FAMILY LAW CHILD ABDUCTION HAGUECONVENTION Whether mother and children habitually resident in AustraliaorSouth Africa immediately before retention in Australia whetherretention of children is wrongful whether fatherhas and was exercisingrights of custody having regard to applicable South African law whetherfather acquiesced to the retentionof the children in Australia in the contextof ongoing discussion between the parents as to the return of the mother andchildrento South Africa whether the children would be placed in anotherwise intolerable situation if return order made machineryordersmade for the return of the mother and children. Family Law Act 1975 (Cth) Family Law(Child Abduction Convention) Regulations 1986 (Cth) Family Law (ChildProtection Convention) Regulations 2003 (Cth) Childrens Act No.38 2005 (South Africa) C v S (minor: abduction: illegitimatechild); Re J [1990] 2 All ER 961 De L v DirectorGeneral, NSW Department of Community Services (1996) 187 CLR640 Department of Health and Community Services, State Central Authority vCasse [1995] FamCA 71; (1995) FLC 92-629 DJL v Central Authority [2000] HCA 17; (2000) 201CLR 226 Director -General, NSW Department of Community Services & JLM[2001] FamCA 1338; (2001) FLC 93-090 Department of Communities (Child SafetyServices) & Rolfston [2010] FamCA 264 Director-General, Departmentof Families, Youth and Community Care v Thorpe (1997) FLC 92-785 DP vCommonwealth Central Authority; JLM v Director-General, NSW Department ofCommunity Services [2001] HCA 39; (2001) 206 CLR 401 I v C and Another(11137/2013) [2014] ZAKZDHC 11 (4 April 2014) In Re F [2006] FamCA685 Laing v Central Authority (1999) FLC 92849 McCall andMcCall; State Central Authority (Applicant); Attorney-General (Intervener) (1995) FLC 92-551 McDonald v Director-General, Department ofCommunity Services NSW (2006) FLC 93- 297 Murray v Director, FamilyServices (ACT) [1993] FamCA 103; (1993) FLC 92-416 Panayotides & Panayotides (1997) FLC 92-733 Police Commissioner of South Australia vTemple [1993] FamCA 63; (1993) FLC 92-365 Re: A (Abduction: Custody Rights) (1992)Fam 106 Re A & anor (minors)(abduction:acquiescence) [1992] Fam106 Re H (minors) [1997] UKHL 12; [1998] AC 72 Rippoll-Dausa v Middleton N.O.& Others [2005] ZAWCHC 6; 2005 (3) SA 141 State Central Authority & Hotzner (No2) [2010] FamCA 1041 Volks N.O. v Robinson 2005 (5) BCLR 446(CC) Murray v Director, Family Services (ACT) [1993] FamCA 103;

(1993) FLC 92-416 APPLICANT: State Central Authority RESPONDENT: Ms Hansen FILENUMBER: MLC 5551 of 2014 DATE DELIVERED: 14 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Macmillan J HEARING DATE: 18 August 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Stoikovska SOLICITOR FOR THE APPLICANT: Department of Human Services, Legal ServicesBranch COUNSEL FOR THE RESPONDENT: Mr Mawson QC SOLICITOR FOR THE RESPONDENT: Clancy & Triado ORDERS IT IS ORDERED THAT TheState Central Authority and the mother of the children E born ... 2011 and Aborn ... 2012 make such arrangements as are necessary for the children to returnto South Africa in the company ofthe mother by 11 November 2014 or such otherdate agreed upon in writing by the mother and the State Central Authority. TheRegistrar of the Family Court of Australia hand over the passports of the motherand the children to the legal representativesof the mother upon thepresentation of these orders to facilitate their return to South Africa inaccordance with these orders. Themother forthwith do all acts and things necessary to apply to the South AfricanHigh Commission in the Australian Capital Territoryfor a visa that will enableher to accompany the children to South Africa and remain in South Africa for aperiod of not less thanthree (3) months to enable the institution ofproceedings in South Africa with respect to parenting arrangements for thechildren. Uponthe mother receiving notification of the outcome of her visa applicationpursuant to paragraph 3 hereof the mother forthwithnotify the State CentralAuthority as to the outcome of her visa application, the notification to includethe provision by the motherto the State Central Authority of any relevantdocumentation and the like. Withintwo (2) working days of receiving notification from the mother of the outcome ofher visa application pursuant to paragraph4 hereof, the State CentralAuthority: shallnotify the father by email or facsimile as to the outcome, including theprovision of any relevant documentation and the likereceived from the mother;and copythe solicitors for the mother into all correspondence sent to the father for thepurpose of this notification. Uponthe father being notified that the mother has obtained an appropriate visa toenter South Africa pursuant to paragraph 5 hereof,the father shall: withinseven (7) days thereafter book and pay for or cause to be paid airline ticketsfor the mother and the children to return toSouth Africa and provide a copy ofthe

tickets and travel itinerary to the State Central Authority for forwardingto the mother andthe mothers solicitors with the date of departure to benot less than fourteen (14) days after the date of purchase of theairlinetickets; and notless than seven (7) days prior to the intended date of departure deposit orcause to be deposited into an account nominated inwriting by the mother the sumof AUD$18,473 for the accommodation and support of the mother and the childrenupon their return toSouth Africa; and notless than fourteen (14) days prior to the intended date of departure provide tothe mother and the mothers solicitors alist of three (3) motor vehiclesfor the mothers use upon her return to South Africa priced between ZAR205,000 and ZAR 333,000and not less than forty-eight (48) hours thereafter themother shall nominate in writing her choice of one (1) motor vehicle fromthelist of three (3) motor vehicles provided by the father; and notless than seven (7) days prior to the intended date of departure provide to themother and the mothers solicitors proofof purchase of the motor vehicleof the mothers choice pursuant to paragraph 6(c) hereof. Pendingthe childrens return to South Africa the Commissioner of the AustralianFederal Police and all Federal Agents of theAustralian Federal Police retainthe names of the children E born ... 2011 and A born ... 2012 on the All PortsWatch Alert Systemat all international points of departure from Australia. Uponreceipt of the airline tickets referred to in paragraph 6(a) hereof, the StateCentral Authority shall provide a copy of thetickets and travel itinerary and asealed copy of these orders to the Marshal of the Family Court of Australia andthe AustralianFederal Police. Uponreceipt of the airline tickets pursuant to paragraph 8 hereof, the AustralianFederal Police shall remove the names of the childrenE born ... 2011 and A born... 2012 from the All Ports Watch Alert System to take effect from 12.00 am onthe date of travel forwhich the airline tickets have been issued. TheMarshal of the Family Court of Australia and all Federal Agents of theAustralian Federal Police and Officers of the Police Forcesand Services of thevarious States and Territories are required and empowered to take all necessarysteps to give effect to theseorders. Theorder for the return of the children to South Africa pursuant to paragraph 1hereof shall lapse and the application for returnshall be discharged in theevent that: themother complies with her obligation pursuant to paragraph 3 hereof to forthwithapply for a visa and the mothers visa applicationis refused; or thefather fails to provide the return airline tickets in

accordance with paragraph6(a) hereof; or thefather fails to pay the total sum of money referred to in paragraph 6(b) hereofby way of accommodation costs and support forthe mother and children;or thefather fails to provide the mother with proof of purchase of the motor vehiclereferred to in paragraph 6(d) hereof in accordancewith paragraph 6(c)hereof. Therebe liberty to apply in relation to the implementation of these orders. TheForm 2 application filed 25 June 2014 be otherwisedismissed. IT IS NOTED that publication of this judgmentby this Court under the pseudonym State Central Authority & Hansenhas been approved by the Chief Justice pursuant to s 121(9)(g) of theFamily Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER:MLC 5551 of 2014 State CentralAuthority Applicant And Ms Hansen Respondent REASONS FOR JUDGMENT On25 June 2014 the Secretary of the Department of Human Services representing theState Central Authority filed a Form 2 applicationpursuant to the Family Law(Child Abduction Convention) Regulations 1986 (Cth) seeking the return ofthe children E who is three years of age and A who is almost 23 months of age toSouth Africa. It is submittedby the State Central Authority that the childrenhave been wrongfully retained by the mother in Australia. Themother, who is the respondent in this application, and the children left SouthAfrica and travelled to Australia on 25 November2013. The mother says that shetold the father that she wanted to return to Australia to see how thingswent and that the father consented to her leaving South Africawith the children. That agreement was predicated on the mother and the childrenremaining in Australia until 15 January 2014. The mothers father bookedreturn airline tickets for the mother and the children. On11 December 2013, in the course of what the mother described as an exchange ofmessages in which we both discussed our feelings,our relationship, ourfuture and the future of the children, she says that havingexplained to the father that she and the children were very happy in Australia he wrote [s]tay in Australiathen if you so (sic) unhappy with me, raisethe kids by yourself and get a job, be independent, since thats what youwantso badly. It is her evidence that shortly thereafter she cancelledthe airline tickets booked for her and the childrensreturn to SouthAfrica on 15 January 2014. Themothers case is that she was not habitually resident in South Africa atthe time she allegedly retained the children andthat the father did not have orwas not exercising rights of custody

in relation to the childrenand that on that basisthe children had not been wrongfully retained inAustralia. She further submitted that in any event the father acquiesced in thechildren remaining in Australia and/or that there is a grave risk that thechildrens return to South Africa would expose themto physical orpsychological harm or otherwise place them in an intolerable situation, and thatthe Courts discretion beingenlivened, I should exercise that discretionnot to order the childrens return to South Africa. BACKGROUND Thefather is 25 years of age. He was born in South Africa. He is a full-timeuniversity student. The mother, who is 22 years of age,was born in Australia.She is engaged in home duties. Themother moved to Johannesburg in South Africa to live with her mother and hermothers partner in 2006. She was at that timeonly 14 years of age. Themother attended school in Johannesburg. Thefather and mother met in or about 2009 when they were aged 20 and 17respectively. It is the mothers evidence and not thesubject of disputethat she started spending three nights per week at the fathers home inJohannesburg where he lived withhis mother and sister. In2010 the mother completed her secondary education in South Africa and wasstudying at university in Johannesburg. The mother saysthat the cost of heruniversity course became an issue between her and her mother, who encouraged herto undertake a course of studywith better employment prospects in Australia. Asa result, in early 2011 the mother travelled to Australia and studied for aperiodof six months, qualifying as a pastry chef. She deposes that she and thefather discussed her return to Australia and they agreedthat, although theywould stay in touch, they would also be free to see other people if they wishedto do so. The father denies thathe and the mother agreed that they were free tosee other people and says that the mother was adamant that she would find a waytocome back to South Africa to continue their relationship. Duringthe time the mother spent in Australia she discovered that she was pregnant, andin fact she was six months pregnant by thetime she became aware that she waspregnant. The mother did not tell the father she was pregnant, only contactinghim after Esbirth in mid 2011 Thereis some disagreement in relation to the manner in which the father accepted thenews of Es birth. It is the fathersevidence that at the time hewas utterly shocked but that [e]ventually, after processingthe news and initialshock, I accepted that I was now a father and had to dowhat was best for my little girl. The father further deposes that[i]t remains my

