Interpretations of the Hague Child Abduction Convention 1980 in New Zealand Since COCA: Cause for Concern?

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I. Introduction

> Child abduction is not an act of love. It has never been and never will be. It is the ultimate revenge on the other partner – and the pain never leaves.[1]

International child abduction[2] is a significant global problem.[3] The *Hague Convention on the Civil Aspects of International Child Abduction 1980*[4] attempts to ameliorate this problem by facilitating prompt return of abducted children to their state of 'habitual residence'.[5]

As a signatory state, New Zealand initially implemented its *Hague Convention* obligations by way of the *Guardianship Amendment Act 1991* ('*GAA*'). However, on 1 July 2005, the *Care of Children Act 2004* ('*COCA*') replaced the *GAA* as New Zealand's implementing statute.[6] Whilst *COCA* clearly changes New Zealand's approach to child law in some areas, subpart 4 of Part 2 of *COCA* replicates New Zealand's *Hague Convention* implementing provisions as contained in the *GAA*. Likewise, s 23(3) of the *Guardianship Act 1968* has been retained under *COCA* in the form of s 4(7). However, notwithstanding these fundamental similarities between the two Acts, *COCA*

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1 T Ooi, 'Kidnapped Children: Parents' Pain Never Dies' Straits Times (Singapore), 24 November 1994 at 9 as cited in L Cardin, 'The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One' (1997) 20 Houston Journal of International Law 141 at 142.

2 Within this paper 'child abduction' refers to a wrongful removal from or retention outside the child's state of 'habitual residence' which has been unilaterally decided by the abductor and which infringes any 'rights of custody' another person may have: Hague Convention, Arts 3 and 5. Consistent with private international law usage, the term has no relation to third party abductions/'stranger kidnappings', which are recognised as having very different motivations: E Perez-Vera, Explanatory Report of the Convention on the Civil Aspects of International Child Abduction, Actes et Documents of the XIVth Session, Vol III (1980) 426 at 451 ('Perez-Vera Report').

3 See generally <http://www.incadat.com> and <http://www.un.org> each viewed 14 July 2007. Note also S Barone, 'International Parental Child Abduction: A Global Dilemma with Limited Relief – Can Something More be Done?' (1995) 8 New York International Law Review 95 at 96.

4 Hereafter 'Hague Convention' or 'Convention'.

5 Hague Convention, Preamble. Discussion of issues surrounding interpretations of 'habitual residence' and 'rights of custody' is outside the scope of this paper. However, *Punter v Secretary for Justice* [2007] 1 NZLR 40 (CA) and *Murrow v Hunter* [2006] NZFLR 623 (HC) – criticised as 'wrong' for not recognising 'the sharp distinction between rights of custody and rights of access' in *Hunter v Murrow* [2005] EWCA Civ 976 (CA), respectively provide important statements of recent New Zealand authority.

6 COCA, ss 2 and 3(2)(g).

has recently occasioned significant *Hague Convention*-related debate in New Zealand's appellate Courts.

Secretary for Justice v HJ[7] marks the Supreme Court's first *Hague Convention* decision under *COCA*. Critically, *HJ* departs from a strong line of authority under the *GAA* regarding the scope and application of some of the Convention's exceptions and the proper approach to the exercise of discretion once an exception is found established.[8]

The Convention's success relies heavily on mutual trust, respectful reciprocity and markedly close judicial/administrative authority cooperation.[9] Accordingly, the purpose of this paper is to analyse whether *HJ* and the conclusions of selected other post-*COCA* appeal cases regarding 'grave risk' and the general exercise of discretion[10] are consistent with key comparative interpretations and what the implications of any differences in approach might be. Therefore, Parts II and III of this paper respectively discuss the Convention's background and the relevance of *COCA*. Part IV explores the conclusions of six appeal cases under *COCA*. Part V examines Canada, the United States, the United Kingdom and Australia's approach to 'grave risk' and discretionary exercises. Part VI focuses on the implications of significant similarities and differences identified. Part VII offers some concluding remarks regarding the future direction of New Zealand's Convention jurisprudence.[11]

II. Understanding the Hague Convention: Background and context

In this paper, I do not rehearse all of the arguments put forward in judgments regarding the specific requirements for successful establishment of Convention exceptions, as others have done elsewhere at length. Nevertheless, particularly given this paper's focus on discretionary exercises under the Convention, some discussion of Convention policy issues and an overview of the exceptions invoked in cases discussed in Parts IV and V is necessary in order to distil whether New Zealand approaches are congruent with international authority. Accordingly, relevant background issues providing the framework for analysis in Parts III-VII are discussed below.

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7 *Secretary for Justice (as the New Zealand Central Authority on behalf of TJ) v HJ* [2007] 2 NZLR 289 (NZSC) (hereafter also 'HJ'); *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) – the 'grave risk' issue (COCA, s 106(1)(c)) was not raised in the Supreme Court appeal.

8 Compare for example, *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA); S v S [1999] NZFLR 625 (*HC & CA*); *KS v LS* [2003] NZFLR 817 (HC, Full Court); *KMH v The Chief Executive of the Department for Courts* [2001] NZFLR 825 (HC); *Adams v Wigfield* [1994] NZFLR 132 (HC); *Clarke v Carson* [1995] NZFLR 926 (HC); *Damiano v Damiano* [1993] NZFLR 548 (FC).

9 *S v S*, ibid; *DP v Commonwealth Central Authority*; *JLM v Department of Community Services* (2000) 180 ALR 402 at para [155] per Kirby J (dissenting) (HCA) ('DP/JLM'); Hague Convention, Art 7; Perez-Vera Report, above n 2 at para [9]: 'the applicability of Convention's benefits will itself depend upon the concept of reciprocity'. Note also M Weiner, 'Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction' (2002) 33 Columbia Human Rights Law Review 275 at 285. As to comity as a cannon of construction lying at the heart of international Convention jurisprudence, see generally L Silberman, 'Interpreting the Hague Convention: In Search of a Global Jurisprudence' (2005) 38 U.C. Davis L. Rev. 1049; S Nelson, 'Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction' (2001) University of Illinois Law Review 669 at 671.

10 COCA, s 106(1)/Hague Convention, Arts 12, 13, 18 and 20.

11 The law stated within this article is current as at December 2007.

A. History of the Hague Convention

Prior to the Hague Convention's inception, the lack of enforcement of foreign custody orders created perverse incentives for parents to engage in 'forum shopping', ie the seeking of a more favourable jurisdiction to adjudicate or escape from custody disputes.[12] When taken together with social, legal and technological factors[13] such as increasing globalisation, heightened personal mobility, sky-rocketing divorce rates, escalating numbers of marriages between residents of different countries[14] and the vulnerability of children possessing dual citizenship and multiple passports,[15] securing an abducted child's return was particularly difficult.[16] Additionally, resolution of custody disputes by way of the imprecise 'best interests of the child' standard created difficulties.[17] Indeed, as international commentators have observed, 'It is more difficult to define children's interests than those of an adult, who can express what he or she takes to be his or her best interests'.[18]

By the mid 1970s, the growing incidence of international child abduction came to be described by Commonwealth Law Ministers as an issue of 'immense social importance and requiring early concrete action'.[19] Although, as Anton[20] emphasises, reported cases of child abduction appear relatively small during this period, recognition of the risk of harm to abducted children and the

12 L Herring, 'Taking Away the Pawns: International Parental Abduction & the Hague Convention' (1994) 20 *N.C. J. Int'l L. & Com. Reg.* 137 at 142-143: 'The non-deferential treatment of foreign custody orders created a conductive environment for child snatching'. See generally D Rivers, 'The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parental Abductor' (1989) 2 *Transnational Law* 589 at 616 for discussion of relevant international conventions prior to the Hague Convention.

13 A Dyer, Report on International Child Abduction By One Parent, Preliminary Document No. 1 of August 1978, III Hague Conference on Private International Law, Actes et Documents of the XIVth Session: Child Abduction 12 at 18 ('Legal Kidnapping Report').

14 P Beaumont and P McEleavy, The Hague Convention on International Child Abduction (1999) 2; L Stotter, 'The Light at the End of the Tunnel: The Hague Convention on the Civil Aspects of International Child Abduction Has Reached Capitol Hill' (1986) 9 *Hastings International & Company Law Review* 285 at 300.

15 D Zawadzki 'The Role of Courts in Preventing International Child Abduction' (2005) 13 *Cardozo Journal of International & Company Law* 353 at 354; J Kay 'The Hague Convention – Order or Chaos?' (2005) 19 *AJFL* 245; *Thomson v Thomson* (1994) 119 DLR (4th) 253 at 296 (SCC).

16 See generally, J Todd, 'The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?' (1995) 2 *Ind. J. Global Stud.* 553; T Harper, 'The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-abduction' (1995) *Emory International Law Review* 257.

17 Application of the 'best interests' standard includes consideration of both a child's physical and psychological well-being': J Goldstein et al., The Best Interests of the Child: The Least Detrimental Alternative (1996) 5; P Beaumont and P McEleavy, above n 14 at 2.

18 J Rubellin-Devichi, 'The Best Interests Principle in French Law & Practice' (1994) 8 *Int'l J.L. & Fam.* 259, 263. See generally, M Freeman, 'In the Best Interests of Internationally Abducted Children? – Plural, Singular, Neither or Both?' (2002) *IFLJ* 77.

19 Hague Conference on Private International Law, Actes et Documents da la Quatororzième Session, III, Child Abduction at 15, n. 6. See generally also J Eekelaar, 'International Child Abduction by Parents' (1982) 33 *University of Toronto Law Journal* 281 regarding suggestion that the Commonwealth Secretariat ought to follow the discussions on child abduction at The Hague.

20 A Anton, 'The Hague Convention on International Child Abduction' (1981) 30 *ICLQ* 537 referring to the 1978 A Dyer, Legal Kidnapping Report, above n 13. See also P Dallmann – citing US State Department Reports, 'The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by the US Courts' (1994) 5 *Ind. Int'l & Comp. L. Rev.* 171 at 177.

'certainty of distress' for left-behind parents generated 'overwhelming support'[21] for increased coordination and cooperation between Governments to prevent this 'social evil'.[22]

The November 1979 meeting of the Special Committee adopted a draft Convention.[23] This document served as the basis for discussions by the Fourteenth Session of the Hague Conference held in October 1980, which agreed upon the final version of the Convention that was formally adopted by the unanimous vote of States that were present[24] and the Fourteenth Session in Plenary Session.[25] Somewhat unusually, following the Closing Session, the Convention was made available for immediate formal signature.[26] Canada, Portugal and France were the first three States to ratify the Convention. These States' ratifications took effect on 1 December 1983.[27] New Zealand's accession[28] to the Convention came into force on 1 August 1991.[29]

B.Purposes, Policy & Structure of the Convention

Premised upon recognition that the 'true victims' of child abduction are the children who suffer the trauma of being uprooted from their milieu of habitual residence, the anguish of a loss of contact with a parent previously involved in their care, and the insecurity associated with adjusting to a strange culture and language,[30] among contracting states,[31] the Hague Convention is the principal legal remedy for parents of internationally abducted children. As Torrez J emphasises, the Hague Convention is neither an extradition treaty nor a mechanism for adjudicating the merits of any

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21 See Replies to Questionnaires circulated to Governments in 1978 together with A Dyer, Legal Kidnapping Report, above n 13; N Lowe et al., International Movement of Children: Law, Practice and Procedure (2004) 197.

22 *Thomson v Thomson* (1994) 119 DLR (4th) 253 at 271 (SCC).

23 Working Document No. 11 of the November 1979 Special Commission.

24 Specifically: Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the United States, Venezuela and Yugoslavia. Member States Argentina, Turkey and Surinam did not attend the meetings. Notwithstanding their active role in the First Commission's proceedings, Israel, Egypt and Italy did not participate in the vote: N Lowe, above n 21; Perez-Vera Report, above n 2.

25 Perez-Vera Report, ibid at para [1]. See generally N Lowe et al., ibid, at 196-198.

26 Canada, France, Switzerland and Greece immediately signed, which is why the Convention bears the date 25 October 1980: Perez-Vera Report, ibid, at 426, para [1].

27 HccH, 'Spreadsheet Showing Acceptance of Ratifications & Accessions': <http://www.hcch.net/index_en.php?act=publications.details&pid=3282&dtid=36> viewed 14 July 2007.

28 Only States which were present at the Convention's inception were eligible to ratify; other countries interested in abiding by the Convention have only the option of acceding. Practically, the difference is, however, minimal in terms of the Convention's interpretation: N Lowe et al., above n 21.

29 GAA 1991; ibid.

30 Perez-Vera Report, above n 2 at 431; Hague Convention, Preamble; A Dyer, Kidnapping Report, above n 13 at 19-20. Currently, 79 countries are party to the Convention: HccH, 'Spreadsheet Showing Acceptance of Accessions' (July 2007) <http://www.hcch.net/index_en.php?act=publications.details&pid=3282&dtid=36> viewed 14 July 2007 ('HccH Spreadsheet').

31 As J Starr, 'The Global Battlefield: Culture and International Custody Disputes at Century's End' (1998) 15 *Arizona Journal of International & Company Law* 791 at 794 notes, there is a stark contrast 'in life and law' between signatory and non-signatory states. Other than to note that the Convention's success depends on broad ratification/accession by the international community: Perez-Vera Report, above n 2, discussion of issues associated with 'safe-haven' non-signatory states such as those throughout the Middle East where Israel is the only signatory nation, is outside the scope of this paper.

specific custody issue.[32] Rather, the Convention is simply a civil[33] law remedy designed to restore the pre-abduction status quo by mandating, in the absence of an established exception,[34] return of abducted children under the age of 16 years 'forthwith' to the state of their habitual residence.[35]

The general rule that a child's best interests are to be determined by Courts in the child's state of habitual residence is a 'fundamental and animating' principle of the Convention.[36] This principle is supported by an underlying assumption as to the capacity of the Courts in contracting states to protect children's best safety and welfare interests. On this point, the conclusions of the New Zealand Court of Appeal in *A v Central Authority for New Zealand* are germane:[37]

> Where the system of law of the country of habitual residence makes the best interest of the child paramount and provides mechanisms by which the best interests of the child can be protected and properly dealt with, it is for the Courts of that country and not the country to which the child has been abducted to determine the best interests of the child.

Flowing from the Convention's underlying principle and supporting assumption,[38] the express objects of the Convention are thus:[39]

> (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 access under the law of one Contracting State are effectively respected in the other Contracting States.

Consistent with the Convention's procedural character pertaining to a summary choice between competing forums,[40] upon filing of an application for return, the Convention stipulates immediate suspension of all ongoing substantive proceedings pending resolution of the *Hague Convention*

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32 Torrez J, 'The International Abduction of International Children: Conflicts of Laws, Federal Statutes, and Judicial Interpretation of the Hague Convention on the Civil Aspects of International Child Abduction' (2005) 5 *Whittier Journal of Child & Family Advocacy*, 7 at 8. As explained in *Meredith v Meredith* 759 F. Supp. 1432 at 1434 (D. Ariz, 1991), the Hague Convention 'merely empowers a court to determine the merits of an abduction, and not the merits of any custody claim'.

33 As opposed to a criminal remedy. As Passanante, 'International Parental Kidnapping: The Call for an Increased Federal Response' (1996) 34 *Columbia Journal of Transnational Law* 677, 690 explains, the Convention's drafters elected to address only the civil aspects of abduction predominantly because criminal sanctions generally prove inefficient in deterring international abductions.

34 As contained in the Hague Convention, Arts 12, 13, 18 and 20; COCA, s 106. As the Perez-Vera Report, above n 2 at 432 and 461, makes clear, the inclusion of the Convention's limited exceptions represented a 'fragile compromise' aimed at accommodating differences in legal systems and tenets of family law in effect in the various States that negotiated the Treaty.

35 Hague Convention, Art 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.

As to other objective temporal qualifications that must be established, see Arts 3, 5, 12 and 35/COCA, s 105 respectively regarding 'wrongful removal/retention', 'custody/access rights', requirement for proceedings to be commenced within one year of the wrongful removal/retention, and precluding any retroactive effect between relevant Contracting States. See generally, Perez-Vera Report, above n 2.

36 *Aulwes v Mai* (2002) 220 DLR (4th) 577 at 587 (CA).

37 *A v Central Authority for New Zealand* [1996] 2 NZLR 517 at 523 (CA). Compare also conclusions of the English Court of Appeal in C v C [1989] 1 WLR 654 at 664.

38 *Aulwes v Mai*, above n 36 at 587.

39 Hague Convention, Art 1.

40 *S v S*, above n 8; *Adams v Wigfield*, above n 8.

claim.[41] In this sense, the Convention demonstrates its 'overriding commitment' to deterring international parental abduction.[42] Indeed, in the words of Perez-Vera:[43]

> [T]he Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access.

Because the *Hague Convention* is not self-executing, its enforceability depends on signatory countries enacting implementing legislation, ie domestic law adopting the Convention.[44] In New Zealand, *COCA* – to which the *Hague Convention* is completely Scheduled – is the current implementing legislation giving effect to New Zealand's 1991 accession.[45] Critically, although it is possible for State parties' implementing legislation not to directly incorporate the Convention into domestic law,[46] in all jurisdictions, implementing legislation is not an alternative to the *Hague Convention*. Rather, it is the legal means of utilising the remedies contained in the treaty.[47]

The *Hague Convention* is comprised of six chapters and 45 Articles, including six discretionary exceptions to an abducted child's mandatory return. Currently, 80 countries are party to the *Hague Convention*. However, the Convention is in effect between New Zealand and only 44 sister nations.[48]

C. The Relevance of Welfare

The principle that decisions relating to children ought to be based on the child's 'best interests' is arguably one of the most extensively accepted principles in the Western world.[49] Reflecting its drafting in an atmosphere of emerging recognition of children's rights and the 'best interests' principle,[50] the Preamble of the *Hague Convention* declares that 'the interests of children are of

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41 Hague Convention, Arts 16 and 19.

42 B Bodenheimer, 'The Hague Draft Convention on International Child Abduction' (1980) 14 *Family Law Quarterly* 99 at 102.

43 Perez-Vera Report, above n 2 at 434, para [34]. Compare also *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at para [11] (HCA).

44 S Barone, 'International Parental Child Abduction: A Global Dilemma with Limited Relief – Can Something More Be Done?' (1995) 8 *New York International Law Review* 95, 101-102.

45 Acceding on 31 May 1991, New Zealand was the third contracting state to accede to the Convention, although 16 others had previously ratified. By way of implementation through the GAA, the Hague Convention came into force in New Zealand on 1 August 1991.

46 For example, in the United Kingdom, the Convention's Preamble and Arts 1, 2, 20 and 35 are notably absent from the jurisdiction's Child Abduction and Custody Act 1985. However, following *Re D (a child) (foreign rights of custody)*, below n 393, Art 20 appears recognised as indirectly incorporated.

47 W Rigler and H Wieder, The Epidemic of Parental Child Snatching: Attempts to Prevent Parental Child Abduction, Applicable United States Laws and the Hague Convention <http://www.travel.state.gov/family/abduction/resources/resources_545.html> viewed 14 July 2007.

48 HccH Spreadsheet, above n 30 and HccH 'News and Events', <http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=133> viewed 1 August 2007. Statistics as at 1 June 2007.

49 See generally J Eekelaar, above n 19; A Dyer Kidnapping Report, above n 13 at 22, and compare more traditional methods of custody allocation in other parts of the world.

50 G van Bueren, The International Law on the Rights of the Child (1995) 3 and 45.

paramount importance in matters relating to their custody'.[51] However, the tension inherent between protecting an individual child's best safety and welfare interests and the Convention's overall interest in preventing abductions generally has not yet been categorically resolved.

In recent years, significant developments in children's rights[52] and domestic violence treaties[53] have brought the individual rights vs collective interests tension under closer scrutiny with increased calls for greater consideration of children's particular rights and wishes in legal proceedings.[54] Where the 'child's objection' or 'grave risk' exceptions are invoked, the tension between the Convention's remedial and normative roles is particularly strong.[55] Certainly, in this context, the *Hague Convention's* relatively state-centred[56] approach has been criticised as doing 'little or nothing to promote the rights of children'.[57]

Notwithstanding some fairly trenchant criticisms that the *Hague Convention* 'agrees badly' with the view that the 'best interests of the child' principle ought to provide a formula that enables 'open' assessments of the complete situation of the individual child,[58] Courts internationally have expressly approved the *Hague Convention's* compatibility with Art 3(1) of the *United Nations Convention on the Rights of the Child 1989* (*UNCROC*),[59] which provides, 'In all actions concerning children, whether undertaken by pubic or private social welfare institutions, courts of law,

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51 As M Freeman (2002), above n 18 observes at 80, welfare considerations are also clearly evident in the jurisdictional requirements for a Convention application – welfare considerations being so fundamental to the Convention's ethos that it will not even begin to operate where there is conflict with these issues.

52 See for example United Nations Convention on the Rights of the Child ('UNCROC') which requires nations to recognise the human rights of children, including the right to have their views heard and considered in custody proceedings: Art 12. Perhaps importantly, the Hague Convention was adopted around two years after completion of the first UNCROC draft in 1978 and approximately 20 years after the Declaration on the Rights of the Child 1959: GA res 1386 (XIV) 14 UN GAOR Supp (No 16) 19, UN Doc A/4354, 1959.

53 Note for example, Convention on the Elimination of All forms of Discrimination against Women (1984) ('CEDAW'); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1989) ('CAT').

54 Note for example M Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 593 at 662-663 – arguing that Courts should display greater willingness to consider a child's preference when he/she expresses a desire to remain with an abducting parent who is a victim of domestic violence, due to the child's possible fear of the left-behind parent; S Nelson, above n 9 at 672 – criticising Courts' narrow interpretation of exceptions to return and arguing that a broader interpretation of exceptions is necessary to better protect the best interests of abducted children.

55 See generally Perez-Vera Report, above n 2; *S v S* [1999] NZFLR 625 (HC & CA); P Beaumont and P McEleavy, above n 14 at 29. Compare conclusions of Australian Courts, holding that because UNCROC expressly approves of the Hague Convention, UNCROC considerations cannot override purposes/policy articulated by the Hague Convention: authorities: *McCall v State Central Authority* (1994) 18 Fam LR 307 (Fam CA, Full Court).

56 As opposed to a transnational approach. The Convention is said to adopt a state-centred approach as it allows the judicial system of each Contracting State to exercise substantial discretion when interpreting the Convention: A Scott, 'From a State-centred Approach to Transnational Openness: Adapting the Hague Convention with Contemporary Human Rights Standards as Codified in the Convention on the Rights of the Child' (2004) 11 *Ind. J. Global Leg. Stud.* 233 at 235.

57 J Starr, 'The Global Battlefield: Culture and International Custody Disputes at Century's End' (1998) 15 *Arizona Journal of International & Company Law* 791, 832.

58 See for example J Schiratzki, 'Habitual Residence in Sweden and the USA' (2001) 15 *International Journal of Law, Policy and the Family* 297 at 300-301; R Schulz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *ICLQ* 771 at 800 – suggesting the Hague Convention lacks sufficient flexibility to appropriately deal with non-standard cases and hence risks being incongruent with the forum conveniens principle.

