FAMILY LAW CHILDREN InterimParenting Application filed while children were visiting Australia onholiday where children ordinarily resident in New Zealand bestinterests of child resident in another country Family Law Act 1975 (Cth) ss 63, 67ZC,68B De L v Director-General, New South WalesDepartment of Community Services (1996) 187 CLR 640 Pascarl &Oxley (2013) FLC 93-536 Zanda & Zanda [2014] FamCAFC173 ZP v PS (1994) 181 CLR 639 APPLICANT: Mr Vaziri RESPONDENT: Ms Maddison FILENUMBER: PAC 4807 of 2014 DATE DELIVERED: 21 October 2014 PLACE DELIVERED: Parramatta PLACE HEARD: Parramatta JUDGMENT OF: Hannam J HEARING DATE: 20 October 2014 REPRESENTATION SELF-REPRESENTEDLITIGANT: Mr Vaziri COUNSEL FOR THERESPONDENT: SOLICITOR FOR THE RESPONDENT: Ms Cantrall Ms Boldiston of Bankstown LegalAid ORDERS (1) Thatpursuant to s 67ZC of the Family Law Act 1975 the children of therelationship, namely: (a) S; and (b) T; born... December 2000 (the children) are to be returned to NewZealand. (2) That by way of implementation of Order (1), the childrens names areto be removed from the Airport Watchlist in forceat all points of arrival anddeparture in the Commonwealth of Australia forthwith. (3) That the mother is to provide the following Undertaking to theCourt: (a) That I willcooperate with the orderly conduct of the proceedings including returning toAustralia with the children for the purposesof the preparation of a familyreport. (4) That the father is to provide the following Undertaking to theCourt: (a) That I willpay for the costs associated with the mother and the childrens return toAustralia in the event that a familyreport is ordered (5) Fathers application for Interim Orders isdismissed. NOTATION (6) The mother intends to take steps to commence familylaw proceedings in New Zealand (including attending to any necessary pre-actionprocedures) within 28 days of the date of these Orders. IT IS NOTED that publication of this judgment by thisCourt under the pseudonym Vaziri and Maddison has been approved by theChief Justice pursuant to s 121(9)(g) of the Family Law Act 1975(Cth). FAMILY COURT OF AUSTRALIA AT PARRAMATTA FILE NUMBER:PAC 4807 of 2014 Mr Vaziri Applicant And Ms Maddison Respondent REASONS FOR JUDGMENT INTRODUCTION Sand T are twin girls who are almost 14. They have been living in New Zealandfor the last five years since their parents separatedand for lengthy periodsbefore that time with their mother. Theycame to Australia with their

mother, approximately three weeks ago to spend sometime with their father during the school holidays. Without any prior notice thefather cancelled the childrens return air tickets and their names havebeen placed on the airportwatch list, which means that they cannot be removedfrom Australia. Ataround the same time as cancelling the air tickets, the father brought aparenting application, including seeking final ordersthat he and his wifeexercise joint parental responsibility in relation to the children, that thechildren live with him and spendtime with their mother each alternate weekend,half the school holidays and on special days, and that the parties be restrainedfromremoving the children from Australia for five years. He seeks interimorders that the childrens names be placed on the airportwatch list andthat the parties be restrained from removing them from Australia and seeks theappointment of an Independent ChildrensLawyer. Essentially, the fatherwishes for the parenting proceedings to proceed in the usual manner and for thechildren to remainin Australia until the proceedings are complete. Themothers position is that the fathers application is essentially aninternational relocation case, which should beheard in New Zealand as that isthe childrens habitable residence and she seeks for his application to besummarily dismissed. The mother also seeks an order that the children bereturned to New Zealand and that their names be removed from the watchlist. BACKGROUND Virtuallyall of the background to this matter is not in dispute between the parties. Theparents, who were never married, commenceda relationship and commenced livingtogether in 2000. Their twin girls were born in December 2000 and throughoutthe period theparents were together the mother and the children lived in NewZealand for lengthy periods. The father says that there were threeoccasionswhere the mother and children lived in New Zealand for at least six monthswhilst the mother says there were two occasionswhere she and the children livedin New Zealand for 12 to 13 months. Thereis no dispute that when the parties separated in 2009, which the mother saysoccurred on 1 May, the mother returned with thechildren to New Zealand wherethey have lived ever since. Although the father says that the mother relocatedthe children to NewZealand without his consent and initially told him it wasonly for a holiday, he does not dispute that the children have lived withtheirmother in New Zealand for the last five years, and that they have only visitedAustralia on two occasions. He also agreesthat he has

