

Blanchard J I think the Court of Appeal is saying something different from what I've just put to you.

Hart Yes, that's the question.

Tipping J But they have it tilted more in favour of non-return than that would my brother's more level approach have it.

Hart Indeed.

Blanchard J There has to be a default position I suppose if after you've weighed everything up you're back at level pegging to mix metaphors and then I suppose you would say well given the nature of the exception the default position is in favour of the fact that the children are settled in New Zealand.

Hart Indeed, that is the crux of the argument that at that point the interests of the children become critical. It enables the Court at that point to look at what's happening in the particular situation without being hampered by this drive to return the children at all costs. I think that's all I need to say on the presumption issue. What I'd like to do now is deal with the factual situation and the appellant's assertion that the respondent concealed the children. This is going to be very dull but I think it's important to just step through as many of the facts that are relevant as possible.

Elias CJ Well what's your position on concealment that there was no concealing. She took the children and she didn't let the father know an address for her or for the children but there's nothing more than that, is that what you're saying?

Hart Yes, the respondent's position is that she certainly didn't lie low. In her mind when the two finally split he was the one who went off. He left as much as she did. She went to Women's Refuges and he managed to track her down to one of them, but when they finally split he basically abandoned her and the family.

Tipping J Is it a fair summary of your position that she neither facilitated contact nor actively prevented it?

Hart Not quite Sir. The mother for a long time it appears from the evidence, and we'll have a look at that if you would bear with me, but she did appear to for a long time try and facilitate through, there's letters there showing that she would be asking him to have a relationship with the children and

Elias CJ But that's all before she takes them so I don't think we need to get into that.

Hart That's true but it does I think indicate that she had no intention to deprive the man from his rights to see the children.

Anderson J So why did she leave? She hadn't had any contact with him since the letter of the 15th November. Two months later she comes to New Zealand. She hadn't had much contact with him before that so she was not under any imminent threat from him. For understandable reasons she feels she'd like family support in her home country I suppose, but she could still have written to the sister and said look I need to get back to my family in New Zealand, you can contact me through my brother there. That's all it would have taken.

Hart I can see that that's how it could be interpreted, however I would ask the Court to bear in mind that there's evidence that this woman has battered women's syndrome. There are reasons for her

Anderson J That might be a reason for concealment but the issue is did she conceal in the circumstances where she didn't disclose.

Hart Well she didn't conceal. Our submission is most definitely she didn't conceal.

Tipping J Well you don't want to set up reasons why she might have.

Anderson J I mean she didn't change her appearance I suppose or move to a community passing herself off as a Scots person or something like that but she just subsided from view without letting on. It's not an extreme case of going on the lam but it's a case of not keeping him informed of what she was doing.

Hart There's a dual thing going on here between the two ideas of her concealing them and the idea that she was somehow escaping from a violent situation and I think both of them come into play there and I think it's too simplistic to say that

Elias CJ But we're not going to judge her motives in this. I would have thought your best point is that she and the children had no contact with him and no terribly effective means of contacting him. He'd withdrawn – she came to New Zealand – she just didn't do anything to leave a forwarding address.

Hart Well that's true.

Elias CJ And do you just say that's not concealment or if it is it's not in context, the sort of conduct that should lead to an automatic exporting of the children so as not to encourage abduction of children.

Blanchard J The abduction didn't break up an ongoing relationship.

Elias CJ Yes.

Anderson J And also in his letter of 15th November he more or less expressed resignation that he wouldn't see them for some considerable time.

Hart Well indeed that appears to have been his stance. There are several statements to that effect – I'm going away – I won't see you – I might see you one day.

Anderson J Well can we put it like this then, if it's concealment there's nothing malicious about it.

Blanchard J Aren't you really just relying on para.64 of the Court of Appeal's judgment, which seems to me pretty much to summarise the position that you're putting before us at the moment?

Hart Sorry Sir, which paragraph was that?

Blanchard J 64 on page 241.

Hart That her misconduct, if any, was of limited moral gravity. My submission is that there was no misconduct. I know it's a side issue

Blanchard J Well they say if any.

Hart Yes, but our submission is that she didn't as

Tipping J Her only sin was bringing the children without his strict consent. Now the absence of his consent in these circumstances is what you might call fairly understandable. That was her primary sin if you can call it a sin that didn't seek his consent. Now I can quite understand why she wouldn't seek his consent if he'd just shoved off and he'd behaved in the way he had. I personally don't think there's very in this concealment point other than the simple fact she didn't facilitate, she didn't take active steps to tell him where she was. Now that is equally understandable. I think we're getting hung up here on sort of terminology.

