

HONG KONG / JUDGMENT

K v. K

COURT

Family Court

DECIDED

19 January 2007

CASE / FILE NUMBER

FCMC1409/2003

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bjbj IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
MATRIMONIAL CAUSES SUIT NO. 1409 OF 2003

BETWEEN K Petitioner and K Respondent

Coram : H.H. Judge Bruno Chan in Chambers Date of Hearing : 4 January 2007 Date of Judgment :
19 January 2007

J U D G M E N T

This is the Petitioner Father application for an order for the Respondent Mother to forthwith return to him the child of the family, M, a boy now 10 years old, whose custody had been granted to him in the parties divorce several years ago, but has since about August 2006 been retained by the Mother in Sydney, Australia after spending the summer with her there. First, some relevant background. The parties were married in 1996 in Hong Kong where they were then residents. The Father was in fact born, raised and educated in Hong Kong, while the Mother was born in China and later came to Hong Kong. Their only child, M was born on 13th October 1996 in Melbourne while the Mother was visiting Australia. They returned to Hong Kong about a month after the Child s birth. During the marriage the Father worked as a sales manager, while the Mother was a sales executive until the birth of the child when she resigned from her job. In January 2001 the Father s then employer relocated his position to Beijing, China and so the family moved there to reside in accommodation arranged by the employer, although the parties were then already leading separate life albeit under the same roof, while the child was enrolled into an international school in Beijing. In July 2002 the Mother and the child returned to Hong Kong for the summer vacation but remained there until December 2002 during which the child was enrolled into a local school, but was said to have difficulty adjusting to the local school system

which was different from the international school which he used to attend in Beijing. As a result he was returned to his father's care in Beijing and back to the same international school, while the Mother remained in Hong Kong. On 4th January 2003 the parties formally entered into a Deed of Arrangement in contemplation for divorce, in which it was agreed inter alia that the Father was to pay the Mother \$12,500 per month for her maintenance, that the Mother was to transfer her interest in 2 properties in Hong Kong to the Father, and that custody of the child was to be granted to the Father with reasonable access to the Mother. Also of relevancy is Clause 5 of the said Deed which I find appropriate to set out hereinbelow in its entirety : -

5. Upon the request of the child and for the benefit of the child but not otherwise, the Wife consents that the child be removed out of jurisdiction of Hong Kong to The People's Republic of China by the Husband on or before 19th January 2003 for the purpose of studying subject to the written undertaking by the Husband that he shall bring the child back to Hong Kong every summer vacations for the period from 15th July to 15th August or such period to be agreed upon by the parties hereto and that the child shall stay with the Wife during that period of time until further order of the court. The air fares for the child for the trips shall be borne by the Husband . Two other relevant clauses at the end of the Deed are : -
9. This Deed shall be construed in accordance with the laws of Hong Kong and each party hereby submits to the jurisdiction of the Hong Kong courts.
11. In the event that a divorce is granted, the terms of this Deed will survive the event and continue in force . Shortly thereafter and pursuant to the said Deed, the Father instituted these divorce proceedings, and upon the granting of the decree nisi of divorce on 30th July 2003, the terms of the Deed aforesaid were also made an order of the court. It was further directed in the order that the child be not removed from Hong Kong without leave until he attains the age of 18 years but provided that if either parent to give a general written undertaking to the court to return the said child to Hong Kong when called upon to do so, and unless otherwise directed with the written consent of the other parent, that parent may remove the said child from Hong Kong for a period specified in such written consent. The decree nisi was then made absolute on 22nd September 2003. After the divorce the Father continued to work and live in Beijing with his then girlfriend I, whom he has subsequently married, and the child who continued to attend the same international school. Sometime in 2003 the Mother left Hong Kong to emigrate to Sydney where she has since settled and now works as a nurse. As agreed between the parties and pursuant to the said Deed of Arrangements and the resultant order, the Mother was able to exercise access to the child on every summer from 2003 to 2005 when the child would return to Hong Kong in June where he would share times with his grandparents from both sides, before he was accompanied by his maternal grandmother to Sydney to be with his mother until August when he would return to his father in Beijing in time for school. In 2006 similar arrangements were made for the child to visit his mother in Sydney, although on this occasion the Mother collected him in Hong Kong in about mid-June 2006 before they were to fly to Sydney later at the end

of the month. M was due to return to Hong Kong from Australia on 10th August 2006 and then to Shanghai instead of Beijing as the Father has moved to a new job in Shanghai, but on 20th July 2006 the Mother advised the Father on the telephone that the child wished to stay in Australia and was not going to return to him. During the next 2 weeks the Father continued to press for the return of the child but to no avail. The Father then flew to Sydney on 7th August 2006 with Irene and asked to see the child but was unable to do so. On 11th August he requested that the Australian Central Authority apply for the return of the child under the Child Abduction Convention. The Australian Central Authority directed the Father to first obtain an Article 15 Declaration of the Convention to confirm that the child was habitually resident in Hong Kong. That application was heard in Hong Kong on 22nd September 2006 before Hartmann J in the High Court under HCMP No. 1815 of 2006 when he found that child's place of habitual residence was in fact with his father in China, which is not a contracting party to the Convention, instead of Hong Kong, which is, and therefore declined to grant the Article 15 declaration. In the meantime, on 18th August 2006 the Mother filed an application in the Family Court of Australia at Sydney for parenting orders including that the child do live with her in Australia. On the same day the Father filed a notice of motion in Hong Kong in these proceedings for an order that the Mother be committed for contempt of court in failing to return the child to him. On 11th October 2006 the Father filed the summons which is now before me for the return of the child. On 12th October 2006 he filed a further summons for variation of the maintenance for the Mother, which was later by agreement adjourned together with his notice of motion pending the outcome of his application for the return of the child. The Father also entered a conditional appearance in the Mother's Australian proceedings to apply for a declaration that the Australian court has no jurisdiction to hear the Mother's application for the child, relying on the 2 clauses over the exclusive choice of law and choice of forum contained in the said Deed of Arrangement executed by the parties back in 2003 which nominates the laws and courts of Hong Kong, and that the Mother is in contempt of the Hong Kong court in failing to return the child to him under the original custody order and hence she should not be heard in respect of her application for the child. He also sought, as an alternative, a stay of the Australian proceedings on the grounds that Australia is an inappropriate forum. His application was however refused by the Australian court on 7th December 2006 as Le Poer Trench J found that the best interests of the child as the paramount consideration require that there should be inquiry into the merits of the Mother's application for the child to live with her in Australia or whether it is in the best interests of the child to make a summary order for his return to Hong Kong for the parenting dispute to be dealt with there. As regard the Father's argument of the Mother contempt, the learned Judge said this in his reasons for decision (Hearing Bundle p. 139) :-