taken no steps untilvery recently to obtain any parenting orders. Thetwo visits to Australia were both paid for by the father and were for thepurposes of the children spending time with him. Thefirst occasion was inabout December 2011 when the mother and children returned to Australia for 14days. The second occasion, whichcommenced approximately three weeks ago wasalso to be a visit for two weeks but the father cancelled the return tickets forthechildren (but not for the mother). Atthe same time, the father commenced these proceedings, by filing an InitiatingApplication on 9 October 2014 and, as he soughtan order that the parties berestrained from removing the children from Australia and that their names beplaced on the airport watchlist prior to the hearing, the mother and childrenhave effectively remained stranded in Australia. Themother says, and it appears that the father does not dispute, that she and thechildren have been relying upon a friend for accommodationand money for foodand day-to-day living expenses during the time that they have remained inAustralia. The pastor of the motherschurch in New Zealand has alsogiven her money so that she can pay for return flights to New Zealand. She hasno other savings andhas exhausted her holiday pay. She is concerned that shemay lose her job if she does not return to New Zealand immediately andthat thechildren were also to have commenced school in New Zealand over a week ago. Thefather has not provided any financial support for the children or the motherduring the additional time they have been requiredto remain in Australia. Sincethe time of their return to living in New Zealand in May 2009 the children haveconsistently lived in City B where they areattending school and progressingsatisfactorily academically and socially. They live with their mother in athree bedroom house,across the road from a church where the mother works andthe children are involved in faith-based and social activities. There areanumber of close family members who live nearby and the children spend a greatdeal of time with the extended maternal family. They also participate inextracurricular activities such as sport and activities associated with theschool and church and have aclose knit local friendship group. THE LAW TheFull Court of the Family Court in Zanda & Zanda [2014] FamCAFC 173recently considered the authorities relating to cases in which children, who areordinarily resident in a foreign jurisdiction, arethe subject of parentingproceedings in Australia. At [106], the Court said that the correct test fordetermination of forum, whendealing with

childrens issues has not beenin doubt since ZP v PS (1994) 181 CLR 639. In that case at 660 Brennanand Dawson JJ said: Once the jurisdiction conferred by s 63 ofthe Family Law Act 1975 on the Family Court in custody proceedingsis effectively invoked and there is no doubt that both parties invokedthat jurisdictionin this case s 64(1)(a) of the Act requires thatthe Court regard the welfare of the child as the paramount considerationinexercising the Courts power. Section 64(1)(a) makes no exception in thecase of proceedings relating to the custody ofthe child ordinarily resident inanother country, even if the child has been abducted from that country andbrought to Australiain breach of an order of court of competent jurisdiction inthe other country. Thecourt in Zanda also referred to another recent Full Court decision inPascarl & Oxley (2013) FLC 93-536, which also reiterated that thedoctrine of forum non conveniens is not applicable where the child iswithin the jurisdiction. Instead, in exercising the jurisdiction which has beenconferred uponit, the Family Court must determine what is in the best interestsof the child. Later in that case, the Full Court said [at 86]: ...the principles to be applied in parenting cases which involve a foreign elementwill be determined by the nature of the applicationbefore the court. Where anapplication is made under provisions of the Act which prescribe the bestinterests test, whether or nota child is within the jurisdiction, then it isthat test which will apply. Thefathers interim application is for an injunction restraining the parentsfrom removing the children from Australia, anorder that the children residewith him and an order appointing an Independent Childrens Lawyer in theproceedings. Theinjunctions in relation to the children may be made by a court as itconsiders appropriate for the welfare of the childunder s 68B ofthe Act. The order with respect to residence is made under a provision whichprescribes the best interests test. Themother is seeking an order that she be permitted to remove the children fromAustralia to New Zealand and that the fathersInitiating Application bedismissed. Sofar as the first order is sought by the mother is concerned, that the childrenbe returned to New Zealand, the mother seeks a summaryorder made pursuant tothe welfare power under s 67ZC, in respect of which the best interest testis also prescribed. Section67ZC gives the Court broad powers to make orders relating to thewelfare of children. The mothers application for a summary orderisbased on this power. It is submitted on behalf of the mother that such an orderwill be in the best interests of