view that [the mother] fell pregnant on purpose in anattempt to secure a place in my family and my life. Itis the mothers evidence that she lived with her grandmother, the maternalgreat-grandmother, in Australia in the weeks followingEs birth. On 14September 2011, when the child was around seven weeks of age, the mothertravelled with her to South Africawhere they lived with the father at hismothers house. Onabout 23 December 2011 the mother travelled, together with E, the paternalgrandmother and paternal aunt, to Australia for a holiday.During this time themother and E stayed initially with the maternal great-grandmother and then withthe paternal grandfather. Thefathers family stayed in a hotel. Thefather did not travel to Australia with the mother on this occasion. On 19January 2012the mother and E and the fathers family returned to SouthAfrica. Themother and E continued to live in South Africa with the father at hismothers house until they returned to Australia on1 May 2012, for whatthe mother says was a holiday. During this visit, the mother and E stayed withthe mothers father athis home in Melbourne. It is the mothersevidence that it was during this visit that she discovered she was pregnant withthe parties second child A and, upon learning of the pregnancy, sheinformed the father. The mother deposes that whilst thefather wasindifferent about it his family was very happy to learn of thispregnancy. Themother and E returned to South Africa on 26 June 2012, again living with thefather at his mothers home. The mother saysthat during this time she andthe father had some discussions in which we agreed I would return toAustralia so that [A] couldbe born there to enable the child to obtaindual citizenship. On 26 September 2012 the mother travelled to Australia withEand the paternal grandmother with the intention of giving birth in Australia.During this time, however, the father determinedthat his university examschedule would not permit him to travel to Australia for the birth, and themother subsequently returnedwith E to South Africa in early October 2012. On9 November 2012 A was born in South Africa. The mother and the two childrencontinued to live at the home of the maternal grandmotheruntil their departurefor Australia in November 2013. Itis common ground that in November 2013 it was agreed between the mother andfather that the mother would travel with the two childrento Australia until 15January 2014, and return tickets were booked for that date. On 25 November 2013the mother left South Africawith the two children and has remained in Australiawith

the children since that date. LEGAL PRINCIPLES TheFamily Law (Child Abduction Convention) regulations 1986 (Cth)(the Regulations) are the legislative foundation for theConvention on the Civil Aspects of the InternationalChild Abductionreferred to for convenience in these reasons as the Hague Convention. Theobjects of the Hague Convention are to : (a) secure theprompt return of children wrongfully removed or retained in any ContractingState; and (b) to ensurethat rights of custody and of access under the law of one Contracting State arerespected in the other Contracting States. Anapplication pursuant to the Regulations for the return of a child to his or hercountry of habitual residence is to be distinguishedfrom an application todecide which of his or her parents that child should live with: DJL v CentralAuthority [2000] HCA 17; (2000) 201 CLR 226; Director-General, NSW Department ofCommunity Services & JLM [2001] FamCA 1338; (2001) FLC 93-090. Regulation16 (1) provides that the Court must order the return of a childif: (a) anapplication is made for the return of that child; (b) thatapplication is filed within one year after the childs removal orretention; and (c) the StateCentral Authority satisfies the court that the childs removal orretention was wrongful as defined in subregulation(1A). Regulation16 (1A) provides as follows: For subregulation (1), a childsremoval to, or retention in, Australia is wrongful if: (a) the child was under 16; and (b) the child habitually resided in a convention country immediately before thechilds removal to, or retention in, Australia;and (c) the person, institution or other body seeking the childs return hadrights of custody in relation to the child under thelaw of the country in whichthe child habitually resided immediately before the childs removal to, orretention in, Australia;and (d) the childs removal to, or retention in, Australia is in breach ofthose rights of custody; and (e) at the time of the childs removal or retention, the person,institution or other body: wasactually exercising the rights of custody (either jointly or alone); or wouldhave exercised those rights if the child had not been removed orretained. Regulation16(3) provides that the Court may refuse to order the return of the child if theperson opposing that return establishes that: (a) the person,institution or other body seeking the childs return: wasnot actually exercising rights of custody when the child was removed to, orfirst retained in, Australia and those rights wouldnot have been exercised ifthe child had not been so removed or retained; or hadconsented or subsequently acquiesced in the child being

removed to, or retainedin, Australia; or (b) there is agrave risk that the return of the child under the Convention would expose thechild to physical or psychological harmor otherwise place the child in anintolerable situation; or (c) each of thefollowing applies: thechild objects to being returned; thechilds objection shows a strength of feeling beyond the mere expressionof a preference or of ordinary wishes; thechild has attained an age, and a degree of maturity, at which it is appropriateto take account of his or her views; or (d) the returnof the child would not be permitted by the fundamental principles of Australiarelating to the protection of humanrights and fundamental freedoms. PROCEDURE AND EVIDENCE Inthis case the State Central Authority relies upon the followingdocuments: (a) The Form 2application filed 25 June 2014 and the documents annexed to that applicationbeing; affidavitof L P, affirmed 17 June 2014, attaching Instrument of Authority; applicationunder the Convention dated 9 May 2014 thefathers affidavit sworn 29 April 2014, with exhibits; themothers affidavit sworn 3 April 2014, with exhibits; Ordersmade 7 April 2014 in the Family Court of Australia; and affidavitof Ms S as to the applicable law in South Africa, sworn 23 May2014. (b) Theaffidavit of Ms F filed 5 August 2014 and the document annexed to thatapplication, being: thefathers affidavit sworn 3 August 2014, with exhibits (c) Theaffidavit of Ms F filed 18 August 2014 and the documents annexed to thatapplication, those documents being: theaffidavit of Ms K, South African solicitor, sworn 16 August 2014; and theopinion of Ms W SC, senior advocate at the Johannesburg Bar, dated 16 August2014. Themother relies upon the following documents: (a) her AmendedResponse to Initiating Application filed 18 August 2014; (b) heraffidavit filed 25 July 2014; (c) heraffidavit filed 5 August 2014; and (d) theaffidavit of Mr B filed 14 August 2014. TheState Central Authority bears the burden of proving that the retention of thechildren in Australia is wrongful as defined insub-regulation (1A). The motherin this case does not concede that the children have been wrongfully retained inAustralia. If theCourt determines that the children have been wrongfullyretained in Australia the mother bears the burden of establishing one ofthegrounds which would enliven the Courts discretion not to order theirreturn to South Africa. Thestandard of proof as provided by s 140(1) of the Evidence Act 1995 (Cth)is the balance of probabilities. Althoughit was foreshadowed at the mention of this matter that both the father and themother would be required for

cross-examination,ultimately neither counselsought to cross-examine any of the witnesses and the matter proceeded by way ofsubmissions. Althoughit was submitted by counsel for the State CentralAuthority that I should prefer the evidence of the father to that of the mother,neither the father nor the mothers evidence has been tested and I am notpersuaded that in the absence of that evidence beingtested that I should adoptthis course. Where,as in this case, there are differences in the evidence of the parties, the factthat the evidence has not been tested can presentsome difficulties. As Jordon Jsaid, which was cited with approval by the Full Court on appeal inPanayotides & Panayotides (1997)FLC 92-733: ... Isimply must do the best I can. I look to the versions of each of the parties, Ifind the common ground, and I note the areasof conflict. I can look to theinherent probabilities. Of course, when one is talking about the intent of theparties, where thisis a matter of some conjecture, one looks to the conduct ofthe parties, and any documentary or corroborative evidence which mayhelpdetermine that issue. Ialso do not accept as submitted by counsel for the State Central Authority thatI should place any weight, either in terms of themothers credit or inrelation to the question of whether the father has rights of custody, upon themothers evidenceat paragraph 46 of her affidavit sworn 23 July 2014where she says that she accepted that the father has rights of custodyfor both children. In her affidavit sworn 14 August 2014 themother clarified her evidence on the basis that she said she had been referringto the lawsof Australia. Counselfor the State Central Authority submitted that in circumstances where the motherwas describing the history of the childrenscare prior to her departurefor Australia with the children that she must have been referring to the laws ofSouth Africa. Whilstit is clearly the case that the mother was describing thefathers involvement and relationship with the children prior tothemleaving for Australia, it does not necessarily follow that the mother understoodthe concept of rights of custodyor the basis upon which theymight be determined, and that therefore when she deposed that she had beenreferring to the laws ofAustralia this was a disingenuous attempt on her partto resile from a concession she had made in relation to whether the fatherhadrights of custody. Ultimately, it is a matter for the Court, not the mother, todetermine whether the father has rights of custodyand is exercising thoserights based upon all of the evidence of the particular case. Whether or not

themother understood the legalconcepts, it is clear based upon her evidence thatshe was questioning the level of the fathers involvement in thechildrenslives. Theissues I must determine and the order in which I propose to deal with them areas follows: (a) What is thechildrens country of habitual residence? (b) Did thefather have rights of custody in the country in which the children residedimmediately prior to their retention in Australia? (c) If thefather had rights of custody, was he exercising those rights at the time of thechildrens retention in Australiaor would he have exercised them but forthe childrens retention in Australia? (d) Was thechildrens retention in Australia in breach of those rights ofcustody? (e) Did thefather acquiesce in the children remaining in Australia? and (f) Would thechildrens return to South Africa expose the children to a grave risk ofphysical or psychological harm or placethem in an otherwise intolerablesituation? HABITUAL RESIDENCE InLK v Director-General, Department of Community Services (2009) FLC 93-937the High Court considering the concept of habitual residence said at paragraph22 as follows: ... If the term habitual residence is to be given meaning, somecriteria must be engaged at some point in the inquiryand they are to be foundin the ordinary meaning of the composite expression. The search must be forwhere a person resides and whetherresidence at that place can be described ashabitual. TheHigh Court went on to say at paragraph 23: ... First, application of the expression habitual residencepermits consideration of a wide variety of circumstancesthat bear upon where aperson is said to reside and whether that residence is to be described ashabitual. Secondly, the past andpresent intentions of the person underconsideration will often bear upon the significance that is to be attached toparticular circumstanceslike the duration of a persons connections witha particular place of residence. Atparagraph 25 their Honours said it may be accepted that [h]abitualresidence, consistent with the purpose of its use, identifiesthe center (sic)of a persons personal and family life as disclosed by the facts of theindividuals activities(see E F Scoles, P Hay, P J Borchers and SC Symeonides, Conflict of Laws, 4th ed (2004) at 247). Forthe purposes of the Regulations, it is the child or childrens habitualresidence immediately before their alleged wrongfulretention that is in issue.The habitual residence of a child or children cannot be, as the High Court saidat paragraph 34: ... confined to the intentions of the parent who in fact has the day-to-day careof the child. It will

