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IN THE FAMILY COURT
AT MANUKAU

FAM-2016-057-000016
[2016] NZFC 4633

IN THE MATTER OF	The Care of Children Act 2004
BETWEEN	ALF MCCREERY Applicant
AND	HELGA MCCREERY Respondent

Hearing:	2 May 2016
Appearances:	Dr A Cooke for Applicant V Leishman for Respondent J Robertson - Lawyer for Child
Judgment:	14 June 2016

RESERVED JUDGMENT OF JUDGE I M MALOSI
[Application for return of children to Australia]

Introduction

[1] This is an application by the Applicant/Father, Alf McCreery filed on 16 February 2016 pursuant to s.105 of the Care of Children Act 2004 ('COCA'), for the return of two children to Australia. It is opposed by the Respondent/Mother, Helga McCreery.

[2] The Applicant and both children are Australian citizens, whereas the Respondent is a New Zealand citizen.

[3] The parties were married on 7 November 2009, having met some three years earlier. Together they had a son, Cowan who was born on [date deleted] 2010 and a daughter, Emma who was born on [date deleted] 2012.

[4] The children have been in New Zealand with the Respondent since 2 October 2015. They are all living with the Respondent's mother and her partner.

[5] Unsurprisingly, the parties have different accounts of the circumstances under which the children came to be here. The Applicant concedes he knew they were coming to New Zealand with the Respondent (indeed, he took them to the airport), but says that was so the Respondent could support her sister [medical details deleted], and they were expected to return after Christmas.

[6] The Respondent accepts the situation with her sister was part of the reason for leaving Australia, but perhaps more significantly the parties had previously had problems in their marriage which resulted in them separating at the end of 2013 (the Applicant does not accept there was a separation), and she felt that they both needed some space to decide if their marriage was finally over. It is not clear if the Respondent communicated that clearly, if at all, to the Applicant.

[7] In any event, it is beyond contention that immediately prior to arriving here, Cowan and Emma were living with their parents in [location deleted] on the [Australian location deleted]. There the parties own a [business details deleted] business which the Applicant operates. The Respondent was a full-time mother, but also helped out with the business from time to time.

[8] The hearing proceeded by way of submissions only, including from Lawyer for Child. Each party filed affidavit evidence setting out their respective positions, and in the case of the Respondent she also relies upon affidavits from her mother, her mother's partner, the President of the local Playcentre the children had been attending here, and a Consultant Psychiatrist. She also seeks leave to file a late affidavit from a local Doctor (GP) who has been treating her, which is objected to by the Applicant.

Relevant law

General legislative framework

[9] The Hague Convention on the Civil Aspects of International Child Abduction has been incorporated into New Zealand's domestic legislation by way of Subpart 4 of COCA.

[10] The objects of the Convention are –

> *(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
>
> *(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.*

[11] The focus then is on forum, premised on a presumption that any disputes about the child's care should properly be determined by a Court in that child's habitual place of residence rather than a Court of the country to which the child has been removed to/retained in.

[12] In this regard, the Brookers text notes as follows:[1]

> ***Inquiry into harm should not be used as a vehicle to litigate child's best interests***
> *Any inquiry concerning physical or psychological harm should not cover factual matters which would more properly be dealt with in the*

[1] CC106.22(7)

eventual custody hearing. See also Tahan v Duquette (1992) 259 NJ Super 328; 613 A 2d 486, at 334; or 489:

> *'It is not intended to deal with issues of factual questions which are appropriate for consideration in a plenary custody proceeding. Psychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships all bear upon the ultimate issues [of custody]. The Convention reserves these considerations to the appropriate tribunal and the place of habitual residence; here Canada, specifically Quebec. No Court on a petition for return should intrude upon a foreign tribunal's subject matter jurisdiction by addressing such issues.'*

[13] Section 105(1) of COCA sets out the grounds which must be established (on the balance of probabilities) before an order for the return of a child can be made. They are as follows:

> *(a) That the child is present in New Zealand; and*
>
> *(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and*
>
> *(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and*
>
> *(d) That the child was habitually resident in that other Contracting State immediately before the removal.*

[14] In the event those grounds are established, the Court *must* make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order *unless* the opposing party is able to satisfy the Court, again on the balance of probabilities, as to at least one of the five grounds for refusal of an order set out in s.106(1).[2]

[15] Even if one of the defences under s.106 is made out however, there is no presumption in favour of return.[3] Ultimately it is a matter of discretion for the Court as to whether or not to make an order for return, balancing the interests of the child

