EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

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IN THE FAMILY COURT
AT PAPAKURA

FAM-2016-055-000108
[2016] NZFC 6882

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004 - THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980
BETWEEN	KENNITH HALL Applicant
AND	JUDY SLATE Respondent

Hearing:	17 August 2016
Appearances:	Mr A Ashmore for the applicant Ms S Bailey for the respondent
Judgment:	26 August 2016

RESERVED JUDGMENT OF JUDGE A-M SKELLERN
[HAGUE CONVENTION - HABITUAL RESIDENCE, GRAVE RISK]

Introduction

[1] The applicant Mr Hall and the respondent Ms Slate are the parents of Fiona Slate-Hall ("Fiona") who was born in New Zealand on [date deleted] 2007.

[2] Mr Hall seeks an Order pursuant to the provisions of the Hague Convention on the civil aspects of child abduction as contained within the New Zealand Care of Children Act 2004 (sections 94 to 124) for Fiona's return to Australia.

[3] Fiona is currently in the care of Ms Slate in [suburb deleted], Auckland, New Zealand.

[4] Mr Hall currently lives in [location deleted], Australia.

[5] Mr Hall seeks the Order pursuant to s 105 of the Care of Children Act 2004 ("the Act") which provides:

105 Application to Court for return of child abducted to New Zealand

> (1) An application for an order for the return of a child may be made to a Court having jurisdiction under this subpart by, or on behalf of, a person who claims—
>
> > (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.
>
> (2) Subject to section 106, a Court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—
>
> > (a) an application under subsection (1) is made to the Court; and
> >
> > (b) the Court is satisfied that the grounds of the application are made out.
>
> (3) A Court hearing an application made under subsection (1) in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a court of that State, or a decision of a competent authority of that State, declaring

that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State, and may adjourn the proceedings for that purpose.

(4) A Court may dismiss an application made to it under subsection (1) in respect of a child or adjourn the proceedings if the Court—

(a) is not satisfied that the child is in New Zealand; or

(b) is satisfied that the child has been taken out of New Zealand to another country.

[6] Pursuant to s 105(1), Mr Hall must establish:

(a) That the child is present in New Zealand;

(b) The child was removed from another contracting state, namely Australia, in breach of the applicant's rights of custody in respect of the child;

(c) At the time of the removal those rights of custody were actually being exercised by the applicant; and

(d) The child was habitually resident in Australia immediately before her removal to New Zealand.

[7] If the Court is satisfied those elements are established by Mr Hall, the Court must make an order for the prompt return of Fiona to any person or the country specified in the order,[1] unless Ms Slate satisfies the Court that one of the grounds in s 106 of the Act applies. If any such ground applies, the Court **may** refuse to order the return of the child.

[8] For the purposes of this case, the only dispute in terms of the s 105 criteria is under s 105(1)(d) –whether Fiona was habitually resident in Australia immediately before her removal to New Zealand.

Background

[9] Mr Hall and Ms Slate separated in 2008, shortly after Fiona was born.

[1] Care of Children Act 2004, s 105(2)

[10] The relationship between them for a period of time was clearly difficult. Ms Slate sought and obtained a Protection Order under the Domestic Violence Act against Mr Hall, which was made final in 2012.

[11] On 21 October 2013, a Parenting order was made, providing for Ms Slate to have the day to day care of Fiona and Mr Hall to have contact with her as agreed.

[12] In 2014, Mr Hall and Ms Slate discussed the prospect of Mr Hall moving to Australia. Initially they agreed Fiona would stay with Ms Slate in New Zealand and visit Mr Hall in Australia.

[13] Mr Hall moved to Australia and Fiona visited him there on three occasions. The cost of her travel was met by Mr Hall.

[14] In 2014, Mr Hall asked Mrs Slate whether she would agree to Fiona moving to Australia. She says he spoke of his financial stability and his willingness to support Ms Slate's role as Fiona's mother.