Anderson J It's not a case of where a parent abducts to provide the other parent of access or custody, that's just a consequence of her coming to New Zealand in this case.

Hart That's true

Anderson J It's not the motive.

Hart I'm just concerned to cover the point because the appellant I believe would assert that there was concealment and I just want to make sure that we cover enough of the evidence to show that there wasn't active concealment.

Tipping J But where is it in your submissions? You've presumably summarised the evidence in your submission. Is it necessary to go beyond that?

Hart Well could I perhaps just point you to one or two

Tipping J Well just refer to where it is in your submissions to start with.

Hart Oh in my submissions we're looking at

Tipping J I think you've got quite a lot on this.

Blanchard J You start at 2.7

Hart Well I won't refer to the parts that refer to the affidavits since that doesn't seem to have been admitted but perhaps if we look at my submissions starting on page 19 of them and I've referred to that, which must be the 15th November letter at the page 107 of the case on appeal. That's an undated letter but

Tipping J Well the letter of 15 November is not the one you're wanting us to look at?

Hart Not just yet. We'll look at both if you wouldn't mind. The first one is at page 107.

Tipping J 29 September 2000.

Hart That's just

Tipping J Has someone put that in?

Hart It's in my estimate Sir.

Tipping J It's your handwriting?

Hart It's my note. I think it must be roughly around that date.

Tipping J It's a wee bit weird and misleading.

Hart I do apologise.

Elias CJ I've just crossed it out.

Hart He says half way down the letter "I am leaving Tuesday and he says if you want to get in contact with me ring Mum's place. Tell my kids I

love them and Dad will see them one day. Well I am going." So he's saying that he's going.

Anderson J Yes but they weren't living together at the time. He's saying where are you, you're living in Canberra and you won't tell me where?

Blanchard J The PS is not helpful to you.

Tipping J No, I don't know why we're looking at this letter.

Blanchard J You're really perhaps not helping your case in this, look again at the evidence.

Hart Alright let's move on to the 15th November letter. That's on page 112. The point is he is always saying that he's going, not just her and in this one he says "well by the time you get this Dad will be gone".

Tipping J What does that mean 'dead' or gone generally?

Hart Well it seems that as Your Honour said earlier the relationship was intermittent. It seems they never really lived together properly. I don't think the father was present during the time that the children were born and that was the nature of the relationship.

Elias CJ Miss Hart is this dated by him or by you?

Hart That's not dated by me.

Elias CJ No, thank you, it looks like the same writing.

Hart And then over the page at page 115 he says "tell my kids that I love them very much. I will see them again one day. I don't know when I will be back". So he's not making it easy for her to find him.

Anderson J Well go to the next page and he gives his sister's address.

Hart But that's

Tipping J "If you want to write to me send it to ..".

Hart That's submitted to be a long way from him having a proper address of his own.

Anderson J I've just lost the point of this, trolling through the evidence. What point are you trying to make?

Hart The point of this is to show that if there's any question of the mother having not contacted the father, he hasn't made it easy, because he's saying well I might be back one day. There's an indication there that he's just not around. She can't just pick up the phone, she's got to go

and send a letter to some address which she has no idea whether it's going to reach him or not.

Anderson J "Dear T, I need to get back to New Zealand with my family. I don't know where I'll be staying. Contact me through whatever the brother's name is? I mean she's quite literate, far more than him. When you look at her letters they're quite well constructed and thoughtful. She's twice his age as well and she's a mature woman. She's 40 at this stage and he's about 20 and a half, 21. I think your best argument with respect is that you can understand why she didn't go to length to contact him when to all intents and purposes the relationship had just fallen apart and he'd resigned himself to the fact that it would be sometime before he saw his children so that she didn't go with the idea of depriving him of his custodial rights, she just went for family reasons. That's what it amounts to, not a malicious abduction.

Hart Indeed. In that case I would just refer perhaps to one last extract and that is the affidavit of the father and that's at page, one of the affidavits, at page 58 of the casebook.

Elias CJ Of the case on appeal is it?