59 20 November 1989, GA res 44/25, UN GAOR (44th Sess) 108. UN Doc A/RES/44/25, 1577 UNTS 44 28 ILM 1457 (entered into force 2 September 1990).

administrative authorities, or legislative bodies, the best interests of the child shall be a paramount consideration'.[60]

In particular, the Australian Courts[61] have grounded acceptance of the compatibility proposition in the fact that Art 11 of *UNCROC* implores States 'to take measures to combat the illicit transfer and non-return of children abroad'.[62]

In a similar fashion, Courts in the United Kingdom have been quick to uphold the *Hague Convention's* primacy both with respect to *UNCROC* and the *European Convention on Human Rights* ('*ECHR*'). In relation to the *Hague Convention*, Balcombe LJ emphasised in *G v G*:[63]

> For my part, I am not prepared to assume that Parliament, in passing the Child Abduction and Custody Act 1984, accepted that it was substituting a test which did not put the child's welfare as the first and paramount consideration.

Likewise, the three landmark decisions in *Maire v Portugal*,[64] *Ignaccola-Zenide v Romania*[65] and *Sylvester v Austria*[66] have made clear that a failure by domestic authorities to take 'adequate measures' to enforce a return order under the Convention can constitute a State breach of Art 8 of the *ECHR*, which imposes a positive obligation on States to ensure effective reverence for the right to respect for family life.

Further support for the proposition that the tension between individual rights and collective interests is most properly resolved in favour of stability for children generally is also provided by the Canadian Supreme Court's *Thomson v Thomson*[67] decision, where the dichotomy distinguishes

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60 For a brief history regarding the rights of children, see generally R Rios-Kohn, 'The Convention on the Rights of the Child: Progress and Challenges' (1998) 5 *Geo. J.* on Fighting Poverty 139 at 140-145. Whilst the term 'best interests' is not defined in UNCROC, as Rios-Kohn explains, the principle's intent is not to guarantee that a child's best interests will trump other competing interests. Rather, the principle aims to ensure that a child's interests are appropriately considered. Application of the 'best interests' principle recognises the child as an individual rights holder, which entitles him/her to proper consideration of any interests that may be affected.

61 See for example decisions of the Full Court in *McCall v State Central Authority*, above n 55 at 323; *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982 at 1000 (FCA). For similar statements of principle in the New Zealand context see S v S, above n 8 at 634:

> On an application under the Hague Convention resort may be made to the United Nations Convention on the Rights of the Child where no inconsistent with the former.

and *KMH v The Chief Executive of the Department for Courts* [2001] NZFLR 825 at 836 (HC):

> I am of the view that New Zealand's ratification of the Convention on the Rights of the Child in March 1993 cannot be taken as involving watering down of the earlier implementation (via the Guardianship Amendment Act 1991) of the Hague Convention.

62 N Lowe et al., above n 21 at 200, suggests that this proposition is 'further bolstered' by Art 35, which implores States 'to take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose or in any form'. Note also *Sonderup v Tondelli* (2001) SA 1171 at 1198 (CCSA) where the Constitutional Court of South Africa considered the interplay between custody and jurisdictional matters and the interaction between a child's short and long-term best interests. The Court held that even if Art 12 of the Convention limited a child's s 28(2) Constitutional right that 'A child's best interests are of paramount importance in every matter concerning the child', by virtue of the Convention's important policy objectives of abduction deterrence, comity and forum determination, any such limitation is justifiable on a proportionality analysis.

63 *G v G (Minors) (Abduction)* [1991] 2 FLR 506 at 514.

64 *Maire v Portugal,* Application No 48206/99 (ECtHR).

65 *Ignaccola-Zenide v Romania* (2001) 31 EHRR 7 (ECtHR).

66 *Sylvester v Austria* [2003] 2 FLR 210 (ECtHR).

67 *Thomson v Thomson* (1994) 119 DLR (4th) 253 (SCC).

between the majority and minority judgments.[68] Writing for the minority, L'Heureux-Dube J accepts La Forest J's majority interpretation that the Preamble 'refers to the best interests of children generally and not to the best interests of any particular child', but states, 'I cannot believe that the intention was to ignore the best interests of individual children'. Subsequently Her Honour concludes that:[69]

> The emphasis placed upon prompt return in the Convention must be interpreted in light of the paramount objective of the best interests of children and in light of the express wording of the Child Custody Enforcement Act 1987 through which the Convention was enacted in Manitoba, and should not mean return without regard for the immediate needs or circumstances of the child.

Importantly, however, as the Preamble explains and the majority acknowledges, unlike custody determinations where legislatures generally devolve the task of determining a child's best interests to the Courts themselves,[70] the *Hague Convention* represents a policy decision as to what is in children's collective best interests, ie individual children's best interests were made a primary consideration and balanced against competing factors in the process of drafting and finalising the Convention.[71] Consequently, the 'fragile compromise'[72] represented by adoption of the narrow exceptions to the general rule of rapid mandatory return dictates that, on a policy level, the *Hague Convention* and its implementing regulations/legislation[73] is consistent with Art 3(1) of *UNCROC*.

With respect to the relevance of welfare in the Courts' exercise of discretion, the consistent view of the Courts internationally has been that, following establishment of a recognised exception, the 'gate is unlocked' and, provided that the purposes of the Convention are also weighed, the Court may engage in a best interests/welfare assessment when exercising discretion to order a child's return.[74] Indeed, in the New Zealand context, the internationally-cited High Court decision in *Clarke v Carson*[75] acknowledges that 'it is impossible to ignore welfare when exercising discretion':

> [The] discretion must be exercised in the context of the Act under which it is conferred and the Convention which it implements in Schedules. (See *Re A (Minors) (Abduction: Custody rights)* [1992] 12 WLR 536 at 550 per Lord Donaldson of Lymington MR.) It therefore requires assessment of whether decisions affecting the child should be made in the Court from the country from which the child has been wrong-

68 Compare also *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 at 220 where Waite J concludes that 'It is implicit in the whole operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases' and Perez-Vera Report, above n 2 at paras [24] – [25].

69 *Thomson v Thomson*, above n 15 at 303-305.

70 P Alston, 'The Best Interests Principle: Towards a reconciliation of culture and human rights' in P Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 21.

71 R Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12 *Transnat'l L. & Contemp. Probs*. 393 at 397-399. Compare also comments of Courts in *De L* (1996) 187 CLR 640 at 684 (HCA); *S v S,* above n 8 at 514 and P Beaumont and P McEleavy, above n 14 at 29.

72 Perez-Vera Report, above n 2 at 432 and 461.

73 Implementation of the Convention through Regulations or legislation is at the discretion of individual State parties.

74 *Re A (Minors) (Abduction: Acquiescence) (No. 2)* [1993] Fam 1 (CA); *TB v JB* [2001] 2 FLR 515 (CA); *Central Authority v Reissner* (1999) 25 Fam 330. Compare also comments of S Parker, 'The Best Interests of the Child – Principles and Problems' in P Alston (ed), above n 70 at 28 who argues that, particularly in terms of the exercise of the Court's discretion, juxtaposition of 'children' and 'child' in Art 3(1) UNCROC means that the Article's collective element must 'inevitably temper the way in which the individual right is exercised and interpreted.'

75 *Clarke v Carson* [1996] 1 NZLR 349 (HC). Note also similar comments of Full Court upheld by Court of Appeal in *KS v LS* [2003] NZFLR 817 at para [120] (HC Full Court).

> fully removed or the country of the Court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other.[76]

D. Interpretative Aids & the Importance of Uniformity

The absence of a single tribunal/institution to resolve interpretative controversies creates a challenge of achieving a reasonable level of consistency in *Hague Convention* interpretations adopted by domestic Courts in the Convention's 80 contracting states.[77] However, the Convention's subject matter and the Treaty interpretation maxim of 'good faith' dictate that international interpretative uniformity is required if the *Hague Convention* is to continue to achieve its core objectives.[78] As Silberman explains, where the Convention becomes subject to 'varying national approaches and perspectives', potential abductors have a greater incentive to abduct in the belief that they will be able to avoid the Convention's application and sanction by exploiting divergent legal interpretations.[79] Additionally, malleable Convention interpretations compromise stability within family relationships – parents requiring predictability in the travel abroad of their children.[80]

Acknowledging that rigid adherence to foreign precedent is undesirable in terms of ensuring that the Convention remains responsive to problems imperceptible at the time of its drafting, it is argued that application of the principles contained in the *Vienna Convention on the Law of Treaties*[81] provides a useful starting point for achieving interpretation consistency within global Hague Convention jurisprudence.[82] Article 31 of the *Vienna Convention* states:[83]

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 32 further directs that:

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76 *Clarke v Carson*, above n 8 at 351.

77 W Duncan, 'The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau' (2000) 33 *N.Y.U. J. Int'l L. & Pol*. 103 at 105.

78 See generally M Weiner, 'Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction' (2002) 33 *Colum. Human Rights L. Rev*. 275.

79 L Silberman, above n 9 at 1057-1060.

80 M Weiner, above n 9 at 291.

81 Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331 at 340 ('Vienna Convention'), entered into force 27 January 1980, <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> viewed 14 July 2007. See generally also I Sinclair, The Vienna Convention on the Law of Treaties (2nd ed, 1984) 141-147; E Criddle, 'The Vienna Convention on the Law of Treaties in US Treaty Interpretation' (2004) 44 *Va. J. Int'l L*. 431.

82 L Silberman, above n 9 at 1059. See generally D Bederman, 'Revivalist Canons and Treaty Interpretation' (1994) 41 *UCLA L. Rev*. 953, 972; I Johnson, 'Treaty Interpretation: The Authority of Interpretative Communities' (1991) 12 *Michigan Journal of International Law* 371 at 375. Compare *Air France v Saks* (1985) 470 US 392 at 397 emphasising that 'interpretation of a multilateral treaty is different than interpretation of pure domestic law'.

83 Compare comments M Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 *U. Pa. L. Rev*. 687 at 688-689 and 693-694 arguing that a purposive analysis offers the 'best hope' for maintaining uniformity and recognising situations where a departure from the status quo is warranted.

> Recourse may be had to supplementary means of interpretation,[84] including the preparatory work of the treaty and the circumstances of its inclusion, in order to confirm the meaning resulting from the application of Art 32, or to determine the meaning when the interpretation according to Art 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

Consequently, given that 'persistently forwarded unconventional construction of a treaty can be seen as implicit abrogation',[85] as *Thomson v Thomson*[86] affirms, national Courts have an obligation to keep *Hague Convention* interpretations as uniform as possible and to 'follow the consensus'.[87] Indeed, in its requirement that national Courts take account of 'any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation',[88] Art 31(3)(b) makes it 'abundantly clear'[89] that international consensus achieved through the application of autonomous definitions[90] and the giving of credence to meanings ascribed by sister signatories is desirable.

E. Overview of the Exceptions to Mandatory Return

Recognising the inflexibility of a rule denying Judges any discretion and that, in some circumstances, restoration of the status quo ante can endanger a child, the *Hague Convention* contains six exceptions/defences[91] to a wrongfully removed or retained child's mandatory return.[92] Most relevant to this paper's comparative analysis, however, are the exceptions contained in Arts 12(2), 13(b) and 13(2).[93] A brief outline of these exceptions and the onus for their establishment thus follows below.

On the issue of onus, *Basingstoke v Groot*[94] provides New Zealand authority for the proposition that it is well-settled that the burden of proving a defence to the satisfaction of the Court rests

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84 In the context of the Hague Convention, this direction to consult supplementary materials is particularly important given the Convention's extensive drafting history, the travaux préparatoires and the Perez-Vera Report. Importantly, the Perez-Vera Report, above n 2 at 436 and para [85], emphasises the need to create 'autonomous definitions and concepts' in order to ensure the Hague Convention's long-term success.

85 I Johnson, above n 82 at 384-385.

86 *Thomson v Thomson*, above n 15 at 272-273.

87 See also *Re F (Child Abduction: Risk if Returned)* [1995] 2 FLR 31 at 34 (CA) where Butler-Sloss LJ opines that 'it is the duty of the Court to construe the Convention in a purposive way and make the Convention work'.

88 Vienna Convention, Art 31(3)(b).

89 *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192 at 197.

90 'Autonomous' refers to the notion that the Hague Convention ought not to be interpreted merely by reference to domestic standards. See generally Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001) at paras 4.1 and 4.2.

91 These terms are used interchangeably within this paper.

92 Hague Convention, Arts 12, 13 and 20.

93 COCA, ss 106(1)(a), 106(1)(c) and 106(1)(d) respectively.

94 *Basingstoke v Groot* [2007] NZFLR 363 at paras [10] – [18] (CA).

with the abducting parent.[95] Similarly, that the onus is an ordinary onus has been confirmed by the Supreme Court in *HJ* where Tipping J refers to it thus,[96] 'There was an ordinary onus on the mother to establish the existence of the s 106(1)(a) ground. But it was not appropriate to say that having established that ground the mother had an onus, let alone a heavy onus of persuading the Court not to order return.'

However, notwithstanding establishment of a defence, the decision to refuse a child's return remains discretionary.[97] As Tipping J emphasises in *HJ*, a two-part enquiry is required when considering a defence to an application made under s 105 of *COCA,* 'It is important in this respect to keep conceptually separate whether a ground for declining to order return has been established, on the one hand; and if so, whether return should or should not be ordered, on the other. The first is an issue of fact; the second involves an exercise of discretion'.[98]

Significantly, whilst standards of proof differ between defences in some contracting states,[99] in New Zealand, *Basingstoke v Groot* affirms that the determinant in relation to the standard of proof for all defences is the balance of probabilities.[100]

With respect to the nature of the defences, as Anton[101] emphasises, all of the defences – deriving their justification from three different principles,[102] represent a compromise among drafting nations which were divided in their opinions as to whether any justifications ought to be allowed for an abductor's actions. The four defences contained in Arts 12(2), 13(a) and 20 relate to general conditions which may stop a Court from returning a child to its place of habitual residence. By contrast, the two defences contained in Arts 13(b) and 13(2) derive specifically from consideration of the child's interests and wishes.[103]

Importantly, the Convention's defences are only grants of discretion.[104] A fear of abuse and judicial overreaching has consequently seen the proposition that all defences to the presumption of return are 'narrowly drawn' and ought to be 'narrowly construed' well-emphasised by the Courts

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95 For international authority on this point see *Gsponer v Johnson* (1988) 12 Fam LR 753 at 766; *Friedrich v Friedrich* 78 F. 3d 1060 (6th Circ, 1996); *Sonderup v Tondelli* (2001) 1 SA 1171 (CCSA); *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL) – holding that the balance of probabilities is the sole standard of proof, but 'the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'

96 *Secretary for Justice v HJ*, above n 7.

97 See Hague Convention, Art 18. As recognised by the Supreme Court in *Secretary for Justice v HJ*, in New Zealand, debate as to the source of discretion is largely rendered academic due to s 106 of COCA deeming all defences discretionary.

98 *Secretary for Justice v HJ* above n 7.

99 See for example the United States where 'grave risk' and the 'human rights' defence require proof by way of 'clear and convincing evidence' whilst the other exceptions require simply proof by a 'preponderance of evidence': Friedrich v Friedrich, above n 95. Compare also comments English Court of Appeal in *In re S (A Child) (Abduction: Custody Rights)* [2002] 1 WLR 3355 at para [48] (CA) and *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 at para [110] (CA).

100 *Basingstoke v Groot*, above n 94 at paras [10] – [18].

101 A Anton, 'The Hague Convention on International Child Abduction' (1981) 30 *ICLQ* 537, 550.

102 Perez Vera Report, above n 2 at paras [27] – [32].

103 Ibid, paras [27] – [32].

104 See Perez-Vera Report, ibid, para [113] – stating that the exceptions 'do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances.'

in New Zealand and internationally.[105] Undoubtedly, an overly broad interpretation of the defences would likely defeat the Convention's overall purpose of deterring international child abduction. As emphasised by the English Court of Appeal in *TB v JB*, 'systemic invoking' of the defences and substitution of the forum chosen by the abductor for that of the child's habitual residence 'would lead to the collapse of the whole structure' of the *Hague Convention* by 'depriving it of the spirit of mutual confidence which is its inspiration'.[106]

1. *One Year & Settled: Art 12(2)/s 106(1)(a)*

Pursuant to Art 12(2), a Court may refuse a child's return where it is satisfied both that (1) more than one year has elapsed since the child's wrongful removal or retention; and (2) that the child is 'now settled in the new environment'. As Beaumont and McEleavy emphasise, the settled exception recognises that the Convention's objective of prompt return is severely undercut by the passage of time and that restoration of the status quo ante may be difficult or impossible and hence ought not to be ordered without an evaluation of the merits of doing so.[107] However, the exception does not mandate a custody determination under the *Hague Convention*. Rather, the exception requires an evaluation of which country has jurisdiction to determine the custody decision as the country most closely connected to the evidence regarding a child's care.

Whether a return application was filed within one year of a child's wrongful removal or retention is a strictly factual issue. By contrast, establishing settlement to the satisfaction of a Court leaves much room for discretion.[108] However, both aspects of the exception have recently attracted

105 See for example *Rydder v Rydder* 49 F. 3d 369 at 372 (8th Circ, 1995). Compare DP/JLM, above n 9 at 414 (HCA). See also A Anton, above n 101; L Silberman, 'Hague International Child Abduction Convention: A Progress Report' (1994) 57 *L. & Contemp. Probs*. 209 at 233 – 247 – stating that the Convention's success depends on application of the defences being limited. See also Perez-Vera Report, above n 2 at para [34].

106 *TB v JB*, above n 99 at 534 and 544. See also Perez-Vera Report, above n 2 at para [34].

107 P Beaumont and P McEleavy, above n 14 at 203. See also Perez-Vera Report, above n 2 at paras [106] – [107] and comments of Singer J in Re C (Abduction: Settlement) [2005] 1 FLR 127 (FD) as approved on appeal in *Cannon v Cannon* [2005] 1 WLR 32 (CA) explaining that Art 12(2) 'defines the point of transition':

> Established settlement after more than one year since the wrongful removal or retention is the juncture in a child's life where the Hague Judge's legitimate policy objective shifts from predominant focus on the Convention's aims (for the benefit of the subject child in particular and of potentially abducted children generally) to a more individualised and emphasised recognition that the length and degree of interaction of the particular child with his or her new situation deserve qualitative evaluation, free of Hague Convention considerations and constraints.

108 Compare provisions Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility ('Brussels II Revised'), repealing Regulation (EC) No 1347/2000 (2003) OJ L 338/1 ('Brussels II'). Brussels II Revised has applied since 1 March 2005 and supersedes domestic law in all EU member states except Denmark. In situations of subterfuge, Brussels II Revised precludes an abducting parent from relying on a child's settlement: Art 10(b). Likewise, the Regulation provides that the one-year time period begins to run from the time the left-behind parent 'has had or should have had knowledge of the whereabouts of the child' rather than from the time of abduction: Art 10(b). For full text of Brussels II Revised document, <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_338/l_33820031223en00010029.pdf> viewed 14 July 2007.

controversy, most notably in terms of what qualifies as 'settled' and at what point the one-year time limit ought to begin to run.[109]

2. *Grave Risk: Art 13(b)/s 106(1)(c)*

Perhaps unsurprisingly, as the exception involving the most judicial discretion, Art 13(b) is the *Hague Convention's* most litigated and successfully invoked exception.[110] Pursuant to Art 13(b), a Court may refuse a child's return if, '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'.[111]

As the Perez-Vera Report explains, Art 13(b) focuses on the social situation[112] to which the child will be returned and represents a 'fragile compromise' between drafting nations in order to recognise the realities of returning a child, ie the fact that in some instances a particular child's welfare requires more than his/her summary return.[113]

It is well-settled that the Art 13(b) defence imposes a stringent test whereby the present risk[114] is 'serious',[115] the harm 'severe and substantial'[116] and the situation 'intolerable'[117].[118] Indeed, the

109 See comments of P Beaumont and P McEleavy, above n 14 at 203-204 regarding background of the Art 12(2) provision and initial proposal for a dual system depending on whether the location of the child was known. See also R Schuz, 'In search of a settled Interpretation of Article 12(2) of the Hague Child Abduction Convention' (2008) 20 *CFLQ* 64. Note controversy surrounding proper treatment of cases where subterfuge/secreting of the child is involved. Compare United States' practice of 'equitable tolling': *Furnes v Reeves* 362 F. 3d 702 (11th Circ, 2004); *Lops v Lops* 140 F. 3d 927 (11th Circ, 1998) and *Wojcik v Wojcik* 959 F. Supp. 413 at 421 (E. D. Mich., 1997). Contrast English position explicitly rejecting any imposition of tolling: *Cannon v Cannon*, above n 107. As to positions in Ireland, Scotland Australia and Canada, see respectively *P v B (No 2) (Child Abduction: Delay)* [1999] 4 IR 185 (SC); *J v K* (2002) SC 450 (Outer House); *D-G, Department of Community Services v M and C* (1999) 24 Fam LR 168 (Full Court, FCA) *Auwles v Mai* (2002) 220 DLR (4th) 577 (Nova Scotia, CA).

110 HccH, Statistical Analysis, above n 30 at 17 – stating that, although refusals generally remain rare, 'the reason for refusal most frequently relied upon as a sole reason was Art 13(b)'. Nevertheless, attempts to invoke the defence fail in most cases.

111 Hague Convention, Art 13(b). Whilst some contracting states require the harm to also constitute an intolerable situation, in New Zealand, legislation and interpretations make plain that the defences are independent with the factual circumstances giving rise to a 'grave risk' of an 'intolerable situation' ostensibly being broader than the 'grave risk' of 'physical or psychological harm' defence. See generally COCA, s 106(1)(c); *Damiano v Damiano*, above n 8; *S v S*, above n 8.

112 Note paragraph 3 of Art 13 which requires judicial/administrative authorities to take into account 'information relating to the social background of the child'. As the Perez-Vera Report, above n 2 explains at para [117], although procedural in nature, the provision attempts to contemporaneously 'compensate for the burden of proof' placed on the Respondent and to 'increase the usefulness of information supplied by the authorities' in the child's State of habitual residence.

113 Perez-Vera Report, ibid, paras [116] and [29].

114 As distinct from a risk which previously existed: *TB v JB* (Abduction: Grave Risk of Harm), above n 99 at 532.

115 See S Nelson, above n 9; Perez-Vera Report, above n 2 at para [29].

116 See for example *A v Central Authority for New Zealand*, above n 8; *Gsponer v Johnson* (1988) 12 Fam LR 753; Armstrong v Evans (2000) 19 FRNZ 609 (DC); Mok v Cornelisson [2000] NZFLR 582 (FC). The stringency of the test does not vary depending on whether a grave risk of 'physical or psychological harm' or an otherwise 'intolerable situation' is alleged: *H v H* (1995) FRNZ 498 at 504 (HC). Furthermore, 'the harm must be caused by the return and not be the mere continuation of an existing state which would have continued in any event': *TB v JB (Abduction: Grave Risk of Harm)*, above n 99 at 533.

117 *H v H*, ibid; *Clarke v Carson*, above n 8; *B v B (Abduction)* [1993] 1 FLR 238 at 247.