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[2] S.105(2) COCA

[3] *White v Northumberland (2006) 26 FRNZ 189; [2006] NZFLR 1105 (CA),* at [24]

(which are not necessarily paramount)[4] against any feature in the case that might require those interests to yield to the deterrent purpose and other policies of the convention.[5]

Relevant principles – s.106(1)(c)

[16] In this instance the Respondent raises as her sole ground of objection that set out in s.106(1)(c) (i) and (ii), namely:

> *'(1) If an application under s.105(1) is made to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court –*
>
> *(c) that there is a grave risk that the child's return –*
>
> *(i) would expose the child to physical or psychological harm; or*
>
> *(ii) would otherwise place the child in an intolerable situation.'*

[17] As held by the Court of Appeal in *HJ v Secretary of Justice*[6]:

> *The s.106(1)(c) defence is not easy to invoke successfully. This is in part a function of the hurdle provided by the expression 'grave risk' and in part because of judicial expectations that, in the normal course of events, the legal system of other countries will protect children from harm.*

[18] Indeed, in *A v Central Authority for New Zealand* [7] the Court of Appeal discussed the approach to be taken when the grave risk ground is relied upon:

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

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[4] s.4(4)(a) COCA
[5] *Secretary for Justice v HJ* [2007] 2NZLR 289 (SC)
[6] 26 FRNZ 168, paragraph [33]
[7] [1996] 2 NZLR 517; *A v A* (1996) 14 FRNZ 348 at 355

[19] Quite properly, there is no argument advanced by the Respondent that Australia does not have a mechanism by which the best interests of the children (and the Respondent for that matter) can be protected and properly dealt with. Their own Family Courts Act came into force in 1975 and many, if not all, of the safeguards available in our Family Court are available in Australia.

[20] In *Adams v Wigfield* [8] the Court held that when considering the grave risk defence, it is the effect upon the child which has to be evaluated.

[21] For a risk to be grave, it must be weighty ie it must mean that the risk is likely, rather than a possible risk and that its' consequences for the child will be most serious.[9]

[22] Similarly, the physical or psychological harm to the child must be substantial and more than transitory.[10]

[23] As held by the High Court in *KS v LS* [11], 'intolerable' as referred to in s.106(1)(c)(ii) must have a degree of permanence to it, and not be merely transitory.

[24] In *H v H* [12], Greig J held that:

> *Intolerable means that something cannot be tolerated. It is not just disruption or trauma, inconvenience, anger. It is something which must be of some lasting serious nature which cannot be tolerated. Human beings, and particularly children, can adjust and re-adjust to various matters, change in their lives, death and injury, illness and other matters.*

The evidence

Respondent

[8] [1994] NZFLR 132; (1993) 11 FRNZ 270 (HC)
[9] *KS v LS (child abduction) [2003] 3 NZLR 837*
[10] *Coates v Bowden* [2007] 26 FRNZ 210 (HC)
[11] [2003] 3NZLR 837 at [92]
[12] (1995) 13 FRNZ 498

[25] There can no issue that the Applicant has solidly laid the foundation for his application pursuant to s.105, and the Respondent appropriately concedes that point.

[26] The burden then shifts to her to satisfy the Court on the balance of probabilities that the defence she relies on, namely s.106(1)(c) is made out on the face of the untested evidence.

[27] In Lawyer for Child's report of 14 March 2016,[13] Mr Goodwin succinctly summarises the matters raised by the Respondent, which are adopted for the sake of convenience:

(a) *Domestic violence in the relationship*
- *(i)* *Forced sexual relations (without consent), including exposure to the children*
- *(ii)* *Psychological abuse*
- *(iii)* *Physical abuse*
- *(iv)* *Economic abuse*

(b) *Inappropriate behaviour in front of the children*
- *(i)* *Sexually explicit language in front of the children*
- *(ii)* *Inappropriate sexual behaviour in front of the children*

(c) *Concerns with Cowan's behaviour*
- *(i)* *Violent behaviour to his sister*
- *(ii)* *Sexualised behaviour*
- *(iii)* *Concerns re exposure to pornographic material*
- *(iv)* *Involvement of him in secrets*
- *(v)* *That he has been punched by the Applicant*

(d) *The Respondent's mental health*
- *(i)* *Prescribed anti depressant medication*
- *(ii)* *Assessed as having PTSD, suffering from stress and major depressive disorder*
- *(iii)* *Suffers from panic attacks*

[28] Notwithstanding the number and nature of these concerns, there is no evidence before this Court that the Respondent sought any assistance from the family justice system in Australia prior to coming to New Zealand with the children in October of last year.