Hart Oh sorry, of the case on appeal, and at para.6 and 7 these appeared to constitute his efforts, the extent of his efforts to contact the mother and it seems that it's fairly vague – there's nothing definite there at all. He says "I attempted to contact H through various means, including an old Post Office box and friends", and that, well I was going to refer to the respondent's new affidavit but it's in that affidavit she explains that that Post Office box was an hour's drive from where she lived and he was demanding that she actually pay for it.

Blanchard J And hour's drive is not far in that part of Australia.

Anderson J It's next door virtually.

Elias CJ Miss Hart this really is not I think helping us. I would have thought that as Justice Blanchard put to you some time ago, para.64 of the Court of Appeal decision is as good as it gets.

Hart Alright.

Elias CJ I think we have been through, I certainly have, been through some of this material and there's no king hit in it.

Hart Perhaps I could just finish that by saying then that going back to the Court of Appeal judgment it was said there that if there was concealment that that would effect the situation in the exercise of the discretion, but it did say there that the onus would perhaps go to the left-behind parent to show good reason and that concealment would be a good reason, so putting it in a broader context, the respondent's

submissions is that the concealment issue if it were raised in the exercise of a discretion, is to be raised by the left-behind parent to show a good reason why the discretion which otherwise would simply go to the party resisting return.

Elias CJ Well in this case such concealment as there was, was simply the move to New Zealand, the failure to get in touch and say where she was, was not a high order concealment. Obviously it's a matter that could be taken into account in the exercise of a decision whether to send the children back, but in the scale of things it just doesn't seem very significant.

Hart Except that if it's held that she did conceal the children, it changes everything.

Elias CJ Well I don't know why it does.

Tipping J Most people who abduct children surely are not particularly anxious to be found, so I would have thought to be a pejorative kind the concealment must be fairly active so to speak.

Anderson J And deliberate.

Tipping J Can I ask you a completely different point in the interests of putting this rather exact factual examination to bed?. For the purpose of trying to explain to any readers of our ultimate judgment what I think might be an interesting point to them although it hasn't risen in this case, s.105 of our Act says that an application can be made by a person who claims that amongst other things that at the time of the removal the rights of custody of that person were actually being exercised by that person, or would have been so exercised but for the removal. Now against the narrative background of all this I as a relative layman would be wondering how on earth this man was actually exercising rights of custody in relation to these

Hart I 'm so glad you raised that point.

Elias CJ Well it was argued, it was lost and we've moved on.

Tipping J I know we've moved on but I would like to have a succinct description of who found what in order to preclude that point.

Hart Because it seems to me that would have been the answer

Tipping J I'm not asking you to argue it, I'm just asking you to identify it.

Elias CJ As I understand it the Court of Appeal didn't give leave on that is that right?

Hart They didn't give leave on that issue, that's correct. Well there was a lot of discussion about it as one of the Judges in one of his earlier judgments he had difficulty with that same concept because how can you say he's actually

Tipping J Look I don't want to start a hare run, Miss Hart, I just want you to tell us succinctly as you can why that's not a live issue and when it ceased to be a live issue, if it ever was.

Hart It was argued

Tipping J Just so we can rule it off.

Hart It was argued most strenuously in the High Court that it couldn't possibly be said

Tipping J Look please, please, please, you're trying to re-argue the point. What stopped it from, when did that issue die?

Elias CJ In the High Court.

Hart It died in the High Court.

Tipping J In the High Court that issue died did it, or it wasn't taken further beyond

Hart It was raised, I'm just trying to remember

Tipping J Look if it's not immediately to hand I'll look it up for myself. I didn't want to district you but it struck me as a point that most people looking at this case and a judgment or judgments we may deliver would immediately be curious about, that's all, once you've put the narrative in front of the public.

Hart My recollection is that it was put to the Court of Appeal as part of the leave application.

Tipping J And you didn't get

Hart And leave was not granted on that issue.

Tipping J Leave was not granted. It would have been a cross-appeal presumably but on your part in the Court of Appeal.

Hart We gave up at that point. There was not enough legal aid to go around.

Anderson J In view of the letters you referred us to it could probably be said that he wasn't actually exercising custodial rights because she'd run off with the children and he didn't know where they were. Run off with the children within Australia, and he didn't know where they were.

Tipping J Well anyway I now understand why it's no longer a live issue and I just thought that the presentation of this saga might benefit from at least reference to how and where it became no longer a live issue, but I'm sorry I have distracted you. Thank you I've now got the submission for that. Thank you Miss Hart. The Chief Justice has come to my assistance.