[15] Ms Slate agreed for Fiona to live with her father in Australia, she says in late 2014, he says in January 2014. Whatever the date of the initial verbal agreement, they signed a written agreement on 10 February 2015 (the Agreement). The Agreement contained the following provisions;

> *1 Fiona will be come into the full time care of Kennith as at 10 February 2015.*
>
> *2 Fiona will be leaving NZ for Australia with Kennith on 11 February 2015.*
>
> *3 Kennith will endeavour to send Fiona back to NZ for holidays twice a year.*
>
> *4 The cost of Fiona's airfares will be at Kennith's cost.*
>
> *5 Fiona will be enrolled at the local primary school and attend after school care.*

6 *All her living and educational costs will be the responsibility of Kennith solely.*

7 *Kennith will supply Judy with a tablet to allow her to Skype/communicate with Fiona.*

8 *Kennith will keep Judy informed of Fiona's health and wellbeing and progress at school at regular intervals.*

Fiona will be back on the 22nd December 2015

[16] Fiona travelled to Australia to live with Mr Hall on 11 February 2015.

[17] She remained living there until she came to New Zealand on 24 March 2016 to visit Ms Slate. She has remained in New Zealand since that time given Ms Slate's decision not to send her back to Australia.

[18] Ms Slate does not dispute signing the Agreement but says she entered into it without the benefit of legal advice and that her agreement for Fiona to live in Australia was entirely conditional upon Mr Hall returning Fiona to New Zealand to visit her mother and siblings.

[19] Ms Slate points to the failure of Mr Hall to send Fiona to New Zealand for Christmas 2015-2016 as a deliberate breach of the Agreement and as evidence of his inability or unwillingness to prioritise Fiona's need to have her relationship with her maternal family above his new partner and her needs.

[20] Ms Slate says that while Fiona was in Australia, the contact she had with Fiona was sporadic and that the first time she received a school report about Fiona's progress was when she read the report annexed to Mr Hall's initial affidavit. She says there were problems being able to contact Fiona.[2]

[21] Mr Hall says that Ms Slate was in fact difficult to contact while Fiona was in Australia. He exhibits screen shots of a number of texts asking her to call, one

[2] Affidavit of Ms Slate sworn 9 August 2016, Paragraph 13

particular text saying; "*Haven't heard from you in a while. Don't forget you have a girl over here, that needs to hear from you Judy."*[3]

[22] Mr Hall says that he told Ms Slate around August 2015 that he could not send Fiona over to New Zealand but rather he would be able to send her in the first school term holidays and that Ms Slate said that was fine.

[23] Arrangements were made to send Fiona to New Zealand on 24 March 2016 and Mr Hall advised Ms Slate through her partner by text on 17 March 2016 of the flight details.[4]

[24] Ms Slate acknowledges this message was sent but says she did not receive it at the time, and received it only after checking her partner's phone.[5]

[25] Ms Slate did not attend at the airport to uplift Fiona and she did not see her until Fiona's grandmother delivered her to Ms Slate's sister on 29 March 2016. Fiona's grandmother required a guarantee that Fiona would be returned to Australia on 7 April 2016 on the return ticket provided to her by Mr Hall.

[26] Ms Slate attaches significance to the request for a guarantee as proof that Mr Hall knew he had breached the agreement between them and as a result of that knowledge, there was a risk Fiona would not be returned.

[27] Ms Slate decided not to return Fiona to her father and instructed Ms Bailey to write to Mr Hall on 4 April 2016 advising him of her decision.

The Proceedings

[28] Mr Hall, upon receiving the letter from Ms Bailey advising of her client's intention to retain the care of Fiona, instructed Australian solicitors.

[29] He was served with an Order Preventing Fiona's Removal from New Zealand which had been made on 22 April 2016 - applied for by Ms Slate to

[3] Affidavit of Mr Hall sworn 8 June 2016, Annexure E
[4] Affidavit of Mr Hall sworn 8 June 2016, Annexure G
[5] Affidavit of Ms Slate sworn 9 August 2016, paragraph m, page 10

prevent Mr Hall coming to collect Fiona from New Zealand and returning to Australia with her.

[30] Mr Hall wrote to the Family Court at Papakura on 26 April 2016, advising the Court that he had instructed lawyers to *"...prepare an application under the Hague Convention."* [6]

[31] Ms Slate was served with the proceedings on 14 July 2016. She responded to the application on 9 August 2016, making an application to file her response out of time. The application was granted, although the Judge considering the application commented that the respondent's basis of defence was unclear.

[32] Ms Slate's Notice of Defence failed to particularise the nature of the defence and her affidavit in support did not set out with any real clarity, the defence being relied upon.