usually be necessary to considerwhat each parent intendsfor the child. When parents are living together, young children will have thesame habitual residence astheir parents. No less importantly, it may beaccepted that the general rule is that neither parent can unilaterally changethatplace of habitual residence. The assent of the other parent (or a courtorder) would be necessary. But again, if it becomes necessaryto examine theintentions of the parents, the possibility of ambiguity or uncertainty on thepart of one or both of them must beacknowledged. Thereis in this case no dispute that the fathers habitual residence is SouthAfrica. On the basis that the mother cannot unilaterallychange thechildrens place of habitual residence, any ambiguity or uncertainty thatmust be considered is, of necessity, withrespect to the habitual residence ofthe mother and the children prior to their leaving South Africa. Therelevant date for determining the childs habitual residence is the dateof the alleged wrongful retention. That occurs,as stated in Murray vDirector, Family Services (ACT) [1993] FamCA 103; (1993) FLC 92-416 at 80,252, whena child which has previously been for a limited period of timeoutside the state of its habitual residence, is not returned to thatstate atthe expiry of such limited period. There is no dispute in this case thatthe mother left South Africa with the children,by agreement with the father, inlate November 2013 on the basis that she would return to South Africa with themon 15 January 2014.To that end the paternal grandmother booked return ticketsfor the mother and the children, which the mother says she cancelled shortlyafter 11 December 2013 when she says the father agreed to her remaining inAustralia with the children. Inthe Form 2 application filed 25 June 2014 the State Central Authority includedin the details concerning the childs retentionasfollows: (i) On or about23 November 2013, the requesting father agreed for the mother and children toAustralia for a holiday until 15 January2014 and return flights were booked for15 January 2014. (ii) On orabout December 2013, the requesting father agreed to an extension for theholiday in Australia and the mother agreed toreturn with the children in March2014. (iii) On orabout January 2014, the respondent mother indicated to the requesting fatherthan she did not intend to return to SouthAfrica with the children. (iv) The fatherdid not agree for the children to remain in Australia beyond March 2014, (v) Thepaternal grandmother travelled to Australia on 17 March 2014 to visit with themother and children and persuade the motherto return to

South Africa with thechildren. The respondent mother refused to return with the children to SouthAfrica. (vi) On 1 April2014, the requesting father instructed a solicitor to send a formal letter tothe respondent mother requesting thechildren be returned no later than 7 April2014. (vii) On 3April 2014, the respondent mother filed legal proceedings in the Family Court ofAustralia file number MLC 2822 of 2014,seeking an abridgement and for thechildrens names to be placed on the [A]irport [W]atch [L]ist. (viii) An Orderwas made in 7 April 2014 by the Senior Registrar of the Family Court ofAustralia, restraining the mother and fatherand their servants and/or agentsfrom removing or attempting to remove, the children from the Commonwealth ofAustralia, and an orderwas made for the childrens names to be placed onthe Airport Watch List. (ix) Therespondent mother has wrongfully retained the children in Australia in breach ofthe requesting fathers rights ofcustody. Atparagraph 15.5 of his affidavit annexed to the Form 2 application the fatherdeposes that he and the mother agreed thatshe and the minor childrenwould return from their holiday on 15 January 2014 and their return tickets werebooked for that date.However, the [mother] and I discussed the issue duringDecember 1014 (sic) and decided that she and the minor children would stayalittle longer in Australia on holiday. On3 February 2014 the father sent the following message to the mother: ... so what you saying (sic) is, you not coming back at all? In march (sic) youchanging your tickets? Make it clear and stop messingaround, you telling me 110percent you are now living in Australia. Itis not clear from the fathers evidence exactly when the discussions herefers to in December 2013 occurred and whether theytook place prior to orafter the mother cancelled the return airline tickets. There is no otherevidence with respect to these discussions. Althoughthe mother asserts that the father certainly gave me the impression overa period of some weeks that he has consentedto me staying in Australia with thechildren although it was not his preferred position, it is similarly notclear whethershe is referring to the WhatsApp messages or some otherdiscussions and if there were other discussions there is no evidence as towhenthose discussions took place or their content. However it is clear from themothers evidence that based upon the statementsmade by the father on 11December 2013 she had cancelled the tickets that had been booked for her returnto South Africa with thechildren. Itis reasonable to infer and I am satisfied that even if the father had

agreedthat the mother could extend her holiday in Australiathat when the mothercancelled the tickets prior to the proposed return date on 15 January 2014 shehad formed the intention to remainin Australia with the children. It is alsoreasonable in my view to infer based the exchange of messages between the fatherand themother that the mother did not tell the father she had cancelled thetickets. Themother disputes that either she or the children were habitually resident inSouth Africa prior to travelling to Australia in lateNovember 2013. It wassubmitted on behalf of the mother that there has been some ambiguity about herhabitual residence and thatof the children, or at least the older child,between September 2011 and November 2013, but that the mother has beenhabitually residentin Australia since November 2013, and that on that basis thechildren should be regarded as being habitually resident in Australiaat thetime it is asserted they were wrongfully retained in Australia. Themothers evidence was that she lived in Australia until she was 14 yearsold, at which time she moved to South Africa. Themother says that she travelledback and forth between Australia and South Africa between September 2011 and 25November 2013, thateach time she did so she entered South Africa on avisitors visa, and after May 2012 a two-year Relative Permit, which hasnow expired. The mother also relied upon the fact that E was born in Australiain July 2011 and lived in Australia until Septemberthat year and that Eaccompanied the mother on each occasion she travelled to Australia. Counselfor the mother submitted that it is possible for a person to be habituallyresident in more than one place at one time, theinference being that the motherwas habitually resident in both South Africa and Australia. The motherscounsel referred meto the decision of Murphy J in Department of Communities(Child Safety Services) & Rolfston [2010] FamCA 264 and in particular tohis Honours analysis of the decision of the High Court in LK vDirector-General Department of Community Services (2009) FLC 93-937. In that case the High Court said at paragraph 25 that although they thoughtit was unlikely: ... it is not necessary to exclude thepossibility, that a person will be found to be habitually resident in more thanone place atthe one time. But even if place of habitual residence isnecessarily singular, that does not entail that a person must always besoconnected with one place that it is to be identified as that personsplace of habitual residence. So, for example, a personmay abandon a place asthe place of

that persons habitual residence without at once becominghabitually resident in some otherplace; a person may lead such a nomadic lifeas not to have a place of habitual residence. Ido not accept the submission that there is any ambiguity about themothers habitual residence during the period between September2011 andNovember 2013 or that she was habitually resident in both South Africa andAustralia, albeit not necessarily at the sametime, during this period. In myview the evidence all points to the fact that the mother was habitually residentin South Africa.That includes the mothers own evidence that: she moved toSouth Africa with her mother when she was 14 years of age and completed hersecondary education in South Africa; although themother studied in Australia for a period of six months and gave birth to E inAustralia during 2011, she also deposesthat after Es birth shereturned to Johannesburg to live with [the father] and hisfamily; the mothertravelled to Australia on what she describes in her affidavit as aholiday in December 2011 and again inMay/June 2012; the mothertravelled to Australia in September 2012 in anticipation of As birth asshe and the father had agreed that theywanted A to have Australian citizenship,but that when the father was unable to travel to Australia for the birth shereturned toSouth Africa where she remained thereafter with both children,living with the father at his mothers home until her and thechildrens departure for Australia in late November 2013; at all timesprior to her departure for Australia in late November 2013 the mother intendedto return to South Africa and travelledon airline tickets with a return date of15 January 2014; in the course ofa discussion with the father and the paternal grandmother in approximatelyOctober 2013 she told the paternal grandmotherthat she was not happy in SouthAfrica and that it was decided that [she] would go on holiday toAustralia with the children; the mother doesnot suggest that at the time she left for Australia she had already formed anintention to live in Australia and tothe contrary it is her evidence that shewanted to return to Australia to see how things went; and although shedoes not say exactly when this occurred, it is her evidence that it was onlyonce she arrived in Australia that she saysshe was much happier andobserved how much happier the children were. Inmy view, the fathers evidence in relation to the applications he and themother made to both the C School and the R School,private schools inJohannesburg, for the children commencing in 2015 and 2016 respectively, whenviewed in the

context of the otherevidence, is also consistent with the motherhaving had a settled intention to habitually reside in South Africa,notwithstandingher assertion that she was uncertain about her future and onlymade the applications to cover all bases. Themessages between the father and the mother also support my conclusion that themother was habitually resident in South Africaat the relevant time, and thatshe had not formed an intention to habitually reside in Australia prior to herdeparture. Evenon 11 December 2013, which is when she says the father agreed that she couldremain in Australia with the children, the motherdeposes she and the fatherexchanged numerous messages in which we both discussed our feelings, ourrelationship, our futureand the future of the children. For example, themother said to the father prior to, but on the same date as the message whichthe mother relies upon in support of her case that the father agreed to herremaining in Australia, [i]ts nice to havefamily around all thetime but I could never take the kids away from you and at the end of the dayyour (sic) right that me and u(sic) are a good pair because we agree with eachother on a lot of the same things. In my view, this is notconsistent with someone who has, even after her arrival in Australia, a settledintention to reside in Australia.These messages are in my view part of anongoing discussion as to the parties future. Givingthe word habitual its natural meaning, a person in order to become habituallyresident in a country must be in that place foran appreciable period. As LordBrandon of Oakbrook observed in C v S (minor: abduction: illegitimatechild); Re J [1990] 2 All ER 961: ... there is a significant difference between a person ceasing to be habituallyresident in a country A, and his subsequently becominghabitually resident incountry B. A person may cease to be habitually resident in country A in a singleday if he or she leaves itwith a settled intention not to return to it but totake up long-term residence in country B instead. Such a person cannot, however,become habitually resident in country B in a single day. An appreciable periodof time and a settled intention will be necessaryto enable him or her to becomeso. AlthoughLord Brandon went on to say that a person may have ceased to be habituallyresident in country A before becoming habituallyresident in country B, it doesnot alter my view that the mother was habitually resident in South Africa at therelevant time. Iam not satisfied on the balance of probabilities on theevidence before me that to the extent that the mother formed the