118 As to key authorities internationally on this point, see generally: *Re S (Abduction: Custody Rights)* [2002] EWCA Civ 908; Re Q Petitioner 2001 SLT 243; AS v PS [1998] 2 IR 244; *Thomson v Thomson*, above n 15; *Friedrich v Friedrich*, above n 95.

weight of international authority is that the 'narrowly' interpreted defence will only succeed 'in the most exceptional cases'[119] and must not be used as a vehicle to litigate/re-litigate the merits of a custody dispute.[120]

That the policy of precluding parents from adducing evidence on the merits has potential to engender perverse results[121] – invoking of the Art 13(b) exception creating a clear tension between the Convention's approach and a conventional best interests analysis, is acknowledged. However, as Courts and commentators have repeatedly emphasised and the more aberrant cases[122] make patently clear, a broad construction of Art 13(b) threatens to categorically undermine the Convention's objectives and adversely impact on the reciprocity and cooperation enjoyed among contracting states.[123]

3. *Child's Objection: Art 13(2)/s 106(1)(d)*

Closely connected to Art 13(b) through its concern with advancing children's particular interests, Art 13(2) allows a Court to refuse a sufficiently old and mature child's return where the child objects[124] to being returned.[125]

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119 *S v S*, above n 8; *Re S (Abduction: Rights of Custody*, ibid; *Friedrich v Friedrich*, above n 95 at 1069. Compare also *Vigreux v Michel* [2006] 2 FLR 1180 (CA) – see Vigreux and Brussels II Revised discussion Section V(C) below. In Vigreux, the Court held that a successful Art 13 defence requires something 'exceptional' in the facts and that compelling facts were required to persuade the Court not to exercise its discretion to return the child.

120 Hague Convention, Art 5. As M Weiner, above n 9 at 337 highlights, Hague Convention advocates have always feared that Art 13(b) would be the Convention's 'Achilles heel'. Note also P Beaumont and P McEleavy, above n 14 at 140 – 'Art 13(b) is without doubt the most strictly regulated of all the exceptions and has been upheld in only a handful of cases'; A Anton, above n 101 at 551 – 'the exception is intended to be a narrow ground of refusal.'

121 See for example views of commentators writing on the subject of women abducting in the face of domestic violence: M Weiner, above n 9; S Nelson, above n 9 at 672 – arguing that a broader interpretation is necessary to safeguard the best interests of children; M Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *Journal of Law, Policy and the Family* 191, 198-205.

122 Compare *PF v MF* [1992] IR 390 (IRSC) – Irish Supreme Court holding father's irresponsible management of money constituted an 'intolerable situation'; perhaps to a lesser extent DP/JLM, above n 9, which both stand in stark contrast to the very narrow approach advocated by the 6th Circuit Court of Appeals in Friedrich v Friedrich, above n 95 at 1069.

123 L Silberman, above n 9; M Weiner, above n 9; *Tahan v Duquette* 613 A. 2d 486 at 489 (N.J. Sup. Ct. App. Div., 1992).

124 Whilst it is well-settled that the term 'objects' is to be interpreted literally, proper application of the exception requires that a child's objection is to return to their country of habitual residence rather than merely to returning to their left-behind parent: *Re S (A Minor) (Abduction: Child's Views)* [1993] Fam 242 at 250. However, it is important to recognise that, in some situations, the child's objection to returning to their state of habitual residence becomes 'so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated': *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 at 203.

125 Hague Convention, Art 13(2). In New Zealand, COCA's implementation of Art 13(2) differs from that in the GAA by replacing the phrase 'take account of' with that of 'give weight to'. Whilst the raison d'être for this change in wording is unclear, in *White v Northumberland* [2006] NZFLR 1105 (CA), the Court of Appeal suggests that Parliament has signalled a preferred approach where the controversy associated with Balcombe LJ's 'shades of grey' and Millet LJ's 'in or out' approaches as articulated in *Re R (child abduction: acquiescence)* [1995] 1 FLR 716 at 731 and 735 (CA) require resolution in New Zealand. However, following the English Court of Appeal's clear preference for Balcombe LJ's 'shades of grey approach' in *Zaffino v Zaffino* [2006] 1 FLR 410 (CA) and *Vigreux v Michel* [2006] 2 FLR 1180 (CA) and *White v Northumberland's* express approval and adoption of this, it appears unlikely that COCA's changed wording will be particularly significant.

The Convention's drafting history confirms that all drafting nations agreed that the Convention's *ratione personae* application to all children under 16 years[126] meant inclusion of Art 13(2) was 'absolutely necessary'.[127] However, the Convention offers no definition of a 'threshold age' at which a child becomes sufficiently mature to interpret his/her own interests.[128] Accordingly, as the Perez-Vera Report suggests, Art 13(2) is best viewed as an attempt at balancing the two competing interests of ensuring broad scope and application of the Convention and accommodating those nations that allow children under the age of 16 to determine their own place of residence.[129]

Analysis of reported decisions under Art 13(2) reveals increasing judicial sensitivity towards children's views, with the detrimental effects of forcibly returning children against their will being frequently acknowledged.[130] Importantly, however, recent international interpretations of Art 13(2) appear fairly consistent.[131] Indeed, congruent with the Convention's other exceptions, Courts generally adopt a relatively strict interpretation – a factor particularly important given the exception's extensive jurisprudence and that approximately 78 per cent of abducted children are under the age of 10 years.[132] Nevertheless, notwithstanding that the exception now requires consideration in the wider context of contemporary notions of children's rights,[133] Art 13(2) remains subject to the arguments which divided delegates over its inclusion in 1980. Most notable is that regarding Art 13(2)'s openness to judicial abuse through its granting of broad discretion that allows Judges to subjectively determine first whether a child is sufficiently mature to choose between their abducting and aggrieved parent and second, based on the Court's perception, the appropriate weight to give the child's objection when deciding whether to order return.[134]

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126 Children aged 16 years and older being assumed to have more of an independent existence and having 'a mind of [their] own which cannot easily be ignored either by one or both of [their] parents, or by a judicial or administrative authority': Perez-Vera Report, above n 2 at paras [30] and [77].

127 Perez-Vera Report, ibid, para [30]. Significantly, through its acknowledgment of children's right and ability to participate in matters affecting them, Art 13(2) broadly reflects UNCROC, Art 12. Note, however, that Art 13(2) applies only where a child 'objects' and that the Hague Convention contains no requirement to give weight to a child's wish to return. Nevertheless, as *S v S*, above n 8 at 521 suggests, it is likely that Art 12 of UNCROC requires a Court to listen to such views. Compare Brussels II Revised, which is acknowledged as placing much greater emphasis on listening to children's views where such views are appropriate having regard to the relevant child's age or degree of maturity: *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 (HL); Art 11(2). However, by way of earlier adoption of Strasbourg jurisprudence regarding obligations under Arts 6 and 8 of the ECHR, for some States, the Brussels II Revised Regulation is perceived as occasioning little practical change: A Schulz, 'The New Brussels Ii Regulation and the Hague Conventions of 1980 and 1996' (2004) *IFLJ* 22. Note also that under Brussels II Revised, a Court is unable to refuse a child's return unless the applicant has first been afforded an opportunity to be heard in the proceeding: Art 11(5).

128 Note and compare various proposals to restrict the exception, eg to children over 12 years, and to exclude the exception altogether. See generally summary provided by the Canadian delegation in Vol III Discussions of the 14th Session at p. 243. See also Perez-Vera Report, above n 2 at para [78].

129 Perez-Vera Reports, ibid. See also P Beaumont and P McEleavy, above n 14 at 178-180. Note A Anton, above n 101 at 550.

130 Note, for example, *TB v JB*, above n 99.

131 See Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (October 2006), <http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf> at 107-126 viewed 12 August 2007.

132 Ibid.

133 UNCROC, for example.

134 See generally P Beaumont and P McEleavy, above n 14 at 178-180 discussing why introduction of Art 13(2) proved so contentious during the Convention's drafting.

In a similar fashion, Art 13(2) is criticised as placing an 'inordinate burden of responsibility' on young children to make vital decisions which they 'are not psychologically equipped to handle'.[135] Indeed, as the Perez-Vera Report explains:[136]

> [Art 13(2)] could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think that they are being forced to choose between two parents.

Likewise, the strong potential for too broad an interpretation of Art 13(2) to erode the rights of left-behind parents and undermine the Convention's objects by permitting a requested Court to adjudicate on custody issues and allowing children rather than Judges to ultimately decide whether they will be returned have been well-emphasised.[137]

F. The Changed Profile of Abductors

All international parental child abductions are distinct both factually and in their effects on the particular child concerned.[138] Nevertheless, some common patterns in abductor profiles are discernible. Importantly in terms of the Hague Convention's continued responsiveness to emerging trends, current patterns suggest a contemporary abductor profile quite different to the presumption on which the Convention was introduced in 1980.

Between the 1970s and early 1990s, the stereotype of a parental abductor constituted a non-custodial father – usually a foreign national, who was dissatisfied with an actual or anticipated custody decision and so desperate to have permanent contact with his children that he was willing to wrongfully remove them abroad.[139] Indeed, it is this notion which is implicitly reflected in the

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135 See Vol III of the Discussions of the Fourteenth Session at p. 243 where the United States emphasises that, from its perspective, inclusion of Art 13(2) was 'seriously objectionable'. Note also 1997 Report of the Special Commission whose review highlights feelings by some nations that the Convention 'gives too much weight to the opinion of the child, considering what is involved is just a matter of determining the forum', <http://www.hcch.net/index_en.php?act=publications.index> viewed 1 Aug 2007. Regarding potential imposition of an unacceptable psychological burden, see generally B Cantwell and S Scott, 'Children's Wishes, Children's Burdens' (1995) 17 *Journal of Social Welfare and Family Law* 337.

136 Perez-Vera Report, above n 2 at para [30].

137 Ibid, paras [77] – [78].

138 For a discussion of common and potential effects of international child abduction on children see generally, M Freeman, 'International Abduction: The Effects', Report funded by the Department for Constitutional Affairs and prepared for the Reunite Research Unit, Leicester, (2006) <http://207.58.181.246/pdf_files/library/freeman_2006.pdf> viewed 10 September 2007; Reunite International, 'The Outcomes for Children Following an Abduction' (September 2003), Report Funded by the Foreign and Commonwealth Office, <http://207.58.181.246/pdf_files/library/freeman_2003.pdf> viewed 10 September 2007; M Agopian, 'The impact on children of abduction by parents' (1984) 63(6) *Child Welfare* 511; G Greif, 'Many years after the parental abduction: Some consequences of relevance to the court system' (1998) 36(1) *Family and Conciliation Courts Review* 32; G Greif, 'The long-term impact of parental abduction on children: Implications for treatment' (1998) 26 *Journal of Psychiatry and Law* 45.

139 A Dyer Report, above n 13 at 19; P Beaumont and P McEleavy, above n 14 at 13-15; M Agopian, Parental Child-Stealing (1981), ibid, at 3-4 – claiming to be the first formal study of patterns characteristic of international child abduction; M Agopian and G Anderson, 'Characteristics of parental child stealing' (1981) 2(4) *Journal of Family Issues* 471.

Perez-Vera Report's explanation that in an abduction situation, 'the child is taken out of the family and social environment in which its life had developed'.[140]

Since the mid 1990s, a pronounced change in the profile of abductors has occurred.[141] Indeed, the most recent global survey indicates that approximately 68 per cent of contemporary abductors are mothers, most of whom are the primary or joint-primary caregiver returning 'home'. Furthermore, results also indicate that freedom from domestic violence is a recurrent motivator for abduction.[142]

Freeman[143] has questioned whether it can still be stated with confidence that the 'best interests of children are generally being protected, when the face of abduction has changed so significantly that children are being returned from their primary carers'. However, as Lowe and Horosova[144] emphasise, the argument remains that it is 'basically wrong' for children to be unilaterally uprooted from their habitual residence. Certainly, the presence of domestic violence does temper the strength of best interests arguments. Nevertheless, where a child and his/her mother's safety can be afforded proper protection by the child's habitual residence, that country remains the best forum for adjudicating the merits of any custody dispute.[145] Accordingly, whilst it is argued that the Convention's policy and objects remain appropriate, it is accepted that the global problems created by drafters' omission[146] of domestic violence and other contemporary trends from the abduction paradigm will require Courts and other bodies to carefully consider how the instrument continues to evolve.[147]

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140 Perez-Vera Report, above n 2 at para [11]. Note that although A Dyer's 'Legal Kidnapping' Report, above n 13 was included in the Convention's preparatory documents and contains a section 'Typical elements of the situation which produces the abduction of a child by one of his parents', the Special Commission's Report comments at 174, 'We dare not advance ideas on the possible psychological motivations leading to "abduction"; this remains an obscure domain for the jurist'.

141 P Beaumont, and P McEleavy, above n 14; TB v JB, above n 99.

142 M Weiner, above n 9.

143 M Freeman, 'In the Best Interests of Internationally Abducted Children? – Plural, Singular, Neither or Both' (2002) *IFLQ* 77, 82. Compare C Bruch 'Sound Thinking or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law' (2006) 39 *Family Law Quarterly* 281.

144 N Lowe and K Horosova, 'The Operation of the 1980 Hague Abduction Convention – A Global View' (2007) 41 *Family Law Quarterly* 59 at 71.

145 See *A v Central Authority for New Zealand*, above n 8.

146 Note comments M Weiner, above n 9 that such omission means the Convention effectively functions as if drafters had explicitly assumed abductors were male non-custodial parents.

147 Note that one of the biggest problems at the time of the Convention's drafting was the lack of abductor profile statistics.

III. COCA 2004: A Comment on Policy and Notable Changes

In light of interpretations internationally and under the *GAA* both holding that discretion under the Convention is 'not unfettered' and instead 'must be exercised in the context of the Convention and the Act in which it is incorporated',[148] analysis of whether *COCA* does in fact represent a change in *Hague Convention* policy is warranted.

COCA represents an attempt to 'modernise' the law relating to guardianship and care of children in a manner that 'more effectively promote[s] the interests of children and satisf[ies] the needs of all New Zealand families'.[149]

Regarding *COCA's* specific 'public policy' objectives, the Bill's Explanatory Note identifies its main objectives as being to:[150]

- Ensure a stronger focus on the rights of the child;
- Recognise the diversity of family arrangements that exist for the care of children;
- Improve New Zealand's compliance with international obligations, for example, those under the United Nations Convention on the Rights of the Child (UNCROC);
- Support a child's right to ongoing contact with both parents and mitigate the risk of unsafe contact arrangements.

A number of *COCA's* provisions – eg ss 4-6, stand in 'clear distinction' from the law as it previously existed.[151] However, despite affirmation that *COCA's* changes encompass much more than mere codification,[152] the Courts have consistently emphasised that *COCA* does not constitute a radical shift in the law.[153] Nevertheless, particularly with respect to *COCA's* increased focus on

148 See for example, *S v S*, above n 8 at 635. The on-going international debate regarding the breadth of discretion exercised 'under' or 'outside' the Convention, ie discretion included within an exception and that exercised under Art 18, is acknowledged. Compare, for example, divergent judgments of Lord Roger and Baroness Hale in *Re M and another (children)* [2007] UKHL 55 (HL). Note that although COCA expressly renders the s 106(1) exceptions discretionary, the source of the relevant discretion may well be a proper factor when it comes to deciding the proper weight Convention policy considerations ought to attract.

149 'General Policy Statement', Care of Children Bill, (2003, Bill No 54-1) at 1, introduced into Parliament 10 June 2003, <http://www.parliament.nz/NR/rdonlyres/1D86B4E3-0A1B-41A1-9338-58231519953C/59990/DBHOH_BILL_5507_117999994.pdf> viewed 12 August 2007. Third reading and Royal assent 9 November 2004 and 21 November 2004 respectively, <http://www.parliament.nz/NR/rdonlyres/1D86B4E3-0A1B-41A1-9338-58231519953C/59992/DBHOH_BILL_5507_118993.pdf> viewed 12 August 2007.

150 Care of Children Bill, above n 149 at 2 and 24-25. These objectives are explicitly reflected in s 3(1) of the COCA regarding the Act's 'purpose'. Compare also Government policy as expressed by the Ministry of Social Development in the Agenda for Children and the Vision for Children, <http://www.msd.govt.nz/work-areas/children-and-young-people/agenda-for-children/> viewed 1 August 2007 where a focus on 'a new 'whole child' approach to child policy' is recorded.

151 *White v Northumberland* [2006] NZFLR 1105 at para [50]; *Ding v Minister of Immigration* (2006) 25 FRNZ 568 at paras [137] – [188] (HC) – identifying relevant changes and holding, at para [183], that even where COCA is found to have no direct application, the Act provides important evidence of New Zealand's current public policy regarding the status of children.

152 See generally *T v J* (unreported, High Court, Wellington, CIV-2005-485-559, MacKenzie J, 10 November 2005) at para [26] (HC). Note also COCA, s 13.

153 *White v Northumberland*, above n 125 at para [51]; *N v N* [2007] NZFLR 320 (FC). For pre-COCA judicial acknowledgment of changing family structures and recognition of children's rights issues, see generally *Tavita v Ministry of Immigration* [1994] 2 NZLR 257 (CA); *P v K* [2003] 2 NZLR 787 (HC); *L v A* [2004] NZFLR 298 (HC) at paras [44] – [46] (HC).

children's rights and parental responsibility,[154] it is important to acknowledge that *COCA's* reforms share similarities with the major child law reforms which have occurred in jurisdictions such as Australia and England and Wales.[155]

Under *COCA*, the paramountcy principle remains at 'centre stage'.[156] However, in contrast to s 23 of the *Guardianship Act 1968*, s 4 has been 'substantially recast' to provide a much 'sharper focus' regarding the paramountcy principle's application.[157] In particular, s 4(1) now provides that 'the welfare and best interests[158] of the child must be the first and paramount consideration' in the administration and application of *COCA*.[159]

Significantly, with particular respect to the *Hague Convention*, the Explanatory Note to the Care of Children Bill makes no reference to the *Hague Convention* in its identification of the 'main changes to existing law'.[160] Similarly, *COCA* continues to utilise 'wording' drafting methodology

154 Note in particular COCA, ss 3(1), 3(2)(a)(i), 4(5)(a) and 5.

155 See Australian Family Law Reform Act 1995 and Children Act 1989 (Eng.) respectively. Compare also Brussels II Revised.

156 *ACCS v AVMB* [2006] NZFLR 986 at para [53] (HC).

157 Ibid, paras [53] and [55].

158 The phrase 'welfare and best interests' being derived from UNCROC. For discussion of the distinction between 'welfare' and 'best interests' see conclusions of O'Dwyer DCJ in *C v W [Custody]* [2005] NZFLR 953 (FC).

159 For a non-exhaustive list of principles relevant when assessing a child's best interests and welfare, see COCA, s 5.

160 Care of Children Bill, above n 149 at 2-4.

whereby the Convention is implemented through incorporation into statutory provisions.[161] Importantly, whilst relevant provisions of the *COCA* are not framed in precisely identical terms to the *Guardianship Act 1968* and the *GAA*, as *HJ v Secretary for Justice*[162] affirms, corresponding provisions are to the same effect. Critically on this point, through its provision that '[t]his section does not limit section 83 or subpart 4 of Part 2', s 4(7) of *COCA* retains what was accepted as the paramountcy principle qualification[163] contained in s 23(3) of the *Guardianship Act 1968*.[164]

On the issue of the propriety of any legislative intent to displace *Hague Convention* jurisprudence under the *GAA* by introduction of *COCA*, Art 27 of the *Vienna Convention* makes clear that enactment of a conflicting domestic statute cannot change a country's international obligations

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161 M Nixon, 'Legislation and the Hague Convention' (April, 2007) *New Zealand Law Journal* 91, 92. The Legislation Advisory Committee Guidelines on Process and Content of Legislation, para [6.2.2] explain the 'wording' method thus:

> In many cases, the wording of a treaty is incorporated into the body of the Act. The Act may specify the treaty that it seeks to implement or it may not. In either case, the wording of the treaty is reflected in the Act's provisions. Sometimes the wording is repeated verbatim and sometimes it is translated to accommodate local conditions … As most treaties tend to be expressed in general language, mainly to achieve agreement, the wording method is used often.
>
> As to the rationale for utilising the 'wording' method in the context of COCA's Hague Provisions, note comments of the Minister of Justice in his speech on the Bill's second reading, <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/c/a/1/00DBHOH_BILL5507_1-Care-of-Children-Bill.htm>:
>
> One issue raised by the submissions related to the manner in which the Bill implements the Convention. The Bill implements the Convention in New Zealand by setting up a statutory regime that elaborates the provisions of the Convention itself. The select committee heard the view that all that was necessary was a shorter Bill that simply stated that the Convention was the law for New Zealand and provided judicial and administrative authorities with the necessary powers to fulfil their obligations under the Convention. It was argued in support that any difficulties in the interpretation of the Convention could be resolved by reference to cases decided in other countries rather than by provisions in the legislation.
>
> The select committee gave careful consideration to that view. However, it decided that the Bill should remain in its present form. That was because it recognised the need to deal promptly with applications made under the Convention. The committee acknowledged that lawyers, judges, and officials would be helped to deal with applications expeditiously if the legislation were in a form which they were familiar; if interpretation questions apparent on the face of the Convention were resolved in the legislation; and if the provisions of the Convention were arranged in a manner that assisted understanding of them. I take the same approach.
>
> Regarding the various drafting techniques employed in New Zealand, see M Gobbi, 'Drafting Techniques for Implementing Treaties in New Zealand' (2000) 21 Statute Law Review 71. Note that New Zealand's method of implementing the Hague Convention is somewhat unusual within the international community whereby the text of the Convention is usually incorporated into domestic law directly without variation: P Nygh, 'Review of the Hague Convention on the Civil Aspects of Child Abduction' (2000) 16 AJFL 67 at 70-71. Compare Australian methodology whereby the Convention is embodied in the Family Law Regulations (subordinate to the Family Law Reform Act) rather than being attached to ratifying legislation.

162 *HJ v Secretary for Justice* [2006] NZFLR 1005 at para [11] (CA).

163 See *Damiano v Damiano* [1993] NZFLR 548 at 551 (FC); *Adams v Wigfield* [1994] NZFLR 132 at 138 (HC) and *S v S* [1999] NZLR 513 at 523 (HC & CA).

164 Section 23 of the Guardianship Act 1968 relevantly provides that:

> 23. Welfare of child paramount
>
> (1) In any proceedings where any matter relating to the custody or guardianship of or access to a child … is in question, the Court shall regard the welfare of the child as the first and paramount consideration.
>
> …
>
> (3) Nothing in this section shall limit the provisions of … Part I of the Guardianship Amendment Act 1991.

under a Treaty.[165] Consequently, recognising Van Alstine's[166] argument that Treaties ought to be considered as being 'capable of maturing beyond drafters' contemplation' and that international amendment of the *Hague Convention* is difficult,[167] as a matter of international law, New Zealand remains precluded from invoking *COCA* as justification for any failure to perform its obligations under the *Hague Convention*. Accordingly, it is argued that the Court of Appeal's statement in *White v Northumberland*[168] that *Hague Convention* cases under *COCA* must 'continue to be determined according to past precedents and on a uniform international basis' is apposite – the potential for any strict application of statutory provisions over the Convention itself resulting in New Zealand failing to fulfil its *Hague Convention* obligations being acknowledged.[169]

IV. Recent Hague Convention Interpretations Under COCA

For its Convention interpretations under the *GAA*, New Zealand enjoyed an enviable reputation among signatories. Decisions such as *A v Central Authority for New Zealand,*[170] *S v S*[171] and *KS v LS*[172] demonstrate the strict/'narrow' approach – consistent with English decisions,[173] that New Zealand traditionally applied to the *Hague Convention's* exceptions. Undoubtedly, New Zealand's long-standing exceptional record of orders for return (see Lowe & Horosova table below)[174] is attributable to this strict approach, as well as New Zealand's articulated commitment to upholding the purposes and policy of the Convention.