Hart Well I haven't got a lot more to say. It's really just to summarise where we've got to with these issues. The main point that this respondent makes is that the Court of Appeal was correct in the manner in which it treated the s.106(1)(a) exception; was correct in saying that there is no scope for presumption in favour of return once an exception has been made out; was correct in saying that at that point the interests of the children are a controlling consideration. It was correct in holding that the mother in terms of the concealment issue there was no misconduct and was correct in overturning the Family Court and High Court decision and deciding that there should be no order for return. That Court considered the particular interests of those subject children, the fact that they are settled, or were settled by the time of that hearing and that it was in their best interests that they stay in New Zealand. The Court at the end of that judgment says that even if the case were more finely balanced it would be inclined to take into consideration subsequent events.

Elias CJ Well it's saying that if it had been more finely balanced they would have but you didn't need to because they didn't find it finely balanced.

Hart Indeed, yet the respondent refers to that simply to say that if there is any doubt in this Court's mind then I would request that consideration be given to that statement. So the situation was just to sum up the factual situation that led to this Court considering it today, we had two people in an intermittent relationship; they had two children; there is violence; the relationship disintegrated; protection orders were obtained; the respondent lived in Women's Refuges for some time before deciding to seek sanctuary in her home country where she had family support. Some time went by before the Hague application was initiated and there are differing views as to what the reasons were for that, but the fact remains that the children have now been here for over four years and I understand are doing very well.

McGrath J Miss Hart can I just ask the family support aspect? Is the emphasis there placed on her brother coming to live with her?

Hart That's correct Sir.

McGrath J Is there any other factual matter in the evidence that goes to family support?

Hart My understanding is that the brother is the only close relative in New Zealand

McGrath J And he's gone to live with her in Havelock North?

Elias CJ She's not there anymore.

Hart At that time. The brother was a solo parent too I understand and so they were very close because they were both in the same sort of situation in a way.

Blanchard J That raises though a question that I've wondered about. Wouldn't it be the position that if this Court is reviewing the exercise of a discretion by a Family Court Judge that we have to look at whether that exercise of discretion was appropriate at the time that it was being exercised. Indeed but we may have to look at the factual situation at the time the application was made rather than taking into account subsequent events.

Elias CJ It never works like that of course on appeal in family cases does it?

Blanchard J It doesn't ordinarily but again there is another perverse incentive at play

Elias CJ Lots of appeals

Blanchard J For the respondent to an application just to keep on appealing because with the passage of time there's more chance of a sympathetic Appeal Court looking at the position at what might be the wrong time, namely the current time, saying well the children if they weren't settled before, they certainly are now. I would have thought you have to look at it at the time of the application.

Hart It is accepted what you say but it does seem a rather harsh and perhaps artificial way of viewing this kind of situation and

Tipping J Well wouldn't it be consistent with the Hague Convention policy though? It's supposed to be a short sharp and the idea if it can string out for three years

Elias CJ Well it shouldn't have.

Tipping J Well it shouldn't have, but anyway it's going to string out for some number of months, if not years, if you have successful appeals.

Hart That's true but it is submitted that would be a somewhat negative approach or unduly

Anderson J It could raise theoretical difficulties, for example if the father were living in Tyre at the time of the abduction and the return was to be last week.

Hart Well the fact remains that the mother has appealed and I'm sure she would assert that it was for genuine reasons and not in an attempt to delay matters.

Anderson J Well she got leave from two Courts, which is some indication that perhaps this was worth looking at.

Elias CJ My real concern is that I'm not sure that the Family Court Judge addressed the right question because of the view he took that there was a presumption.

Hart That is the crux of this case that the Judge in my submission has a view of the Convention which effectively means the presumption of favour of return overrides everything.

Elias CJ But because there aren't findings of fact on the effect of removal on the children's sense of settlement, it means that the Court of Appeal on the other hand seems to have assumed from the finding that they were settled that they should not be returned which is to impose a presumption of non-return which is clearly not what's envisaged by s.106. It's a mess.

Tipping J We may have to re-exercise the discretion on the correct basis de novo in this Court.

Elias CJ Well I'm not sure that there's the evidence.

Tipping J Well that's the problem, and as of what notional time?