the childrenas determined by theconsiderations relating to best interests in the Act. In addition, it iscontended on behalf of the motherthat New Zealand is the appropriate forum formatters relating to parenting of these children to be determined and that theCourtcould also be confident that the domestic laws of New Zealand will dealwith matters relating to parenting in a proper fashion. Sofar as I understand the fathers case, he is concerned that there are somerisks of harm to the children if they are returnedto New Zealand and also hasconcerns about his own capacity to participate in proceedings in New Zealand forreasons related to hisown criminal history. Are the orders sought in the childrens bestinterests? Thecentral question for me to determine is, whether the orders sought by the motheror the father are in the childrens bestinterests. Primary Considerations Thefirst of the primary considerations is the benefit to the children of having ameaningful relationship with both of their parents. As I understand his case,the father attaches particular weight to this consideration as he wants to havea continued involvementin looking after (his) children. Havingregard to the meaning in the authorities of meaningfulrelationshipas a relationship which is important or significant, it isdifficult to conclude that the children have, since their parents hadseparated,had the benefit of having a meaningful relationship with their father. Theyhave only seen him on two occasions for amatter of weeks over a five-yearperiod. It is clear that if the children are to have the benefit of ameaningful relationship withboth of their parents, that appropriate parentingorders need to be made by an appropriate authority. It may be that this couldbe achieved through the fathers Initiating Application in the FamilyCourt, though it is more likely that it would be moreappropriately dealt withby the Court in New Zealand where the children are habitually resident. Iam of the view that allowing the children to return to New Zealand, so long asappropriate safeguards are in place so that the fathersproceedings arenot jeopardised, that the childrens return to New Zealand will not denythem the benefit of having a meaningfulrelationship with both of the parents. The mother has indicated that she will undertake to cooperate with the orderlyconduct ofthe proceedings, which would include returning to Australia with thechildren for the purposes of the preparation of a family report,if required.The father has indicated that he will undertake to pay for the costs associatedwith the mother and the childrensreturn to Australia for the preparationof a family report. Further, the

mother has indicated that she intendsinitiating proceedingsin New Zealand in relation to parenting in the event thatthe children are returned. Underthe fathers proposal that the children live with him until theproceedings are determined, the children would experiencea meaningfulrelationship with their father, but there is a real risk that there relationshipwith their mother who has been theirprimary care-giver may be jeopardised. Themothers life is completely based in New Zealand, including her home andher employmentand she has no current capacity to support herself in Sydney. Realistically, the proceedings may take many months or longer to completeandthe mother may not be in the position to remain in Australia. Thereis no basis upon which I could conclude that it would be in the childrensbest interest for them to be severed from thebenefit of a meaningfulrelationship with the mother who has been primarily responsible for their carethroughout their life. Thesecond primary consideration of the need to protect children from physical orpsychological harm, from being subjected to or exposedto abuse, neglect orfamily violence does not arise in this matter. There is no allegation orevidence that if the children arereturned to New Zealand they will be exposedto harm of this type or that they will be exposed to it if they remain inAustraliaas proposed by the father. Additional Considerations Sofar as the additional considerations are concerned, the views of the childrenare unknown. Very little is known about the relationshipof the children withtheir father, though he certainly expresses what appears to be a genuine desireto develop a relationship withthem. It is beyond dispute that thechildrens primary carer throughout their life and particularly in thelast five yearshas been the mother. There is also evidence, which is notcontradicted, that the children have a close relationship with many membersofthe maternal family in New Zealand. Inthe last five years the mother alone has made all of the decisions about majorlong-term issues in relation to the children. Thefather has certainly spentsome limited time with the children and there is undisputed evidence that he hasprovided some financialsupport for them including, in particular, funding theirtrips to Australia. Themost critical of the additional considerations relating to the best interests inthis matter is the likely effect of any changesin the childrenscircumstances as a result of the orders proposed by the father. If the orderssought by the mother are made,the childrens circumstances will notchange and there is no reason to suggest that this would have any

deleteriouseffectupon them. If the children were in effect required to remain inAustralia while the proceedings are ongoing, this would be a massivedisruptionto their home life, school life, sporting and social life and extended networkof friends and family. Thefather gives no evidence of the practical arrangements he proposes and accordingto his affidavit in recent times his own personalcircumstances have changedsignificantly and it appears he proposes that the children live with him at thepaternal grandparentshome. There is no evidence of any arrangements hehas made with respect to schooling or to support the likely problems that wouldarise with such a sudden transition. In addition, as previously referred to, itcannot be guaranteed that the mother will be ableto remain in Australia herselfand separation from the mother where she has been the primary caregiver wouldundoubtedly have a significantimpact upon these children. Anothersignificant consideration in this matter related to the best interests is thecapacity of the father to provide for the needsof the children, including theemotional and intellectual needs. The way in which the father brought thisapplication, in the contextwhere he paid for the children to spend some timewith him in Australia, and cancelled their return tickets without any priornoticeor discussion with the mother and bringing an application for thechildren to live with him when he has seen them on only two occasionsin fiveyears, shows that he has limited capacity to understand the impact of hisactions and proposals upon the children. Itis the fathers case that the mother has shown an incapacity to keep thechildren safe and relates an incident where thegirls were approached by amember of the church community in New Zealand to participate in a photographicsession in which the girlswere to be naked or near naked. However, it is commonground that this information was provided to him by the mother herself, onthebasis that as the childrens father, he needed to know about the incident.Further, on the mothers version, sheimmediately took appropriateprotective action in reporting the incident to police. The mother also saysthat the alleged offenderhas been dismissed from the mothers Church, andthat there is a protection order in place so that he is not able to come nearthe church or their home and that she has had no further communication with theman in question. Inmy view, the uncontested evidence about the childrens progress, includingacademically and socially and about the childrensliving circumstances inNew Zealand, indicates that the mother is