50. Given the facts of the case before me I would not exercise my discretion at this time to prevent the wife from proceeding with the hearing of her interim and final applications. I should caution however, that as the evidence emerges in the case a Judge hearing the case may at any time conclude that the wife should not be allowed to proceed further with the

case in this court . He then went on to order that the Mother s application for interim children s orders be listed before a Judicial Registrar on the 28th February 2007, that a Family Report be prepared for an assessment of the child s relationships with his parents and the ascertaining of any wishes that he may wish to state relevant to residence and the time he should spend with each parent, and that an Independent Children s Lawyer be appointed for the child. Meanwhile the Mother has never made any application for variation of custody of the child in this jurisdiction, and despite a direction from this court given on 6th November 2006 requiring her to file her affidavit to the Father s application for the return of the child within 7 days from the date of the direction, she only filed it through her solicitors on 3rd January 2007, just one day before the hearing. In her affidavit the Mother admits that she has a duty to return the child to Hong Kong, but as a mother she has decided to accede to the child s wish to stay with her in Australia and to apply for his custody in Australia because the child has told her that he was not happy in Beijing in view of the Father s dating with I and had no time for him, and now that I is pregnant and is due to give birth to a baby soon, it is expected that the Father will have even less time to look after the child, hence the child would like to stay in Australia with her. The Mother also claims that the child originally accepted staying in Beijing because he had a good relationship with the Father s domestic helper, as well as one Lau s family in Beijing with whom the child regularly spent his Sundays. Now that the Father has moved to Shanghai with his family, the child would have to leave the domestic helper and the Lau s family, and hence he was worried about his life as well as his new school in Shanghai. The Mother has also instructed a social worker to prepare a report in respect of the welfare of the child and his relationship with her, which she has exhibited to her said affidavit. The report is of course all one-sided without the Father s view and he was never interviewed by the worker. The child was however reported by the worker to have missed his mother very much since his parents divorce, and that it was his own decision about staying with his mother in Australia, as he was found to have a very high IQ with overall thinking and reasoning abilities exceed those of approximately 91% of children his age , and is certainly mature to express he wants his mother rather than his father . Relying on the principle that the child s best interest is of paramount consideration, and as he has now settled well in Australia, Mr Leung for the Mother argues that since a hearing will soon be held in the Family Court of Australia in February 2007 of her application for an order for the child to stay with her in Australia, and as the Father is also legally represented in that application, his interests will not be prejudiced if the case is to be dealt with in Australia, and so he asks that the Father s application be dismissed. Mr. Pilbrow for the Father argues that the Mother, by wrongfully retaining the child in Australia and refusing to return him to Hong Kong or to the Father s custody, the Mother is in effect in contempt of the original order which granted custody of the child to the Father and prohibited his removal out of the jurisdiction without the sanction of the court, and by keeping the child in Australia and from the Father despite his repeated requests, she remains in contempt and does not propose to purge it, she should not heard as to her opposition to his application. He relies on the case of *Hadkinson v Hadkinson* [1952] 285, [1952] 2 ALL ER 567, CA. In that case a mother was granted custody of

her son upon the dissolution of her marriage, but was directed that he should not be removed out of the jurisdiction of the court without its sanction. Having remained she later caused the child to be removed to Australia where she was living with her present husband. On a summons issued by the father of the child, Wallington J on 29th May 1952 ordered the mother to return the child within the jurisdiction not later than 31st August 1952. On an appeal by the mother against the order, counsel for the father took the preliminary objection that the appeal should not be heard because the mother had been at all times, and still was, in contempt. It was held that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the child out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction. While accepting that, unlike the case of *Hadkinson*, there is no application by the Mother before me, and that in the absence of any objection from the Father, I did exercise my discretion to hear the Mother and allowed her affidavit to be read by her counsel at the hearing, as it was undoubtedly necessary for me to receive any evidence or information relating to the welfare and interest of a child, as *Le Poer Trench J* did in the Father's application in Australia, I find the principles set out in the judgment of *Romer LJ* in *Hadkinson* both illuminating and helpful (p. 292) : - It appears to me that this is the very kind of case in which the ordinary rule should be applied in all its strictness. Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be. Where, however, the order relates to a child the court is (or should be) adamant upon its due observance (e.g. the recent case of *Corcoran v Corcoran*). Such an order is made in the interests of the welfare of the child and the court will not tolerate any interference with or disregard of its decisions upon these matters. Least of all will the court permit disobedience of an order that a child shall not be removed outside its jurisdiction. The reason for this is obvious. The court cannot exercise its quasi-parental powers in relation to a child unless effect can be given to its orders, and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant, even temporarily, out of the country are jealously scrutinized and are only granted subject to every guarantee that is reasonably possible being exacted for the return of the child at the end of the authorized period. There is always the danger that a parent will be able, by wrongfully taking a child abroad, or by keeping him there after the sanctioned period has expired, to present the court with a *fait accompli* and to argue that, the child having become firmly established outside the jurisdiction, it would be against his interests to bring him back within it; indeed, an argument to this effect was foreshadowed during the discussion before us on the present appeal. On the argument that the mother ought to be heard on the ground that the child's best interest was of paramount consideration, His Lordship said (p. 293) : - There would, I think, have been some force in this contention if the