The Hearing on 17 August 2016

[33] The hearing on 17 August 2016 proceeded on a "Submissions Only" basis. Counsel for the applicant raised the issue that the question of appointing a Lawyer for Fiona had not been raised by counsel for the respondent to this point but she had in her written submissions, made reference to Fiona's fundamental rights to have her views known. Mr Ashmore submitted he would wish to have an opportunity to respond to this submission if it were to be relied upon.

[34] Ms Bailey clarified that the arguments she relied upon were; that in fact Fiona was not habitually resident in Australia immediately before her removal, or if that argument did not succeed, that there is a grave risk that an order for Fiona's return would expose her to psychological harm; or would otherwise place her in an intolerable situation.

The Respondent's Argument - Habitual Residence

[35] Ms Slate relies on the following as a basis to satisfy the Court that Fiona's habitual residence was not Australia;

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[6] Affidavit of Mr Hall, sworn 8 June 2016 Annexure J

(a) The settled purpose being for Fiona's habitual residence to become Australia was satisfied if and only if the conditions in the agreement were satisfied by Mr Hall, the child's ties to New Zealand and her mother's care were not severed entirely and accordingly her habitual residence did not stop being New Zealand;[7] or

(b) Although it is accepted that over time there would be a gradual loss of habitual residence, this has not yet occurred in the year that Fiona spent in Australia, and her connection with New Zealand has not weakened enough and her connection in Australia was not strong enough to suggest habitual residence.[8]

(c) The case of *Punter v Secretary for Justice* [2004] NZLR 28, confirms the proposition that when assessing whether a child is habitually resident in one state or another, not only is the actuality of residence required, there must also be a "settled purpose".

(d) The fact that Mr Hall did not; seek to discharge the existing order placing Fiona in Ms Slate's day to day care, register the Agreement in New Zealand or seek child support from Ms Slate are all factors tending to suggest the move to Australia was not underpinned by a settled purpose.

(e) The inclusion of the word "endeavour" in respect of the agreement to return Fiona to New Zealand for holidays, suggested that Mr Hall lacked the intention to comply with the terms of the Agreement and would be seeking to have an excuse not to comply.

(f) Fiona's enrolment in school and receipt of Medicare cover was not proof that Fiona's habitual residence was Australia. Had she been on holiday, she would have been covered by Medicare and she was enrolled in school because that is required by law.[9]

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[7] Submissions of Counsel for Ms Slate, paragraph 25
[8] Paragraph 33
[9] Oral Submissions of Counsel for Ms Slate

The Applicant's Response to the Habitual Residence Argument

[36] Counsel for the applicant responds to the argument on behalf of Ms Slate as follows:

(a) The respondent is conflating the concept of consent and habitual residence. Had she been the claimant seeking the return of the child from Australia, she could perhaps have argued that her consent to the removal was only conditional upon the conditions of the Agreement being adhered to and breach of those meant consent could not be taken for granted.[10]

(b) Habitual residence is a question of fact, not a contractual principle.

(c) Issues quite beyond parental intention such as living arrangements, schooling, and cultural, social and economic integration are all relevant in determining a child's habitual residence.[11]

(d) Even if it were accepted by the Court that Mr Hall has somehow breached a contact regime, the respondent's approach would impose upon the child the legal fiction of loss of habitual residence irrespective of the child's everyday life and the appearance and the intention of the parties.[12]

Analysis

[37] The onus of proof, where there is a dispute as to habitual residence, remains with the applicant. He must satisfy the Court on the balance of probabilities that the country from which the child was removed was the child's habitual residence immediately before removal.[13]

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[10] Submissions of Counsel for Mr Hall paragraph 28
[11] Paragraph 31
[12] Paragraph 33
[13] *Basingstoke v Groot* (2006) 26 FRNZ 707

[38] The term habitual residence, usually requires both a settled purpose to take up the habitual residence and actual residence for an appreciable period.[14]

[39] Other factors however that may be taken into account are the length of stay in the new country, the purpose of the stay and the strength of ties with that country.[15]

[40] The term habitual residence *"...has no particular legal magic. It is to be construed in the ordinary meaning of the words. The essence of the word 'habitual' is customary, constant, continual. The opposite of that is casual, temporary or transient."*[16]

[41] The Agreement was clear in its intent and framed in simple terms. The pivotal terms were;

(a) Fiona was to go into the fulltime care of Mr Hall on 10 February 2015 and would be leaving for Australia the following day.[17]

(b) Mr Hall was to endeavour to send Fiona back to New Zealand for holidays twice a year at his cost.[18]

(c) Mr Hall was to take sole responsibility for Fiona's living and educational costs.[19]

[42] Fiona moved to Australia on 11 February 2015 based on the very clear intention of her parents that she would live with Mr Hall in Australia.