165 Art 27 of the Vienna Convention 1969 provides that: 'A party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty'.

166 M Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 *U. PA. L. Rev*. 687 at 782-783. For further discussion of principles relevant to Treaty interpretation/construction, see generally A Glashausser, 'What We Must Never Forget When it is a Treaty We Are Expounding' (2005) 73 *U. Cin. L. Rev*. 1243.

167 L Silberman, above n 9.

168 *White v Northumberland* [2006] NZFLR 1105 at para [53]. See also *Punter v Secretary for Justice* [2007] 1 NZLR 40 at paras [10] – [12] (CA); *Dellabarca v Christie* [1999] 2 NZLR 548 at 551 (CA) and *Chief Executive of the Department for Courts v Phelps* [2000] 1 NZLR 168 at para [14] (CA).

169 Compare *MHP v Director-General, Department of Community Services* (2000) 26 Fam LR 607 – holding that Australia's method of implementation strengthens an argument that the Convention must be interpreted 'according to Australian legal standards.'

170 *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA).

171 *S v S* [1999] 3 NZLR 513 (HC & CA).

172 *KS v LS* [2003] 3 NZLR 837 (HC, Full Court).

173 Ibid, para [143].

174 N Lowe and K Horosova, above n 144 at 88-90. Whilst it cannot be stated that a high rate of refusals categorically equates to 'bad performance' (particularly where application numbers are small), a comparison of contracting state's individual return rates attracts at least some validity, particularly when assessed against global averages.

Table 1:Individual State's Return Rates[175]

	2003				1999			
	Overall Return Rate		Judicial Return Rate		Overall Return Rate		Judicial Return Rate	
State	Number	%	Number	%	Number	%	Number	%
USA	131/284	47%	78/115	68%	109/210	52%	50/60	83%
England & Wales	86/141	61%	73/99	73%	84/149	56%	76/90	84%
Spain	37/87	42%	29	38%	18/36	50%	8/12	67%
Germany	31/80	39%	19/26	73%	24/70	35%	13/26	50%
Canada	24/56	42%	11/14	79%	21/35	60%	8/12	66%
Italy	23/46	50%	14/26	54%	24/41	59%	18/25	71%
Australia	18/43	42%	16/25	64%	33/64	52%	26/34	76%
France	28/42	66%	17/21	81%	21/42	50%	10/13	77%
Switzerland	25/39	64%	7/8	88%	5/11	45%	4/5	80%
Turkey	20/35	48%	5/12	42%	—	—	—	—
Ireland	22/33	66%	10/12	83%	23/38	60%	16/20	80%
Mexico	17/27	63%	7/8	88%	6/41	15%	6/6	100%
New Zealand	16/27	60%	12/14	86%	26/39	66%	22/26	85%
Netherlands	8/26	31%	6/8	75%	15/26	57%	10/12	83%
Belgium	12/25	48%	9/12	75%	7/8	88%	3/3	100%
Sweden	11/22	50%	4/7	57%	8/14	57%	6/10	60%
Portugal	12/19	63%	7/10	70%	4/11	36%	1/2	50%
Poland	6/18	33%	3/11	27%	—	—	—	—
Chile	6/17	36%	2/16	13%	2/7	29%	2/5	40%
Argentina	6/13	46%	6/6	100%	—	—	—	—
Hungary	9/13	69%	4/7	57%	4/8	50%	4/7	57%
Israel	6/13	46%	3/6	50%	8/19	43%	6/11	55%
Denmark	4/12	33%	3/8	38%	5/11	45%	3/4	75%
Austria	6/11	54%	3/6	50%	0/9	0%	0/7	0%
Scotland	10/11	90%	5/5	100%	9/10	90%	1/1	100%
Czech Republic	6/11	54%	3/4	75%	3/4	75%	0/1	0%
Global	**628/1241**	**51%**	**361/544**	**66%**	**477/952**	**50%**	**304/411**	**74%**

175 Reproduced directly from N Lowe and K Horosova, above n 144 at 88. Return rates indicated are calculated from results of the second and third Statistical Surveys, respectively conducted in 1999 and 2003 by Cardiff University Law School's Centre of International Family Law Studies and funded by the Nuffield Foundation. For confirmation of relevant statistics, see generally N Lowe et al., A Statistical Analysis of Applications Made in 1999 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Prel. Doc. No. 3 (revised. version, November 2001), <http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2268&dtid=32> viewed 10 September 2007 and N Lowe et al. A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Prel. Doc. No. 3 (October 2006), <http://www.hcch.net/index_en.php?act=publications.details&pid=3889&zoek=national%20report> viewed 10 September 2007.

In a similar fashion, it is also important to acknowledge New Zealand's good reputation as a contracting state which, within its general adherence to a strict approach, is often instrumental in ensuring that the *Hague Convention* remains responsive to contemporary trends.[176] Accordingly, building on Parts II and III, this section gives consideration to key doctrinal changes effected by six post-*COC*A Convention decisions.

A. White v Northumberland [2006] NZFLR 1105 (CA)

Although delivered approximately four months after the Court of Appeal's *HJ v Secretary for Justice*[177] decision, *White v Northumberland*[178] essentially begins the series of judgments serving to substantially alter the landscape of New Zealand's *Hague Convention* jurisprudence. Most notably, the decision attracts significance for its preferring of Balcombe LJ's 'shades of grey' approach to the child objects/s 106(1)(d) defence over that of Millet LJ's 'in or out' approach, which had previously been applied by the New Zealand High Court in *Collins v Lowndes*.[179] However, the decision also attracts attention for its conclusions as to whether the exercise of discretion in cases under s 106(1)(d) of *COCA* requires a Court to take into account 'general welfare' considerations.[180]

The Court of Appeal rejected the submission that ss 4(1)-(3) of *COCA* required *Hague Convention* jurisprudence to give way to the fundamental guidelines contained in these sections. This conclusion was grounded in a view that the submission failed to 'accord proper weight to s 4(7)'. In support of that proposition, the Court approved continued application under *COCA* of the comments of Elias J in *Clarke v Carson*[181] where Her Honour referred to s 23(3) of the *Guardianship Act 1968* as 'displacing' the general paramountcy principle contained in s 23(1) and emphasised that 'the function of a New Zealand Court hearing an application under the 1991 Act is circumscribed'.[182]

On the issue of the propriety of recognising general welfare considerations acknowledged in the English *Zaffino v Zaffino (Abduction: Children's Views)*[183] decision as being relevant on a Balcombe analysis, the Court of Appeal held that such recognition was appropriate. However, consistent with *Zaffino*, the Court stressed that relevant welfare considerations were limited to, 'those relating to the period *up to* when the Court (be it a foreign court or the local court) could deal with the question of where the child should live'.[184]

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176 See for example *Mok v Cornelisson* [2000] NZFLR 582 (FC) and *Armstrong v Evans* [2000] NZFLR 984 (DC) – internationally recognised as being particularly pioneering: J Grey, 'Respecting human rights in the drafting and interpretive stages of the Hague Convention on the Civil Aspects of International Child Abduction' (2003) 17 *A.J.F.L.* 270; M Weiner, above n 9.

177 *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) – judgment delivered 11 April 2006.

178 *White v Northumberland* [2006] NZFLR 1105 (CA) – judgment delivered 29 August 2006.

179 *Collins v Lowndes* (unreported, High Court, Auckland, AP115-SW02, Harrison J, 6 March 2003).

180 *White v Northumberland*, above n 125 at para [10]. The proper exercise of discretion is also recognised as the fourth step of Balcombe LJ's 'shades of grey' analysis.

181 *Clarke v Carson* [1996] 1 NZLR 349 at 351 (HC).

182 *White v Northumberland*, above n 125 at paras [50] – [52].

183 *Zaffino v Zaffino (Abduction: Children's Views)* [2006] 1 FLR 410, in particular at paras [13], [19], [24], [49] and [52] (CA).

184 *White v Northumberland*, above n 125 at paras [54] – [55] (Emphasis added).

As a subsidiary point under this head, the Court of Appeal rejected a submission regarding the direct relevance of its earlier conclusions in *HJ v Secretary for Justice*[185] vis-à-vis the exercise of discretion under s 106(1)(a) – instead holding that the child objects defence gives rise to 'quite different' discretionary considerations.[186]

B. Secretary for Justice v HJ [2007] 2 NZLR 289 (SC)

Secretary for Justice v HJ represents the first, and to date only, *Hague Convention* case to reach the Supreme Court.[187] The unanimous decision refusing the return of two young children to Australia was delivered in three separate judgments.[188] Whilst the facts in *HJ* are unusual and largely specific to the Art 12/s 106(1)(a) defence, the decision attracts significance for its extensive obiter comments regarding the Court's exercise of discretion upon finding a s 106(1) defence established.

The brief facts of this case are that the abducting mother obtained the equivalent of a protection order in three Australian States. The left-behind father apologised for his violent behaviour and offered the mother some space. However, in his letter agreeing that the children could have passports, he stated, 'when you go I want to know where you are and you have 14 days to return'.[189] Without informing the father, the mother left Australia with the children. When the father attempted to locate them some 15 months later, he discovered that they had moved to New Zealand. Seven months later the father initiated *Hague Convention* proceedings. By this time the children had been living in New Zealand for nearly two years.[190]

The Family and High Courts ordered the children's return – holding that the mother had failed to establish a defence under ss 106(1)(b) and 106(1)(c) and that, although the children were 'settled', the mother's concealment of them meant that it would undermine the integrity of the *Hague Convention* if return was refused under s 106(1)(a). In a judgment focused solely on ss 106(1)(a) and 106(1)(c) issues and taking a different view of the factual basis for the children's return, the Court of Appeal substituted its discretion for that of the lower Courts and set aside the order for return.[191] The Supreme Court upheld that decision on s 106(1)(a) grounds – 'grave risk'/s 106(1)(c) matters not falling for consideration in the appeal.

With respect to the exercise of discretion under s 106(1), the Supreme Court's conclusions can essentially be grouped into three areas:

1. Whether there is 'a presumption of return in exercising a discretion in keeping with the purpose of the Convention';[192]

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185 *HJ v Secretary for Justice*, above n 7.

186 *White v Northumberland*, above n 125 at para [56].

187 It is noted that in relation to *Andrews v Secretary for Justice* [2007] NZFLR 891, the Supreme Court recently refused leave to appeal: *KMA v Secretary for Justice* [2007] NZSC 56.

188 The first by Elias CJ at paras [1] – [30]; the second by Tipping on behalf of Blanchard, Tipping and Anderson JJ at paras [31] – [117]; and the third by McGrath J at paras [118] – [146].

189 *Secretary for Justice v J* (unreported, Family Court, Hastings, FAM: SAM-2004-020-76; 020/147/03, von Dadelszen DCJ, 16 April 2004) at para [8].

190 *HJ v Secretary for Justice (as the New Zealand Central Authority on Behalf of TJ)*, (unreported, High Court, Wellington, CIV-2004-441-263, Ellen France J, 15 June 2004) at paras [3] – [8].

191 *HJ v Secretary for Justice* [2006] NZFLR 1105 (CA) – the near two year delay from the hearing in the High Court is somewhat unexplained.

192 *Secretary for Justice v HJ* [2007] 2 NZLR 289 at para [66] (NZSC).

2. How the Court ought to deal with any alleged settlement based on concealment or deceit; and
3. How the Courts should generally approach the s 106(1)(a) discretion, particularly in terms of any hierarchy of relevant factors and their weight.

On the issue of whether the Court of Appeal erred by failing to apply a 'presumption of return' when exercising its discretion under s 106(1), the majority distinguished the comments of the Court of Appeal in *S v S*[193] as merely providing a 'broad introductory overview of the purpose of the Convention'. Subsequently, their Honours held that it was inappropriate to 'speak in terms of a presumption of return in a discretionary situation'.[194] Similarly, through reference to the 'high threshold' of harm implicit in the s 106(1)(c) and s 106(1)(e) exceptions, Elias CJ concluded that neither *COCA* nor the *Hague Convention* supported a presumption of return where a s 106(1) ground was found established.[195]

Regarding the proper approach to settlement achieved through concealment or deceit, the Court articulated a preference for dealing with the issue as a factor weighing in the exercise of discretion. The majority approved the Court of Appeal's adoption of the test for 'manipulative delay' as discussed by Thorpe LJ in *Cannon v Cannon*[196].[197] Their Honours held that treating 'manipulative delay' as a discretionary factor was likely to 'better achieve' the Convention's policy objective of precluding abductors from obtaining an advantage from their own wrongdoing than any attempt to address the issue indirectly in a settlement assessment.[198] McGrath J generally agreed with the majority approach on this point. However, His Honour was careful to emphasise that, in a s 106(1)(a) proceeding, the Convention's purposes were unlikely to be 'well served' by a comparison of relative parental responsibilities if the Court was satisfied that there was no 'manipulative delay' giving rise to invoking of the exception.[199]

Unwilling to weigh the presence of concealment or deceit as heavily as the majority, Elias CJ stressed that, on her construction of s 4 of *COCA*, any inquiry into the relative responsibilities of parents in establishing a s 106(1) exception appeared to be a 'wrong approach'.[200] Indeed, in Her Honour's opinion, by way of s 4(3) of *COCA*, it is only where a child's return is not adverse to his/her best interests and welfare that conduct of an abducting parent can 'assume any real significance'.[201]

The most significant level of divergence between the Court's three judgments occurs with respect to the issue of how Courts should generally exercise the s 106(1) discretion.

In the majority's opinion, exercise of discretion under s 106(1)(a) is a 'balancing exercise'. The exercise requires a Court to 'compare and weigh' the two considerations of 'the welfare and best interests of the child' and the 'general purpose of the Convention in the circumstances of the particular case'.[202] In terms of factors relevant to a child's best interests, 'everything logically capable of bearing on whether it is in the best interests of the child to be returned should be con-

193 *S v S* [1999] 3 NZLR 528 at para [9] (CA).

194 *Secretary for Justice v HJ*, above n 7 at paras [67] – [68].

195 Ibid, paras [2] and [21].

196 *Cannon v Cannon* [2005] 1 WLR 32 at para [59] (CA).

197 *Secretary for Justice v HJ*, above n 7 at para [79] citing *HJ v Secretary for Justice*, above n 7 at paras [59] – [60].

198 *Secretary for Justice v HJ*, ibid, para [69].

199 *Secretary for Justice v HJ*, above n 7 at para [142].

200 Ibid, paras [3] and [22].

201 Ibid, paras [23] – [24].

202 Ibid, para [85]. Acknowledgment that 'these two considerations will not necessarily be in conflict' is also important.

sidered'.[203] If a Court concludes that return is not in a child's best interests, policy factors favouring return in the interests of avoiding 'perverse incentives' become relevant. Where a Court finds no such competing factors, the child's return should be refused.[204] However, notwithstanding the need to recognise the exceptions' shared context, both general and particular 'statements in judgments or other writings about one ground should not be applied automatically or uncritically to another'.[205]

Similarly, regarding the s 106(1) discretion generally, McGrath J held that the 'starting point' is that: [206]

> the legislative purpose is that the power to return a child in circumstances covered by s 106(1) is intended to be exercised in the context of the Convention, having regard in particular to what would give effect to the Convention's purposes in relation to this provision.

With respect to s 106(1)(a), McGrath J acknowledged that, after 12 months, the Convention's principal objects have much less relevance. However, His Honour held that welfare considerations do not become the overriding determinant. McGrath J also held that the word 'limit' in s 4(7) of *COCA* did not prompt application of the paramountcy principle in the exercise of discretion. Rather, in His Honour's opinion, a Court exercises the s 106(1)(a) discretion with a 'blank slate, taking account of all the relevant circumstances and considerations, in light of the shifting policy of the Convention'.[207]

In somewhat stark contrast, Elias CJ was of the firm view that once a s 106(1)(a) defence was established, it was a 'judicial determination'[208] of a child's 'welfare and best interests' which must prevail as the 'first and paramount consideration'[209] in any decision to refuse/order a child's return. Furthermore, Her Honour held that this approach/application of the 'overarching principle contained in s 4(1)'[210] was unaffected by s 4(7)'s provision that s 4 'does not limit' subpart 4 of Part 2.[211] In support of this proposition, Elias CJ emphasised that s 4 'applies to the extent that it does not 'limit' subpart 4'.[212] Additionally, at paragraph [26], Her Honour opined that s 4(1) 'does not displace other policies of the Convention, as implemented in the [COCA]'. Indeed, as Her Honour stated at paragraph [25]:

> Because the exception is directed at the interests of the children, applying s 4(1) to the decision to order non-mandatory return does not 'limit' subpart 4. Its application is consistent with the 'paramount importance' of the interests of children emphasised in the Preamble of the Convention.

Whilst the s 106(1)(c)/'grave risk' exception did not fall for consideration by the Supreme Court, the Court of Appeal's conclusions vis-à-vis the conflicting *KS v LS*[213] and *El Sayed*[214] approaches requires comment.

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203 Ibid, para [86].

204 Ibid, para [87].

205 *Secretary for Justice v HJ*, above n 7 at paras [39] – [40].

206 Ibid, para [136].

207 Ibid, at para [138].

208 Ibid, para [23].

209 Ibid, paras [24] and [28].

210 Ibid, para [24].

211 For a discussion of COCA, s 4(7) and its application see above Part III and below Part V.

212 *Secretary for Justice v HJ*, above n 7 para [24].

213 *KS v LS* [2003] 3 NZLR 837 (HC, Full Court).

214 *El Sayed v Secretary for Justice ex parte El Sayed* [2003] 1 NZLR 349 (HC, Full Court).

On the issue of whether the lower Courts erred in applying *KS v LS*, the Court of Appeal articulated a preference, 'on the whole', for the approach taken in *KS v LS* to that set out in paragraphs [58] - [61] of *El Sayed*.[215] However, whilst acknowledging that, 'in the normal course of events, the legal systems of other countries will protect children from harm',[216] the Court also stated that 'it had no difficulty with [the] proposition' that the grave risk exception could be invoked to refuse a child's return to a country possessing a 'perfectly adequate legal system'.[217] Additionally, the Court opined that the 'difference between the *KS v LS* and *El Sayed* approaches may be little more than semantic'.[218] Perhaps most critically, the Court drew on the High Court of Australia's *DP/JLM v Commonwealth Central Authority* decision and held:[219]

> We recognise that the integrity of the Convention and its underlying policies may (and usually will) be important considerations when a discretionary defence is invoked. As well, the s 106 exceptions are defined so narrowly that there are comparatively few cases in which they apply. To that extent we agree with *KS v LS*. But there is no requirement to approach in a presumptive way the interpretative, fact finding and evaluative exercised involved when one or more of the exceptions is invoked, cf *DP v The Commonwealth Central Authority* (2001) 180 ALR 402. So to that extent we agree with *El Sayed*.

C. Smith v Adam [2007] NZFLR 447 (CA)

Smith v Adam[220] continues the series of New Zealand cases seeking to invoke the grave risk exception on the ground that return would risk harm to the abducting mother's health, and by extension, her ability to care for her child/children. In the context of allegations that the mother would suffer a 'major depressive episode' if forced to return to England, the critical issues before the Court were:

1. Whether the lower Courts[221] erred in interpreting s 106(1)(c) narrowly?
2. Whether any relevant 'grave risk' could be ameliorated?
3. Whether conditions ought to have been attached to the return order?[222]

With respect to the proper interpretation to be applied to s 106(1)(c), *Smith v Adam* builds on the *HJ v Secretary for Justice*[223] decision in its conclusion that the approach taken in *HJ* does not differ to that of the Australian High Court in *DP/JLM*[224].[225] Additionally, the decision attracts significance for its statement that, between contracting states, it will usually be expected that relevant

215 *HJ v Secretary for Justice*, above n 7 at para [31].

216 Ibid, para [33].

217 Ibid, para [31].

218 Ibid, para [32].

219 Ibid.

220 *Smith v Adam* [2007] NZFLR 447 (CA) – judgment delivered 22 November 2006.

221 *DA v MS* (unreported, Family Court, Waitakere, Mather DCJ, 10 March 2006); *S v A* (unreported, High Court, Auckland, CIV-2006-404-1646, Winkelmann J, 14 July 2006).

222 *Smith v Adam*, above n 220 at para [5].

223 *HJ v Secretary for Justice*, above n 7 (CA).

224 *DP v The Commonwealth Central Authority*; *JLM v Department of Community Services* (2000) 180 ALR 402 (HCA). Note paras [41] – [45], [191] and [9].

225 *Smith v Adam*, above n 220 at paras [8] and [10]. At para [10] the Court also notes that even if there had been a difference in approach, application of *R v Chilton* [2006] 2 NZLR 341 suggests 'no basis for any departure from the principles set out in HJ'.

health and welfare systems will be 'designed to keep people well and to protect children from harm'.[226]

On the issue of discretion, the decision similarly attracts attention for its holding that the conclusion of the *HJ* Supreme Court majority at paragraph [87] with respect to s 106(1)(a) is 'equally applicable to the s 106(1)(c) defence'.[227]

Regarding the issue of risk, the Court emphasised that, in discharging her burden of establishing 'grave risk', the abducting mother had to show *why* the legal, health and welfare systems of England would fail to protect her child against that risk pending the custody and access issues being decided. Drawing on *HJ*, the Court held, that in the absence of evidence to the contrary, the Judge was entitled to assume that such protections would be available.[228] Furthermore, the Court concluded that it was proper to 'require' the abducting mother to 'take steps to keep herself well by accepting assistance and support from those structures'.[229]

In terms of the appropriateness of attaching conditions to any return order, whilst the Court noted the possibility of alerting the United Kingdom welfare authorities before the mother's arrival, it made clear that attachment of conditions in the absence of establishment of a defence was inappropriate.[230]

D. Andrews v Secretary for Justice [2007] NZFLR 891 (CA)

An extensive range of issues were advanced by the abducting mother in this appeal.[231] However, the decision is most notable for its holding that, in situations of 'likely financial hardship' in the requesting state, a Court may properly exercise its discretion under s 106(1)(c) to refuse an order for return.[232]

Whilst the *Andrews* development that 'financial hardship' can constitute an 'intolerable situation' is significant, the Court's statement that the defence remains difficult to establish is also important to acknowledge. Indeed, in reaching its conclusion that Ms Andrews could not avail herself of the s 106(1)(c) defence, the Court was careful to emphasise that the onus remained on the applicant to satisfy the high hurdle[233] that a 'grave risk' of financial hardship was a real risk in the child's state of habitual residence.[234] With respect to cases generally seeking to invoke the

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226 *Smith v Adam*, above n 220 at para [7].

227 Ibid, para [13] citing *Secretary for Justice v HJ*, above n 7 at para [87].

228 *Smith v Adam*, above n 220 at para [20] (Emphasis added).

229 Ibid, paras [21] – [22].

230 Ibid, para [26].

231 As set out at para [12], issues raised include: failure to appoint a lawyer to represent the children; absence of a proper psychological report under s 133; High Court erring in its treatment of particular evidence; failing to consider the 'fundamental rights' defence under s 106(1)(e); adopting an erroneous approach to custody rights and their exercise as well as to the issues of consent and removal.