mother had desired to inform the court that, for reasons of health or otherwise, it was dangerous, impossible, or even impracticable, to bring the infant immediately from Australia to this country. The court would undoubtedly grant audience to anyone who desired to bring matters of this kind to its attention even a person who was in contempt; for a refusal so to do might result in irreparable injury to the infant. Nothing of this kind, however, was or could be suggested in the present case. We were however, was or could be suggested in the present case. We were informed that the mother herself has means and is married to a man of wealth. No difficulty of any other kind was even hinted at in the way of the child's return; indeed, after we had announced our decision to allow the preliminary objection we were told by Mr. Beyfus that the boy would probably be returned to England within a fortnight or so. Although, therefore, there are circumstances in which the court would hear a parent who was in contempt (and I do not suggest that the examples which I have given are exhaustive), no such circumstances exist in the present case. Undoubtedly the mother should be heard before a final decision is reached on a matter so vital to the infant as his future domicile. Let her be heard, however, when the boy's return within the jurisdiction will have produced the dual effect of partially purging the mother's contempt and of enabling the court to enforce such order with regard to the child as it may then think proper to make. Sitting in the same court, Denning LJ, as he then was, agreed with Romer LJ when he said (p. 298) : - It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel M.R. said in a similar connexion in *In re Clements v Erlanger* : I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction. Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed. The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this court. He should be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy returned we must decline to hear her appeal. The principles enunciated in the judgments of Hadkinson are, in my

view, essentially the same as those of the Convention on the Civil Aspects of International Child Abduction which provide that : - The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions - Of which Articles 1 5 being the scope of the Convention provide so far as material : - Article 1 The objects of the present Convention are -

- a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. Article 2 Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available. Article 3 The removal or the retention of a child is to be considered wrongful where -
 - a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
 - b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. Article 4 The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years. Article 5 For the purposes of Convention - a. rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child s place of residence; b. rights of access shall include the right to take a child for a limited period of time to a place other than the child s habitual residence . It is clear that the reason behind the rationale and philosophy which govern the Convention that wrongful removal of a child to a foreign jurisdiction or its wrongful retention therein must be immediately corrected by a mandatory return to the home jurisdiction of the child is also essentially the same as that enunciated in the judgment of Romer LJ in Hadkinson : that the removal of a child from its home environment of habitual place of residence is almost always against the welfare of the child, therefore such harm and damage to the welfare of the child must be immediately corrected by the urgent return of the child. The Convention however does provide certain exceptions in which the requested state is not bound to order the return of the child under Articles 12 and 13 as follows : - Article 12 Where a child has been wrongfully removed or

retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child. Article 13 Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

- a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence. This, as I have already pointed out, would have been a Convention case but for the point of the child's habitual residency, and is instead an application in the Family Court, where the parties obtained their divorce and where the original custody order was made, for a summary order for the return of the child to the jurisdiction from which it had been removed. So the obvious question is : Should the principles of the Convention apply in this case? There is a long series of English authorities which I find most helpful. The leading case on this question, where one parent has without warning taken a child away from the country where they have been living up to that date, which was then commonly referred to as a kidnapping case, is *Re L (Minors) (Wardship : Jurisdiction)* (1974) 1 ALL ER 913, CA, which was a case of an English mother married to a German father and children born and brought up in Germany. After examining all the other relevant kidnapping cases including *McKee v McKee* [1951] 1 ALL ER 942, *Re H (Infants)* [1965] 3 ALL ER 906, *Re E (An Infant)* [1967] 1 ALL ER 329, *Re T (Infants)* [1968] 3 ALL ER 411, and *Re TA (Infants)* [1972] 166 Sol Jo 78, Buckley LJ laid down the principle as follows (p. 924) : - Beyond doubt *J v C* establishes, if authority were needed, that where in a wardship case the court considers the facts and fully investigates the merits of a dispute, the welfare of the child concerned is not the only consideration but is the first and paramount consideration or be taken into account, whether the dispute be between a parent and a

parent, to between parents and a stranger in blood or between one such stranger and another. As to the meaning of first and paramount consideration it is, I think, useful to bear in mind what was said by Lord MacDermott in *J v C* : Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed. Every matter having relevance to the welfare of the child should be taken into account and placed in the balance. Other matters, which may not directly relate to the child's welfare but are relevant to the situation, may be proper to be taken into account and given such weight as the court may think fit, subject always to the welfare of the child being treated as paramount. The interests, wishes and conduct of parents and of other members of the child's family and, indeed, of other persons, may fall under either of these heads. Race, nationality or religion may very probably and quite properly affect parental wishes about how and where a child should be brought up. These are factors which may well have an important bearing on the child's growth to maturity and his welfare. In *J v C* Lord Guest observed that nationality is one of the factors which the judge should take into consideration. It must form one element in balancing operation to be performed to determine where the child's welfare lies. It is, however, not more than one of the balancing factors. Where, as in the present case and in *J v C*, no order has been made by a foreign court relating to the custody or upbringing of the child, no question of comity arises. Even if an order has been made by a foreign court, an English court is nonetheless bound in duty to protect the child's welfare without being bound to enforce the foreign order or to follow it (*J v C* per Lord Guest, Lord MacDermott and Lord Upjohn). How, then, do the kidnapping cases fit these principles? Where the court has embarked on a full-scale investigation of the factors, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, and may be a circumstance of great weight; the weight to be attributed to it must depend on the circumstance of the particular case. The court may conclude that notwithstanding the conduct of the kidnapper the child should remain in his or her case (*McKee v McKee*, *Re E* (an infant) and *Re T A* (infants), where the order was merely interim); or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed (*Re T* (infants)). Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment, apply, but the decision must be justified on somewhat different grounds. To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his