[13] Originally, Mr Goodwin acted for the children but by the time of this hearing he had been replaced by Ms Robertson

[29] In her affidavit of 29 February 2016, the Respondent set out details of the nature of their relationship and history of domestic violence which included:

(i) Being pressured into having sex within a few weeks of Cowan's birth by way of caesarean section, and when she refused his response was to verbally abuse her calling her names such as 'drama queen, cunt and crazy.' He also showed her his testicles and told her how full there were. He said that not having sex or ejaculating affected his mood or ability to think straight;

(ii) After Emma's birth, the Respondent's evidence is that the Applicant's behaviour deteriorated. He began forcing her to have sex against her will. His preferred method of sex was 'doggy style' and on at least seven occasions in 2014 and 2015 she recalls him pushing her over, holding her down and entering her from behind. 'He was very rough and tore my vagina on most of these occasions.' One time she recalled occurred in the children's bathroom when they were in the room next door. On another occasion (in 2015) the parties were in the garage and Cowan walked in on them. She says the Applicant always refused her requests for him to stop;

(iii) In 2013, without the Respondent's knowledge, he used his mobile phone to film them having sex. He then showed it to the Respondent telling her how much 'it turned him on'. She asked him to delete it but does not know if he did or not;

(iv) The Applicant would masturbate several times a day while watching pornography on his phone and show the Respondent sores on his penis from doing so. He would say to her he had to masturbate because she did not give him enough sex;

(v) He would masturbate and ejaculate on her when they were in bed. Again, the Applicant would not desist when the Respondent asked him to;

(vi) Whilst watching TV he would force her mouth onto his penis without her consent, which she considered to be better than him forcing himself inside of her;

(vii) On 16 August 2015, the Applicant says there was an altercation over who was to feed the dog. She accepts that she grabbed the Applicant's shirt to get him to turn around, and then shoved the plate of dog food at him. In response, she says he grabbed her by the throat and dragged her 2 or 3 metres outside onto the grass. She recalls her feet leaving the ground and feeling the pressure on her neck. Later on when she tried to read the children a bed time story she could hardly talk and her throat was 'in extreme pain.' In the meantime the Applicant had left but returned about 10.00pm very intoxicated. When the Respondent got into bed with Cowan, the Applicant grabbed her by the arm, and threatened to break her arms and legs, and kill her. The next day the Applicant left and went to his mother's. He sent her a text apologising for scaring her;

(viii) The Respondent accepts that she did not report any of the assaults or abuse to the Police. She says she was too frightened of what the Applicant's response would be, and felt ashamed and humiliated to disclose the abuse she has been subjected to. Without family or real support systems in Australia she was also worried about how she would survive if he went to prison. On 28 September 2015 the Respondent says she finally got up the courage to tell her mother and sister about what had happened in August. Her mother then rang the [location deleted] Police Station. The Police recommended

she leave with the children and obtain a protection order. The Respondent has now laid a formal complaint with the Police about the incident.

[30] Since shortly after arriving in New Zealand the Applicant has cut the Respondent's access to their joint and business bank accounts, although just three weeks prior to this hearing he began paying her $200.00 per week for the care of the children (up from $26.00 per week). I accept that if the Respondent returns to Australia she will not qualify for Centrelink benefits (equivalent of WINZ). She would however, be able to claim a family tax benefit but that would be a maximum of $275.00 per fortnight.

[31] In terms of the Applicant's behaviour in front of the children, she raises a number of concerns about the inappropriateness of that on occasion. She gives examples of him making comments about sexual matters in their presence, including sexual comments about the Respondent herself (eg 'your face looks like it has seen a cock').

[32] Of the two children, the Respondent is most worried about Cowan. Her concerns include:

(i) Cowan being violent towards his sister (hitting and slapping);

(ii) Behaving badly towards other children;

(iii) Cowan is overly clingy to her and sometimes refuses to leave the house to socialise with other children;

(iv) Increasingly sexualised behaviour eg one day as they were leaving the house he said to the Respondent, 'why don't you stay home and suck your boobs', then on another occasion he grabbed his penis and said, 'Mum, do you want to eat my sausage?'