intentiontohabitually reside in Australia after she arrived in Australia, that she hadformed the necessary settled intention to do so orthat there had beensufficient time for her to become habitually resident in Australia by the timeshe cancelled the return tickets,by 15 January 2014, being her initial returndate or any later date that the father may have agreed to not knowing that themotherhad already cancelled the return tickets. Inany event, even if the mother had become habitually resident in Australia, itdoes not follow that the children were also habituallyresident in Australia,and it was not open to her to unilaterally change the childrens habitualresidence. Inall of the circumstances I am satisfied that the father and the mother and thetwo children of their relationship were habituallyresident in South Africaimmediately prior to the mothers decision to remain in Australia with thechildren. RIGHTS OF CUSTODY Thenext issue I must determine is whether at the time of the childrensretention in Australia the father in this case hadrights of custody, whether hewas exercising those rights and whether the retention of the children inAustralia was in breach ofhis rights of custody. Regulation4(2) of the Regulations provides that for the purposes of sub-regulation 4(1)rights of custody include rights relatingto the care of the person ofthe child and, in particular, the right to determine the place of residence ofthe child. Havingfound that the children were habitually resident in South Africa the Court mustfirst determine what rights the father in thiscase has in relation to thechildren in South Africa having regard to the applicable law of South Africa(McCall and McCall; State Central Authority (Applicant); Attorney-General(Intervener) (1995) FLC 92-551). Whether those rights amount torights of custody within the meaning of regulation 4 is bedetermined in accordancewith Australian law. Itwas submitted by counsel for the State Central Authority that although in SouthAfrica because the father and the mother are unmarriedthe father does not haveparental responsibility for the children as of right, he has acquired fullparental responsibility and rightswith respect to the children pursuant to s21 of the Childrens Act 38 of 2005 (South Africa)(the Childrens Act) and that such parentalresponsibility pursuant to the Childrens Act constitutes rights ofcustody pursuant to the Regulations. Section 21 provides asfollows: (1) The biological father of a child who does not haveparental responsibilities and rights in respect of the child in terms of section20, acquires full parental responsibilities and rights in respect of thechild- (a) if at the time of

the child's birth he is living with the mother in apermanent life-partnership; or (b) if he, regardless of whether he has lived or is living with themother- (i) consents to be identified or successfully applies in terms of section 26to be identified as the child's father or pays damagesin terms of customarylaw; (ii) contributes or has attempted in good faith to contribute to the child'supbringing for a reasonable period; and (iii) contributes or has attempted in good faith to contribute towardsexpenses in connection with the maintenance of the child fora reasonableperiod. (2) This section does not affect the duty of a father to contribute towardsthe maintenance of the child. (3) (a) If there is a dispute between the biological father referred to insubsection (1) and the biological mother of a child withregard to thefulfilment by that father of the conditions set out in subsection (1)(a) or (b),the matter must be referred for mediationto a family advocate, social worker,social service professional or other suitably qualified person. (b) Any party to the mediation may have the outcome of the mediation reviewedby a court. (4) This section applies regardless of whether the child was born before orafter the commencement of this Act. Counselfor the State Central Authority submitted that at the time of thechildrens birth the father was living with the motherin a permanent lifepartnership or that in the alternative he satisfies the criteria in s 21(1)(b)of the Childrens Act. Themothers case was that she and the fatherwere not living in a permanent life partnership when either of the children wasborn. Themother and the father relied upon the affidavits of their respective expertwitnesses. Mr B, the mothers expert witnesswho is a solicitor of some 22years experience most of which he spent in practice in South Africa, opined that based uponthe evidence of the mother, there is a dispute asto if they were living in permanent life partnership. Mr Bdid not, however, adduce any evidence as to the basis upon which that might bedetermined in South Africa. Ms W SC, who was briefedto provide an opinion onbehalf of the State Central Authority or its South African equivalent, as to theprovisions of the ChildrensAct, gave advice which was of moreassistance to the Court. It was Ms Ws evidence that although the termpermanent life partnership is not defined in theChildrens Act, it has been considered in a number of cases to which shereferred. Thefirst of those case was Volks N.O. v Robinson 2005 (5) BCLR 446 (CC) inwhich Ms W said a permanent life partnership was described as beinga commitment to a shared household, financial and other dependencebetween

the parties, the duration of the relationship andthe roles played inthe relationship by the parties in relation to one another. Ms W furtherreferred to a similar descriptionin Rippoll-Dausa v Middleton N.O. &Others [2005] ZAWCHC 6; 2005 (3) SA 141 (C) where she described the court as focussed onmonogamous cohabitation, mutual emotional support and reciprocalfinancial support. Finally, Ms W referred to the case of S v Jand Another [2010] ZASCA 139; [2011] 2 All SA 299 (SCA) in which the Supreme Court of Appealin South Africa, considering inter alia the rights acquired by a father pursuantto s 21 of theChildrens Act, referred to that relationship as apermanent love relationship . AlthoughI am satisfied that the parties had been in a relationship prior to the mothergoing to Australia to study, I am howevernot satisfied on the evidence beforeme that the father and mother were living in a permanent life partnership eitherprior to themother travelling to Australia, during her stay in Australia, andmore importantly at the time of Es birth. The tenor of thefathersevidence is that they were in a loving relationship and the Facebook messagesannexed to his affidavit confirm thatis likely to have been the case, howeverthere is no evidence that the parties were living together or had immediateplans to doso. The father was at the time 22 years of age and the mother was 19years of age. However,I am satisfied that the parties relationship had all the hallmarks of apermanent life partnership once the motherreturned to South Africa afterEs birth in Australia. The father and mother lived in a monogamousrelationship at the homeof the maternal grandmother and notwithstanding thatthe mother complains about that relationship and about living in South Africa,she travelled to Australia on two occasions, returning to South Africa to livewith the father on each occasion. The child A wasborn during this period and inthose circumstances I am satisfied that the father has acquired parentalresponsibilities and rightsfor A pursuant to s 21((1)(a) of theChildrens Act. AlthoughI am not satisfied that the father and mother were living in a permanent lifepartnership at the time of Es birth that is not the end of thematter. It was submitted by counsel for the State Central Authority thateven ifthe Court is not satisfied that the father and mother were in a permanentlife partnership when each of thechildren were born, that the father hasacquired parental responsibility and rights by virtue of the provisions of s21(1)(b) ofthe Childrens Act. Counselfor the State Central Authority submitted that all three necessary criteria aresatisfied. The father is named

on both childrensbirth certificates andthere is no dispute that the father has consented to be identified as the fatherof both children. However,the mother disputes that the father has eithercontributed or has attempted in good faith to contribute to the childrensupbringing or that he contributes or has attempted in good faith to contributetowards expenses in connection with the maintenance of the childrenfor therequisite reasonable period. Whilstthe two experts reach different conclusions based upon the their interpretationof the facts, albeit that that is ultimatelya matter for this Court todetermine, they also differ significantly upon what they each say is requiredwith respect to these provisions. Themost significant point of difference between them is in relation to Mr Bsevidence that as there was no mediation pursuantto s 21(3) of theChildrens Act and no court order, the father has not acquired parentalresponsibilities or rights. Mr Bdoes not refer to any authority to support thisproposition. Inrelation to this issue, Ms W opined as follows at paragraphs 27 and 28 of heraffidavit: Section 21(3) provides that in the event of a dispute between the parents as towhether or not the father fulfils criteria in section21(1) the matter must (notshall) be referred for mediation to a Family Advocate, social worker, socialservice professional or otherqualified person. However, the High Court is theupper guardian of all minor children and the provisions of section 21(3) do notdiminish the High Courts powers as upper guardian. If it is in theinterests of the child, either parent or both of them mayask the High Court tomake an order without them first having to engage in mediation. In my own experience applications for declaratory orders in instances wherethere is a dispute between parents as to whether thefather has acquired rightsand responsibilities in terms of section 21 are as a matter of course regularlyheard by the High Courtwithout mediation having first occurred. I am unaware ofany matter in which a High Court has insisted on mediation having firsttakenplace and my own experience confirms this. This, whilst mediation may avoidexpensive and protracted litigation it is not peremptory. Counselfor the State Central Authority also referred me to I v C and Another(11137/2013) [2014] ZAKZDHC 11 (4 April 2014) (I v C),an unreported decision of the High Court of South Africa, KwaZulu-Natal LocalDivision, Durban in which Gabriel AJ concludedthat his Honour had jurisdictionto hear the matter notwithstanding that the parties had not been first referredto mediation. Thecourt in this case was

asked to interpret s 21 of theChildrens Act following a request by the High Court of JusticeFamily Division in the United Kingdom for the purposes of Hague Conventionproceedingsin the United Kingdom for the return of a child to South Africa.Gabriel AJ said at paragraph 7 as follows: Ms Annandale argued that this is not a dispute about the paternity rights of theunmarried biological father emanating in this countryand that section 21(3)(b)finds no application. I agree. This case concerns the resolution of a questionposed by the UK High Courtwhich is dealing with proceedings in this initiatedthere in terms of the Hague Convention. In those proceedings, the UK High Courtwill determine whether the applicant had rights of custody when S [...] wasremoved, as contemplated in Article 3 of the Hague Convention.A resolution of,inter alia, that matter will determine whether that Court will order thereturn of S [...] to the Republic. I am not required to answer anyof thosematters in this application. Theprovisions governing whether a biological father who does not have parentalresponsibilities and rights in respect of childrenpursuant to s 20 of theChildrens Act has acquired full parental responsibility are setout in s 21(1) of the Childrens Act. The requirement that the partiesattendmediation is contained in s 21(3) and is relevant for the purposes of adispute as to whether the biological father has satisfiedthe requirements of s21(1) in proceedings in a court of competent jurisdiction in South Africa. I amsatisfied that it has no applicationto the proceedings in this Court and is notrelevant to this Courts determination. Therelevant sections speak for themselves. Section 21(3) providesthat: (a) If there isa dispute between the biological father referred to in sub-section (1) and thebiological mother of a child with regardto the fulfilment by that father of theconditions set out in subsection 1(a) or (b), the matter must be referred formediation toa family advocate, social worker, social services professional orother suitably qualified person. Itis clear from that section that the mediation is intended to assist partieswhere there is a dispute as to whether the biologicalfather has met theconditions contained in s 21(1) of the Childrens Act and is not in itselfdeterminative of whether he hasacquired those rights. Turningto s 21(1)(b) of the Childrens Act, the question I must determine iswhether the father in this case has, for a reasonableperiod, contributed ingood faith to the childrens upbringing and towards expenses in connectionwith the maintenance of thechildren. MrB opined that if the ... Mothers evidence is considered, it seemsthat