education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child. In my judgment, the decision of this court in *Re H (infants)* was based on considerations of this kind. As citations which I have already made disclose, judges have more than once reprobated the acts of kidnappers in cases of this kind. I do not in any way dissent from those strictures, but it would, in my judgment, be wrong to suppose that in making orders in relation to children in this jurisdiction the court is in any way concerned with penalising any adult for his conduct. That conduct may well be a consideration to be taken into account, but, whether the court makes a summary order or an order after investigating the merits, the cardinal rule applies that the welfare of the infant must always be the paramount consideration. Following that case there have been others which apply the same test and principle, such as *Re R (Minors) (Wardship : Jurisdiction)* (1981) 2 FLR 416 where Ormrod LJ said much the same thing on p. 426A : - The damage to a child's interest which may arise from not making a summary order is conveniently set out by Buckley LJ .. in his judgment in *Re L* .. In a sentence, they are alienation from background, home, schools, friends, relations and, ultimately, from his country and its society and culture. These dangers have to be weighed against the risk to the child of possible, perhaps probable, separation from the mother, of being entrusted to the care of a father whose capabilities and fitness to act as a single parent may be in doubt, in surroundings which may be unfavourable in themselves, and of being subject to a regime of law under which the protection of their interests may be open to question. Since those cases have been decided, and since the enactment of The Child Abduction and Custody Act 1985 which gave effect to the Hague Convention, the first in the line of cases which considered its impact in Non-Convention application is that of *G v G (Minors) (Abduction)* [1991] 2 FLR, 506, where Balcombe LJ said this in the leading judgment (p. 514) : - the philosophy behind this Act, and indeed behind the Convention which it adopted, is that in normal circumstances it is in the interests of children that parents or others should not abduct them from one jurisdiction to another, but that any decision relating to the custody of children is best decided in the

jurisdiction in which they have hitherto normally been resident . This was considered and approved by the Full Court of Appeal and was followed in another international child abduction case, *Re F (A Minor)* [1991] 1 FLR 1 where Lord Donaldson of Lymington MR agreed that in enacting the 1985 Act, the English Parliament was not departing from the fundamental principle that the welfare of the child is paramount, but rather it was given effect to it. He also said at p. 4 : - The welfare of the child is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child s best interests require. The second context, which only arises if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made . Balcombe LJ, sitting in the same court, added that the effect given to the Child Abduction and Custody Act 1985 in relation to non-Convention countries is consistent with the practice which the Australian courts have adopted, when he said on p.5 : - By 1976 Australia had entered into bilateral treaties with New Zealand and Papua New Guinea with respect to children removed from those jurisdictions, and those treaties were enshrined in the provisions of s. 68 of the Australian Family Law Act. That enactment helped them to shape the common law. In *Khamis v Khamis* [1978] FLC 90 486, when dealing with a child who had been removed from California, the Full Court of the Family Court of Australia indicated that, in determining an appropriate forum, the court should endeavour to apply principles identical to those outline in s. 68 of the Family Law Act, notwithstanding that California was not a signatory to any bilateral treaty, nor did the legislation particularly apply to it. Australia, but not Chile, is a party to the Hague Convention, and in the case of *Barrios v Sanchez* [1989] FLC 92 054, the Full Court of the Family Court of Australia was concerned with children who had been removed from Chile to Australia. In its judgment the court said that : the clear policy of the Convention is that save in exceptional circumstances, children who have been removed from their lawful custodial parent in another country without the authority of a court should be returned to that parent. In the present case, we think it is appropriate to take this into account as an element to be considered I also agree with what the Full Court of the Family Court of Australia said in *H v H* [1985] FLC 91 640 that, as a general principle, courts should act in comity to discourage the abduction of children across national borders. The forum which has the pre-eminent claim to jurisdiction is the place where the child habitually resided immediately prior to the time when it was removed or retained without the consent of the other parent. In my judgment, a rapid accession to the Hague Convention by all nations would be a welcome advance towards the recognition of the rule of law by all nations . Those principles were then further advanced by the case of *D v D (Child Abduction)* [1994] 1 FLR 137, CA, where a mother appealed from the order made on 5th July 1993 by a High Court judge in consolidated wardship applications by the father for the return of 2 children aged 7 and 3 years respectively to Greece which had then not yet ratified the Hague Convention, Butler-Sloss LJ, as she then was, said this in her judgment (p. 140) : - It was also argued that to apply the principles of the Convention in a non-Convention case was incompatible with the decision of the Hague of Lords in *Re H; Re S (Minors)*

(Abduction : Custody Rights) [1991] 2 AC 476, [1991] 2 FLR 262. In that case, the application itself was made under the provisions of the Convention at a time when the Convention had not come into force between the UK and the USA. Mr Tattersall argued that the decisions of this court in *G v G (Minors) (Abduction)* [1991] 2 FLR 506 and *Re F (A Minors) (Abduction : Custody Rights)* [1991] Fam 25, sub nom *Re F (A Minors) (Abduction : Jurisdiction)* [1991] 1 FLR 1 were wrongly decided. *G v G* involved Kenyan law and *Re F* Israeli law. In each case this court applied the general principles of the Convention to the extent that it was in the interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been normally resident. This court is bound by those decisions which I would respectfully endorse and they are in my view in no way incompatible with the decision of the House of Lords in *Re H; Re S* (above). The courts have always set their face against condoning the abduction of children from their rightful homes and have for many years provided a summary procedure to determine whether to return them. None the less it is important to remember that the Articles of the Convention are not to be applied literally in the wardship jurisdiction and the court retains the discretion to consider the wider aspects of the welfare of the wards. While agreeing that the wardship judge had applied the correct principles when making the order for the return of the children to Greece, Butler-Sloss LJ nevertheless allowed the appeal reluctantly, citing the problem of delay as the principal reasons (p. 143) : - I am very conscious that in principle this is a case which ought to be heard by the Greek court and not the English court. But in the unusual circumstances of this case I have come to the reluctant conclusion that at this stage an English court should make the decision about these children. The reasons are these. Principally it is the problem of delay. The summary procedure ought ideally to be swift and the children returned expeditiously. In this case, the children have now been in the sole care of their mother for 14 months and in the case of the boy that is half his life. Consequently it may present formidable problems in removing him from his mother. The period of 14 months is also relevant to N who has expressed fears of return which were a cause of concern to the court welfare officer, reinforced by the present decision of the mother not to return. Those issues have convinced me that the children cannot immediately return to Crete without further investigation. After the delay which has already occurred, for this court to remit the case to the English High Court to decide whether to return the children to Greece for the Greek court to make the decision about their future will markedly increase that delay before a final decision can be made. Since I have come to the firm conclusion that the children's problems have to be further considered by an English judge, it is better at this stage that he should make the decision as to their future. In coming to this conclusion I am very aware of the injustice to the father since the mother has achieved a decision which her conduct does not merit. But this court is principally concerned with the welfare of the children. In most child abduction cases, that welfare requires them to be sent home. There are, however, unusual cases, of which this is one, where the English court has to make the decision as to what are the particular needs of the child concerned. The Convention provides for this in Art 13. Nothing I have said in this judgment about my