Hart It is a real problem, I accept that. The issue of settlement - I take it that there's no discussion required on that issue today?

Tipping J Not the fact of, the consequences of we've been discussing at some length, but you have a finding of settlement which is not challenged so there is settlement for the purposes of the section. But it's the consequences when measured against convention policies that is the essence of this

Elias CJ And the policies of the legislation more generally.

Hart Judge von Dadelszen found that the mother had concealed the children and that she somehow did not have clean hands. Our submission as respondent is that that is no a fair way to regard her behaviour at that time.

Blanchard J Well we've been through that.

Hart So we're left with the timing of the settlement, at what time it's judged at?

Elias CJ I think it must be at the time the order is made. I think that's really the only way you can do it.

Hart The

Elias CJ But any delays might well be able to be taken into account in the exercise of the authority to require removal.

Hart You mean the order of this Court?

Elias CJ Which ever order is the operative order.

Hart Yes.

Elias CJ Is there anything else you wanted to add Miss Hart.

Hart Those are my submissions Your Honour.

Elias CJ Thank you. Yes Mr Pidgeon.

Pidgeon I shall be brief may it please the Court. I don't believe it is necessary to go through legal aspects which my friend has addressed because the issues are very clear before the Court. However there is one particular aspect that in the light of my learned friend's addressing in some detail on evidentiary matters and perhaps when you're conscious of legal issues it's easy to overlook the situation of this father, and in fairness there are some matters which are relevant to the exercise of the discretion and that is first of all the mother obtained a protection order in Australia on the 24th October 2000 and that's at page 26 of the case on appeal.

Tipping J 24th October 2000, page?

Pidgeon 26 of the case on appeal. Now there is no evidence that that has ever been revoked, so that it's important, bear in mind as to what the father can do and I accept the

Elias CJ But this is just totally speculative isn't it? I mean you're saying there may have been reasons why he couldn't have got in touch with the mother but I don't think we're in a position to know where the rights and wrongs are of this at all.

Pidgeon Well if I just pass on from that, I just wanted to make that point.

Tipping J But if your point is, with respect to what's just been, your point Mr Pidgeon is that it doesn't lie in her mire to complain of lack of contact.

Pidgeon Exactly.

Tipping J Once she's got this protection order.

Pidgeon Exactly. And indeed when you look at the evidence that was before the Family Court Judge at page 58 of Mr J affidavit, he details at some length in his opening paragraphs on that page of the efforts he made while in Australia and while the mother was in Australia, to have contact. For example two days after separation, this is para.5, "H and the children had left home taking all the contents, and no knowledge of whereabouts. I attempted to contact her through various means, an old Post Office, friends; I was able to ascertain that they had spent four months in a small town north of Rockhampton; left without a forwarding address; received information that they were living at an address north of Townsville. In other words life was made extremely difficult for him. And if you refer to the letters that my learned friend has pointed out, in particular the 15th November 2001. This is the one that he said well what can I do? He refers at the bottom of page 112, 'you had me arrested this time' for making occasionally made contact, so like had not been made easy for him and if you read his letters, immaturely expressed as they are, it is just simply not open for the mother to suggest that he doesn't indicate concern or interest for the children and furthermore he did apply for access before he was aware of the mother coming to New Zealand. In other words before the Hague Convention application in Australia was dealt with. And in each of those two letters that were being referred to by my learned friend he gave contact addresses. The first one to his mother and the next one to his sister. Now it's important to appreciate, especially with a 20-year old that he may not be as aware of his rights, what he should or should not do and life was made very difficult by this mother. His mother-in-law in fact, to deprive him of contact with the children, and it's important when you look at the policy of the Convention where the focus is that it's in the best interest of children to return them to their place of habitual residence that the children have the right to contact with their father. So that not only has the father been deprived of all contact, these very young children have been deprived of that right too. And finally, when we look at the issue of resolving matters of custody and access, it is submitted that the evidence in Australia of the relationship between the father and mother, the steps that had been taken, the fact that the Courts there seemed to be very familiar with matters which have been brought to its attention from time to time. The logical forum is Australia. These children were born in Australia. The father is Australian. They lived life together as a family in Australia.

Elias CJ Well there's no evidence of that at all is there?

Pidgeon This is set out in Mr J affidavit.

Elias CJ Of living life as a family in Australia.

