ANY PUBLICATION OF A REPORT OF THESE PROCEEDINGS MUST COMPLY WITH S 139 OF THE CARE OF CHILDREN ACT 2004

IN THE COURT OF APPEAL OF NEW ZEALAND

CA776/2008
[2009] NZCA 17

	BETWEEN	M T Applicant
	AND	D H Respondent

Hearing: 11 February 2009

Court: Chambers, Robertson and Baragwanath JJ

Counsel: Applicant in person
J E Key for Respondent

Judgment: 18 February 2009 at 11 a.m.

JUDGMENT OF THE COURT

A The application for special leave to appeal is declined.

B Costs reserved.

REASONS OF THE COURT

(Given by Baragwanath J)

[1] The parties' children, one three years old and the other nearly two, were born in Australia where their New Zealand parents had lived since 2002. In late February 2008, without the knowledge of the children's father, DH, their mother, MT, brought them to New Zealand. Ms T seeks special leave to appeal to this Court against a judgment of the High Court (Mallon J) which dismissed an appeal from an order of

Judge Callinicos in the Family Court under s 105 of the Care of Children Act 2004 on 10 September 2008 that the children be returned from New Zealand to Australia. The application for return was supported by the Australian Government Central Authority acting under article 9 of the Hague Convention on the Civil Aspects of International Child Abduction (Schedule 1 to the Act).

[2] Section 105(2) states:

> (2) Subject to section 106, a Court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—
>
> (a) an application under subsection (1) is made to the Court; and
>
> (b) the Court is satisfied that the grounds of the application are made out.

It is now common ground that s 105(2) applies. So the remaining question concerns the application of s 106.

[3] The application was based on s 106(1)(c) and (e), which state:

> (1) If an application under s 105(1) is made to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under s 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court —
>
> …
>
> (c) That there is a grave risk that the child's return—
>
> (i) would expose the child to physical or psychological harm; or
>
> (ii) would otherwise place the child in an intolerable situation; or
>
> …
>
> (e) That the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

[4] In her clear and moderately expressed submissions Ms T elected not to pursue certain submissions advanced to the courts below relying on other paragraphs

of s 106(1). Her contention advanced a combination of reasons under para (e) overlapping with a submission under para (c) of grave risk that the children's return would expose them to harm or place them in an intolerable situation.

[5] She relied upon affidavits by herself and family members containing allegations that the respondent had indecently handled the private parts of the older child and the fact that in February last year she had obtained against him in Sydney an Apprehended Domestic Violence Order to which the respondent had consented on what his affidavit described as a "without admissions" basis.

[6] Ms T expressed concern that proposed caregivers in Australia nominated by the Australian Central Authority were a married couple, the husband being a subordinate of the respondent, and that the children would be left either without effective protection from the respondent, to whom the caregivers were beholden, or to look after themselves on the streets of Australia. She submitted that the document on the basis of which the caregivers' nomination was made was not admissible and in any event had been withdrawn.

[7] She spoke of the financial burden upon her mother who she feared would have to accompany the children to Australia because she could not herself do so, since she was required to appear in the Taumarunui District Court on 19 February 2009.

[8] On applications for stay both the President of this Court ([2008] NZCA 586) and the Supreme Court ([2009] NZSC 4) have expressed themselves unpersuaded that the case has sufficient strength to a warrant stay of the District Court's order. On the present leave application we reach the same conclusion.

[9] The essential point is that the children were removed from Australia by the appellant in circumstances which trigger the New Zealand courts' obligation under s 105 to return them unless a s 106 exception is established.

[10] Central to the question whether that is made out is a judgment:

> (a) as to the nature of any risks to which the children may be exposed (para (c)); and
>
> (b) as to the prospect of any breach of human rights and fundamental freedoms on the part of the children or others (para (e)).

[11] Of importance to each is the fact that the justice which will be administered both by the Australian Central Authority for the Hague Convention and by the Family Court in Sydney will be of no lesser quality than that of their New Zealand equivalents. Both will have an equal concern for the wellbeing of the children, which will be at the forefront of their consideration. Given the Apprehended Violence Order they will undoubtedly take particular care to ensure that whatever order is made will not place the children at unacceptable risk.

[12] Given such safeguards there is no basis for challenge to the operation of the order of the Family Court. Following discussion with Mrs Key, counsel for Mr H, it was clear that there is no reason why removal cannot be deferred until after Ms T's case on 19 February 2009.

[13] Ms T has now advised the Registrar that the fixture for that date is a status hearing. She advises that she does not propose to accompany the children to Australia. Their proper care will be a matter for the New Zealand and Australian Central Authorities. It is to be hoped that her mother's assistance will be available.

[14] Ms T has not shown any arguable error, in either Judge Callinicos's judgment or that of Mallon J, justifying the grant by this Court of a second appeal. Special leave to appeal to this Court is therefore declined. We note that Judge Callinicos contemplated the possible need for him to give more particular directions. If any issue arises concerning the costs of the return, there is jurisdiction in the Family Court under s 121 which he may consider exercising.

Solicitors:
J W Key, Feilding for Respondent