concern for these children is intended to have any effect upon the exercise of the discretion of the judge hearing this case at first instance. On the facts then before him he may well decide the children's future is to be in Greece and not in England. But for all these reasons I have already set out I have come to the reluctant conclusion that this appeal should be allowed and the case should be remitted to a High Court judge, not a deputy, to consider as a matter of some urgency, the future of these children. I would allow the appeal. Balcombe LJ in the same court agreed with Butler-Sloss LJ and said in his judgment on page 144: - This a non-Convention case. In *Re F (A Minor) (Abduction : Custody Rights)* [1991] Fam 25, sub nom *Re F (A Minor) (Abduction : Jurisdiction)* [1991] 1 FLR and *G v G (Minors)* [1991] 2 FLR 506 this court decided that the general principles of the Hague Convention should apply in an appropriate non-Convention case, on the basis that the application of the welfare test normally required that decisions relating to the care of children are best decided in the jurisdiction in which they have hitherto been normally resident. (An appropriate non-Convention case is one where there is no reason to suppose that the courts of the other jurisdiction will apply an approach to the question of that case of the child significantly different to that of the English court). In my judgment Judge Bell was correct in considering that he was bound by the decisions in *G v G* and *Re F* (above) to apply the general principles of the Hague Convention. However, his judgment is open to criticism in that he appears to have sought to apply the detailed provisions of the Convention to a non-Convention case. It seems that the case was argued before him, as it was before us, on this basis, so he may be excused for his error. However, I should stress that, in a non-Convention case, the welfare of the children remains the paramount consideration, and the principles of the Convention are applicable only to the extent that they indicate what is normally in the interests of the children. Having said that, I agree with Butler-Sloss LJ, whose judgment I have had the advantage of reading in draft, that the judge was right to apply the principles of the Convention in the present case and that, had it not been for the change in the mother's circumstances that has only become known since the date of the hearing before him, I would have dismissed this appeal. When the case was before the judge, the mother accepted that, if the judge ordered the return of the children to Crete, she would, albeit reluctantly, accompany them. Now that she knows if she did not already know then that she is pregnant by an Englishman, she will not return to Crete with the children before her confinement. This does present this court with a real difficulty. For the reasons given by Butler-Sloss LJ, with which I agree, the welfare of these two children now requires that their future be decided by an English court at the earliest opportunity. These young children have now been in England for 14 months. It cannot be in their interests that they should now return to Crete without their mother, with the possibility that the Greek court will then find that their welfare requires that they should return to England to live with their mother. It is best that an English court should now make the decision about these children's future, bearing in mind that an English judge may well take the view that their welfare requires that they should live in Crete with their father and his family, rather than in England with their mother. For these reasons, I, too, would reluctantly allow this appeal. In *Re : M (Abduction : Non-Convention Country)* (1995) 1 FLR 89, CA, a case involving 2 children born in Italy in

1990 and 1992, respectively, of an English mother and an Italian father. In 1993 the relationship between the parents broke down and in September of the same year the mother applied to the Italian court for a custody order in respect of the 2 children. Having been advised by her Italian lawyers that her application stood little prospect of success, in December 1993 the mother brought the children to England and sought a residency order from the English courts. In January 1994 the father started proceedings in the Italian court, and an order was made directing that in the interim the children were to live with the father, although custody of the children was vested in the local authority in Italy. In February 1994 the father filed his answer in the English proceedings, and made an application for a peremptory return order. The judge hearing the case at first instance expressed concern regarding the practical arrangements which would be made should the children be returned to Italy, but upon the father having given certain undertakings, an order was made for the peremptory return of the children to Italy which was then not yet a ratifying signatory of the Hague Convention. The mother appealed and introduced fresh evidence to show that the arrangements made in Italy regarding the matters which had concerned the judge were inadequate. In dismissing the appeal, Waite LJ summarized the principles upon which the courts should act in non-Convention cases in his judgment on p. 90 : - First, the underlying assumptions which the court applies *prima facie* to every case are those which underlie the Hague Convention itself, namely that the best interests of children are normally best secured by having their future determined in the jurisdiction of their habitual residence and sparing them the distress and disruption which they are liable to suffer if one parent abducts them from the home jurisdiction in order to secure a tactical, or a supposed juridical, advantage in a competing jurisdiction : See *Re S (Minors) (Abduction)* [1993] 1 FCR 789 and *D v D (Child Abduction : Non-Convention Country)* [1994] 1 FLR 137. Secondly, in acting by analogy with the Convention the court takes account of those matters which it would be relevant to consider under Art 13. Thirdly, it is of course of the jurisdiction to grant a peremptory return order that the judge should act urgently. That means that the court has no time to go into matters of detail. The case has to be viewed from the perspective of a quick appraisal of its essential features. Any risk of injustice suffered by the abducting parent as a result of limiting the scale of the survey in the interests of speed is minimised by the adoption in the Court of Appeal of a policy which, while discouraging appeals that attempt to reargue the merits, allows some relaxation of the rule in *Ladd v Marshall* [1954] 1 WLR 1489. That relaxation is applied to the extent necessary to enable this court to determine whether there are any matters not dealt with at first instance which might have materially affected the judge's decision, had he been aware of them. Fourthly, in this area as in many others the principle of comity applies. It is assumed, particularly in the case of States which are fellow members of the European Union, that such facilities as rights of representation, means of collecting information through independent sources and welfare reports, and opportunities of giving evidence and of interrogating the other side, all of which are necessary to place the court in a position to determine the best interests of the child concerned, will be secured as well within one State's jurisdiction as within another. In another case of similar facts, *Re M (Abduction : Peremptory Return Order)* (1996) 1 FLR, 478,