232 *Andrews v Secretary for Justice* [2007] NZFLR 891 at para [60] (CA) – judgment delivered 5 June 2007.

233 Affirming its comments in *HJ v Secretary for Justice*, above n 7 the Court of Appeal stated at para [51]:

> [51] The defence is not an easy one to make out. As William Young P said, delivering the judgment of the Court in *HJ v Secretary for Justice* [2006] NZFLR 1005:
>
> [33] The s 106(1)(c) defence is not easy to invoke successfully. This is in part a function of the hurdle provided by the expression 'grave risk' and in part because of judicial expectations that, in the normal course of events, the legal systems of other countries will protect children from harm.

234 *Andrews v Secretary for Justice*, above n 232 at paras [60] and [67].

defence, the Court held that objective information relating to the applicant's financial position is required.[235] Furthermore, consistent with assumptions about other contracting states' legal, health and welfare systems, the Court held that, in the absence of evidence to the contrary, Courts will assume that the requesting state will provide some form of financial assistance, eg emergency/other benefit, if necessary.[236] Significantly, the Court also opined that a requesting state's actual/probable denial of legal aid to an abducting parent does not categorically preclude an order for an abducted child's return.[237]

E. Butler v Secretary for Justice [2007] NZFLR 791 (CA)

The significance of *Butler v Secretary for Justice*[238] lies in two key areas, specifically:

1. Whether delay itself after the commencement of a proceeding can establish an 'intolerable situation' under s 106(1)(c); and
2. Whether *COCA* requires appointment of counsel to represent the child in all cases?[239]

In reaching its conclusion on both issues, the Court of Appeal drew heavily on the English House of Lords decision in *Re D (A Child) (Abduction: Rights of Custody)*.[240] Additionally, the Court acknowledged Panckhurst J's conclusion in the High Court that *A v Central Authority for New Zealand*[241] remained the 'leading case in New Zealand on s 106(1)(c)', as well as His Honour's opinion that the Court of Appeal's conclusions at paragraphs [32] and [33] in *HJ* were in a 'similar vein'.[242]

The Court of Appeal held that 'it is obviously conceivable that the consequences of delay might contribute to what would be an intolerable situation for a child if returned'.[243] However, in rejecting the abducting mother's claim that the four year-old child's living in New Zealand for some 25 months since Hague proceedings were initiated established an 'intolerable situation', their Honours also reasoned that Courts 'should be slow' to hold that the 'ordinary consequences of inevitable delays (ie delays which are part and parcel of litigation)' establish the s 106(1)(c)(ii) defence.[244]

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235 Ibid, para [67].

236 Ibid, paras [62], [63] and [68].

237 Ibid, para [64] citing *In the Marriage of CD and JC McOwan* (1993) 17 Fam LR 337 (FCA).

238 *Butler v Secretary for Justice* [2007] NZFLR 791 (CA) – judgment delivered 30 May 2007.

239 Ibid, para [3].

240 *Re D (A Child) (Abduction: Rights of Custody)* [2006] 3 WLR 989 (HL).

241 *A v Central Authority for New Zealand* [1996] 2 NZLR 517 at 523 (CA).

242 *Butler v Secretary for Justice*, above n 238 at para [22] citing paras [59] and [60] of Pankhurst J's 9 March 2007 judgment in the High Court.

243 Ibid, para [23]. Compare comments of Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)*, above n 240 at para [53] regarding delay of 3 years 10 months vis-à-vis child of 4½ years:

> In this context a delay of this magnitude in securing the return of the child must be one of the factors in deciding whether the summary return, without any investigation of the facts, will place him in a situation which he should not be expected to have to tolerate.

244 *Butler v Secretary for Justice*, above n 238 at paras [1], [4], [5] and [23].

On the issue of whether Panckhurst J erred in holding that appointment of counsel for the child was unnecessary, with reference to s 6 of *COCA*, *Re D*[245] and evolving Hague Convention practices, the Court acknowledged the general importance of the submission that there is now/should be, 'a principle in Hague Convention proceedings which requires the appointment of a lawyer to represent the child unless no useful purpose would be served by such an appointment.'[246]

The Court agreed with Panckhurst J that in light of *Re D*, 'existing practice as to the appointment of counsel may require re-consideration'.[247] However, in their Honours' opinion, Panckhurst J's reference to *Re D* created difficulties vis-à-vis the appropriateness of the point as a proper ground for leave to appeal.[248] Accordingly, the Court dismissed the application for leave to appeal on both grounds.

F. Coates v Bowden (2007) 26 FRNZ 210 (HC)

Concerning a situation of three notable incidents of domestic violence, *Coates v Bowden*[249] is significant for its conclusions regarding factors relevant/irrelevant to the exercise of discretion where the 'grave risk' of 'physical or psychological harm'[250] and 'child objects'[251] defences are found established.[252]

In exercising the residual discretion under s 106(1), the Court adopted the 'balancing' approach articulated by the majority at paragraphs [85] – [86] in *Secretary for Justice v HJ*.[253] Regarding the relevance of the Supreme Court's 'balancing exercise' to the s 106(1)(c) defence, the Court applied *Smith v Adam* in its statement that:[254]

> Where the grave risk exception is made out, it would obviously not be in the best interests of the particular child to order return. We find it difficult to envisage a situation where the competing policy factors of the Convention would, in terms of the Supreme Court test, clearly outweigh the interests of the child in such a situation.

As further support for this proposition and refusing an order for the children's return, the Court cited *Re D*, where Baroness Hale stated:[255]

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245 *Re D (A Child) (Abduction: Rights of Custody)*, above n 240 inter alia at para [59]:

> It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto.

246 *Butler v Secretary for Justice*, above n 238 at paras [14] – [15].

247 Ibid, para [18].

248 *Butler v Secretary for Justice*, above n 238 at paras [15] – [16].

249 *Coates v Bowden* (2007) 26 FRNZ 210 (HC) – judgment delivered 30 May 2007.

250 COCA, s 106(1)(c)(i) – as discussed at paras [33] – [57]. Note also paras [58] – [63] regarding unsuccessful appeal as to establishment of an 'intolerable situation' under s 106(1)(c)(ii).

251 As discussed at paras [64] – [81].

252 As detailed at paras [9] – [13], specifics of relevant incidents of domestic violence include: kicking the abducting mother while pregnant; pouring kerosene over the mother and the house where her and her children were living then threatening to kill them; and tripping one of the children and attacking the mother while she held the other in her arms. Additionally, allegations of violence towards the children and their pet dog were also raised: paras [15] – [19].

253 *Secretary for Justice v HJ*, above n 7 at paras [85] – [86], as cited in *Coates v Bowden*, above n 249 at paras [86] – [87].

254 *Smith v Adam*, above n 220 at para [14] as cited in Coates v Bowden, above n 249 at para [88].

255 *Re D (A Child) (Abduction: Rights of Custody)*, above n 240 at 1008, as cited in *Coates v Bowden*, ibid, para [89].

> It is inconceivable that a Court which reached the conclusion that there was a grave risk that the child's return would expose him to physical harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.

In terms of policy considerations relevant to the Supreme Court's balancing test, the Court held that the fact that the children had been in New Zealand for two years and were now settled in their schools was important.[256] The Court acknowledged that the abducting mother had provided the children with information which was 'highly inappropriate' and 'would have reinforced their views' of their father and their 'reluctance to return to Australia'. However, applying *Secretary for Justice v HJ*, the Court held that, in the absence of a causal connection between the mother's behaviour and establishment of the s 106(1)(c) and (d) defences, the Convention's policy objectives did not require a 'punitive approach'.[257] Importantly, the Court also held that even where the threshold for establishment of another s 106(1) defence is not met, it is proper for evidence adduced in support of that defence to be taken into account as part of the Court's 'best interests' inquiry when exercising discretion.[258]

V. International Case Law

Consistent with the New Zealand situation, recent years have witnessed a dramatic increase in the number of appellate-level *Hague Convention* decisions internationally.[259] Growing recognition of abduction's changed social context[260] and heightened judicial sensitivity toward children and abductors' welfare upon return have likewise occasioned some important doctrinal changes within various signatories' *Hague Convention* jurisprudence. Accordingly, this section traces and teases out developments and current approaches applied in the major contracting states to which children are abducted. Noting in particular the breadth of situations alleging 'grave risk', this Part's comparative discussion focuses on similarities and differences in interpretation vis-à-vis issues raised in the six cases discussed in Part IV.

A. Canada

Perhaps reflecting Canada's considerable involvement in the Convention's drafting process and position as one of the first three ratifying states, Canadian statements of appellate authority are relatively limited and consistently evidence strict adherence to a narrow interpretation of the Convention's exceptions.[261] Likewise, in decisions specifically dealing with the exercise of discretion, a strong focus on the Convention's policy is apparent.

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256 *Coates v Bowden*, above n 249 at para [94].

257 Ibid, paras [90] – [91] and [97].

258 Ibid, para [99].

259 For example, as M Weiner, 'Navigating the Road', above n 9 observes at 277, the volume of United States federal decisions now dwarfs the number of published state opinions. Indeed, between 1993-2001, the quantity of federal decisions increased by more than 300%.

260 See above, Part II (F).

261 As to the two key Supreme Court decisions largely responsible for this approach, see *W(V) v S(D)* [1996] 2 SCR 108 at 135-136 (SCC) and *Thomson v Thomson* [1994] 3 SCR 551 at paras [40] – [43] (SCC). Indeed, as M Bailey, 'The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks on Canada's Implementation' (2000) 33 *N.Y.U. J. Int'l L. & Pol.* 17 at 34 notes, Art 13(b) is pleaded in nearly 50% of reported cases but is rarely met with success.

Thomson v Thomson remains the leading statement of authority regarding the interpretation framework applicable to Convention applications generally and the parameters of the Art 13(b)/ 'grave risk' exception in particular.[262] However, *Pollastro v Pollastro*[263] and *NP v ABP*[264] also attract attention for their impact on the stringency of the 'grave risk' requirement.

Internationally, *Pollastro* arguably marks the beginning of wider judicial recognition of the indirect and deleterious effects a mother's suffering can have on a child. *Pollastro* provides authority for the proposition that returning a child to a violent environment can place that child in an 'inherently intolerable situation', in addition to exposing the child to 'a serious risk of physical or psychological harm'.[265] Where a child's interests are 'inextricably tied' to an abducting mother's psychological and physical security,[266] the possibility of harm to that parent is a proper consideration in 'grave risk' determinations.[267] However, the evidence adduced must be credible and additionally satisfy the high threshold outlined in *Thomson*.[268]

The approach of the Quebec Court of Appeal in *NP v ABP*[269] similarly echoes elements of the minority view in *Thomson* regarding the relevance of a child's best interests.[270] In *NP v ABP*, the Court held that the mother's refusal to return to Israel because of a real fear of the child's father who was engaged in the prostitution business was sufficient to establish an 'intolerable situation'. However, like *Pollastro*, the Court also affirmed that a narrow Art 13(b) interpretation applied and that ordinarily an abducting parent's refusal to return with a child would not support a Court's decision to refuse return.[271] Consequently, the Court's holding that in most situations conditions/ undertakings sufficient to protect the child's safety can be imposed is significant in terms of the

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262 *Thomson v Thomson*, above n 15. In Thomson, the Court held that a 'grave risk' of physical or psychological harm must also amount to an 'intolerable situation'.

263 *Pollastro v Pollastro* (1999) 171 DLR (4th) 32 (Ont. CA). Hereafter also 'Pollastro'.

264 *NP v ABP* [1999] RDF 38 (Que. CA).

265 *Pollastro v Pollastro*, above n 263 at para [33].

266 Note the potential for this formulation to give rise to a differing 'grave risk' standard depending on whether the abductor is the child's mother or father.

267 *Pollastro v Pollastro*, above n 263 at para [34]. In the New Zealand pre-COCA context, compare *Armstrong v Evans* (2000) 19 FRNZ 609 (DC) – re mother's threat of suicide, and contrast *KS v LS* [2003] NZFLR 817 (HC, Full Court) – child's needs not inextricably tied to mother and need to be with during operation. Indeed, as L'Heureux-Dubé J notes at p. 11 in 'Cherishing our Children: The Role of the Hague Convention on the Civil Aspects of Child Abduction' Conference Paper of Speaker Presentation given at 3rd World Conference on Family Law & Rights of Children and Youth, Bath, England, 20-22nd September 2001, <http://www.lawrights.asn.au/docs/dube2001.pdf> viewed 20 July 2007, the Pollastro decision, 'demonstrates the tremendous responsibility placed on the shoulders of Judges implementing the Convention, because once the child is returned, the Court no longer has jurisdiction to protect his or her interests or the inextricably linked interests of an abused mother.'

268 *Pollastro v Pollastro*, above n 263 at paras [29] – [32]. Whilst much evidence in *Pollastro* was disputed, the Court held that there was compelling evidence supporting the mother's allegations of extreme violence, death threats and parental irresponsibility by the father.

269 *NP v ABP*, above n 264.

270 *Thomson v Thomson*, above n 15 at 303-305 per L'Heureux-Dubé J – see also Part II(C) discussion above. Indeed, in *Pollastro*, above n 263 at para [28], the Court held that the 'grave risk' assessment was difficult, if not impossible, 'without reference to the interests and circumstances of the particular child.'

271 Compare comments Court in *C v C* [1989] 1 WLR 654 at 661 (CA) per Butler-Sloss LJ.

particular facts of *NP v ABP* being so exceptional that any attempt to impose conditions would be ineffective.[272]

Finizio v Finizio-Scoppio[273] and *Jabbaz v Mouammar*[274] are also important in terms of distilling the current Canadian position. In *Finizio*, the Court affirmed that the exceptional situations in *Pollastro* and *NP v ABP* did not represent a sea change in the law vis-à-vis Art 13(b)'s stringency. Significantly with respect to *HJ,*[275] in approving the English Court of Appeal decision in *C v C,*[276] the *Finizio* Court held that, in the absence of compelling evidence, Courts should presume that 'the Courts of another contracting state are equipped to make, and will make, suitable arrangements for the child's welfare'.[277] Regarding the exercise of discretion, the *Finizio* Court held that undertakings are an 'important factor' and that Counsel ought to 'deal fully' with the issue of how a child is to be returned.[278]

In the context of uncertainty over an abducting mother's immigration status, *Jabbaz* likewise emphasises Canada's reluctance to engage in any broadening of the 'grave risk' exception.[279] Indeed, in holding that some instability in a child's residence is not intolerable, the Court reasoned that, within Art 13(b), the term 'intolerable', 'speaks to an extreme situation, a situation that is unbearable; a situation that is too severe to be endured'.[280] Subsequently, the Court approved the Court's observations in *F(R) v G(M)*[281] and held that, 'Courts should be very wary of grafting new

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272 Indeed, in concluding that the child's return without his mother would be 'wholly inappropriate', the Superior Court (with which the Court of Appeal agreed) stated:

> This woman was taken to Israel on false pretences, sold to the Russian Mafia, and resold to the Applicant who forced her to prostitute herself through his Unique Escort Agency. She was locked in, beaten by the Applicant, and raped. She was threatened on multiple occasions in no uncertain terms. Obviously, the police authorities of Israel are unaware, so it seems, of the real activities of the Applicant and of his links with the Russian Mafia. Moreover, the Applicant declares that he has 'friends in the police'. He 'gets his information' if needed.

273 *Finizio v Finizio-Scoppio* (1999) 46 O.R. (3d) 226 (Ont. CA) – judgment delivered approximately 5 months after differently constituted Court's decision in *Pollastro*, above n 263.

274 *Jabbaz v Mouammar* (2003) 226 DLR (4th) 494 (Ont. CA).

275 *HJ v Secretary for Justice*, above n 7 at para [32]; *Secretary for Justice v HJ*, above n 7.

276 *C v C* [1989] 1 WLR 654 at 664 (CA) per Lord Donaldson of Lymington MR.

277 *Finizio v Finizio-Scoppio*, above n 273 at paras [34] – [35]. Compare in the New Zealand pre-COCA context *A v Central Authority for New Zealand*, above n 8 at 522-523 and *S v S*, n 8 at 630-632.

278 *Finizio v Finizio-Scoppio*, above n 273 at paras [36] – [39] citing La Forest J in *Thomson v Thomson*, above n 15 at 599:

> Through the use of undertakings, the requirement in Art 12 of the Convention that 'the authority concerned shall order the return of the child forthwith' can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the Court of the child's habitual residence, and any short-term harm to the child is ameliorated.

279 Compare also *Garcia v Canada* [2007] FCA 75 (Federal Court, Montreal) at paras [22] – [24] holding that a return order under the Hague Convention does not override a deportation order under the *Canadian Immigration and Refugee Protection Act* 2001, s 50(a).

280 *Jabbaz v Mouammar*, above n 274 at para [23].

281 *F(R) v G(M)* (2002) 116 A.C.W.S. (3d) 550 at para [30] (Que. CA):

> The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However, it is also, in my view, a fragile tool and any interpretation of short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.

public policy exceptions onto the Convention in the face of the very clear public policy represented in the Convention itself'.[282]

Accordingly, following the high threshold set by *Thomson*,[283] Canadian Courts appear willing to find 'grave risk' of psychological harm/an otherwise 'intolerable situation' established only in situations where the left-behind parent is effectively beyond the control of the Police and other law-enforcement agencies.[284] However, as Weiner notes, the *Pollastro* Court's failure to identify the legal protections available to Ms Pollastro upon her return to California is 'truly unique'.[285]

On the issue of whether a child's medical condition/special needs can properly establish a 'grave risk',[286] the Manitoba Court of Appeal's decision in *Chalkley v Chalkley*[287] is notable. In *Chalkley*, substantial medical evidence was adduced regarding the 14 year-old girl's spina bifida and Arnold-Chiari malformation type II conditions. The Court accepted evidence that in times of severe emotional stress the child's laryngeal paralysis became more apparent – diminishing her ability to speak. However, citing *C v C*,[288] the Court held that the temporary nature of any worsening of her condition meant that, on its own, the child's spina bifida fell short of satisfying the high 'grave risk' threshold.[289] By contrast, regarding the child's Chiari II malformation brainstem symptoms, the Court held that the possibility of sudden death from severe distress properly supported a finding of 'grave risk' when taken together with the child's fear of abandonment, need for emotional support and strong objection (involving a threat of suicide) to return.[290]

With respect to *COCA's* introduction and the New Zealand Courts' reasoning in *White v Northumberland*[291] and *HJ*[292] vis-à-vis the relevance of welfare, Quebec's implementation and interpretation of the Convention is particularly interesting. Indeed, in contrast to most other terri-

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282 *Jabbaz v Mouammar*, above n 274 at para [39].

283 *Thomson v Thomson*, above n 15.

284 As ostensibly was the case in both *Pollastro v Pollastro*, above n 263 and *NP v ABP*, above n 264.

285 M Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 593 at 653. Note that both *NP v ABP*, ibid, and *Pollastro*, ibid, were decided prior to *DP/JLM*, above n 9, but do not appear to have influenced the High Court of Australia's reasoning in any significant manner. For examples of authority explicitly noting the availability of legal protections in the child's state of habitual residence, see *In the Marriage of Murray and Tam* (1993) 16 Fam 982 – noting availability protection orders; *Walsh v Walsh* 221 F. 3d 204 (1st Circ, 2000) – examining whether legal mechanisms 'practically ineffective'; *A v Central Authority for New Zealand*, above n 8. Compare *DR v AAK* [2006] ABQB 286 at para [8] (QB) refusing return on grounds that:

> [A]ll of the participants in the French administration of justice … were so blinded by the history of the domestic dispute between the mother and father so as to fail to take precautions in the child's interest while investigating the allegations in a neutral fashion. Their collective failure to introduce sufficient protections for the child, until that investigation happened and was concluded, gave the mother no choice but to take steps invoking Art 13(b) to protect the child.

286 In the post-COCA New Zealand context compare *Smith v Adam* [2007] NZFLR 447 (CA).

287 *Chalkley v Chalkley* (1995) 10 R.F.L. (4th) 442 (Man. CA); leave to appeal refused: (1995) 11 R.F.L. (4th) 376n (SCC); trial decision varied on appeal: (1994) 96 Man. R. (2d) 56 (QB).

288 *C v C,* above n 276 per Lord Donaldson of Lymington MR.

289 *Chalkley v Chalkley*, above n 287.

290 Ibid.

291 *White v Northumberland*, above n 125. See discussion Part IV(A) above.

292 *Secretary for Justice v HJ*, above n 7.

tories and provinces, Quebec's implementing legislation adopts the Convention's principles rather than directly incorporating its text.[293]

In *C[M.L.L.] v R[J.L.R.]*,[294] the Quebec Court of Appeal expressly considered the extent to which Quebec's implementation regime required application of Art 33 of the Quebec Civil Code – essentially stating the paramountcy principle.[295] The minority opined that Art 33 did apply to Convention applications. However, applying *Thomson*,[296] the majority affirmed that the position under Quebec legislation is consistent with that applied elsewhere in Canada, ie a Convention application does not engage the best interests of the child test; relevant presumptive interests are those set out in the Convention's preamble. Furthermore, when exercising discretion under the Art 12/'settled' exception, it is the interests of the child and not the conduct of the abducting parent which attract priority in any necessary balancing of these factors against the Convention's policy/objectives.[297]

Regarding the general exercise of discretion under the Convention, the Nova Scotia Court of Appeal's decision in *Aulwes v Mai*[298] is important. Indeed, like the majority in *HJ*,[299] *Aulwes v Mai* emphasises that the exercise of discretion requires balancing the relevant child's interests against the Convention's policy.[300] Furthermore, adopting the Scottish Court's formulation in *Soucie v Soucie*, the Court makes clear that welfare is determinative only to the extent that the policy favouring entrusting a child's return to his/her state of habitual residence is 'no longer strong'[301]:

> [T]he key question is whether '… the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention, namely the return of the child to the proper jurisdiction so that the child's future may be determined in the appropriate place.'[302]

293 Whilst New Zealand does not simply implement the Convention's principles, COCA's method of implementation – see Part III above, is likewise distinctive in terms of the interplay of provisions consequently engendered.

294 *C[M.L.L.] v R[J.L.R.]* [1997] R.D.F. 754 (Que. CA).

295 Article 33 of the Civil Code of Quebec (1991) provides that 'every decision concerning a child shall be taken in light of the child's interests and the respect of his rights'.

296 *Thomson v Thomson*, above n 15.

297 In *C[M.L.L.] v R[J.L.R.]*, above n 294, the Court emphasised that the abducting father's conduct in wrongfully retaining and concealing his son's whereabouts from his mother for some 5 years was both 'illegal and reprehensible'. However, finding that the child was settled in Canada and objected to a return to Spain, the Court reversed the lower Court's decision and refused the child's return. Compare comments NZ Courts in *Secretary for Justice v HJ*, above n 7 and *White v Northumberland*, above n 125.

298 *Aulwes v Mai* (2002) 22 D.L.R. (4th) 577 (NSCA).

299 *Secretary for Justice v HJ*, above n 7.

300 At para [68], the Court opines that:

> [R]elevant objectives include first, general deterrence of international child abduction by parents; second, prompt return of the child facilitated by precluding a full inquiry into the 'best interest' of the child in the state to which the abductor has fled with the child; third, restoration of the status quo; and fourth, entrusting to the courts of the place of habitual residence the ultimate determination of what the best interests of the child require.