(v) Since being in New Zealand, Cowan has made disclosures which suggest he has seen the Applicant watching pornography (or been shown it by him) and masturbating;

(vi) Cowan has also disclosed being told secrets by the Applicant which he is not allowed to tell the Respondent, being given beer by the Applicant saying it would help him sleep, and being punched in the head by the Applicant which hurt.

[33] The evidence of the Respondent's mother, Joanne O'Sullivan and step-father, Stephen O'Sullivan is not inconsistent with hers. Joanne happens to be a [occupation deleted] with many years experience with Child, Youth and Family in [location deleted]. I declared having had dealings with her in that capacity, but as it turned out so too had some of the Counsel involved in this case.

[34] Amongst other things, Joanne gave evidence that:

(i) Corroborated the Respondent's evidence about disclosing the details of the incident on 17 August 2015 to her, and the actions Joanne then took with the Police;

(ii) She had seen instances of the Applicant's angry demeanour, including when he slapped the Respondent, and experienced intimidating behaviour from him herself;

(iii) The Applicant was generally neglectful and unsupportive of the Respondent and her care of the children;

(iv) She has witnessed Cowan's violent behaviour, fear of men and water, and refusing the leave the house due to being anxious;

(v) She had ongoing concerns about the Respondent's health prior to her coming to New Zealand including back aches, colds, raw bleeding hands and poor dental hygiene.

(vi) When the Respondent arrived in New Zealand in October 2015 she had lost a considerable amount of weight just in the week since Joanne had been with her in Australia, and was in a dishevelled state of attire. She was often tearful and initially incapable of performing everyday tasks such as preparing meals or driving herself to appointments.

(vii) Consequently, Joanne has given up work to make herself available fulltime to the Respondent and the children.

[35] In relation to Stephen O'Sullivan's evidence he gives examples of the Applicant's angry disposition, including being physically threatening towards Cowan and making inappropriate sexual comments in front of him. Comments Cowan has made to Stephen since being in New Zealand led him to believe:

(i) Cowan has seen the Applicant being violent to the Respondent;

(ii) Cowan has been directly subjected to violence from the Applicant; and

(iii) Cowan has been exposed to sexually inappropriate conduct by his father either directly or indirectly.

[36] Stephen has also observed the Respondent's difficulty in managing the children's behaviour and has had to step in on occasion. From the affidavit of the Playcentre Manager it would appear that the behaviour of the children has improved significantly since they first started some 3 months prior. They have grown in confidence and independence. The Respondent has been observed to be less anxious and much more relaxed with her children: 'Her laughing, joking and engaging is the biggest change'.

[37] In terms of her mental health and well being, I accept that the Respondent has taken a number of steps since she arrived in New Zealand. For herself she has seen a

Psychologist, Psychiatrist and GP. She has also engaged Cowan in counselling with a very experienced Clinical Psychologist, Sue Mafi.

[38] On 5 October 2105 the Respondent engaged in counselling with Gail Ratcliffe, another very experienced Clinical Psychologist. That is ongoing. Ms Ratcliffe prescribed [medical details deleted] (an anti-depressant drug).

[39] The Respondent has also sought assistance from a local GP, Dr Lorna Buhler. (Despite the objection to the lateness of Dr Buhler's affidavit sworn 28 April 2016, leave is granted for it to be accepted for filing on the grounds of relevance[medical details deleted].

[40] After an examination on 6 April 2016, Dr Buhler made a diagnosis of major depressive episode with anxious mood, as well as Panic Disorder. She specifically noted an escalation in the Respondent's anxiety and insomnia since she first met with her in December 2015.

[41] She then saw the Respondent again on 20 April 2016. During that consultation she suffered a panic attack which lasted for about 20 minutes. She reported that the Respondent was 'intensely stressed and struggled to breathe. She was unable to talk at the time, until I managed to help her regular her breathing.'

[42] I note that at one point during the hearing the Respondent appeared to have succumbed to another panic attack. If that was simply a performance for the benefit of the Court, then it was a particularly compelling one. Both Joanne and Stephen have observed the Respondent's panic attacks before. When she had a turn during the hearing it was Stephen who came forward to take her to the back of the Court where Joanne was seated. Together they were able to calm her.

[43] In conclusion, Dr Buhler held 'grave concerns' for the Respondent's mental health and vulnerability if she were to return to Australia, and was concerned about her mood and anxiety further deteriorating there.