CA, where the parties were married in Dubai and continued to reside there. The mother regularly went to England in the summer with the children to visit relatives and friends. In June 1995 she arrived in England with the children with the approval of the father. Shortly thereafter she petitioned for divorce and applied for a residence order of her 10 and 2 1/2 years old children. She obtained an interim residence order in July 1995. The father went to England to attempt a reconciliation which was unsuccessful. He then applied for a peremptory order for the return of the children to Dubai. In November 1995, the judge rejected the mother's application for an adjournment to enable her to call evidence of her own as to the legal process in Dubai. The return order was granted after undertakings had been obtained from the father to pay the fares for the return of the mother and children, to provide a separate home for them in Dubai where he would agree to the children remaining in her care subject to his rights of frequent contact, to maintain her and them, to provide funds for her independent legal representation in proceedings in Dubai regarding the children's future, and to register all those undertakings at the Foreign Office in London and the British Embassy in the United Arab Emirates. The mother appealed. In dismissing her appeal, the Court of Appeal examined the principle underlying the purpose of the peremptory return order when Waite LJ again said on p. 479 : - The rationale for such orders was explained by this court in *Re F (A Minor) (Abduction : Jurisdiction)* [1991] Fam 25, [1991] 1 FLR 1 and *Re M (Abduction : Non-Convention Country)* [1995] 1 FLR 89. It involves applying, by analogy, to non-Convention cases the underlying philosophy of the Hague Convention on the Civil Aspects of International Child Abduction 1980 that it is in general in the best interests of all children to have their lives subjected to the minimum of upset after parental breakdown, by ensuring that disputes as to their future should be disposed of in the courts of their country of habitual residence, and also by dealing at the same time, peremptorily, with attempts by one parent to abduct the children to a country which may be supposed to offer a better chance of securing the outcome preferred by that parent. The judge regarded the present case as being within those principles and made the return order accordingly. . . . Underlying the whole purpose of the peremptory return order is a principle of international comity under which judges in England will assume that facilities for a fair hearing will be provided in the court of the other jurisdiction, and that due account will be taken by overseas judges of what has been said, ordered and undertaken to be done within the English jurisdiction. That is of course reciprocal. It is to be presumed that judges in other countries will make similar assumptions about the workings of our own judicial system. Very exceptional circumstances would be needed to show that in a particular case the English court would be justified in departing from that general principle. No such grounds have been established here. This is a case of a British woman who married in a country where Islamic law prevails, who made a home there, who has friends there, who has family there, and who must be deemed to have accepted in principle, when she undertook that obligation, that she was going to live in a country where she would receive a fair hearing, if, unfortunately, matrimonial trouble broke out. For my part, I see no reason for disturbing this assumption. In *Re P (A Minor) (Abduction)* (1996) 3 FCR 233, CA where the father applied for the peremptory return of a child removed from India, a non-Convention

country, by the mother without his consent or acquiescence, a different Court of Appeal found it necessary to examine again the long series of cases decided prior to the enactment of the Child Abduction and Country Act 1985 and the underlying principles that have since developed and applied to non-Convention cases. In referring to the dictum of Lord Donaldson of Lynton, M.R. in *Re F* noted above, Ward LJ said this in the leading judgment at p. 239 : - It is important to pause a moment over that dictum. There the Master of the Rolls is urging that a focus be made upon the question which is before the court. Here, there was no question about jurisdiction, nor was there any application to stay under s. 5 of the Family Act 1986, on the basis that another court was the most appropriate forum. None of those questions arise in this appeal. Having accepted the jurisdiction, as the Judge had to do, he was concerned with welfare as it impinges upon what order, if any, should be made for the custody, care and control and so on. At p. 231 F the Master of the Rolls went on to say, dealing, as I read his judgment with his first context (jurisdiction) : Possible outcomes have no bearing on which court should decide. Which court should decide depends, as I said, on whether the other court will apply principles which are acceptable to the English courts as being appropriate, subject always to any contra-indication such as those mentioned in Article 13 of the Convention, or a risk of persecution or discrimination, but prima facie the court to decide is that of the State where the child was habitually resident immediately before its removal . Miss Dodson emphasizes that the contra-indications such as those mentioned in Article 13 are but one of the factors and not necessarily, therefore, an all-embracing factor for the court to consider. The Master of the Rolls also said, and as I have already set out, this is the passage on which the Judge relied : in normal circumstances it is in the interests of the children that parents and others shall not abduct from one jurisdiction to another, but any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been normally resident . Regarding the principles summarized by Waite LJ in *Re M* above, Ward LJ had the following observations at p. 241 : - When Waite, LJ expressed in his judgment that the court can act by analogy and take into account matters relevant to consider under Article 13, he was not, in my judgment, requiring the imposition of an Article 13 test to a non-Convention case. The overwhelming burden of the authorities, undoubtedly, is that welfare is the only consideration which governs the court's decision. That is no more and no less than being in accordance with s. 1 of the Children Act which requires that in any question relating to the upbringing of the child, welfare is the paramount consideration. In adopting this position, we remain in step with the Australian courts. The High Court has recently considered the matter in *ZP v PS* (1994) 122 A.L.J. 1. There Brennan, J held at p. 18 : Putting to one side the cases which the Convention applies, s. 64 (1) (a) defines the paramount consideration. When a child is abducted from one country and brought to Australia and the abduction is not covered by the Convention, the abduction is relevant only by reason of the effect it has on the child's welfare. In this respect the judgment of Buckley, LJ in *Re L* is unexceptionable . He cited the well-known passage at pp. 264