the requirements of Section 21(1) have notbeen met and the RequestingFather does not acquire parental responsibilities and rights orrights of custodyunder South African law. Mr B didnot refer to any evidence upon which he might have based that conclusion nor anyauthority which would support that conclusion. MsW, on the other hand, concluded that the father met both the requirements of s21(1)(b) and (c). She said with respect to subsection(1)(b) at paragraphs 19to 21 of her affidavit as follows: The terminology in this section is wide and may be open to conflictinginterpretations. The term upbringing implies an involvementin the childs life. It, however, makes allowances for the particularcircumstances of the father. Thefather must show that he has tried ingood faith and for a reasonable period tocontribute towards the upbringing of the child. The parties lived together since shortly after the birth of [E]. The [father]has set out in his founding papers (inter alia para 41 ff) themanner in which he participated in the upbringing of the children, most of whichis disputed by the [mother], what is common causeis that the [father] loves hischildren, has been a continuous presence in their lives, has ensured their carewith him in a lovinghousehold, has together with the [mother] made jointdecisions, e.g. regarding their future education and taken steps to enrol themin schools. On the facts in the present case it is my view that the [father] meets therequirements of section 21(1)(b)(ii) of the Act. Iwas also referred by counsel for the State Central Authority to the decision ofGabriel AJ in the matter of I v C, to which I referred to earlierin these reasons. In that case his Honour said at paragraph 35 asfollows: ... this section speaks to contributions or good faith contributions toS[..]s upbringing for a reasonable period. These areelastic concepts andpermit a range of considerations, culminating in a value judgement as to whetherwhat was done could be saidto be a contribution or a good faith attempt atcontributing to the childs upbringing over a period which, in thecircumstances,it is reasonable there is a distinction. HisHonour went on to say at paragraph 39: The Court in Steadman with reference to the dictionary held thatupbringing referred to treatment and instruction receivedfrom onesparents through childhood. I am of the view that theconcept of upbringing denotes more. At its minimum contributingtowards toward a childs upbringing encompasses personal effort towardsinteracting, caring for and being in contact with thechild. But the conceptcould entail more such as a father procuring suitable care or

educational aidsor other material yet usefulcomforts for a child to ensure a comfortable andgood upbringing. Thereis no dispute in this case that after giving birth to E in Australia the motherreturned to live with the father and the childin the paternalgrandmothers home in South Africa. Thereafter, apart from what Idescribed as holidays by the mother and onthe occasion when she travelled byagreement with the father to Australia for As birth, the father andmother lived with E,and after As birth, lived with both children in hismothers home in South Africa. The father was a full-time studentwhilstthe mother was able to devote herself to the care of the children on a full-timebasis. Although the mother is critical ofthe father, I am satisfied that hiscontributions must be viewed in that context. Thefather deposes to the following matters: That although ittook him a while to deal with the news that he was a father, afterprocessing the news and initial shock,I accepted that I was now a father andhad to do what was best for my little girl. [The mother] and I agreed that sheand [E] wouldreturn to South Africa immediately and that we would live togetheras a family, with my mother ... in her home. Accordingly,[the mother] and [E] return to South Africa in about August 2011 and she and thechildren (sic) moved in with my motherand me and we lived together as a family.The relationship between [the mother] and myself was loving and supportive andwe wereboth proud parents of our beautiful little girl, [E]. Myparents supported us financially, and [the mother] had the luxury of being astayat-home mother. I am an involvedfather, but my studies take up agreat deal of time. I am young and am committed to completing all my intendedstudies in order tobe able to make a career in the future in my chosen field... That heparticipated in the daily upbringing of the children in the following ways,albeit that the list is not exhaustive: Ihave been involved in all major decisions regarding the minor childrensupbringing; I love and support both children unconditionally and providefor their emotional and intellectual needs, along withthe [mother]; I have provided, through my parents, for the childrensphysical and emotional security. They live in a beautifulhome and want fornothing. They feel safe in our home and we have provided them with a stablefamily environment in which they alsohad the luxury of having [the mother] be astay-at-home mother (although [the mother] will have to at some point, as ayoung andcapable person, start working and earning an income); I come home from university if I do not have lectures in theafternoon to have lunch with

[the mother] and the children; I spend time with the children in the late afternoon playingwith them or sitting with them; I spend time with the children teaching them about music. Ihave an electric drum set, a guitar and an electric pianoset up in my study andI play the minor children songs or encourage them to learn to play. [E] inparticular loves this activityand both children have shown an interest inmusic; [The mother] and I agreed that the minor children should growup being able to speak multiple languages, and apartfrom English and Afrikaans,should speak Italian and Greek. My mother, who is Greek, speaks to the minorchildren in Greek with myencouragement and participation. My father, who isItalian, speak Italian to the minor children, with my encouragement andparticipation;and I sat with [the mother] when she bathed the minor children. Ialso often entertained [E] while she was in the bath,as she is a little olderalready and allowed some extra play time in the bath; Inresponse to the mothers affidavit filed 25 July 2014 in which she wascritical of his lack of involvement, the father deposesas follows: I deny that Ihad little to no involvement in [Es] care, or that my mother or [mysister] spoke to me about my responsibilitiesin respect of [E] during thistime. Later on, after [As] birth, they did talk to me about making moretime for [the mother]and the minor children; I specificallymake mention that [E] loved coming to wake me up in the morning. We played alittle game issue would hop onto the bedand tickle me and kiss me while I wassnoozing or pretending to sleep, waiting for her next littleattack. [E] wouldrun in and out of my room every 5 or 10 minutesin a playful mood; and While I denythat [the mother] single-handedly raised the children, theintention of my paragraph was to speak to the long term future and benefits ofmy studies to us asa family. I cannot easily take time off my studies to be athome while I am young, as this would impact my and therefore ourchildrensfuture, in particular, my ability adequately (sic) to cater fortheir financial needs. Thefather concedes that his mother and sister did talk to him about making moretime for the mother and the children following Asbirth. The fact thatthey did so however does not lead me to conclude that he was not contributing orattempting to contribute ingood faith to the childrens upbringing. Tothe contrary, the fathers concession in these circumstances tends to lendweight to his evidence that he did so contribute. Thefather is a full-time student and during the relationship the mother was thechildrens primary caregiver. The fact thatthe father was not in

aposition to be as involved in the childrens care as the mother does notmean that he was not contributingnor attempting to contribute in good faith,having regard to those circumstances. It cannot be that because a parent iseither workingor studying that they are therefore not contributing orattempting to contribute in good faith to their childrens upbringing.Theamount that they can contribute to the day-to-day care is of necessity limitedby the time that they may have available. A parentsinvolvement in theirchildrens day-to-day activities is not, in my view, the only relevantcontribution that a parent canmake. That a parent is studying so as to obtainemployment in the future, or is in employment, is arguably also a relevantcontribution. Iagree with counsel for the State Central Authority that the Court needs to lookat the totality of the evidence. This includes themessages passing between thefather and the mother after she arrived in Australia, as follows: Mother:Ive been thinking a lot ... about our situation and what I keep tellingmyself is that I want u (sic) to be happy andthe kids to be happy and honestlyI think you would be happier with out (sic) me around! I dont know whatto do because Icant take [E] and [a] (sic) away from you thatisnt fair at all, also I dont think I can keep going the wayweare with us fighting all the time its not healthy and as strong as I maymake myself look Im very close to breakingpoint and cant breakfor [E] and [as] (sic) sake! I also cant live with never havingmoney its actuallymaking me depressed like now I have R 2000 for themonth and for the kids Xmas! And I feel bad to ask your mum to ask your dadthatsnot right! I am going to look into my options here of working andthe kids! X[3 December 2013 at 10.25] Mother: I agreewith what u (sic) are saying and I obviously think that for me and u (sic) to betogether is the best but yeah weboth need to work on ourselves!!4 December 2013at 7.28] In response tothe father stating: I just asked if you (sic) coming back becauseyouve completely ignored me since youleft. I didnt argue with youat all. The mother replied ... Ive been trying to give uspace![11.12.2013 at 2.46] Mother: But Iguess this has to stop Im sick of never know where we stand with eachother and I act stand offish because Ithink u (sic) are! [11 December 2013 at2.51] Mother:Its nice to have family around all the time but I could never take thekids away from you and at the end of the dayyour (sic) right that me and youare a good pair because we agree with each other on a lot of the same thingswhen it comes to thekids [11 December 2013 at 2.55] Mother: Anyways(sic) I dont want

to argue about this while Im here! Maybe well(sic) get it right when I come back!X 11 December 2013 at 12.49. Inmy view, these messages are consistent with both an ongoing relationship, albeitthat it is clear there had been problems in thatrelationship, and anacknowledgement by the mother of the importance of the father in thechildrens lives. The inference Idraw from the mothersacknowledgement of the fathers role in the childrens lives, albeitthat it was not unconditionaland without reservations, is that notwithstandingthat she was critical of the level of his involvement, he was contributing orattemptingin good faith to contribute to the childrens upbringing. Inall of the circumstances based upon the totality of the evidence I am satisfiedthat the father has attempted in good faith tocontribute to thechildrens upbringing for a reasonable period. I am also satisfied thatthe father has, for a reasonableperiod, attempted in good faith to contributetowards the expenses in connection with the maintenance of the children. Thereis no dispute that following the mothers return to South Africa afterEs birth and until her departure for Australiaon 25 November 2013, thefather, the mother and the children lived in the paternal grandmothershome and were financiallysupported by both the paternal grandfather and thepaternal grandmother, who was herself supported by the paternal grandfather. Counselfor the mother submitted that, in those circumstances, it is not the father whohas contributed to the childrens supportbut rather the paternalgrandparents and that on that basis, as the matters to be considered in s21(1)(b) are conjunctive, the fatherhas not satisfied all of the necessarycriteria and has not acquired full parental responsibilities and rights. If thatinterpretationwere correct, as submitted by counsel for the State CentralAuthority, an impecunious unmarried father could never acquire parentalresponsibility and rights. Iam satisfied that this section of the Childrens Act does not require thecontribution to the childrens expenses tocome directly from thefathers own funds. Clearly, if it were not for the fathersrelationship with his parents theywould not have contributed to the expenses ofthese children. The fathers parents, and in particular his father, haveprovidedsupport for the father and either directly or indirectly as aconsequence of their relationship to the father they have providedsupport forthe mother and the children. The decision of Gabriel AJ in I v C lendssupport to this conclusion. Inall of the circumstances of this case, based upon the totality of the evidence,I am