capable of providing for the needs ofthe children. Themother has demonstrated that she has an appropriate attitude to the children andto the responsibilities of parenthood, and hasan intention to bring theparenting proceedings in New Zealand to regularise issues in relation to thechildrens parenting. Although, as I have previously indicated, theactions of the father in relation to his application to this Court and in theordershe seeks are not particularly child focused, he has been responsible inpaying for the children to spend time with him in Australiaand seeks to be aresponsible and involved parent in the bringing of this application. Applyingthe best interests considerations to the mothers application underthe welfare power for a summary order thatthe children be returned to NewZealand, I am of the view that it would be in the childrens bestinterests for this to occur. I am also of the view, in regard to thefathers application for an order that the children reside with him, thatit wouldnot be in the childrens best interests for this order to bemade. Having found that the order for the children to be returnedto NewZealand is in the childrens best interests, I also find that it is notappropriate for the welfare of the childrento make the injunctionsought by the father to restrain the parties from removing the children fromAustralia as requiring them toremain in Australia is contrary to theirwelfare. Inaddition to seeking an order that the children be returned to New Zealand, themother also seeks that the fathers InitiatingApplication be dismissed.Although it was submitted on behalf of the mother that in seeking summarydismissal it was not being suggestedthat the fathers application hadabsolutely no merit, the mother relied heavily upon her submission that NewZealand is theappropriate forum for a consideration of parenting orders andthat the Court could have confidence in the domestic law of New Zealandto dealproperly with such an application. This issue was referred to by the High Courtin De L v Director-General, New South Wales Department of CommunityServices (1996) 187 CLR 640 in relation to the Hague convention andAustralian law implementing when the High Court said: Theregulations reflect the objects of the Convention to settle issues ofjurisdiction between the contracting states by favouringthat forum, which hasbeen the habitual residence of the child. The underlying premise is that, oncethe forum is located in thisway, each contracting state has faith in thedomestic law of the other contracting state to deal in a proper fashion withmatters,relating to the

custody of children under the age of 16. Inthis case, however, although the mother has said that she has an intention tobring parenting proceedings in New Zealand and althoughI have no particularreason to doubt her bona fides, there are currently no proceedings on foot inNew Zealand and there is no requirementfor her to initiate them. If thefathers application before this Court is dismissed and the mother doesnot initiate proceedingsin New Zealand the issue of appropriate parentingorders may never be resolved. Thefather says, and this is not in dispute, that he may have difficulties enteringNew Zealand due to his criminal history whichincludes a conviction forpossession of a firearm for which he received a two year suspended sentence. Hesays in his affidavitthat he is unaware whether he is able to travel to NewZealand. Although his inability to travel to New Zealand will not necessarilyinhibit his capacity to participate in proceedings in that country, there arecurrently no proceedings in existence and no guaranteethat there will be. Inrelation to the application for summary dismissal, it is also of significancethat the fathers application came before theCourt on very short noticegiven the circumstances that he was limited in the time given to the applicationin a busy duty list andthat he was not legally represented. In thesecircumstances, especially where each of the parties seems to acknowledge that aproperparenting arrangement should be implemented, in my view it would beunjust to summarily dismiss the fathers application. Althoughin my view, the proper forum to deal with a parenting application for thesechildren is New Zealand, this is not a sufficientbasis to dismiss thefathers application, at this stage. Aspreviously indicated, the mother has agreed to give an undertaking to cooperatewith the orderly conduct of these proceedings,including, if necessary, toattend herself and with the children for the purposes of the preparation of afamily report and the fatherhas agreed to give an undertaking that he will payfor the airfares and other expenses required for those purposes. Theother order sought by the father on an interim basis is that an IndependentChildrens Lawyer be appointed to representthe interests of the children.In my view, it is premature to make such an order at this stage when the futureof these proceedingsis unknown. For the reasons given, I make the orderssought by the mother, except for the order summarily dismissing thefathersInitiating Application, and I dismiss the fathersapplication for interim orders. The fathers application for finalordersin this matter will therefore proceed in the

usual fashion. Icertify that the preceding forty one (41) paragraphs are a true copy of thereasons for judgment of the Honourable Justice Hannamdelivered on 21 October2014 judgment delivered. Legal Associate: Date: 22October 2014 