5. He continued : It is entirely appropriate for the Family Court in an abduction case to have regard to these factors in determining the welfare of the child. And it may be entirely appropriate to order the speedy return of the child to the country from which he or she has been abducted without making as full an inquiry as the court would ordinarily make in determining an application for permanent custody. Where it is for the welfare of the child that an order for speedy return is made, the Family Court is not primarily concerned with the question whether it is a clearly inappropriate forum to determine an application for permanent custody. The Family Court is the only court that can appropriately make an order for speedy return and it has no jurisdiction to remit the question of permanent custody for determination by a court in another country. The Family Court must therefore make the order that is appropriate in the unique circumstances of the case at the time when the proceedings are before it. In determining an application for speedy return of the child to another country, it may be material to consider whether, if an order is made, the courts of the other country will properly inquire into and determine the child's permanent custody. But that is not to apply a clearly inappropriate forum criterion to the determination of the application. If the Family Court properly makes an order for the speedy return of a child abducted from another country, the court is not declining to exercise its jurisdiction; it is exercising its jurisdiction by making an order dictated by the welfare of that child . Then he referred to a passage in the judgment of Neill, LJ in *Re F* [1991] F.C.R. 227 at p. 231 where he said : in the ordinary way, any decision relating to the custody of children is best decided in the jurisdiction in which they have normally been resident. This general principle is an application of the wider and basic principle that the child's welfare is the first and paramount consideration . Brennan, J criticized that approach but I think he reads more into the judgment than appears. I understand Neill, LJ to be applying the principle of *Re L* with the reservation in the next sentence, which Brennan, J did not like, that : The principle is subject to exceptions and those exceptions will no doubt be worked out in future cases . Whilst, therefore, I respectfully disagree with Brennan J's view that Neill LJ was mistaken, and, in the light of my opinion that in truth nothing divides the English Courts and the Australian Courts, I feel able, paradoxically, to accept the points made by Brennan J at p. 19 that : First, if a child's welfare is to be affected by a custody order, it is the contents of the order that are relevant to the child's welfare, not the court that makes it. Secondly, although as a general proposition the courts of the place of the ordinary residence of the child might be expected to be best suited to determine what is for the child's welfare, that expectation can be displaced by the circumstances. The welfare of a particular child is a unique and often difficult problem : the solution is not to be pre-empted by a general presumption about the capacity, sensitivity or procedures of the respective courts which might have had, might have or might acquire jurisdiction over the child's custody. In any event, when the Family Court is determining an application for the return of a child to the place of the child's ordinary residence, the capacity, sensitivity or procedures of the courts of that country are likely to be of minor importance unless the evidence shows that those courts are unlikely to make and to enforce orders deemed to be appropriate in that society to protect the child and to serve his or her best interests. In determining the application pending before it, however,

the Family Court must take as the paramount consideration the welfare of the child as it sees it, acknowledging the complex of factors that may affect that issue. In these passages above Ward LJ was not, in my judgment, casting any doubt on the points made by Waite LJ referred to above that generally the welfare of a child is promoted by his, or her, return to the country where he, or she, was habitually resident. The principle and approach to be adopted in Non-Convention cases were again examined by Ward LJ in *Re JA (Child Abduction : Non-Convention Country)* (1998) 1 FLR 231, CA, where the father was a national of the United Arab Emirates and the mother was English, and the child in question was born in 1995 in the Emirates and of dual nationality. The family came to England in 1996 and later that year the mother indicated that she wished to remain in England. She then issued divorce proceedings and the father issued an originating summons in wardship seeking the peremptory return of the child upon various undertakings. The wardship judge found that the child was habitually resident in the Emirates when the mother came to England in 1996 and the mother was therefore wrong to keep the child in that country without the father's agreement or court authority. However the judge found that there was a sufficient degree of acceptance by the father that the child would live with the mother in England for it to be inappropriate to accede to his request for summary return. The father appealed. The mother filed a respondent's notice in which she asked the court to consider the way in which the issue was likely to be resolved by a court in the Emirates and the stress on her if she were to return there. In dismissing the appeal but on different grounds, Ward LJ said this at p. 233 : - It was also common ground that the judge correctly addressed the next important principle as follows : In the ordinary case it is in the child's best interests for his or her welfare to be determined by the court of the country where the child habitually resides. The reasons for that have been so often stated that it would be superfluous to repeat them. It is an important component of the principle that the court should not assist or encourage transnational abductions, whether or not the Hague Convention applies, but as has most recently been pointed out by Ward LJ in his leading judgment of the case of *Re E (A Minor) (Child Abduction : Non-Convention Country)* [1997] 2 WLR 223, that and every other general principle in cases concerning children's welfare must give way to the overriding consideration of the child's welfare. That case made it clear that it is wrong slavishly, as it were, to follow by analogy the principles of the Hague Convention cases and apply them to non-Convention cases such as this, nor is it appropriate for it to force into the format of a non-Convention case the terminology that is appropriate to Hague cases. So I start from the proposition that unless there are good reasons for forming a different conclusion, J's future should be decided in Sharjah rather than in [England]. It is clear from the above that Ward LJ approves an approach which has regard to a presumption that in the absence of good reasons to the contrary the welfare of a child who has been abducted is best promoted by his or her return to the country where he or she habitually resided. His Lordship then went on to say this at p. 234 : - The decision to return the child must be justified by more than an adoption by analogy of the Hague Convention approach because in a Convention case welfare is not the paramount consideration or a consideration at all (save in the different guise of Art 13), nor can it be justified as an adoption of principles of forum conveniens