satisfied that the father has acquired parentalresponsibilities and rightsfor the children. Section18 of the Childrens Act provides asfollows: (1) A person may have either full or specific parentalresponsibilities and rights in respect of a child. (2) The parental responsibilities and rights that a person may have inrespect of a child, include the responsibility and the right- (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child. (3) Subject to subsections (4) and (5), a parent or other person who acts asguardian of a child must- (a) administer and safeguard the child's property and property interests; (b) assist or represent the child in administrative, contractual and otherlegal matters; or (c) give or refuse any consent required by law in respect of the child,including- (i) consent to the child's marriage; (ii) consent to the child's adoption; (iii) consent to the child's departure or removal from the Republic; (iv) consent to the child's application for a passport; and (v) consent to the alienation or encumbrance of any immovable property of thechild. Thefather, having acquired parental responsibilities and rights which include theright to act as guardian of the child, must giveor refuse any consent requiredby law in respect of the childs departure or removal from South Africa,giving the father theright to determine that childs place of residence.I am satisfied that in those circumstances the father has rights of custodyforthe purposes of regulation 16. Havingregard to the totality of the evidence I am also satisfied on the balance ofprobabilities that the father was exercising rightsof custody at the time themother determined not to return to South Africa with the children. I have hadparticular regard to thefact that when the mother left South Africa on 25November 2013, with the fathers knowledge and consent, it was with theclear and undisputed intention that she would return to South Africa on 15January 2014. Themother is critical of the fathers failure to contact the children between11 December 2013 and 26 December 2013. However,it is equally the case that themother made no attempt to contact the father or to facilitate any Skype contactbetween the fatherand the children during this period. This lack of contactbetween the father and the children during this period does not in my viewdemonstrate that the father was not exercising rights of custody. It is clearfrom the various messages from the father both priorto 11 December 2013 andafter 26 December 2013 that, apart from this period of

approximately two weeks,the father has consistentlyendeavoured to maintain his relationship with thechildren using Skype, notwithstanding what he suggests is the motherslackof co-operation. In all of the circumstances I am satisfied that thefather was exercising rights of custody in November 2013 whenthe mother leftfor Australia, that he would have continued to exercise his rights of custodyhad the mother returned to South Africawith the children as planned, and thathe has continued to exercise those rights whilst the mother has remained inAustralia withthe children. Iam satisfied that pursuant to regulation 16(1A) of the Regulations that thechildren who are both under 16, were habitually residentin South Africaimmediately prior to their retention in Australia, that the father had rights ofcustody which were being exercisedor would have been exercised but for themother retaining the children in Australia, and that the childrensretention in Australiawas in breach of the fathers rights of custody. Iam satisfied that the State Central Authority has discharged the onus itbearsand established that the children were wrongfully retained in Australia. ACQUIESENCE Itis the mothers case that the father agreed to her and the childrenremaining in Australia and that based upon his acquiescencethis Courtmay and should exercise its discretion not to return the childrento South Africa. Themother, as the person opposing the childrens return to South Africa incircumstances where the Court has found that thechildren were wrongfullyretained in Australia, bears the onus of establishing that the father did soacquiesce to the children remainingin Australia. Themother relies in support of her case with respect to the fathers allegedacquiescence upon messages sent to her by thefather via WhatsApp. Inparticular, she relies upon the message sent by the father at 02:47 on 11December 2013, in which he saidas follows: And the only message youve sent me is one about finding a job inAustralia. You also asked for money and I made a plan anddidnt even hearanything from you about it... Not even a thank you It just aggravates me thatall you can do is always shiftblame on to me... Not once, EVER have you lookedat your attitude with me that she never drop... Even tonight, your sour attitudealways there. Not even a how you (sic), and it just keeps getting worse withtime. Stay in Australia then if you (sic) so unhappywith me, raise the kids byyourself and get a job. Be independent, since thats what you want sobadly. Shealso relies upon the message sent by the father at 12:49 that same day, asfollows: I didnt want to take

any decisions on my own, so I discussed thesituation with my family knowing fully well they will notbe biased because asyou know, they adore you and the children, the conclusion was that they want meand you to be happy and of coursethe children, from what youve said, youand the children are happier in Australia. So maybe the best thing to do is foryouto stop tormenting yourself and just stay there and maybe in timewell live together again. Ill try to come there whenever (sic) Ihave a gap to see the kids as much as I can. Aspreviously referred to there was then a significant gap of time in the messagespassing between the parties. Counsel for the motherrelied upon the fact thatthe father had made no effort to contact the mother or the children between thedate of these WhatsAppmessages on 11 December 2013 and 26 December 2013 and inparticular that he failed to contact them on Christmas Day. Themother sent a message to the father at 05:14on 26 December 2013 asfollows: You didnt even message the kids for Christmas? Towhich the father replied at 15:07on the same date asfollows: You never bothered to answer my message. At every opportunity you use the kidsin any way you can. The fact that I miss them andhow much I love them seems notto concern you. You are set to prove what a bad father I am. So from now on thekids are not partof any discussion till we resolve our supposed relationshipYou will have to decide whether youre coming back and if so droppingallyour bullshit to undermine me all the time. Whats the point of you beinghere if youre always giving off messagesto the kids that Im anunfit father? Ive done the best I can under the circumstances. Maybe youshould ask some otherguy of 22 what he would have done for you to catch a wakeup. If its (sic). not enough for you dont come back (sic). Thisthingwith the kids is OVER. If you come back you will work on our relationship aswithout that the kids will suffer anyway justas they will if you dontcome back. What cant you see??? You will learn to communicate and nothold grudges if youreally care for anyone else other than yourself. Howpredictable that once again the only thing you can do is reprimand me aboutnotwishing merry Christmas to the kids. Why didnt you message me for me tosee them on Skype? Grow up if you want our kidsto grow up with both of us intheir lives, if not DONT COME BACK Itwas submitted by counsel for the State Central Authority that the mother had notestablished the necessary acquiescence to enliventhis Courts discretionnot to return the children to South Africa. Counsel referred me to the decisionof Murray J in

Police Commissioner of South Australia v Temple [1993] FamCA 63; (1993) FLC92-365 (Temples case) at [79,828], where her Honour,referring to the decision of the Court of Appeal in Re A & anor(minors)(abduction:acquiescence) [1992] Fam 106, said as follows: 1. In determining whether a parent could be said to haveacquiesced in the unlawful removal or retention of a child by the other parentwithin art 13 of the convention each case has to be considered on its ownspecial facts. 2. Acquiescence can be either: (a) (i) active acceptance signified either by express words of consent, inwhich case there has to be clear and unequivocal words,or (ii) by conduct and the other party has to believe that there has been anacceptance, or (iii) conduct inconsistent with an intention by the aggrieved parent toinsist on legal rights and consistent only with an acceptanceof the status quo,or (b) passive acquiescence inferred from silence and inactivity for asufficient period in circumstances where different conduct isto be expected onthe part of the aggrieved parent. 3. A parent cannot be said to have acquiesced in the unlawful removal orretention of a child within art 13 unless (a) he is aware of the other parent's act of removing or retaining the child, (b) is aware that the removal or retention was unlawful, and (c) is aware, at least in general terms, of his rights against the other parent, although it is not necessary that he should know the full or precise nature of his legal rights under the convention. 4. Since acquiescence is not a continuing state of mind, an acceptance of theunlawful removal or retention cannot be withdrawn onceknown to the other party,although an attempt to do so soon after the acceptance is notified to the otherparty will be relevantto the exercise of discretion to return thechild. Counselfor the mother referred me to the decision of Re H (minors) [1997] UKHL 12; [1998] AC 72(Re H) in which Lord BrowneWilkinson, with whom LordJauncey of Tullichettle, Lord Mustill, Lord Hoffman and Lord Clyde inallowingthe appeal agreed, said in summary at [90] as follows: ... in my view the applicable principles are as follows. (1) For the purposes ofarticle 13 of the Convention, the question whetherthe wronged parent hasacquiesced in the removal or retention of the child depends uponhis actual state of mind. AsNeile L.J. said in In re S. (Minors) (Abduction:Acquiescence) [1994] 1 F.L.R 819, 838: the court is primarilyconcerned, not with the question of the other parents perception of theapplicantsconduct, but with the question whether the applicantacquiesced in fact. (2) The subjective intention of the wronged parentisa

question of fact for the trial judge to determine in all the circumstances ofthe case, the burden of proof being on the abductingparent. (3) The trialjudge, in reaching his decision on that question of fact, will no doubt beinclined to attach more weight tothe contemporaneous words and actions of thewronged parent than to his bare assertions in evidence of his intention. Butthat isa question of the weight to be attached to evidence and is not aquestion of law. (4) There is only one exception. Whether wordsor actions ofthe wronged parent clearly and unequivocally show and have led the other parentto believe that the wronged parentis not asserting or going to assert his rightto the summary return of the child and are inconsistent with such return,justice requiresthat the wronged parent be held to haveacquiesced. Thedecision of the House of Lords in Re H has been followed by this Courtmost recently in State Central Authority & Hotzner (No 2) [2010]FamCA 1041. Counselfor the mother highlighted Murray Js point in Temples casethat acquiescence is not a continuing state of mind and theacceptance of the unlawful removal or retention cannotbe withdrawn onceknown to the other party. Inthis case, the messages passing between the mother and father appear to be partof an ongoing discussion or debate about the futureof their relationship ratherthan a definitive statement of intention. Although it is the fatherssubjective intention whichis the test, it would appear that not even the mothertook the statement that she should [s]tay in Australia then if you (sic)so unhappy with me as such, as a matter of minutes later she toldhim she could never take the kids away from you and at the end of the dayyour (sic)right that me and u (sic) are a good pair because we agree with eachother on a lot of the same things when it comes to the kids. Themother says the second message upon which she relies is significant, becausewhat she says was a clear and unambiguous statementby the father that she mayremain in Australia was made after the father said he had discussed the matterwith his family. Thismessage, as with the earlier message upon which the mother relies, is similarly,in my view, part of that ongoing discussionabout their relationship and I amnot satisfied on the evidence before me that either of the two messages uponwhich the mother reliesdemonstrate that the father had decided that he wouldnot require her to return with the children to South Africa. The factors whichlead me to this conclusion include the following: that althoughthere does not appear to be any communication between the father and motherbetween 11 December