301 *Aulwes v Mai*, above n 298 at para [78].

302 Ibid, para [62] citing *Soucie v Soucie* [1995] S.L.T. 414 at 417 (Extra Division).

Additionally, where a child continues to have links with his/her country of habitual residence, an order refusing return should not lightly be made.[303]

Regarding the discretionary relevance of the need for an abductor to present with 'clean hands' – a proposition rejected by all members of the Supreme Court in *HJ* except McGrath J, *Aulwes v Mai* also attracts significance. In *Aulwes v Mai* the Court suggests that where a parent uses abduction to deliberately thwart otherwise effective judicial processes, rather than, for example, to escape domestic violence/other safety threats after available legislative mechanisms have been exhausted, such conduct cannot escape unchecked if a Court wishes to make clear its position that the abducted-to country is not a 'safe haven' for abductors.[304] Indeed, as the order for return of the child in *Aulwes v Mai* after some 7 years demonstrates, at least in Canada, deception and a lack of impulsive flight necessitate strong emphasis on the Convention's deterrence objective when exercising discretion.[305]

B. United States

Like Canada, United States' federal appellate-level Convention authority prior to 1999 and *Friedrich v Friedrich*[306] in particular is limited. Nevertheless, within early decisions regarding 'grave risk' and the general exercise of discretion, strict adherence to a narrow approach and a commitment to uniform interpretation are discernible.[307] Indeed, the frequently cited *Friedrich* decision identifies just two situations where the 'grave risk' exception ought to succeed.[308] Furthermore, where Courts initially found Art 13(b) established, an order refusing the child's return tradition-

303 Ibid, paras [78] – [81]. At para [79], the Court stressed that whilst the child was established in her environment in terms of school, friends and activities, given that the child's extended family remained in Iowa, it could not ignore the 'justice and logic' of entrusting the child's welfare/best interests to the Iowa Courts. That allegations of abuse needed to be judicially addressed and therapeutically resolved before there could be any 'realistic prospect' of Mr Aulwes having any meaningful relationship with his daughter also weighed heavily in the Court's exercise of discretion to order return notwithstanding the long passage of time – equating to some 7 years.

304 *Aulwes v Mai*, above n 298 at paras [77] and [80].

305 Ibid, paras [77] and [80] – [81].

306 *Friedrich v Friedrich* 78 F.3d 1060 (6th Cir. 1996). Hereafter also 'Friedrich'.

307 See for example: *Rydder v Rydder* 49 F. 3d 369 (8th Cir. 1995) – holding that specific evidence of psychological harm resulting from primary carer-child separation is required; *Nunez-Escudero v Tice Menley* 58 F. 3d 374 (8th Cir. 1995) – citing Canadian Supreme Court decision in *Thomson v Thomson*, above n 15 at 286 held child's witnessing of domestic violence held not to constitute 'grave risk'; *Tahan v Duquette* 613 A. 2d 486 at 489 (N.J. Super. Ct. App. Div. 1992) – holding that whilst 'the scope of trial Court's inquiry under the [Art 13(b)] exception is extremely narrow', the requisite inquiry involves 'more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint'.

308 *Friedrich v Friedrich*, above n 95 at 1069 the Court stated:

> First, there is a grave risk of harm when return of the child puts the child in 'imminent danger' prior to the resolution of the custody dispute, eg returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse of neglect or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or is unwilling to give the child adequate protection.

For similar sentiments in the pre-COCA New Zealand context, compare *A v Central Authority for New Zealand*, above n 8.

ally followed unquestioned – Courts opining that the potential harm to the child outweighed any need to extensively consider the residual exercise of discretion.[309]

Blondin v Dubois[310] marks an important change in judicial attitudes regarding application of the 'grave risk' exception and factors relevant to the exercise of discretion.

In *Blondin IV*, the Second Circuit upheld the District Court's finding that the children would be exposed to a 'grave risk' of psychological harm if returned to France and the custody of their allegedly abusive father.[311] However, in contrast to all previous United States' authority,[312] the Second Circuit imposed a further requirement that Courts must 'examine the full range of options that might make possible the safe return of a child to the home country' before denying repatriation under Art 13(b).[313] The Second Circuit accepted that 'France could protect the children from further abuse'.[314] Nevertheless, relying heavily on expert evidence reporting that the children were likely to suffer a recurrence of PTSD if returned, the Court held that France could not protect the children from 'the trauma of being separated from their home and family and returned to a place where they were seriously abused'.[315]

On the issue of Art 13(b)'s scope, *Blondin IV* also attracts significance for its holding that a cumulative assessment of individually non-determinative factors can properly support a finding of 'grave risk'.[316] In particular, a child's settlement or objection to return which falls outside the am-

309 See for example *Steffen F. v Severina P*. 966 F. Supp. 922 at 928 (D. Ariz. 1997) – only decision finding grave risk on Friedrich standard; *Rodriguez v Rodriguez* 33 F. Supp. 2d 456 at 462 (D. Md. 1999); *Blondin v Dubois* 19 F. Supp. 2d 123 at 127 (S.D.N.Y. 1998).

310 *Blondin v Dubois* 238 F. 3d 153 (2nd Cir. 2001). Hereafter '*Blondin IV*'. The case was initially heard in 1998: *Blondin v Dubois* 19 F. Supp (2d) 123 (SDNY, 1998) ('*Blondin I*') and subsequently *Blondin v Dubois* 189 F. 3d 240 (2nd Cir. 1999) ('*Blondin II*'); and *Blondin v Dubois* 78 F. Supp 2d 283 (SDNY, 2000) ('*Blondin III*').

311 It is perhaps significant that Mr Blondin made no evidential attempt to contradict the conclusions of the expert procured by Ms Dubois regarding the likely psychological impact a return to France would have on the children: *Blondin IV*, ibid, 160. Thus, the PTSD conclusions of the Ms Dubois' expert stood uncontroverted.

312 L Silberman, above n 9.

313 *Blondin IV* at 163. This 'further analysis' requirement effectively functions in the same way as explicit consideration of how the residual discretion ought to be exercised commonplace in other jurisdictions. Arguably a key difference between approaches in the United States and other jurisdictions is at what point and to what extent Convention policy considerations and a particular child's welfare are balanced. Significantly, in its discussion of the 'further analysis' requirement, the *Blondin II* Court, above n 310 at 242 emphasised that 'comity is at the heart of the [Hague] Convention' and noted the importance of trust and respectful reciprocity:

> the careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations – whose Courts, under the legal regime created by this treaty, are expected to offer reciprocal protection.

314 *Blondin III*, above n 310 at 298.

315 *Blondin III*, ibid.

316 For additional authority holding that a cumulative assessment of intolerability is permissible, see generally *Walsh v Walsh* 221 F. 3d 204 (1st Cir. 2000); *Danaipour v McLarey* 286 F. 3d 1 (1st Cir. 2002); *Didur v Viger* 392 F. Supp. 2d 1268 (D. Kan. 2005). Compare also comments Hale LJ (dissenting) in *TB v JB* [2001] 2 FLR 515 at para [57] (CA) where Her Ladyship adopts a 'totality of the situation' approach toward the alleged 'serious psychological and economic pressures' in finding an Art 13(b) defence established.

bit of Arts 12 or 13(2), are permissible 'grave risk' considerations.[317] Hence, through its acceptance of additional circumstances which can properly constitute 'grave risk' and its requirement that Courts explore 'ameliorative measures'[318]/undertakings[319] which might reduce the relevant risk to something less than 'grave', *Blondin IV*[320] appears to both broaden and narrow Art 13(b)'s application, at least vis-à-vis the *Friedrich*[321] standard.

Whilst some Courts and commentators have welcomed *Blondin IV* as a necessary step in curtailing abuse of Art 13(b),[322] decisions such as *Danaipour v McLarey*[323] and *Van De Sande*[324] directly challenge the appropriateness of undertakings in the exercise of discretion as expounded in *Blondin IV*. Indeed, in *Van De Sande*, the Seventh Circuit cautioned against 'blind reliance' on undertakings in Art 13(b) cases, holding that a Court must 'satisfy itself' that children 'will in fact, and not just in legal theory', be protected upon return.[325] Likewise, in *Danaipour*, the First Circuit opined that where 'grave risk' is found established, the potential for a Requested Court to become embroiled in the merits of underlying custody issues weighs against the entering of extensive undertakings as an alternative to denying a return request.[326]

Since 2005, numerous decisions have reiterated the need for uniformity and that a narrow/purposive approach to interpretation continues to prevail in the United States.[327] Significantly with respect to *Andrews v Secretary for Justice*,[328] United States Courts have affirmed that whilst the

317 *Blondin IV*, above n 310 at 163-164 (settlement); 166-168 (child's objection). In *Blondin IV*, the Court specifically noted that it 'did not rule out the possibility' of a child being 'so deeply rooted' in the Requested State that a 'grave risk' of psychological harm was established. Regarding a child's objection, the Court held that consideration as part of a broader 'grave risk' analysis provided an appropriate means for giving consideration to a younger child's testimony. Given the United States' general unwillingness to uphold the Art 13(2) exception/consider the view of children aged under 14-years – a position arguably reflecting legislative statements giving few rights to children under 14-years in custody matters and the United States' failure to ratify UNCROC, *Blondin IV's* acceptance of a child's objection as part of a broader Art 13(b) analysis is particularly interesting from at least a children's rights perspective. For similar statements of authority see also *Olguin v del Carmen Cruz Santana* (2005) U.S. Dist. LEXIS 408 (E.D.N.Y. 2005); *Elyashiv v Elyashiv* 353 F. Supp. 394 (E.D.N.Y. 2005).

318 *Blondin II*, above n 310 at 248.

319 As the Court explained in *Danaipour v McLarey* 286 F. 3d 1 at 21 (1st Cir. 2002):

> The concept of 'undertakings' is based neither in the Convention nor in the implementing legislation of any nation. … Rather, it is a judicial construct, developed in the context of British family law.

320 *Blondin IV*, above n 310.

321 *Friedrich v Friedrich*, above n 95.

322 L Silberman, above n 9.

323 *Danaipour v McLarey* 286 F. 3d 1 at 21 (1st Cir. 2002) upheld on appeal: *Danaipour v McLarey* 386 F. 3d 289 (1st Cir. 2004).

324 *Van De Sande v Van De Sande* 431 F. 3d 567 (5th Cir. 2005).

325 Ibid, 571-572. Note, however, Court's comments that a Court is not required to make findings regarding the institutional capacity of the Requesting State in all cases. Nevertheless, if 'handing over custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some non-negligible probability injure the child, the child should not be handed over, however severely the law of the parent's country might punish such behaviour': at 571.

326 It is, however, perhaps important to note that in both *Van De Sande*, ibid, and *Danaipour v McLarey*, above n 319, physical harm to the children was also alleged.

327 See for example *Gaudin v Remis* 415 F. 3d 1028 (9th Cir. 2005); In re Adan 437 F. 3d 381 (3rd Cir. 2005). Note also *Air France v Saks* 470 U.S. 392 at 404 (1985): 'in interpreting the language of treaties we find the opinions of our sister signatories to be entitled to considerable weight'.

328 *Andrews v Secretary for Justice* [2007] NZFLR 891 (CA).

'intolerable situation' portion of the 'grave risk' exception encompasses an 'evaluation of the people and circumstances awaiting the child in the country of their habitual residence',[329] financial hardship falls short of the severe harm required to trigger Art 13(b).[330] Likewise, a comparison of available medical/special needs facilities will not lightly be entered into.[331]

Regarding *HJ*[332] and the exercise of discretion under the 'settled' exception where a child's concealment is at issue, the recent *Matovski v Matovski*[333] decision is interesting. In particular, *Matovski* notes the absence of United States consensus regarding the appropriateness of equitable tolling.[334] Through reasoning that the one-year Art 12 period is not a limitation period and that any acceptance of tolling effectively renders the Applicant parent's interests superior to those of the child,[335] *Matovski* concludes that application of equitable tolling to Art 12 is 'inconsistent with the Convention's careful balancing of interests'.[336] Subsequently, like *HJ*[337] and the English Court of Appeal in *Cannon v Cannon*,[338] *Matovski* emphasises that the discretionary nature of Art 12 means that tolling is unnecessary to prevent abductors from concealing the whereabouts of a child.[339] Nevertheless, where concealment/deceit is at issue, the Applicant parent's interests/abductor's conduct are relevant considerations in the exercise of discretion.[340]

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329 *Nunez-Escudero v Tice Menley*, above n 307 at 377; *Tahan v Duquette* 259 N.J. Super 328 (NJ Superior Court).

330 *Baxter v Baxter* 324 F. Supp. 2d 536 (3rd Cir. 2005). Indeed, the United States Department of State expresses similar sentiments in its guidelines regarding Art 13(b), stating at Hague Convention, 51 Fed. Reg. 10, 510 (March 1986) that:

> A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home country where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses a child.

331 *Kufner v Kufner* 480 F. Supp 2d 491 (D.R.I. 2007) – availability treatment facilities for sleep apnea in Germany meant no 'grave risk'; *Olguin v del Carmen Cruz Santana* (2005) U.S. Dist. LEXIS 408 (E.D.N.Y. 2005) – availability of counselling services. The exception appears to be situations where a child's treatment outcomes depend on already-established therapist relationships, eg in cases where sexual abuse is alleged. However, such cases are more frequently (and properly) argued under 'psychological harm' than an 'intolerable situation'. Compare comments *Smith v Adam* [2007] NZFLR 447 (CA) in Part IV(C) above.

332 *Secretary for Justice v HJ*, above n 7.

333 *Matovski v Matovski* (2007) U.S. Dist. LEXIS 65519 (S.D.N.Y. 2007).

334 Compare and contrast *Furnes v Reeves* 362 F. 3d 702 at 723 (11th Cir. 2004); *Lops v Lops* 140 F. 3d 927 (11th Cir. 1998); *Mendez Lynch v Mendez Lynch* 220 F. Supp. 2d 1347 at 1362-63 (M.D. Fla. 2002); *Anderson v Acree* 250 F. Supp. 2d 872 at 875 (S.D. Ohio, 2002).

335 On this point, compare comments of English Court of Appeal in *In re L (A Child) (Contact: Domestic Violence)* [2001] 2 WLR 339 at 352D-E; 363G-H and 376C-D (CA) – holding that 'where there is a serious conflict between the interests of the child and one of its parents which could only be resolved to the disadvantage of one of them, the interests of the child had to prevail under article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms'.

336 *Matovski v Matovski*, above n 333 at paras [19] – [21].

337 *Secretary for Justice v HJ*, above n 7.

338 *Cannon v Cannon* [2005] 1 WLR 32 (CA) – rejecting application of equitable tolling in principle. Indeed, as Thorpe LJ stated at para [51], a tolling rule is 'too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome'.

339 *Matovski v Matovski*, above n 333 at paras [18] and [21].

340 Ibid, para [21].

C. United Kingdom

Bruch[341] describes the English Courts as 'leaders in providing a narrow (perhaps grudging) interpretation of Article 13(b)'. Similarly, Professor Lowe[342] remarks that, within the United Kingdom, 'it is hard to establish any of the exceptions provided for by Articles 12 and 13 – a fact that permits harsh results in [some] cases'. Certainly, since the early seminal decisions of *Re A (A Minor) (Abduction)*[343] and *C v C*,[344] the English Courts' enduring commitment to a restrictive interpretation of the Convention's exceptions and purposive approach towards the exercise of discretion have been well emphasised in key decisions such as *Re F*,[345] *TB v JB*[346] and *Re S*.[347]

With respect to international 'grave risk' developments, *TB v JB*[348] attracts particular significance for its acknowledgment of the changed profile of abductors since the Convention's drafting, and also for its statement that Courts internationally are 'now more conscious of the effects [of violence], not only on the immediate victims but also on the children who witness it'.[349] Critically, however, the majority's assumption regarding the existence of legal protections in a Requesting State and its requirement that the abducting parent 'take all reasonable steps'/'make all appropri-

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341 C Bruch, 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 529 at 533.

342 N Lowe, 'The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint' (2000) 33 *N.Y.U.J. Int'l L. & Pol*. 179 at 189.

343 *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 at 122E per Lord Donaldson MR.

344 *C v C (minor: abduction: rights of custody abroad)* [1989] 1 WLR 654 (CA). Note that the *C v C* approach has, to some extent, been refined by In *Re S* [2002] 1 WLR 3355 (CA) and the now frequently-cited *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* 2 FLR 478 (CA) decision, the *Re C* Court stating at 477-478:

> In testing the validity of an Art 13(b) defence, trial judges should usefully ask themselves what were the intolerable features of the child's family life immediately prior to the wrongful abduction? If the answer is scant or non-existent, then the circumstances in which an Art 13(b) defence would be upheld are difficult to hypothesise. In my opinion Art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation from flight is to remove the child from a family situation that is damaging to the child.

345 *Re F* (minor: abduction: rights of custody abroad) [1995] 3 All ER 641 (CA). Importantly, *Re F* is the first English decision finding the 'grave risk' exception established – the Court holding the child's 'extreme' behavioural reactions to the prospect of return justified an order refusing return on grounds of intolerability. Nevertheless, Sir Christopher Slade stated at 653:

> I understand that the courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the court's discretion under article 13(b) are satisfied. … They are in my view quite right to be cautious and apply a stringent test. The invocation of article 13(b), with scant justification, is all too likely to be the last resort of parents who wrongfully remove their child to another jurisdiction.

346 *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 (CA). Hereafter '*TB v JB*'. Indeed, at para [40], Hale LJ (dissenting, but with whom the majority agreed on this point) stated that 'Courts in this country have always adopted a strict view of Art 13(b)'.

347 In *re S (A Child) (Abduction: Custody Rights)* [2002] 1 WLR 3355 (CA). Hereafter '*Re S*'.

348 In *TB v JB*, above n 99, the abducting mother fled New Zealand to escape her second husband who she alleged had been physically and sexually violent. Analogous with the Australian Court in *In the Marriage of Murray and Tam v Director Family Services (ACT) (Intervener)* (1993) 16 Fam LR 982 (FCA), the majority held that it must assume, until the contrary was proved, that there were legal protections available in New Zealand to protect the mother from future violence. However, consistent with the United States' *Blondin IV*, above n 310 decision, Hale LJ (dissenting) opined that even if a protection order was readily available, it 'would not solve all of the [mother and children's] problems'.

349 *TB v JB*, above n 99 at paras [43] – [44] per Hale LJ and para [105] per Arden LJ.

ate use' of available Court orders to achieve protection for themselves and their child,[350] leaves very little room for any factual assessment of a Requesting State's 'inability' or 'unwillingness'[351] to actually protect against potential harm.[352] Nevertheless, regarding the availability of medical services, whilst not explored further in the decision, *TB v JB* arguably leaves open the issue of whether unavailability of 'appropriate' services can, in law, constitute 'grave risk'.[353]

On the issue of discretion, *TB v JB* 'assum[es] without deciding', that the factors first outlined by Waite J in *W v W (Child Abduction: Acquiescence)*[354] apply equally in Arts 13(b) and 13(2) cases. However, *TB v JB* also goes further in its suggestion that, with respect to the 'child objects' exception, in cases involving primary carer abductions, the policy of the Convention 'weighs rather less heavily when the children wish to remain with their primary carer'.[355] Additionally, consistent with Canadian authority,[356] *TB v JB* makes clear that a child's continuing links with their habitual residence is an important factor that will tend to outweigh any adverse return reactions in a primary carer abductor, eg worsening of depression/possible threat of suicide, in all but the most extreme cases.[357]

In light of the New Zealand Court of Appeal's articulated post-*COCA* acceptance of the 'grave risk' reasoning applied in the *DP/JLM*[358] and *El Sayed*[359] cases,[360] *Re S*[361] is also important. In *Re S*, the Court identified three aspects of Art 13(b) as requiring consideration, specifically:

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350 Ibid, paras [97] – [101].

351 *Friedrich v Friedrich*, above n 95.

352 See generally, M Weiner, above n 9. Compare also similar statements of Court in *Re H (Abduction: Grave Risk)* [2003] 2 FLR 141 at paras [32] – [37] (CA) – holding that English Courts are neither 'entitled to assume a lack of will [by a Requesting State] to protect children' nor that a left-behind parent is 'an uncontrollable risk' that the Requesting States' authorities would be 'unable to manage'.

353 *TB v JB*, above n 99 at para [101]:

> As regards therapeutic help (counselling) for herself and her children, the mother did not seek to suggest that appropriate assistance of this kind is not available in New Zealand.

Compare comments Australian High Court in DP/JLM, above n 9; United States' Courts in *Blondin IV*, above n 310 and *Olguin v del Carmen Cruz Santana*, above n 331; and New Zealand High Court pre-COCA in *KS v LS*, above n 8 and Court of Appeal post-COCA in *Smith v Adam*, above n 220.

354 *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211. Note that these same factors were later adopted by Waite LJ in the Court of Appeal in *H v H (Abduction: Acquiescence)* [1996] 2 FLR 570 (CA) at 574. Notably, *H v H* received brief acknowledgment by the majority of the Supreme Court in *Secretary for Justice v HJ*, above n 7 at para [83].

355 *TB v JB*, above n 99 at paras [55] – [56] per Hale LJ and paras [106] – [107] per Arden LJ. Conversely, at para [56], Hale LJ opines that Convention policy:

> weighs particularly heavily in those cases where children come to visit a parent living here and wish to remain: unless their objections are very cogent indeed, they should return to their primary carer for the dispute about a change in primary care to be settled in their home country.

356 See Part V(A) above and note comments of Court in *Aulwes v Mai*, above n 298 and *Thomson v Thomson*, above n 15 in particular.

357 *TB v JB*, above n 99 at paras [106] – [107] per Arden LJ.

358 *DP/JLM*, above n 9.

359 *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 (HC, Full Court).

360 See *HJ v Secretary for Justice*, above n 7; *Smith v Adam*, above n 220.

361 *Re S*, above n 347.

1. Is the case advanced by the mother capable in law of amounting to an Art 13(b) defence?[362]
2. Is there some linkage between the elements of Art 13(b)?[363]
3. Are the defences to be narrowly circumscribed?[364]

Regarding the appropriateness of a 'narrow'/restrictive approach to Art 13(b)'s exceptions, the Court noted that time had not permitted full argument on the point, but stated that its 'tentative view' was that it 'was not confident that this Court would take the same view as the majority in the High Court of Australia'.[365] As justification for this proposition, the Court subsequently reasoned:[366]

> It seems to us to follow that since the court requires compelling and convincing evidence, then the court is imposing a strict test and, by being stringent, the court is drawing tight conditions for return. … even though the return of the child may seem contrary to her welfare, the Court must steel itself against too freely allowing this exceptional defence and the defendant must be put to strict proof.