which concept, as the phrase is used in other forms of litigation, has no place in the wardship jurisdiction, per Ormrod J in *Re R (Minors) (Wardship : Jurisdiction)* (1981) 2 FLR 416, 426H. True it is that the interests of the child may ordinarily be thought to be better served if the court having direct knowledge of the conditions prevailing in the place where the child has his or her home is charged with the decision whether a change of that home should be ordered where the parents cannot agree about the matter between themselves. The only proper reason for returning the child without investigating the merits is that the child's welfare demands it on a basis so well but not compendiously expressed by Buckley LJ in the locus classicus of *Re L (Minors)* [1974] WLR 250, 264 F 265 C : To take a child from his native land, to remove him to another country where may be his native tongue is not spoken, to divorce him from the social customs and contacts to which he has become accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for the adjudication here. Anyone who has experience in the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child. Judges have more than once reprobated the acts of kidnappers in cases of this kind. I do not in any way dissent from those strictures but it would, in my judgment, be wrong to suppose that in making orders in relation to children in this jurisdiction, the court is in any way concerned with penalising any adult for his conduct. That conduct may well be a consideration to be taken into account, but, whether the court makes a summary order or an order after investigating the merits, the cardinal rule applies that the welfare of the infant must always be the paramount consideration. In the light of these authorities, in particularly of the more recent cases of *Re P* and *Re JA* as noted above, and while the modern cases have emphasised that the principle of comity applies, in determining whether or not I should order the return of the child to the Father in this case, I should have regard to and apply the following principles in all the circumstances of the case : -

- (1) The child's welfare is my paramount consideration.

- (2) There is a presumption that the prima facie position is in favour of return of the child to the country where he was habitually resident.
- (3) That presumption can be displaced in certain circumstances which are shown to be incompatible with the child's best interests. There is no question that the Mother in the present case has retained the child in Australia without the Father's consent or the court's approval, and such retention is in the circumstances wrongful. Nor is there any question of delay, in my judgment, on the part of the Father in bringing his application for the return of his son, given the facts that he had immediately flown from Beijing to Australia to make his request to the Australian Central Authority under the Hague Convention, and then to Hong Kong for the Article 15 declaration as to the child's habitual residency, and when that failed, he immediately launched the present application, first appearing before Judge Chu on 18th October 2006, just one week after the issue of his summons, but for reasons unnecessary for me to go into here, the application was adjourned by the court until 4th January 2007. Granted that such summary procedure ought ideally to be swift and the child returned expeditiously, and it is true that the child has by now been in the sole care of his mother for more than 6 months, but certainly the Father has shown a firm commitment to seeking the return of his child, and has not behaved in anyway that one could infer any delay by acquiescence from silence or lack of activity, and while 6 months in the life of a 10 years old child may not be said to be entirely insignificant, they should not, in my judgment, present any real problems in removing him from his mother. Above all, there is no evidence at all to suggest that there is any risk that his return to his father in China would expose him to any physical or psychological harm or otherwise place him in an intolerable or any situation which may be incompatible with his welfare or interests. It is true that he may have missed his mother whom he obviously loves, and his father as well, of which I have no doubt, which is only normal in view of the fact that he only got to see his mother once a year and for only a month or so, but clearly that by itself cannot be any justification for him to decide to stay with his mother without the consent of his father or at least some proper consultation and discussion between his parents, no matter how mature and intelligent he may have seemed to the Social Worker. His other reasons that his step-mother was due to give birth and hence his concern that she and his father may have to divert some of their care and attention to the new born baby, or that his father's relocation from Beijing to Shanghai and hence a change to a new environment and new school, away from his friendly maid and neighbours, all part and partial of the growing-up of a small child whose resultant concern is entirely normal and understandable, but are certainly not, in my judgment, the kind of risk or harm that would go to displace the presumption that it would be in his best interests not to be removed from his father and his family in the country where he was habitually resident. Accordingly and for all the reasons aforesaid, I allow the Father's application and order that the Mother do return the child to his custody as soon as possible and in any event not later than 1st February 2007. I now wait for the parties to restore the hearing before me on the question of costs. (Bruno Chan) District Judge Mr David Pilbrow SC instructed by Messrs Tang Tso & Lau for the Petitioner Father. Mr S Leung instructed by Messrs Y L Yeung & Co for the

Respondent Mother. PAGE - PAGE - &`#\$~!P] ,f@- sy \$ he~"Td c(#\$ 0kJ\$\$ @P\$\$ :!L- E{k' XW(\$ s `(-3*\$ 43*\$:p . kM.2 {^2\ (\$p2\$ 4g3\$ 4QQ4 0b50p M|;\$ wzO?p= H#@\$ 3i@\$ nSDH lEFE kxL\$ TKxMv. /eNH S\$O\$ c;R\$ G%9UT C:~W x% X\$ x8Y\$ L}YH (Yq[*n\T #b2^\$ Q^f Y6xc\$ e>tD ? Dep= ZJg\$ hx;r N)/h vCip= TCn\ gsTu\$ 4xv\$ Pg;wp xDs\ *y\$ __z4w C? } R\$ ~\$ f!\$- C:~W N)/h E{k' 4QQ4 lEFE C? } wzO? gsTu x% X (\$p2 0kJ\$ #b2^ Y6xc R\$ ~ he~" G%9U (Yq[:p . s ` (TKxM Pg;w kM.2 @HP LaserJet 1200 Series PCL 6 LPT1: winspool HP LaserJet 1200 Series PCL 6 HP LaserJet 1200 Series PCL 6 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) HP LaserJet 1200 Series PCL 6 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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