2013 and 26 December2013 that ongoing debatecontinued; the tenor of thefathers first message on 26 December 2013 was not consistent with someonewho had decided to allow the childrento remain in Australia; significantly,the mother did not suggest in her response to that message that the father hadalready agreed to her remaining in Australia. To the contrary, she continued toargue her case for remaining in Australia. There are a number of examples ofthat ongoing debate: On 1 February 2014 at 2:02:I cant believe u (sic) are taking this that far but ok! To becompletely honestmy perfect picture would be for me to stay here for the nextthree years with u (sic) coming here as often as you can or I come theresay inJuly while your (sic) studying and then deciding what to do because its (sic)not that I dont want us to be a happyfamily its just at thisstage in both our lives the dynamics dont work!. It was not until her message at 00:26 on 3 February 2014, after thefather mentioned that he intended to seek legal advicethat the mother said:Are you not the one who said to stay when I first got here? Itsnot kidnapping ... Imdiscussing whats best for ourchildren! In the same message the mother also said If u (sic) honestlythink that I want to come back and be in the same houseas u after u (sic) havestrangled me twice over being here and the kids being happy and having constantlove around them I dontknow what to say dont u (sic) see whatyour (sic) doing is selfish! To which the father replied at 00:30 on 3 February 2014 sowhat you are saying is, you (sic) not coming back at all?In march you (sic)changing your tickets? make it clear and stop messing around, you telling me 110percent you are now living inAustralia? Thislast message, to which I have also referred earlier in these reasons, suggeststhat the mother did not tell the father that shehad cancelled the tickets forher return to South Africa with the children. The mother does not suggestotherwise. KayJ in Department of Health and Community Services, State Central Authority vCasse [1995] FamCA 71; (1995) FLC 92-629 said at [82,311] that in his Honours viewthere cannot be true acquiescence where the parties are in a state ofconfusionand emotional turmoil (as identified by StewartSmith LJ inRe: A (Abduction: Custody Rights) (1992) Fam 106 at 121). His Honours statement is pertinent to the facts in this case. Forthe father to be said to have acquiesced he must, at least in general terms,also be aware that the removal or retention of thechildren was unlawful and beaware of his rights with respect to the removal or retention of the children inAustralia

(see Director-General, Department of Families, Youth and CommunityCare v Thorpe (1997) FLC 92-785). Themother in this case has not demonstrated that at the time of the fathersalleged acquiescence that he knew, even in generalterms, that he might haveremedies with respect to the childrens wrongful retention in Australia.To the contrary, the fatherrefers for the first time to the possibility ofobtaining legal advice in his WhatsApp message to the mother at 01:20on 1February2014, when he said as follows: Unfortunately you making this an ugly situation this will stop (sic)...youcreated this situation and refuse to solve it, the childrenare not yours. In aweek and a half Im coming to Australia, Im sitting around thetable with you and your dad if thiscant be resolved. Im startinglegal procedures. At00:20 on 3 February 2014 he went on to say: What you (sic) doing is not right, you left on holiday not to go live. If youdont want to solve this civilly Im goingto take legal action,what youve done is kidnapping. Thefather deposes that he consulted his current solicitors on 31 March 2014. Hisevidence was not the subject of any challenge andI accept his evidence. Iam not satisfied on the balance of probabilities that the father had formed thesubjective intention to allow the mother and thechildren to remain in Australiaparticularly in circumstances where he did not have even a general understandingof his rights withrespect to the childrens return to South Africa. I amalso not satisfied that the messages generally, and in particular themessagesupon which the mother relied, in the context of all of the other evidence wouldhave led the mother to conclude that thefather would not assert his rights withrespect to the childrens return, INTOLERABLE SITUATION Counselfor the mother submitted that there is a grave risk that to return the childrento South Africa in this case would exposethe children to harm or otherwiseplace them in an intolerable situation. That being said, counsel for the motherfocussed primarilyupon the risk to the children of them being placed in anintolerable situation. Ascounsel for the mother submitted, there is authority for the proposition thatthe grave risk that the children may be placed inan intolerable situation mayarise as a result of a combination of factors, notwithstanding that thosefactors, if considered inisolation, would not amount to the children beingplaced in an intolerable situation. In the mothers summary of argumentandduring the submissions made by her counsel, the mother relied upon thefollowing matters which she said supported her case: that the mothercan only enter South Africa on a 90 day

visitors visa and that based uponher previous experience she wouldnot qualify for a more permanent visa as aresult of which the mother would be required to leave South Africa every 90 dayswithor without the children in order to renew her visa; that if themother and children return to South Africa it is unclear where they will liveand how they will be financially supported; that themothers 90 day visitors visa would not permit her to obtainemployment; that there is nosystem of social welfare in South Africa which would entitle her to a governmentpension or benefit; that the motherhas no entitlement to spousal maintenance from the father and, in circumstanceswhere the father earns no income,will not be entitled to any childsupport; that insofar asthe father deposes to support being provided by his father for the mother andthe children in South Africa, the paternalgrandfather has no legal obligationto provide that support; that thelitigation in South Africa is likely to take in excess of two years and themother is unable to obtain legal aid fundingin South Africa; and that the motherhas concerns for her safety living in Johannesburg and feels depressed andscared in South Africa. Regulation16(3)(b) was considered by the High Court in DP v Commonwealth CentralAuthority; JLM v Director- General, NSW Department of Community Services[2001] HCA 39; (2001) 206 CLR 401 (JLMs case). The majority(Gaudron, Gummow and Hayne JJ) said as follows: ...If it would expose the child to a grave risk of physical or psychological harm,or an intolerable situation, the discretion torefuse to make an order forreturn is enlivened. It is for the Australian Court to decide whether returnwould expose the child tothat risk. Of course it must be recalled that the onusof proof lies on the party opposing return. It will be for that party todemonstratea grave risk of exposure to harm... ...There may be many matters that bear upon the exercise of that discretion. Inparticular, there will be cases where, by mouldingthe conditions on whichreturn may occur, the discretion will properly be exercised by making an orderfor return on those conditions,notwithstanding that a case of grave risk mightotherwise have been established. ...The burden of proof is plainly imposed on the person who opposes return. Whatmust be established is clearly identified: thatthere is a grave risk that thereturn of the child would expose the child to certain types of harm or otherwiseplace the child inan intolerable situation. That requires someprediction, based on the evidence of what may happen if the child isreturned. In a case where

the person opposing return raises the exception, acourt cannot avoid making thatprediction by repeating that it is not for thecourts of the country to which or in which a child has been removed or retainedtoinquire into the best interests of the child. The exception requires courtsto make the kind of enquiry and prediction that willinevitably involve someconsideration of the interests of the child. Necessarilythere will seldom be any certainty about the prediction. It is essential,however, to observe that certainty is not required:what is required ispersuasion that there is a risk which warrants the qualitative description"grave". Leaving aside the referenceto "intolerable situation", and confiningattention to harm, the risk that is relevant is not limited to harm that willactuallyoccur, it extends to a risk that the return would expose thechild to harm. Becausewhat is to be established is a grave risk of exposure to future harm, itmay well be true to say that a court will not be persuaded of that without someclear and compellingevidence (38). The bare assertion, by the person opposingreturn, of fears for the child may well not be sufficient to persuade thecourtthat there is a real risk of exposure to harm. ... Thatis not to say, however, that reg 16(3)(b) will find frequent application. It iswell-nigh inevitable that a child, taken fromone country to another without theagreement of one parent, will suffer disruption, uncertainty and anxiety. Thatdisruption, uncertaintyand anxiety will occur, and may well be magnified, byhaving to return to the country of habitual residence. Regulation 16(3)(b)andArt 13(b) of the Convention intend to refer to more than this kind of resultwhen they speak of a grave risk to the child ofexposure to physical orpsychological harm on return. [Emphasis in original] Itis not in dispute that the mother has been primarily responsible for the care ofthe children. Whilst in those circumstances thechildren might arguably beplaced in an intolerable situation were the mother not to return to South Africawith them, there is nosuggestion in this case that if an order for return ismade the mother will not or should not accompany the children, subject toherobtaining the necessary visa to enable her to do so. It follows therefore thatthe return of the children to South Africa mustbe viewed in the context oftheir return in the company of the mother and the proposals made by the fatherfor her return with thechildren. Albeitthat it was conceded that the mother bears the onus of establishing that thereis a grave risk that the children will be placedin an intolerable situation ifthey were to return to South Africa, it was

submitted by counsel for the motherthat with respectto the mothers visa, it was incumbent on the StateCentral Authority, acting as an honest broker, to investigateandassist the Court with information in relation to the mothers immigrationstatus in South Africa. Counselfor the mother referred me to a number of cases which he said supported thissubmission. The first of those cases was In Re F [2006] FamCA 685(In Re F). In that case, the Full Court said at paragraph80 as follows: The State Central Authority is charged with the obligation to do anything thatis necessary to enable the performance of the obligationsof Australia under theConvention (Regulation 5(1)(a)). In our view not only does that obligationextend to the requirement to facilitatethe return of a child where such anorder has been made, but it also requires the Central Authority to activelypartake in proceedingsbrought by it under the Regulations and to assist theCourt in determining the proper application of the Regulations to the factsofany one case. InIn Re F the criticism of the State Central Authority related to what wasdescribed as the State Central Authoritys failure to takeaction when itbecame clear that the mother was not going to honour her promises to return thechild voluntarily to the United Statesand its failure to make submissions withrespect to the application of the Regulations. Counselfor the mother also relied upon the comments of both Nicholson CJ and Kay J inLaing v Central Authority (1999) FLC 92849, which were lateradopted by the Full Court in P v Commonwealth Central Authority [2000]FamCA 461. Whilstit may be incumbent upon the State Centrals Authority to act as anhonest broker, that does not, in myview, and as submitted bycounsel for the State Central Authority, shift the burden of proof from themother to the State CentralAuthority. Althoughthere are cases in which a parent who has the care of the children cannot returnto the childrens country of habitualresidence and the Court has heldthat this presents a grave risk to the children of being exposed to anintolerable situation, theevidence in this case does not suggest that this issuch a case. RETURN CONDITIONS Themother in this case deposes as follows: If the children are made to return to South Africa, without question I would gowith them. However, I may only be able to remainin South Africa on a 3 monthvisa. I am well aware that the Father would not be capable of caring for them onhis own. He has hadlittle to no involvement in their care and upbringing todate. If I was not there, this responsibility would most certainly fallupon[T]. [T] spends 6