As a further statement of authority on the general exercise of discretion under the Convention, the decision in *Re D (Abduction: Discretionary Return)*[367] is interesting in terms of its suggestion that various factors may weigh more/less heavily in the discretionary exercise depending on which exception succeeds. Specifically, *Re D* suggests that where the 'child objects' or 'grave risk' exceptions are found established, 'it is more likely that those same grave impediments to a return will dictate the result of the discretionary exercise which follows'. Conversely, where the exception established is consent or acquiescence, the 'spirit of the Convention', ie that abducted children should be returned to their state of habitual residence, whilst always important in the discretionary exercise, is 'a less potent factor in favour of return than in other cases under Art 13'. Although the Court's perception of welfare is important in all cases, welfare is never the paramount consideration.[368]

Whilst *Re D* makes no specific comment on the exercise of discretion under the 'settled' exception, *Cannon v Cannon* and the very recent House of Lords' decision in *Re M and another (children)*[369] 'definitively' settle the 'issues arising under Art 12(2)' and the proper approach to

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362 The Court held that the particular facts pleaded by the mother regarding the child's return to Israel and her own psychological problems (including recognised psychiatric conditions of moderate-severe panic disorder and agoraphobia), may, in some situations, satisfy the strict Art 13(b) threshold of grave harm or intolerability. However, on *Re S's* particular facts, the Court held that the 'very real and worrying problems' likely to confront the mother and daughter in Israel did not produce a situation which could properly be said to be 'intolerable': 'The word 'intolerable' is so strong that by its very meaning and connotation it sets the hurdle high': para [92].

363 Following a review of English and international authority, on this point, the *Re S* Court concluded at para [41] that there was 'considerable international support for the view that there is a link between the limbs of Art 13(b)'. Accordingly, given that Australia (*Gsponer v Johnson* (1988) 12 Fam LR 753 (FCA, Full Court)) and New Zealand (*Damiano v Damiano* [1993] NZFLR 548 (FC)) have elected to apply Art 13(b) as disjunctive exceptions, it is questioned whether this factor alone ought to impact upon England's ability to follow the *DP/JLM*, above n 9 decision, even if not specific to an interpretation under implementing Regulations.

364 *Re S*, above n 347 at para [29].

365 Ibid, para [45].

366 Ibid, paras [45] and [49].

367 *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 (FD).

368 Ibid.

369 *Re M and another (children)* [2007] UKHL 55 (HL) – judgment delivered 5 December 2007. Hereafter '*Re M*' or '*Re M and another (children)*'.

discretion generally.[370] Perhaps most critically vis-à-vis New Zealand's *HJ*[371] decision, *Cannon* affirms that the exercise of discretion under the Convention 'requires the Court to have due regard to the overriding objectives of the Convention' whilst simultaneously 'acknowledging the importance of the child's welfare'.[372] In *Re M*, Baroness Hale expressly affirms the correctness of this statement, adding only emphasis that the word 'overriding' does not mean that the Convention's objectives 'will always be given more weight than other considerations'.[373] Indeed, the Convention's 'simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children' means that the Convention's policy 'does not yield identical results in all cases'.[374] Hence, various Courts' emphasis of Lord Donaldson of Lymington MR's comments in *Re A* remain apposite.[375] Accordingly, it is interesting to compare the similarities between these statements and Elias CJ's judgments in *HJ* and *Clarke v Carson*.[376]

In a similar fashion, the Courts in Ireland and Scotland also have affirmed that discretionary exercises under the Convention are 'quite different from the discretion exercisable in an ordinary custody case'.[377] Consequently, exercise of the Convention's residual discretion 'in the context of the Convention' is 'a matter of balance', with Courts being required to weigh the policy of the Convention on the one hand against the welfare/best interests of the child on the other.[378]

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370 *Cannon v Cannon* [2005] 1 WLR 32 (CA) at para [63]. *Cannon v Cannon* concerned an extreme example of deliberate concealment involving the fabrication of new identities by the abducting mother for herself and the child, the mother obtaining new birth certificates in assumed names selected from gravestone inscriptions: para [5].

371 *Secretary for Justice v HJ*, above n 7.

372 *Cannon v Cannon*, above n 107 at para [38] per Thorpe LJ. Whilst New Zealand's legislative regime renders the point somewhat less relevant, Cannon also affirms that, as a matter of principle, 'a finding of settlement does not result in the dismissal of the plaintiff's application under the Convention'. Rather, Art 18 (or, if necessary, an inference under Art 12) ensures that any such finding merely 'opens the gate to the exercise of a judicial discretion' regarding return: paras [38] and [62].

373 *Re M and another (children)*, above n 369 at para [43] per Baroness Hale. As to relevant considerations note potential application of those canvassed in *Re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 (HL).

374 Ibid, para [48].

375 *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 at 122E:

> [T]he discretion must be exercised 'in the context of the approach of the Convention'. The welfare of the children is not paramount but is a factor; and it is hard to conceive that if established under Article 12, the settlement of children could ever be unimportant. But the discretion is to choose the jurisdiction which should determine the merits of the issue as to with whom, and in which country the children should live and therefore where they should reside in the meantime; that is the context in which, as one factor, their welfare falls to be appraised.

376 *Secretary for Justice v HJ*, above n 7; *Clarke v Carson*, above n 8. Indeed, whilst the importance of the Convention's policy is strongly emphasised in *Clarke v Carson* – a decision clearly consistent with Cannon and other international authority, Elias CJ subsequently demonstrates a marked change of heart on the issue in *HJ*.

377 *In re BAD (An infant)*; *MD v ATD* (unreported, High Court, Ireland, 1997/113M, O'Sullivan J, 6 March 1998); *BB v JB* [1998] 1 IR 299 (IRSC).

378 *BB v JB* [1998] 1 IR 299 (SC). See also, *In the matter of TM and DM (minors)* [2003] 3 IR 178 (IRSC); *J v K* [2002] SC 450 (Outer House); *Soucie v Soucie* [1995] SC 134 (Extra Division). In *BB v JB*, the Irish Supreme Court also articulates a series of factors specifically relevant to the exercise of discretion. The Art 13 provision allowing a court to have regard to 'information relating to the social background of the child' is included in this list. Importantly, all members of the Court approve Lord Donaldson MR's comments in *Re A*, above n 343 and, citing *Re C (Abduction: Consent)* [1996] 1 FLR 414 at 417 identify four reasons why it is appropriate for the Court not to be mandated, but rather to have a discretion following establishment of one of the Convention's exceptions.

Consistent with the strict approach toward Art 13(b) adopted in England and Wales, Ireland and Scotland are steadfast in their maintenance of the *Friedrich*[379] standard regarding 'grave risk'.[380] Consequently, the Irish Supreme Court's acceptance of the proposition that, in some exceptional cases, a comparison of health, education or other available services is properly entered into in judicial determinations of 'grave risk' is important.[381] Likewise, in light of *HJ*[382] and *Butler v Secretary for Justice,*[383] the Court's conclusions in *P v B (No. 2)* regarding the proper treatment of both manipulative and non-manipulative delay are notable. Specifically, *P v B (No. 2)* holds that whilst delay per se is insufficient to invoke the Art 13(b) exception, where any form of delay is established, that delay is a factor to which a Court 'must have regard' when exercising discretion. Furthermore, notwithstanding that the conduct of an abductor is 'crucial and determinative' in most cases, in some situations of manipulative delay, it is proper for a Court to 'look past' an abductor's wrongdoing and consider the manifest needs of the child.[384]

Attempting to place jurisdictions on a continuum of stringency regarding establishment of Art 13(b) and discretionary exercises under the Convention, it is argued that the above analysis suggests that the United Kingdom is somewhat stricter than its Canadian and United States counterparts when it comes to ultimately refusing children's return. Accordingly, introduction of the Brussels II Revised Regulation[385] justifies attention for its likely impact on the future direction of *Hague Convention* jurisprudence, particularly in terms of the potentially changed relevance of welfare considerations and European Union ('EU') members' reduced ability to deny return applications.

Critically, by way of the *Hague Convention* not being 'communitarised' by *Brussels II Revised*, the European Court of Justice remains 'not competent' to interpret the *Hague Convention's*

379 *Friedrich v Friedrich* 78 F. 3d 1060 (6th Cir. 1996).

380 See for example *P v B (No. 2) (Child Abduction: Delay)* [1999] 4 IR 185 (IRSC) – hereafter '*P v B (No. 2)*'; *J v K*, above n 378.

381 In the matter of *TM and DM (minors)*, above n 378, Denham J for the Court stating:

> The High Court Judge erred in conducting an analysis of the health systems of the two jurisdictions. Whilst very rare situations may arise where such a comparison may be relevant, at this time I cannot conceive of any such situations. … I wish to make quite clear that I am not excluding for all time a situation where a comparison of health or education or other services should be excluded from a case where the grave risk exception is in issue. However, any such situation would be exceptional.
>
> Note, however, Court's subsequent comment that 'it is clear from Irish case law that the grave risk exception arising under article 13(b) is one which should be strictly applied in the narrow context in which is arises' (emphasis added). Compare also comments of majority in *DP/JLM*, above n 9 and see discussion infra Part V(D).

382 *Secretary for Justice v HJ*, above n 7.

383 *Butler v Secretary for Justice* [2007] NZFLR 791 (CA).

384 *P v B* (No. 2), above n 378. In *P v B (No. 2)*, the father filed his application for return 20 months after the child's wrongful removal. The Supreme Court held that despite 'the opprobrium to be case upon the defendant [mother] for wrongfully removing R [the child] from Spain', the father's delay was 'inappropriate' and hence satisfied the Court its discretion 'should be exercised in favour of the child remaining in Ireland in its new settled environment'. Note, however, that in light of Brussels II Revised – see comments re settlement and subterfuge above, between EU member states, the strictness in application of these conclusions is perhaps questionable.

385 Brussels II Revised, above n 108.

provisions.[386] However, in its directions as to how the *Hague Convention* is to be applied between EU member states, *Brussels II Revised* takes precedence.[387]

Pursuant to Art 11(4) of the Regulation,[388] EU member states can no longer deny a child's return to one another under Art 13(b) of the *Hague Convention* if it is established that appropriate arrangements have been made to secure the child's protection following return.[389] Additionally, where a Court does deny return, Arts 11(6) and 11(7) – a Danish-brokered compromise,[390] require the Requested State to immediately transmit a copy of the order and all other relevant documents to the Requesting State. The Court or Central Authority receiving this information must then notify the parties and invite them to file submissions on the child custody issues. Where the Court receives no submissions within three-months, the case is closed. However, if submissions are filed, following a custody hearing, the Requesting State can require the child's return.[391] Pursuant to Arts 11(8), 40(1)(b) and 42, such orders are automatically enforceable.[392]

As various Courts have affirmed, *Brussels II Revised* is aimed at increasing judicial cooperation between EU members and closing perceived 'loopholes' in application of the *Hague Conven-*

386 Hence, as opposed to European Community law, between EU member states, the legal basis for an order refusing/granting return remains the Hague Convention's treaty obligation under public international law.

387 Brussels II Revised, above n 108, Art 60(e). This effective 'trumping'/introduction of a two-tiered system for dealing with Convention applications between EU member and Non-member States is expressly permitted by Art 36 of the Hague Convention, which provides that:

> Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

388 Brussels II Revised, above n 108, Art 11(4). Article 11(4) provides that:

> A Court cannot refuse to return a child on the basis of Art 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his/her return.

389 However, according to the Regulation's Practice Guide for the Application of the new Brussels II Regulation (June 2005) at 32, authored by Commission Services in consultation with the European Judicial Network in civil and commercial matters, <http://ec.europa.eu/justice_home/doc_centre/civil/doc/parental_resp_ec_vdm_en.pdf> viewed 1 November 2007, the existence of mere procedures is insufficient to require return. Rather, the Requesting Member State 'must have taken concrete measures to protect the child in question', although which party bears the onus of establishing such measures is left unclear. Compare similarities of approach with United States' *Blondin IV* decision, above n 310.

390 For additional details regarding the compromise retaining application of the Hague Convention rather than also introducing into Brussels II Revised stand-alone rules governing child abduction cases, see A Schulz, 'The New Brussels II Regulation and the Hague Conventions of 1980 and 1996' [March 2004] *IFLJ* 22.

391 Significantly, no time limit is imposed on this Article. Hence, in cases where the 'settled' exception is found established, for example, a Requesting State could conceivably require a child's return after a long period away – undermining the Hague Convention and arguably having at least some deleterious welfare consequences for the child.

392 As Art 42(1) explains, that is 'without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2'.

tion's Art 13(b).[393] Whilst the provisions may initially appear merely declaratory when viewed against common law decisions such as *TB v JB*[394] and *Re H*[395] – respectively turning on the issue of New Zealand and Belgium's ability to sufficiently protect the children concerned, the Regulation will likely effect significant change in civil law[396] jurisdictions. However, whether *Brussels II Revised's* tightening of EU members' ability to refuse children's return will also flow over into *Hague Convention* decisions of the traditionally somewhat problematic jurisdictions such as Germany[397] in their relations with non-member EU contracting states remains unclear. Certainly, *Re M* suggests future approaches will be no less stringent.[398]

In light of New Zealand's recent Convention decisions, the two English decisions *Vigreux v Michel*[399] and *Re D (a child) (foreign custody rights)*[400] governed by *Brussels II Revised* are particularly important from a comity perspective. Specifically, *Vigreux* attracts importance for its holding that the Regulation 'raise[s] the bar against abductors' only in terms of Art 13(b) – *Zaffino*[401] hence remaining the appropriate Art 13(2) test. However, perhaps most critically given the provisions of the *Children Act 1989 (Eng.)* and its checklist of welfare considerations,[402] *Vigreux* makes clear that the introduction of peripheral welfare considerations, eg education and disruption

393 See for example comments of Her Ladyship Baroness Hale of Richmond in *Re D (a child) (foreign custody rights)* [2007] 1 AC 619 (HL). Compare views of United States commentators calling for a new abduction convention protocol, eg L Silberman, 'Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA' (2003) 38 *Tex. Int'l L.J.* 41, and contrast P McEleavy, 'The Brussels II Regulation: How the European Community has Moved into Family Law' (2002) 51(3) *ICLQ* 883 arguing that 'it is wasteful and short sighted to try and deal with any [Convention] shortcomings by simply creating an alternative salutation in a new instrument'. Similarly, note conclusions of N Lowe, 'Negotiating the Revised Brussels II Regulation' [November, 2004] *IFLJ* 205 that any changes ought to have been left to the Hague Conference and that Brussels II Revised changes would have been better achieved by 'wholesale ratification of the Hague Protection Convention'.

394 *TB v JB*, above n 99.

395 *Re H (Abduction: Grave Risk)* [2003] 2 FLR 141 (CA).

396 Indeed, the majority of current EU member states operate under civil law systems: <http://www.europa.eu/index_en.htm> viewed 1 November 2007.

397 Note long-standing debate between United States and Germany regarding Germany's historically low overall rates of return: N Lowe, above n 144.

398 *Re M and another (children)* [2007] UKHL 55 (HL) – upholding decision to return children to Zimbabwe.

399 *Vigreux v Michel* [2006] 2 FLR 1180 (CA). Vigreux was the first decision to consider the impact of Brussels II Revised on the Hague Convention.

400 *Re D (a child) (foreign custody rights)* [2007] 1 AC 619 (HL). Hereafter 'Re D'.

401 *Zaffino v Zaffino* [2006] 1 FLR 410 (CA), noting that 'the policy of the Convention must always be a very weighty factor to consider when exercising the discretion'.

402 Pursuant to the *Children Act* 1989, Ch. 41, s 1(1) (Eng.), when dealing with any matter concerning a child's upbringing or property, the child's welfare must be the Court's 'paramount consideration'. Furthermore, like New Zealand's COCA, s 1(3) of the *Children Act* 1989 contains a 'checklist' of welfare considerations to which Courts must 'have regard' when making any s 8 order. Particularly notable is s 1(3)(a), which requires a Court to ascertain the 'wishes and feelings of the child concerned (considered in the light of his age and understanding)'. Whilst the Hague Convention is implemented through the *Child Abduction and Custody Act* 1985 (Eng.) – a statute simply declaring that subject to Brussels II Revised the Act 'shall have the force of law in the United Kingdom': s 1(2), note similarities between United Kingdom and New Zealand legislative regimes: COCA, ss 4-6 and 94-108. Subsequently compare reasoning *Vigreux v Michel* [2006] 2 FLR 1180 (CA) and *Secretary for Justice v HJ*, above n 7; *White v Northumberland*, above n 125.

issues, into discretionary conclusions under the *Hague Convention* is inappropriate.[403] Accordingly, in Art 13(2) situations, Courts are entitled to weigh only 'the nature and strength of the child's objection' against 'the policy of the Hague Convention buttressed by the provisions of Brussels II Revised'.[404] Furthermore, where permissible welfare considerations are 'neutral'/'evenly balanced', the discretion applicable to all exceptions must be exercised in favour of return.[405]

Likewise, *Re D* is notable for its conclusions regarding delay and its suggestion that some differentiation in the weight afforded to Convention policy as a factor influencing discretionary exercises is appropriate.[406] More particularly, whilst *Re D* affirms the continuing need for 'restrictive application' of the Convention's exceptions,[407] in situations of non-manipulative delay of a significant magnitude,[408] *Re D* holds that such delay is properly considered as one factor in Courts' evaluations of whether an 'intolerable situation' exists.[409] Regarding factors relevant to the exercise of discretion, Baroness Hale's ostensible distinguishing between Arts 12(2) and 13 is interesting. Indeed, Her Ladyship suggests that, in cases of consent or acquiescence, return is much more likely to be ordered than in situations where 'grave risk' is found established.[410] However, perhaps reflecting the absence of any reference to *Cannon v Cannon*,[411] no mention is made of the discretion under Art 12(2).[412] Nevertheless, since *Re D*, *Re M* has since clarified the position – Art 12(2) clearly envisaging that a 'settled' child might be returned.[413]

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403 Indeed, as the Court notes, the Regulation's Art 11(3)'s requirement that cases be dealt with within a six-week time frame in all but exceptional cases is designed precisely to ensure that broader welfare considerations are eliminated from return decisions: paras [33] per Thorpe LJ and paras [88] – [89] per Wall LJ. Compare Art 11 Hague Convention conferring a right to request a statement of reasons for delay if an application has not been resolved within six weeks.

404 *Vigreux v Michel*, above n 399 at para [35] per Thorpe LJ; paras [49] and [79] – [80] per Wall LJ.

405 Ibid, paras [75] – [76] and para [83] per Wall LJ – cautioning that it is 'only too easy for different jurisdictions operating international conventions to retreat into their own national bunkers and refuse to return children who should be returned', and holding, at para [82], that it is:

> incumbent on English judges, if they are not going to return the child or children in question, not only to ensure that they are not trespassing on the foreign court's jurisdiction, but also to explain clearly both why they have decided on that course of action, and why they take the view that it is not inconsistent with comity and international judicial co-operation.

406 Especially relevant in the New Zealand context vis-à-vis *Secretary for Justice v HJ*, above n 7 and *Butler v Secretary for Justice*, above n 238.

407 *Re D*, above n 393 at para [51] per Baroness Hale.

408 Being some 3 years and 10 months in the life of a 4½ year-old child in the *Re D* case.

409 *Re D*, above n 393 at paras [52] – [53] per Baroness Hale.

410 Ibid, para [55]. Nevertheless, picking up on obiter comments in Vigreux, above n 399 the Court appears to suggest that an 'exceptional' dimension is required in a case before the Court will exercise discretion to deny return. Note also that Baroness Hale appears to contradict herself in paras [52] and [55]. Indeed, in para [52] Her Ladyship suggests that, in some cases, conditions/undertakings can sufficiently alleviate establishment of a 'grave risk' defence. However, at para [55], Baroness Hale opines that 'it is inconceivable' a Court finding 'grave risk' would 'nevertheless return him to face that fate'. At para [68], Her Ladyship concludes by emphasising that whilst 'few in number', there are some cases where return of a child wrongfully brought to the jurisdiction 'is not required'.

411 *Cannon v Cannon* [2005] 1 FLR 169 (CA).

412 Indeed, regarding treatment of an abductor's wrongdoing, Baroness Hale's preference that Courts refrain from assessing the 'morality' of abductor actions appears restricted to Art 13, noting at para [56] that:

> By definition, one does not get to art 13 unless the abductor has acted in wrongful breach of the other party's rights of custody. Further moral condemnation is both unnecessary and superfluous.

413 *Re M and another (children)*, above n 369 at para [31].

D. Australia

As decisions such as *In the Marriage of Murray and Tam*[414] demonstrate, early Australian authority evidences a strong commitment to trusting the institutions and procedures of a Requesting State to provide appropriate protections for a child/abductor upon return. However, relying on the natural meaning of the words used in Australia's implementing Regulations,[415] the High Court of Australia's majority decision in *DP v Commonwealth Central Authority; JLM v D-GNSW Department of Community Services*[416] marks an important change in Australia's interpretation of the 'grave risk' exception. Indeed, in contrast to the 'restrictive approach'[417] applied by a strong majority of jurisdictions internationally, *DP/JLM* embraces a more interventionist approach which 'requires Courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child', ie an effective adjudication of the merits of the custody dispute.[418]

Notwithstanding other international developments, since *DP/JLM*, the issue of Art 13(b)'s appropriate scope does not appear to have been expressly reconsidered by the Australian Courts.[419] Accordingly, the *DP/JLM*-driven series of decisions focusing greater attention on the risk to the child and the post-return situation is important to acknowledge given New Zealand's recent Convention decisions.

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414 *In the Marriage of Murray v Tam v Director Family Services* (ACT) (Intervener) (1993) 16 Fam LR 982 (Fam CA). Indeed, in Murray where the left-behind father was a member of the Mongrel Mob and had admitted acts of relatively serious violence, the Court held that:

> It would be presumptuous and offensive in the extreme for a Court in this country to conclude that the wide and children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders made by the Courts.

Similarly, note also *Gsponer v Johnson* (1988) 12 Fam LR 755 (Full Court).

415 From an international perspective, Australia's method of Convention implementation via Regulations is unusual. Pursuant to s 111B(1) of the Family Law Act, the Regulations are made in order to 'enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention'. Whilst for all relevant purposes, Reg 16(3)(b) is identical to Art 13(b), as a matter of construction, it is the Regulations which prevail over the provisions of the Convention: *DP/JLM*, above n 9 at paras [34], [99] – [102], [119] – [122] and [130]. Note also comments of the High Court majority in *De L v D-GNSW, Department of Community Services* (1996) 139 ALR 417 at 421 – 422 (HCA) – holding that Reg 16 is not rendered invalid because of any inconsistency with the paramountcy principle, and that because the Regulations are enacted under the Family Law Act, the Regulations are not required to be consistent with the Act.

416 *DP v Commonwealth Central Authority; JLM v Department of Community Services* (2000) 180 ALR 402 at para [44] (HCA) per Gaudron, Gummow and Hayne JJ. Hereafter '*DP/JLM*'. At para [44], the majority held:

> [There is no warrant for] a conclusion that reg 16(3)(b) [which implements Art 13(b) of the Convention] is to be given a 'narrow' rather than a 'broad' construction. There is, in these circumstances, no evident choice to be made between a 'narrow' and 'broad' construction of the regulation. If that is what is meant by saying that it is to be given a 'narrow' construction' it must be rejected. The exception is to be given the meaning its words require.

417 Emphasised as being critical to the Convention's long-term success in the Perez-Vera Report, above n 2 at para [34].

418 *DP/JLM*, above n 9 at para [41]. See generally also F Bates, 'Grave Risk, or Psychological Harm or Intolerable Situation: The High Court of Australia's View' (2003) 11 *Asia Pacific Law Review* 43.