Pidgeon The conflict is between the two affidavits. The father says one thing and the mother says another. The father said they were living in a de facto relationship. The mother says it was off and on.

Anderson J Well it was on pretty quickly with respect because the first child was conceived a month after she married his father.

Pidgeon Yes, quite, quite.

Anderson J Exactly.

Pidgeon Yes and it reflects credit of course to neither party.

Anderson J Well I don't mean it pejoratively but it is an indication of the difficulties that he as a 19-year old at the time would face in relation to his 39-year old mother-in-law. I mean however violent he was there was a power imbalance by reason of immaturity.

Pidgeon Yes, and this issue of violence, he never for whatever reason appeared to defend these protection orders in Australia or New Zealand. In fact one of the issues that we're facing in New Zealand today is the problem that both the Family Court Judges and counsel involved with the Men's Rights Movements and the consequence of, as some of these groups see, ex parte protection orders being made which block off contact. Now in some cases it's absolutely essential for ex parte protection orders to be made. In other cases it seems to be a tactical manoeuvring to achieve that, and it's not an easy marriage

Tipping J It's the dreadful dilemma of picking the right case.

Pidgeon It's very difficult and I'm not in any sense critical because I support the work the Family Court does and the Men's Movements in my submission have gone quite haywire on some of these issues. But there is that nasty curdle of truth that the effect of protection orders is quite destructive on continuing association with children on the part of the parent in respect of whom orders are made, and it's a dilemma and with respect, looking at this proceeding as a whole, we have a much more mature woman who may have engineered the system and I say that advisedly, to achieve a particular outcome.

Elias CJ Well I just don't see how we can draw any conclusions as to that.

Pidgeon Well the difficulty is we haven't the parties for cross-examination. This is the problem, but in my submission it's only appropriate that I raise that as a very real possibility.

McGrath J Mr Pidgeon you are submitting that the logical forum to decide matters is Australia? Do you have submission to make as to whether New

Zealand is a tenable forum to decide access matters for your client, a practical forum, or is it just a forum that would provide no hearing at all?

Pidgeon Well the situation would be that presumably by looking at the evidence we have he would have to obtain legal aid to conduct the case in New Zealand and that is possible.

McGrath J It's possible?

Pidgeon It is possible. He would have to have the expense of travelling to New Zealand to conduct and take part in litigation, but looking at the track record in Australia as far as the children are concerned, would the father do that? Would a 20 or 21-year old do that, or would he be tempted to think 'things are too difficult, I'll walk away' and is that in the best interests of children in this case? In my submission

McGrath J Is your submission that whereas Australia is the logical forum, in New Zealand there may be too many obstacles for it to be a forum at all?

Pidgeon That is so, looking at this particular case and this particular family, yes.

McGrath J It is only access we're concerned with of course.

Pidgeon Yes it's only access, there's been no suggestion whatever that he's seeking custody or as they call it in New Zealand 'care'.

Tipping J Is that what custody's now called Mr Pidgeon?

Pidgeon Yes, care, and contact is access. It used to be custody and access, it's now in New Zealand care and contact.

Tipping J Care equals custody and contact equals access.

Pidgeon And they are parenting orders for either care or contact, that's under the Care of Children Act.

Elias CJ Mr Pidgeon there's no impediment is there to the question of access being resolved in Australia?

Pidgeon Well the question is would an Australian Court, when the children are not in Australia, make orders, and with respect if the situation was in New Zealand it would be very unlikely for the New Zealand Court to make orders in respect of children who are living in Australia, although the legislation is wide enough for that to be possible in actual practice as the exercise of the discretion the Court is not prepared

Tipping J What if he applied under the leave reserved under the registered order?

Pidgeon He could apply under the leave reserved in Australia

Tipping J Surely they couldn't deny or not hear or determine that on some

Pidgeon Well he would have to come to New Zealand. Is this what you're

Tipping J No, no, in Australia there is now this registered order which reserves leave to him to apply for access. Are you saying that an Australian Judge in spite of that might say 'oh no, no, I'm not going to entertain that'

McGrath J While the children are in New Zealand.

Tipping J While the children are in New Zealand?

Pidgeon I understand that this is a very real likelihood that the Judge would say leave has been reserved by the New Zealand Court, the New Zealand Courts are the Courts that have made this order granting you leave to appear. It could well require him to go to New Zealand.

Anderson J But it now is an Australian order.