[44] None of that is inconsistent with the report dated 9 February 2016 from Dr Caleb Armstrong, the Consultant Psychiatrist. He diagnosed the Respondent as suffering from post-traumatic stress disorder and major depressive disorder. He recommended a course of Citalopram and therapy.

[45] In relation to Cowan he encouraged the Respondent to seek treatment for him with regard to his 'violent and problematic sexual behaviour.'

[46] By way of concluding remarks, Dr Armstrong commented:

> *'It is intended that this letter also serve the purpose of providing evidence of Helga's mental state and how it relates to her decision-making with regard to her handling of the breakup with her husband. It should be noted that talking to Alf or seeking him is likely to act as a trigger to post traumatic stress symptoms which maybe crippling for Helga.*
> *Helga requires a considerable period of stability in her living circumstances in order to have a chance to put into practice the skills and suggestions coming from therapy and will need to form a trusting long term relationship with a therapist to recover. Her current social circumstances seem ideal in regard to this.'*

Applicant

[47] In short, the Applicant does not accept there was domestic violence in their relationship (save for one occasion), and is adamant that there was never an occasion when he forced the Respondent to have sexual relations against her will. He considers the allegations to be 'offensive and defamatory'.

[48] With respect to the incident on 17 August 2015 (the only admission he makes), the Applicant's account is that they argued, although he does not say about what, and the Respondent came running up behind him as he was walking away and (laughing) smashed a plate of hot dog food into his face. He denies grabbing her by the throat, but does admit holding his arm up and restraining her at arms' length. The Applicant maintains that the Respondent was already sick with a sore throat from two days prior, and that he had told her to see a Doctor but she did not. In any

event, he does not give any detail about which part of her body he placed his arm. He then walked her backwards and said, 'What the fuck are you doing?' He denies they ended up outside, or that her feet left the ground. The Applicant says he insisted on an apology, but the Respondent refused. He then loaded an esky with 12 beers and went to the park where he drank them all. He accepts he was drunk when he got back, and that they argued again. He insisted upon the Respondent coming out of the bedroom to talk about what had happened earlier. He says as they walked out of the room, 'I was supporting Helga and she dropped to the floor. As Helga fell down she pulled back on my arms and I said under my breath, "I could kill you." He says he then just walked out of the room and the Respondent followed him. More arguing ensued until both of them ran out of steam (it seems) and they went off to sleep in separate rooms.

[49] With respect to the allegations of forced anal sex, the Applicant denies he 'ever had sex in the way detailed by Helga.' It is unclear whether he is just referring to the act itself or the allegations in respect of the force applied and lack of consent. He accepts that on one occasion he and the Respondent were in the garage having sex when Cowan walked in, but says it was consensual and does not believe Cowan saw anything untoward because they were behind their car.

[50] The Applicant agrees that he once filmed him and the Respondent having sex, but again he says this was done with her consent and they even watched it twice before he deleted it in her presence.

[51] The Applicant rejects the proposition that he financially controlled the Respondent and refers to an email from the Respondent sent 1 December 2015 where she wrote, 'In case you have forgotten I funded the deposit for our house and have always paid and managed the finances.'

[52] Indeed the Applicant's evidence is that on 29 September 2015, the day after Joanne O'Sullivan left Australia after her short visit, the Respondent transferred $28,000.00 from their business account to Joanne O'Sullivan's account. She was then on a plane to New Zealand within a matter of days, and upon arriving here was

able to get in to see a very senior (and no doubt extremely busy) Clinical Psychologist within 3 days.

[53] Although the Applicant responds to virtually every paragraph of the Respondent's substantive affidavit it is unnecessary (and unhelpful) to go through all of that given the nature of these proceedings and the clear theme of denial which run through them.

[54] At the end of the day, the Applicant considers he was a devoted and loving husband and father. (He annexed a number of cards and notes from the Respondent and the children to attest to that).

[55] He acknowledges the marriage is over, and is obviously aware that the Respondent's main family supports are in New Zealand, but he wants the children returned to their home and life in Australia.

[56] The Applicant is no longer living in the family home. Although he visits the property on a regular basis to check on it, and keeps the mortgage and other outgoings up to date, he has moved to live with his mother some 25 minutes drive away and operates the business out of there too. Accordingly, should the Respondent and children return to live in Australia the home they left would be available.

Discussion

[57] Cowan and Emma are only 5 and 3 years old respectively (Cowan turned 5 whilst in New Zealand). Despite meeting with them, Lawyer for Child[14] (unsurprisingly it has to be said) was not in a position to put to the Court any meaningful views from them.