months of each year in Greece. In her absence, the care of thechildren would be left to domestic workers.Emotionally, the children need theirmother and would not cope without me. However,the mother also deposes that [e]ach time [E] and I travelled toSouth Africa after her birth, we did so on 90 day visitors visas only. Wehad toleave South Africa after 90 days for at least 24 hours before we couldreturn to the country. Each time we left South Africa, both[E] and I had to paya $200 fee for overstaying the period of our visas.In 2012 the mother obtained a Relative Permit for both herself and E, whichshe says was effective for the period from 21 May 2012to 20 May 2014. Althoughthe mother deposes to her belief that as she is no longer living with the fathershe would not be able to obtain a RelativePermit, there is no evidence that shehas applied for such a permit or for that matter any other visa. I am satisfiedthat it isreasonable to infer on the basis of the evidence before me that themother will be able to obtain at least a three month visitorsvisa andthat there is some prospect of that visa being extended thereafter, subject toher leaving South Africa for a period of24 hours. Any order for thechildrens return can be made conditional upon the mother obtaining avisa. Itis open to this Court to impose such conditions upon the father as thecourt considers to be appropriate to give effectto the Convention perDe L v Director General, NSW Department of Community Services (1996) 187CLR 640 and as described by Butler-Sloss LJ in C v C (Minor: Abduction:Rights of Custody Abroad) [1989] 2 All ER 465; [1989] 1 WLR 654 at 659to facilitate an easy and secure return home. This, as counselfor the State Central Authority conceded, would includea requirement that thefather make some financial provision for the mother albeit that it may be thathe has no legal obligationto support the mother in South Africa. Ifconditions are to be imposed they need to be, as described by the Full Court inMcDonald v Director-General, Department of Community Services NSW [2007] FamCA 1400; (2006)FLC 93-297 at [29]: ... clearly defined and capable of being objectively measured as to whether ornot the conditions have been fulfilled. The conditionsneed to be met before thereturn can take place. In the event they are not met, the order needs to containa mechanism that clearlyrecognises the return is no longer required to takeplace. All this needs to be done within a tight timetable to meet therequirementsof the Convention that is founded upon the concept that promptreturn to the place of habitual residence is appropriate to protecta child fromthe

harmful effects of its wrongful removal or retention. Counselfor the mother submitted that the mother would require ZAR 10,000 (South AfricanRand) per month (which he said was approximatelyAUD$1,000) for a period of 12months or until she obtained gainful employment, the provision of a motorvehicle and, as she wouldnot be eligible for legal aid, she would require alump sum payment of AUD$10,000 to meet her legal expenses in South Africa. Inhis affidavit sworn 29 April 2014 the father deposes that his family willprovide the mother with a vehicle and suitableaccommodation of her ownchoice at a reasonable cost, and personal maintenance for a period of 6months. In his affidavitsworn 4 August 2014 the father further deposesthat his father confirms that he will pay for a two bedroomed apartmentorcottage ... in an upmarket area in close proximity to my mothers home.My father will pay, inter alia, the childrensmedical and educationalcosts ... and provide a suitable vehicle to the [mother]. Thefather annexed what he said were examples of suitable accommodation, all insecure complexes, and vehicle options, which he saidwere similar to the vehiclethat the mother had used from time to time when she lived in South Africa. It isnot disputed that duringthe time the father and mother lived with the paternalgrandmother in her home the paternal grandfather paid the mother ZAR 5,000permonth and continued those payments until March 2014. Itwas submitted by counsel for the mother that the proposals made by the fatherare completely reliant upon the goodwill of the paternalgrandfather and thatthe mother will be left with the uncertainty of whether the arrangements thatare proposed will continue untilthis matter is finally determined one way oranother in South Africa. Ihave had regard to the fact that the father does not have any independentcapacity to make provision for the mother and the children,either inanticipation of the mother and childrens return to South Africa or whilstthey may be living in South Africa, eitherbecause he has no obligation tosupport the mother and/or no capacity to support the children. Although I cannotimpose conditionsupon the father or for that matter the paternal grandfatherthat will make provision for the mother and the children for an indefiniteperiod, I am satisfied that I can make any return order subject to conditionswhich will provide the mother with what is frequentlydescribed as a softlanding, thereby ameliorating any risk to the children upon their returnto South Africa. Insofaras the mother submits that the parenting proceedings in South Africa

may take upto two years and relies upon the evidenceof Mr B, I note that he makes noreference in his affidavit, unlike Ms W, to s 6(4)(b) of theChildrens Act which provides that [a] delay in any action ordecision to be taken must be avoided asfar as possible. I am satisfiedthat I can reasonably presume, in the absence of evidence to the contrary, thatthe SouthAfrican system of justice will have regard to the best interests ofthe children in this case and, if it is considered to be sufficientlyurgent,that that court is likely to allocate an early hearing date. Ms W opined thatthe matter is sufficiently urgent tojustify the allocation of an urgentdate for hearing, even with evidence and any delay in the commencement of theproceedings shouldbe no longer than a few months. Thereis no evidence other than the mothers assertions, which are disputed bythe father, as to her safety concerns in SouthAfrica or the fact that she feelsdepressed and scared in South Africa and how that might impact upon thechildren. I do not doubtthat the mother faces with some trepidation thepossibility of a return to South Africa and the disruption, uncertaintyandanxiety that the return is likely to cause to both herself andthe children. However, as the High Court said in JLMs case,this is well-nigh inevitable and does not lead me toconclude that an order requiring the childrens return to South Africawould present a grave risk tothese children of exposure to harm or that thatthey would be otherwise placed in an intolerable situation. Iam satisfied, on the basis of the evidence before me, that it is possible inthis case to mould conditions which will sufficientlymoderate any risk to thechildren in the event of their return to South Africa. I am satisfied that inorder to facilitate the childrensreturn to South Africa the mother willfirstly need a visa to enable her to travel to South Africa with the children.The motherwill also need the father to meet the costs of travel to South Africafor herself and the children, the necessary finances to enableher to findsuitable accommodation, a motor vehicle for her use upon her return, andprovision for her day-to-day living expenses. Theevidence before me does not really assist me to assess how much the mother andchildren might require to live, however, doingthe best I can and having regardto the fact that the paternal grandfather previously paid the mother ZAR 5,000per month in circumstanceswhere she and the children were living with thepaternal grandmother, I am satisfied that the father should pay the ZAR 10,000permonth (approximately AUD$1,032 per month based upon the Reserve Bank

ofAustralia exchange rate as at 13 October 2014) sought bythe mother. Basedupon the examples of accommodation annexed to the fathers affidavit, thelikely cost of that accommodation is betweenZAR 12,000 and ZAR 17,000 per month(approximately AUD$1,238 to AUD$1,754 per month based upon the Reserve Bank ofAustralia exchangerate as at 13 October 2014). Again doing the best I can onthe evidence, which is limited to the examples of the rental propertiesprovidedby the father, and given that it is the father who has established the range andthat that range is not large in real terms,I propose to order that the fatherprovide the mother with sufficient funds to rent a property at the upper end ofthat range. Mostof the rental properties given as examples by the fatherrequire a bond or deposit of what appears to be the equivalent of onemonthsrent and I propose to add this to the amount to be paid by thefather prior to the mothers departure. Althoughcounsel for the mother proposed that the father should make provision for themother and the children for a period of 12months, the purpose of the orders Ipropose to make is to facilitate the childrens return to South Africarather than to makeorders governing the arrangements for their care and supporton an ongoing basis. However, in circumstances where the father appearsto haveno capacity to pay child support even if he were ordered to do so, and in lightof the fathers own proposal, I amsatisfied that, in order to provide themother and the children with some financial security upon their return to SouthAfrica, thefather should be required to make financial provision for the wifeand the children for a period of six months from the date of theirreturn toSouth Africa. Although the fathers proposal was not based upon a lump sumpayment, I am satisfied that in orderto ensure that the conditions for thereturn are met the father should be required to make a lump sum payment priorto, and as acondition of, the childrens return to South Africa. Althoughthe mother proposed that the father should provide for her support for a periodof 12 months or until she obtained gainfulemployment, the difficulty with anorder dependent upon the mother obtaining employment is that there is noevidence before me inrelation to what the mother would be likely to earn,assuming she did obtain employment, and whether her income would be sufficientto support herself and the children. Onthat basis I propose to make orders requiring the father to pay a lump sum tothe mother which will allow her to re-establish herselfin South Africa for aperiod of six months

irrespective of whether she does or does not obtain gainfulemployment. The total sumpayable by the father prior to the mothersreturn to South Africa with the children is ZAR 179,000 (AUD$18,473 based uponthe Reserve Bank of Australia exchange rate of 9.6900 ZAR/1 AUD$ as at 13October 2014). This is made up of ZAR 10,000 per monthfor six months, rent ofZAR 17,000 for the same period, and the sum of ZAR 17,000 for any bond themother will likely be requiredto pay, making a total of ZAR 179,000. Thefather deposed that the paternal grandfather will purchase a suitable vehiclefor the mothers use in South Africa. Thefather annexed three possiblemotor vehicle options which ranged in value from ZAR 204,900 to ZAR 332,900(AUD$21,146 and AUD$34,355based upon the Reserve Bank of Australia exchangerate as at 13 October 2014). Onthe basis of the fathers evidence I also propose to require him toprovide the mother with a choice of three vehicles withinthe price range he hasnominated, for the mother to then nominate one of the vehicles, and the fatherto then provide proof to themother of the purchase of the vehicle of her choiceprior to her departure for South Africa with the children. Any failure on thepart of the father to subsequently make that vehicle, once purchased, availableto the mother would in all of the circumstances belikely to reflect poorly uponthe father in light of his evidence to this Court. Counselfor the mother also submitted that as there is no provision for legal aid inSouth Africa the father should be required topay a lump sum of AUD$10,000 tothe mother to enable her to pay her costs of the anticipated proceedings inSouth Africa. Thefigure of AUD$10,000 is based upon the estimate provided by Mr B. There is noevidence as to how he calculates this figure and,significantly, I note that itis based upon his evidence that the matter would likely take in excess of twoyears. I am not satisfiedfirstly that the proceedings will necessarily takethat long or would cost AUD$10,000 as he deposes. I have already referred to theevidence of Ms W that the South African courts may consider it appropriate toallocate the matter an early hearing date. Thereis also no evidence before me as to the availability or lack of availability oflegal aid in South Africa. It is the mothersevidence that, although shewas initially represented by legal aid in the proceedings she instituted in theFederal Circuit Court,her grant of legal aid was terminated withoutexplanation. In all of the circumstances I do not propose to make the ordersoughtby the mother with respect to the provision of a lump sum to meet herlegal costs.

Iam satisfied that providing the mother is able to obtain a visa for no less thanthree months and that the father satisfies theterms of the orders that Ipropose to make, that the children will not be exposed to a grave risk of harmor placed in an intolerablesituation if they to return to South Africa. Inthose circumstances, and having regard to the objectives of the Convention, Iproposeto order the childrens return to South Africa. If themothers application for a visa is not successful or the fatherdoes notmeet the conditions I impose, the order for the childrens return willlapse and the application for the childrensreturn shall be discharged. I certify that the preceding one hundred and forty-eight(148) paragraphs are a true copy of the reasons for judgment of the HonourableJustice Macmillan delivered 14 October 2014. Associate: Date: 14 October 2014 AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/868.html