Pidgeon Yes, but

Elias CJ It's a very blunt instrument isn't it to send these children back simply for a determination of access.

Pidgeon Well that is how the Hague is framed.

Elias CJ It just seems a bit strange as between Australia and New Zealand that they have to be

Tipping J But would they have to go back, would they have to go back for six month? I mean why couldn't they just go back for the hearing?

Elias CJ That's the blunt instrument if you're using the Hague Convention, send them back.

Pidgeon Well they'd have to go back and the general policy forthwith. But it I suppose is theoretically possible to defer an order for return or make a return conditional and I'm aware some countries' jurisdiction have taken exception to that, in other words they feel they feel that an infringement on their, sorry

Tipping J Could the order lie in Court until the Australian end had worked out when they were going to hear it and what evidence was required and so on and then it would speak?

Elias CJ Well there's actually under s.113 the authority has to make arrangements to organise or secure effective exercise of rights of

access if you receive an application. When does that happen? And it can be when the child is present in New Zealand.

Pidgeon Oh no that's the situation where the applicant is not seeking an order for return but lives overseas. There's a reported decision *Kimlet and Jones* I think of Judge Adams

Elias CJ It is under this part however.

Pidgeon It is under this part but what happens is that, and I was counsel in that particular case, where a father was quite happy with the child remaining in New Zealand, lived in England, but wanted to get orders for access so that the children could come during the Christmas holidays to England, and Judge Adams took the view that in determining that issue that because there was no sections in the Convention giving guidance to the Court how it should approach it, it should deal with it purely in the light of the best interests of the children and did in fact make such an order, so that that provision is used where a person is not seeking the return of the children to the country from which they have been taken. Here we have the usual one, which is seeking order for return.

Tipping J Does the father accept that once the determination has been made as to access that the mother can return to New Zealand or is it going to be an attempt to keep

Pidgeon No the position of the father, he wants the children to be in Australia so he can have better contact.

Tipping J Better contact.

Pidgeon Yes, to see them grow up.

Tipping J So really in a sense this is an exercise which is designed to make sure the children actually remain in Australia. He wants them actually to stay in Australia?

Pidgeon Yes he does wish to have them stay in Australia, but that's the norm with the Hague Convention application. They're frequently only access matters. If a parent wants to see the children grow up, how they're doing in school and that kind of thing, so that's the position the father wishes to apply in this particular case.

Tipping J And he hopes to persuade the Australian Court (a) to give him access and (b) to make an order prohibiting her from removing them from Australia?

Pidgeon That is so. That is what he will be seeking, yes.

McGrath J And I suppose that really precludes a New Zealand Court for making an order that they go over for the hearing or any sort of order that would purport to bind the Australian Court's hands by requiring that whatever it did it didn't get

Pidgeon That is the difficulty. Certainly the Australian Courts, and this has happened, I remember with an order that Her Honour Judge Moss made returned on very tight conditions and there was quite a critical judgment and representations made by the senior Family Court Liaison Judge to Judge Mahony taking exception to what it saw as depriving the country of an habitual resident with the right to make determination. However having said that there have been a number of cases even since where differing conditions have been made. For example the case that was heard by His Honour Justice Priestly and Justice Frater. I can never remember the initials, I think it is *KS and Elliot* but it is reported

Elias CJ I think we have it.

Pidgeon Deferred the making of an order for return until after the mother had treatment for cancer. In other words he discussed the residual powers, or they discussed their residual powers under the Act and the two Judges reached the view that despite the norm of making an order for a return forthwith, it was appropriate to leave the order to lie in Court until after the mother had finished the course of treatment so she would be well enough to go back with the children. And that was from recollection several months.

Elias CJ I mean the upshot of an order here is that the mother and children may well be in limbo for what six months?

Pidgeon With respect that need not be so. In the sense that unlike the position with other countries there is a relationship which has been set up between the Chief Family Court Judge of New Zealand and the Liaison Judge I think it's called in Australia, who happens to be Justice Kay in Victoria, whereby if an order for return is made vice versa from Australia to New Zealand they confer and can generally undertake that a fixture will be allocated in a relatively short time.

Elias CJ Is this in the Family Court or is it in the Federal Magistrate's Court?

Pidgeon It's in the Family Court, which is the equivalent to our High Court, so that it is possible, and indeed it would be perfectly possible if in my submission and appropriate if this Court thought fit to make an order for return could be conditional with the lower Court until a prompt hearing is allocated. Now that only exists between as far as I am aware Australia and New Zealand that relationship to get matters heard quickly when they involve a return in either direction.