[58] In light of the ages of the children and the nature of the allegations, Lawyer for Child recommended a s.133 report be obtained. That was considered by the Court and declined.

[14] Mr Goodwin

[59] Clearly there were problems in the marriage when the Respondent left Australia, and whilst it is likely the Applicant had his head buried in the sand about that, I accept he would not have agreed to the children travelling here had he appreciated the risk of them being retained in New Zealand.

[60] Given the circumstances of the Respondent's departure from Australia, I find that she planned to come here with the intention of remaining.

[61] Furthermore, I find the Applicant's account of the incident on 17 August 2015 to be improbable. I consider he was deliberately evasive about how he used his arm to 'walk her backwards', and how after he returned from the park, one minute he was supporting her and the next she dropped to the ground. In my view the veracity of that evidence casts doubt upon his blanket denial of the other allegations of violence.

[62] Even on the Respondent's best case however, I have not been satisfied that there is a grave risk that the children's return to Australia would expose them to physical or psychological harm.

[63] In reaching that conclusion I take into account that most of the allegations, and certainly the most serious ones, are in relation to violence against the Respondent and the risk of the children being exposed to that.

[64] I also note that there have been no proceedings commenced in Australia by the Respondent either in relation to protection from domestic violence or care arrangements for the children. Furthermore, she did not make a complaint to the Police about the incident on 17 August 2015 until over a month later, and then only just before coming to New Zealand.

[65] As I interpret the argument advanced on behalf of the Respondent she pins her hopes primarily on the 'intolerable situation' ground. She seeks to persuade the Court that the impact upon her mental health if the children have to return to Australia will be devastating for her with a corresponding effect upon them. The two, she argues, are inextricably linked.

[66] Although the Court accepted that argument in *Armstrong v Evans* [15] that case involved the testing of evidence, in particular the psychological evidence, and a finding that there was a real risk of the mother committing suicide if she were required to return to Australia.

[67] In this case of course the evidence has not been tested, but in any event that is not the scenario according to the Consultant Psychiatrist engaged by the Respondent. He notes that she denied current suicidal thinking, [16] and there was no specific reference to that level of risk in the more recent report from her GP.

[68] Section 106(1)(c) sets a high bar, and I have simply not been satisfied that it has been reached. In my view any risk to the children of being exposed to physical or psychological harm, or an intolerable situation is appropriately mitigated by the fact that the marriage is clearly at an end, the Applicant has vacated the family home, and either the parties will reach satisfactory arrangements about the care of the children themselves, or they will seek the assistance of the Australian family justice system to do so.

[69] It is not disputed, nor could it be, that Australia can provide the necessary protections and supports for victims of domestic violence, and that the best interests and welfare of children is the paramount consideration in determining arrangements for children's care in parenting proceedings.

[70] Whilst Ms Leishman argues that is insufficient to protect these children from the potential physical or psychological harm, or otherwise intolerable situation, the weight of the case law does not support that submission.

[71] I find that despite the Respondent's family living in New Zealand, she will not be left without appropriate supports if she returns to Australia. Her mother has already shown how far she is prepared to go by giving up her job to be available to her daughter and grandchildren. That of course is highly commendable.

Conclusion

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[15] [2000] NZFLR 984
[16] Dr Caleb Armstrong's report of 9 February 2016 at [15]

[72] For all of the above reasons, I have not been satisfied by the Respondent that there is a grave risk if the children are returned to Australia of them being exposed to either physical or psychological harm, or an intolerable situation.

[73] The correct forum to determine the merits of the case in relation to the future care arrangements of the children is [location deleted], Australia.

Orders

[74] With due regard to the principles underpinning the Hague Convention on the Civil Aspect of International Child Abduction, and the interests of the children to the extent that I have been able to take those into account, I now make an order pursuant to s.105(2) of the Care of Children Act 2004 for the return of both children to [location deleted], Australia.

[75] Arrangements will now need to be made for the children to travel back to Australia, and their care arrangements once they arrive there.

[76] Accordingly, these proceedings are adjourned for 14 days for Counsel to file a Joint Memorandum for my attention in respect of same.

[77] Pending those arrangements being finalised, the order preventing the removal of the children from New Zealand will remain in place.

[78] Leave is reserved to either party, or Lawyer for Child, to seek urgent directions to give effect or better effect to these orders. In that instance, the file is to be referred back to me immediately (or another Judge if I am unavailable).

I M Malosi
Family Court Judge