HIGH COURT OF AUSTRALIA

Manager, Public Information

11 March 2009

LK v DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES

The High Court today upheld a mother's appeal against orders of the Family Court that her four children should be returned to Israel.

In September 2005 a husband and wife, then living in Israel, separated. The four children of the marriage continued to live with their mother. All four children were born in Israel but were entitled to Australian citizenship as their mother was an Australian citizen. In May 2006 the mother and the four children, who were then aged between 15 months and eight years old, travelled to Australia with the father's consent. The mother and children held tickets to return to Israel on 27 August 2006, however when they left Israel both parents understood that it was the mother's intention to make Australia her and her children's home unless the husband decided he wanted to live with them together as a family. In that case she would return with the children to Israel.

Before leaving for Australia the mother registered the children as Australian citizens, obtained Australian passports for the children and enrolled the two oldest children in a private school. Immediately after arriving in Australia the mother sought and obtained Centrelink benefits, the two older children commenced school and the third child was enrolled in pre-school. The older children joined a soccer club and took music lessons. Eventually the mother rented and furnished a home to live in with her children.

In July 2006 the husband advised his wife that he had changed his mind – he wanted a divorce and he wanted the children to return to Israel.

The Convention on the Civil Aspects of International Child Abduction entered into force for Australia on 1 January 1987. Parliament made regulations under the Family Law Act which, in accordance with the Abduction Convention, recognise that "the appropriate forum for resolving disputes between parents relating to a child's care, welfare and development is ordinarily the child's country of habitual residence". The Director-General of the NSW Department of Community Services is empowered under the Regulations to make an application for the return of a child to "the child's country of habitual residence" if the child has been wrongfully removed to or retained in Australia. The regulations provide that a child will have been wrongfully removed to or retained in Australia if, amongst other things, immediately before the removal to or retention in Australia, the child habitually resided in another country which was also a signatory to the Abduction Convention.

At the request of Israeli authorities the Director-General applied to the Family Court for orders returning the children to Israel. A single judge of the Family Court ordered that the children be returned to enable the custody dispute between the mother and the father to be determined according to Israeli law. On appeal, the Full Court of the Family Court affirmed that decision. The mother, LK, appealed to the High Court.

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6868
Email: jmussett@hcourt.gov.au

In a unanimous decision the High Court reasoned it would be necessary to look at all the circumstances of the case, that is – undertake a broad factual inquiry, in order to determine whether the children habitually resided in Israel when they were allegedly wrongfully retained in Australia (assumed, for the purposes of the appeal, to be in July 2006 when the father first asked for them to be returned to Israel). The High Court had regard to the circumstances that, at the time the mother and children left Israel, it was the parents' shared intention that the mother and the children would live in Australia unless the father decided he wanted to reconcile with the mother and that the mother had, before and after her return to Australia, taken various steps to set up a home in Australia (which gave effect to the parents' shared intention). The Court held that as at July 2006 the children did not habitually reside in Israel. The High Court set aside the orders of the trial judge and the Full Court, and dismissed the Director-General's application for orders that the children be returned to Israel.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*