McGrath J And the precedent for that is *KS and Elliot*, Justice Priestly and Justice Frater for making an order which lies in Court until a certain date which could be perhaps three weeks before the fixture for the access hearing?

Pidgeon Well it could be, yes. With respect I don't see any statutory reason why it shouldn't be, put it that way. It would be unusual.

McGrath J But if your general position was successful that would be a means of avoiding the sort of concern that the mother might be over there for six months needlessly.

Pidgeon Yes, and I accept that as a concern, yes.

Tipping J Well particularly in circumstances like these in the sense of the length of time, but never mind the jurisprudential aspects, but the length of time that has elapsed.

Pidgeon Yes, yes. One of the problems of course is that in essence our legal system excluding the Supreme Court which has dealt with it promptly has really not given appropriate weight to the timeframes under the Act, and a reserved judgment of five months is in that category too.

Tipping J Is there any express provision in the relevant sections to make orders subject to conditions?

Pidgeon No.

Tipping J So what Judge von Dadelszen did in that other case was certainly some inherent part to make it subject to condition.

Pidgeon Yes, yes.

Elias CJ Which

Pidgeon Sorry.

Elias CJ Sorry, no you carry on.

Pidgeon It is not uncommon these days for conditions to be imposed where a particular Family Court Judge considers strongly on the particular issue, never mind the flack that comes from overseas.

Elias CJ If the discretion being reached is a wide one, would it not be relevant to consideration in which forum the matter might more conveniently be heard? What I have in mind is the Court that decides this is going to have to consider the quality of life the children have. It's going to have to have a lot of evidence about the circumstances in which the children are placed in New Zealand. The father is not proposing to assume custody of the children so this issue as to whether they should be

relocated to Australia, whether that is necessary in order to maintain the contact with the father, is really going to be the nub of what is considered. Is Australia where the mother and children will be in make-shift circumstances for the hearing? Is that really the appropriate forum for this determination?

Pidgeon Well this is really the philosophy behind the Convention.

Elias CJ Well the philosophy of the Convention is prompt return within a set period. That's the summary right and then it seems to me the circumstances are much more open.

Pidgeon Well clearly what would happen before a hearing would be a need to have a psychologist's report to discuss issues such as bonding, environment, potential setting, home circumstances – that certainly is the practice almost invariably in New Zealand before orders of care and access are made, particularly in view of the allegations that are made by the mother in this particular circumstance. It would with respect be appropriate not only to have that kind of current information as to situation living in Australia but evidence on the manner of the father's contact with relationships with the children, the fact that the children did or did not reciprocate that relationship with the father, from neighbours, people who are aware of the main players in this situation, so that on balance, and I again submit if you're left with a level playing field the Convention is the main thrust here, that Australia would seem to be the logical place. But I accept that there would be a need for evidence from New Zealand as well. I'm aware in some cases that both Australia and New Zealand have requested reports from each other's Social Services Organisations to look into and supply a report. I remember the Department of New South Wales Social Services in a case I was involved with, providing a report on living conditions in Australia for a New Zealand Court, Family Court, who had to determine issues relating to custody and care, so it works both ways. New Zealand can be requested so can Australia. I don't know that I can probably advance the position much more than that. I could perhaps indicate, and it's not particularly relevant for this case, that there is increasing inter-communication with other countries by individual Family Court Judges and particularly with Judges of the United States and indeed with Lord Justice Thorpe in the United Kingdom on discussing issues relating to Hague matters. But the only place where there is an organised structure is Australia and New Zealand. Apparently in the United States they have a special enactment because of the inter-State conflict of enabling Judges of one State involving parents of yet another State when both jurisdictions proceedings have been issued to reciprocate to decide what order matters will be dealt, who will back out and who won't, and the practice in New Zealand at the moment has been that Judges report to the counsel a summary of the effect of the discussion and invite counsel to make submission so that there is provisions of natural justice observed. So in this area there is a lot more inter-communication

between Judges to an extent that I'm not aware of any similar field of law in New Zealand that operates. That's my submission.

Elias CJ Thank you Mr Pidgeon. We'll reserve our decision in this matter and thank you very much counsel for your assistance.

Adjourned: 4.17pm