419 Note, for example, *State Central Authority v Sigouras* [2007] Fam CA 250 at para [64] holding that: '[t]he proper interpretation of Reg 16(3) has been settled by the majority judgment of the High Court cases in [*DP/JLM*]'. Hereafter '*Sigouras*'. Compare also F Bates, 'The Child Abduction Convention: Troubles in Australia' (2007) *IFLJ* 24 – expressing disquiet with the 'unsatisfactory nature' of the way Australian law has developed in a 'piecemeal' and non-continuing manner, often with a failure to properly 'conceptualise the position at large'.

With respect to *Andrews v Secretary for Justice*[420] and the issue of financial hardship potentially constituting a situation of intolerability, the Family Court decisions in *McDonald v D-GNSW, Department of Community Services*[421] and *State Central Authority v Sigouras*[422] are important.[423] Indeed, in *McDonald*, the Court held that the mother's lack of housing and inadequate financial support in Belgium were two important considerations 'out of the many difficulties' undertakings could not alleviate which subsequently justified refusing the children's return.[424] By contrast, in *Sigouras*, the Court held that the mother's ability to access around $8,000 from a bank account and unencumbered ownership of a rental property returning approximately $8,000p.a. meant her alleged inability to obtain a job and financially support herself/adequately care for her children if forced to return to Greece fell short of the extreme situation required under Art 13(b).[425]

Likewise, regarding *Smith v Adam's*[426] conclusion that contracting states' health/welfare systems can be presumed to protect children and abductors from harm, the decisions in *SCA v M*[427] and *State Central Authority v Maynard*[428] are significant.[429] In *SCA*, drawing heavily on the Canadian and United States' *Pollastro* and *Walsh* lines of authority, the Kay J held that ongoing violence necessitating constant moves and depriving children of any form of security could properly establish 'grave risk'. Similarly, in *Maynard*, the Court held that the 3-month old child's serious epilepsy condition which prevented the child from being able to fly, justified an order refusing the child's return.[430] However, not convinced that the mother was 'incapacitated in the same manner as the mother in *JLM*', the Court rejected the mother's more subtle submission that an order for

420 *Andrews v Secretary for Justice* [2007] NZFLR 891.

421 McDonald v D-GNSW, Department of Community Services (2006) 36 Fam LR 468 (Fam CA). Hereafter '*McDonald*'.

422 State Central *Authority v Sigouras*, above n 419.

423 Note that in the context of financial hardship, *DP/JLM*, above n 9 at para [38], appears to draw a distinction between abducting fathers and primary-carer mothers. In the case of primary-carer mothers, the Court implies a need for 'adequate maintenance' and prompt resolution of custody issues upon return. However, in the case of fathers, the Court suggests that, particularly in the case of young children, summary return is more easily justified.

424 *McDonald v D-GNSW*, Department of Community Services, above n 421 at paras [53] – [61]. Other relevant discretionary considerations included the mother's PTSD condition – attributed to domestic violence and her former partner's drug and alcohol problems, the substantial 'passage of time' since the children's removal, and the likely absence of legal representation. Note, however, that the Court was careful to emphasise that it would be 'presumptuous to assume that Belgium does not have appropriate healthcare (whatever that means) available to persons within its borders': para [63].

425 *State Central Authority v Sigouras*, above n 419 at paras [66] – [73].

426 *Smith v Adam* [2007] NZFLR 447 (CA).

427 *SCA v M* (2003) Fam CA 1128 (Fam CA).

428 *State Central Authority v Maynard* (unreported, Family Court of Australia, Melbourne, MLF4286/2003, Kay J, 3 September 2003).

429 Interestingly, the *DP/JLM*, above n 9, majority appears to have been willing to assume the worst about the impartiality of the Mexican Courts and the state of Greek health services. Contrast the Court's rejection of a 'grave risk' defence in *HZ v State Central Authority* (2006) 35 Fam LR 489 (Fam CA). Importantly, in *HZ*, despite noting the changed profile of abductors and extensively reviewing the *Pollastro*, *Walsh* and *Blondin IV* lines of authority, the *HZ* Court held that the mother had failed to adduce sufficient evidence that the Greek authorities would be unable to protect her and the children from the father's alleged violence and other harm.

430 Importantly, the Court also held that the seriousness of the child's medical condition meant any exercise of the residual discretion was a non-event – a return flight being unable to be ordered in the foreseeable future.

return carried a 'grave risk' of psychological harm by virtue of the child's welfare being compromised if she, as primary carer, was forced to return to England.[431]

Regarding the exercise of discretion, the High Court's majority decision in *De L*[432] remains the leading statement of Australian authority. Significantly, *De L* affirms that the paramountcy principle does not apply to applications under the Regulations.[433] Consequently, although relevant factors will 'vary according to each case',[434] the 'basic proposition' is that the discretion is a 'balancing' exercise whereby Courts must exercise their discretion 'judicially', 'having regard to the subject matter, scope and purpose of the Regulations.'[435] Whilst the scope of the discretion is 'unconfined', 'significant weight' should be given to the underlying objectives of the Convention as stated in the preamble'. Similarly, without making it the paramount consideration, welfare is a 'proper matter to take into account'.[436] Additionally, regarding *HJ* and the Art 12(2) discretion in particular, it is perhaps interesting to note that, like *DP/JLM*, Australia appears to prefer a more limited/literal interpretation of Art 12(2) than other jurisdictions[437] – the issue of whether in fact discretion exists following a finding of 'settlement' being left open since *Graziano v Daniels*.[438]

VI. IMPLICATIONS OF NEW ZEALAND'S RECENT DECISIONS

With themes of trust and respectful judicial cooperation at their core, the above analysis essentially highlights two key lines of development in 'grave risk' *Hague Convention* jurisprudence internationally. Specifically, on the one hand, an approach further tightening the traditional 'narrow'/

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431 *State Central Authority v Maynard*, above n 428 at paras [37] – [38]. Critically, whilst acknowledging that the child's wellbeing would 'obviously depend on the parenting ability of the parent', the Court opined that 'even in the eventuality that [the mother] is required to return to England … her level of motivation, commitment and devotion to the child will remain unchanged', albeit 'that this may also entail a significant and even enormous emotional burden and especially so if she is unable to access supports'. Contrast *Director-General, Department of Families v RSP* (2003) 30 Fam LR 566 – holding (consistently with *DP/JLM*, above n 9) that unchallenged evidence regarding the mother's history of depression, intense need for the comfort and support of family, and threatened suicide if returned established a 'grave risk' defence, there being no condition/undertaking which could alleviate the threat of suicide: para [48].

432 *De L v D-GNSW, Department of Community Services* (1996) 139 ALR 417 (HCA) per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. Hereafter '*De L*'.

433 Ibid, 422.

434 *Richards v Director-General, Department of Child Safety* [2007] Fam CA 65 (Fam CA) at para [20].

435 *De L*, above n 432 at 431– noting also that the Regulations are silent as to relevant discretionary factors. For subsequent decisions identifying specific factors relevant to discretionary exercises and affirming extension of *De L* (focused on the 'child objects' exception) to 'grave risk', 'consent' and 'acquiescence', see *State Central Authority v Sigouras*, above n 419 at paras [163] – [180]; *HZ v State Central Authority*, above n 429; *D-G, Department of Youth and Community Services v Reissner* (1999) 25 Fam LR 330 (Fam CA) and *Secretary, Attorney-General's Department v TS* (2000) 21 Fam LR 376 (Fam CA).

436 *De L*, above n 432 at 431; *Richards v Director-General, Department of Child Safety*, above n 434; *D-G, Department of Youth and Community Services v Reissner*, above n 435 – additionally holding that Convention policy is the 'most significant matter to be taken into account' and *D-G, Department of Families, Youth and Community Care v Thorpe* (1997) FLC 92-785 at paras [4.2] – [4.4] (Fam CA).

437 *Cannon v Cannon*, above n 411. Compare also comments of Court in *Secretary for Justice v HJ*, above n 7.

438 *Graziano v Daniels* (1991) 14 Fam LR 697.

'restrictive' construction is discernible.[439] However, moving towards the opposite end of the spectrum, on the other hand is a more literal interpretation, which arguably lessens the 'weighty burden' on abductors to satisfy Courts that there is a 'grave risk'.[440] Nevertheless, regarding the residual exercise of discretion applicable to all exceptions, international authorities appear unanimous in their agreement that a balancing exercise – under which the Convention's policy attracts at least 'significant weight' and welfare is an important, but not paramount consideration, is invoked. Accordingly, the critical question becomes, do post-*COCA* New Zealand decisions appear to reinforce New Zealand's historically strong reputation for upholding the Convention's spirit and integrity,[441] or do they somewhat isolate[442] New Zealand from the international community?

On the issue of Art 13(b)'s construction and the subsequent scope of situations properly establishing a 'grave risk' defence, acknowledging that the majority of New Zealand's abduction cases involve Australia,[443] it is argued that *HJ*[444] and *Smith's*[445] adoption of the *DP/JLM*[446] approach is disappointing for several reasons.

First, as noted above, uniform interpretation of the Convention's exceptions and maintenance of mutual trust between contracting states is fundamental to the Convention's continued success.[447] By permitting an increased focus on risks to an abducted child and the post-return situation, *HJ* and *Smith* have potential to bring New Zealand dangerously close to adjudicating the merits of custody issues most properly left for determination by Requesting States.

Secondly, as a means of ensuring that the Convention remains responsive to the changing social context of abduction, adoption of *DP/JLM's* approach was unnecessary. Indeed, through decisions such as *Mok v Cornelisson*[448] and *Armstrong v Evans,*[449] the New Zealand Courts have demonstrated their ability to fashion 'just' responses which contemporaneously ensure the safety of children/abductors and uphold the Convention's spirit without doctrinal shift.[450]

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439 The EU member state approach under Brussels II Revised being the most strict, followed closely by the United Kingdom's general approach toward non-member EU contracting states. Less stringent, but still maintaining a high standard of strictness and commitment to Convention policy, is the United States' *Friedrich* and 'further analysis' approach under *Blondin IV*, followed by, if not comparable with, the general Canadian position since *Thompson*.

440 Most notably represented by the *DP/JLM*, above n 9, approach followed in Australia.

441 Achieved through decisions such as *A v Central Authority*, above n 8; *S v S*, above n 8; *KS v LS*, above n 8.

442 As *DP/JLM*, above n 9, appears to have done. Note express comments English Court of Appeal in *Re S*, above n 347 at para [45] – holding English Courts unlikely to similarly follow any 'broadening'.

443 *KS v LS* [2003] NZFLR 817 at paras [105] and [114] (HC, Full Bench) – uniformity in interpretation between NZ and Australia therefore being desirable.

444 *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) at para [32].

445 *Smith v Adam* [2007] NZFLR 447 at paras [7] – [10].

446 *DP/JLM*, above n 9.

447 See Parts II(B) and II(D) above.

448 *Mok v Cornelisson* [2000] NZFLR 582 (FC). In *Mok*, the children's likely recurrence of PTSD – a result of being exposed to their father's abusive behaviour, was found to constitute 'grave risk'.

449 *Armstrong v Evans* (2000) 19 FRNZ 609 (DC). In *Armstrong*, the Court held that the mother's PTSD condition – related to post-natal depression and giving rise to a very real threat of suicide if returned, properly established 'grave risk'.

450 Compare also Canadian *Pollastro v Pollastro* (1999) 171 DLR (4th) 32 response and note role of undertakings/conditions in United Kingdom and United States.

Thirdly, English Courts have, at least tentatively, expressly distanced themselves from the *DP/JLM* approach.[451] Similarly, current approaches in other major jurisdictions[452] reveal no suggestion of any intention to depart from their commitment to the strict/narrow interpretation emphasised as being paramount by the Perez-Vera Report.[453] Additionally, the Art 13(b) changes effected by *Brussels II Revised* support the proposition that, if anything, comity and broader abduction-deterrence interests require application of a more, rather than less, restrictive approach toward refusing children's return.[454]

Likewise, on the issue of discretion and the relevance of welfare and Convention policy considerations, *HJ*[455] and decisions subsequently affirming extension of its Art 12(2)-driven discretionary conclusions to the Convention's other exceptions, appear out of step with the weight of international authority.

In *HJ*, both Elias CJ and the majority approaches toward discretionary exercises appear to prefer first determining whether a child's return is in his/her best interests and then secondly considering the impact of the Convention's competing policy factors. Whilst this approach perhaps reflects their Honours' conclusions regarding *S v S*[456] and the absence of 'a presumption of return',[457] the approach is opposite to that adopted in most 'balancing' exercises conducted internationally. Indeed, in *Re M*, the House of Lords very recently articulated a preference that Courts 'start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there.'[458]

Furthermore, regarding *HJ's S v S*[459] conclusions,[460] with respect, it is submitted that the Supreme Court majority's conclusion that use of the word 'nevertheless' by the Court of Appeal in *S v S*,[461] 'clearly shows that the Court was not approaching the discretion in terms of their being any presumption of return after the establishment of a ground for refusal',

misconstrues *S v S's* conclusions. Rather, it is argued that 'nevertheless' simply indicates that a Court's finding of an exception established is not determinative – the Court still retaining a discretion to return the child. On this point, attention is again drawn to *Re M* where Baroness Hale employs use of the word 'nevertheless' in a manner similar to *S v S*.[462]

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451 See *In re S (A Child) (Abduction: Custody Rights)* [2002] 1 WLR 3355 at para [45].

452 For example, Canada, the United States and South Africa. Whilst South Africa is not discussed in detail above, note influential decisions of South African Constitutional Court in *Sonderup v Tondelli* (2001) 1 SA 1171.

453 Perez-Vera Report, above n 2; Indeed, numerous Convention advocates have expressed concern Art 13(b) will be the Convention's 'Achilles heel'. See generally, L Silberman, above n 9; M Weiner, above n 9.

454 Indeed, with Art 11 of Brussels II Revised now rendering it increasingly unlikely that an Art 13(b) defence under the Hague Convention will succeed in applications between EU member states, where the realities of New Zealand's adoption of DP/JLM afford abductors additional scope to establish Art 13(b), potential abductors in EU member states may be encouraged to exploit the divergence interpretation – something drafters of the Hague Convention most definitely sought to avoid.

455 *Secretary for Justice v HJ*, above n 7.

456 *S v S* [1999] NZFLR 625 (HC & CA).

457 *Secretary for Justice v HJ*, above n 7 at paras [66] – [68].

458 *Re M* and another (children) [2007] UKHL 55 at para [39] (HL) per Baroness Hale.

459 *S v S* [1999] NZFLR 641 at paras [8] and [9] (CA).

460 *Secretary for Justice v HJ*, above n 7 at paras [66] – [68].

461 *S v S* [1999] NZFLR 641 at para [11].

462 *Re M* and another (children), above n 369 at para [15] per Baroness Hale; *S v S*, above n 8 at paras [8] – [11].

Additional support for the argument that *HJ's* discretion approach is contrary to the weight of international authority is provided by the fact that in no jurisdiction does welfare prevail as the paramount consideration when it comes to the exercise of discretion.[463] Critically also, in jurisdictions such as Canada and England where the relevant statutory regime closely resembles that of New Zealand post-*COCA*, Courts have expressly rejected the relevance of broad welfare considerations.[464] Accordingly, from a comity standpoint, it is submitted that the approach articulated in *White v Northumberland*, ie that Hague cases 'continue to be determined according to past precedents and on a uniform international basis' is preferable.[465]

That it is arguable that *HJ's* changed difference in the discretion start point is simply one of semantics is acknowledged. However, it is submitted that when it comes to return outcomes, the distinction is important, particularly in the more marginal/closely balanced cases. Indeed, where Courts start from the position of first assessing whether return is in a child's best interests, an order refusing return is rendered much more likely than if beginning from a start position of considering the Convention's policy interests/'presumption of return'. The reason for this is that, in the case of 'settlement' for example, under the former approach, it becomes more difficult for the Convention's policy objectives as articulated in the Preamble to outweigh the child's interests in remaining in the Requested State, especially once other properly-considered discretionary factors such as delay and financial hardship are weighed.[466] Conversely, where Courts begin from a 'presumption of return' or at least adopt a 'blank slate',[467] a child's interests in remaining are required to be much more cogent.

It is argued that the Court of Appeal's *Smith v Adam*[468] decision well illustrates why *HJ's* changed approach is of concern. Indeed, in *Smith*, the Court of Appeal held that 'where the grave risk exception is made out, it would obviously not be in the best interests of the particular child to order return'. Additionally, the Court stated that 'We find it difficult to envisage a situation where the competing policy factors of the Convention would, in terms of the Supreme Court test, clearly outweigh the interests of the child in such a situation'.[469]

It is acknowledged that in cases involving 'grave risk', the interests of the child establishing that exception do properly weigh more heavily in the exercise of discretion than is the case when other exceptions are invoked. However, it is submitted that the Court of Appeal's effective exclusion of Judges' ability to order return after finding 'grave risk' established undermines the Convention's spirit and has important implications vis-à-vis other contracting states' willingness to order return of New Zealand children.[470] Indeed, the New Zealand Courts' conclusions on this point stand in stark contrast to at least the United Kingdom, Canadian and United States' approaches where Courts continue to actively seek to find ways to return abducted children following the establishment of an Art 13(b) exception via, for example, undertakings/conditions and oth-

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463 Importantly, this proposition appears to apply regardless of whether the discretion is exercised under Art 18 or a particular exception, eg Art 13.

464 Note, for example, *Vigreux v Michel* [2006] 2 FLR 1180 (CA).

465 *White v Northumberland* [2006] NZFLR 1105 at paras [49] – [53] (CA).

466 For example, the objective of prompt return is significantly less relevant: *Aulwes v Mai*, above n 298.

467 *Secretary for Justice v HJ*, above n 7 at para [138] per McGrath J.

468 *Smith v Adam*, above n 220.

469 Ibid, para [14].

470 Note observations Fisher J in *S v S*, above n 8; Kirby (dissenting) *DP/JLM*, above n 9 at paras [155] – [157]; *Re M and another (children)*, above n 369 at para [42].

er measures ameliorating the relevant risks to something less than 'grave'.[471] Furthermore, *Smith's* conclusion is directly contrary to the English Court of Appeal's holding that where a residual discretion arises from establishment of a Convention exception, that discretion must be exercised before the Court can proceed with determining the merits of any underlying custody dispute.[472] Importantly, the conclusion also appears inconsistent with the Perez-Vera Report's statement that children's return 'should take place only after an examination of the merits of the custody rights exercised over it'.[473]

Similarly, noting *Coates v Bowden's*[474] reliance on *Smith* and Baroness Hale's 'grave risk' comments in *Re D,*[475] attention is also drawn to Her Ladyship's apparent contradiction of herself in suggesting both that undertakings can alleviate 'grave risk' and that a return order following a finding of 'grave risk' is 'inconceivable'. Additionally, from a policy perspective, Wall LJ's cautioning in *Vigreux*[476] that it is 'only too easy for different jurisdictions operating international conventions to retreat into their own national bunkers and refuse to return children who should be returned' is emphasised.

Likewise, given the fairly fundamental differences in relevant Convention policy considerations applicable when the 'settled' exception is invoked,[477] it is argued that *HJ's* statement emphasising the need for care when applying conclusions regarding one exception to those of another[478] perhaps warranted greater consideration by the *Smith* Court before reaching the conclusion that the Supreme Court approach was 'equally applicable to the s 106(1)(c) defence'.[479] Certainly, there is international authority in support of the proposition that relevant discretionary factors and their weight can, and should, vary depending on which exception is established.[480]

On the issue of concealment, however, it is argued that the *HJ* Court's approach is consistent with international jurisprudence that in cases of moral wrongdoing it is the child's rather than the applicant-parent's interests which must remain superior.[481] However, in light of substantial authority suggesting that where a child retains links with his/her home jurisdiction return should not lightly be refused,[482] the absence of express consideration of this point by the *HJ* Court is arguably also important in terms of New Zealand further distancing itself from the international commu-

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471 See case discussions Part V above.

472 P Nygh, (formerly Nygh J) 'The international abduction of children' in Children on the Move, How to Implement their Right to Family Life (1996) at 42.

473 Perez-Vera Report, above n 2 at para [107] – regarding interpretation of Arts 12 and 18.

474 *Coates v Bowden* (2007) 26 FRNZ 210.

475 *Re D (a child) (foreign rights of custody)* [2007] 1 AC 619 at paras [52] and [55] – [56] (HL).

476 *Vigreux v Michel* [2006] 2 FLR 1180 at para [83].

477 See discussion above, Parts IV and V. Note *Re M and another (children)*, above n 369 at para [57] – holding that Art 12(2) cases 'are the most 'child-centric' of all child abduction cases; *Re C (Abduction: Settlement)* [2005] 1 FLR 127 per Singer J.

478 *Secretary for Justice v HJ*, above n 7 at paras [39] – [40].

479 *Smith v Adam*, above n 220 at para [13].

480 For example, *Re D* (discretionary return), above n 367; *Re M and another (children)*, above n 369 at paras [32], [39] and [43] – [48] noting that the weight attached to relevant discretionary factors can 'vary enormously from case to case' and that the 'policy of the Convention does not yield identical results in call cases'. Compare also United States' approaches such as *Blondin IV*, above n 310 where initial onus of proof is considered relevant to weight of Convention policy subsequently applied in 'further analysis' test.

481 Refer Part V above.

482 *Aulwes v Mai*, above n 298; *Matovski v Matovski*, above n 333 for example.

nity. Similarly, given judicial acknowledgment of changed abductor profiles and *DP/JLM's* suggestion that differential treatment of primary carer mothers and aggrieved fathers is permissible,[483] it is also disappointing that the Supreme Court chose not to deal with this factor in terms of its relevance to 'grave risk' and any discretionary exercise.

VII. Concluding remarks

Long-term success of the *Hague Convention* relies heavily on consistent and fair decision-making so that signatory states and potential abductors understand that there are 'no safe havens among contracting states'.[484]

Overall, contracting states have generally welcomed development of 'just' solutions to 'difficult recurring fact patterns' ostensibly absent from consideration during the Convention's drafting process, eg domestic violence/primary carer abductions.[485] However, as Torez J emphasises, approaches that 'essentially encourage backdoor custody evaluations' must be avoided.[486]

From a comparative perspective and having particular regard to the Convention's policy, this paper has highlighted several specific problems potentially stemming from the *HJ*[487] decision. Critically, through the Court of Appeal's adoption of *DP/JLM*[488] and the Supreme Court's conclusions regarding discretionary exercises, New Zealand appears to have taken a significant step in distancing itself from its sister signatories. Certainly *HJ* appears to have aligned New Zealand much more closely with the relatively isolated interpretations of Australia. Whilst this divergence in approach may have once been manageable had other jurisdictions also followed the Australian High Court's lead, the United States' 'further analysis' approach and the introduction of *Brussels II Revised* leaves one questioning whether New Zealand has indeed struck the correct balance between uniformity and progress.

It is with these difficult questions in mind that this paper draws the curtain on the first 2½ years of child abduction jurisprudence since *COCA* and looks ahead to what this author hopes is a strong future for the Convention.

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483 *TB v JB*, above n 99; *Aulwes v Mai*, ibid; *Pollastro v Pollastro*, above n 263 for example; *DP/JLM*, above n 9 at para [38].

484 *Re M and another (children)*, above n 369 at para [43]. See generally, M Weiner, above n 9; L Silberman, above n 9.

485 M Weiner, above n 9 at 279.

486 Torez J, above n 32 at 51.

487 *Secretary for Justice v HJ*, above n 7; *HJ v Secretary for Justice*, above n 7.

488 *DP/JLM*, above n 9.