[43] Equally clear was that Mr Hall would endeavour or "try" to pay for Fiona to travel to New Zealand twice a year. The possibility that he may not be able to pay for the two visits a year must have been contemplated by the lack of certain and absolute commitment to this provision.

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[14] *SK v KP* [2005] 3 NZLR 590
[15] ibid
[16] *H v H* (1995) 13 FRNZ 498 (HC) Greig J at 501
[17] The Agreement, clauses 1 and 2
[18] Clauses 3 and 4
[19] Clause 6

[44] The Agreement also provided that Ms Slate would no longer have the responsibility to meet the cost of Fiona's living, educational or travel costs. Mr Hall's failure to apply for Child Support, in fact supports the proposition that Fiona was habitually resident in Australia and that Mr Hall had taken over financial responsibility for her.

[45] The parties failed to adhere to all the terms of the Agreement and each places the responsibility for the failure on the other.

[46] The "settled purpose" (which reflects the intentions of the parties) of Fiona's travel to Australia was to live there. She remained there for 13 months. Her stay was not casual, temporary or transient. She was enrolled in school, she had her medical needs met.

[47] The fact that Fiona retained ties to New Zealand and her mother, does not equate with her remaining habitually resident in New Zealand.

[48] The suggestion that somehow Fiona's assimilation into Australia was halted when Mr Hall did not send Fiona to New Zealand in December 2015, carries no weight.

[49] Mr Hall's failure to seek to discharge the New Zealand Order does not change Fiona's habitual residence and neither does it legally justify a refusal to make an order for Fiona's return.[20] The parties agreed that Fiona would from 11 February 2015, live with her father in Australia and that is what then occurred.

[50] Mr Hall's request (delivered by his mother) for a guarantee that Fiona would return to Australia as planned on 7 April, is simply evidence of the lack of trust between the parties.

Finding

[51] Fiona's habitual residence directly before the time of her removal was undoubtedly Australia. The respondent's argument fails on this point.

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[20] Care of Children Act, s 106(3)

Grave Risk of exposure to physical or psychological harm

[52] The question remaining for determination is then whether the respondent has established to the Court's satisfaction that there is a grave risk that the child's return would expose her to physical or psychological harm; or would otherwise place her in an intolerable situation.

[53] The onus of proof is on the respondent to establish that s 106(1)(c) applies. If it does, the Court has a residual discretion as to whether or not to order the return. Section 106 provides;

106 Grounds for refusal of order for return of child

(1) If an application under section 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—

(a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) that the person by whom or on whose behalf the application is made—

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or

(ii) consented to, or later acquiesced in, the removal; or

(c) that there is a grave risk that the child's return—

(i) would expose the child to physical or psychological harm; or

(ii) would otherwise place the child in an intolerable situation; or

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

(2) In determining whether subsection (1)(e) applies in respect of an application made under section 105(1) in respect of a child, the court may consider, among other things,—

(a) whether the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to refugees or protected persons:

(b) whether the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

(3) On hearing an application made under section 105(1) in respect of a child, a court must not refuse to make an order under section 105(2) in respect of the child just because there is in force or enforceable in New Zealand an order about the role of providing day-to-day care for that child, but the court may have regard to the reasons for the making of that order.

The respondent's argument

[54] Ms Slate submits that the grave risk of harm to Fiona arises from Mr Hall's inability to meet the principles of the Care of Children Act regarding Fiona's relationship with her mother and siblings in New Zealand.

[55] She says that Mr Hall has a history of physical and psychological violence and drug and alcohol abuse.

[56] She also says that Fiona may have been present when Mr Hall was arguing with his new partner.

[57] A further concern raised is that Mr Hall may be psychologically abusive to Fiona in his phone calls to her and that would make it intolerable for Fiona to live with Mr Hall in Australia. She has commenced taping Fiona's conversations with her father. She says that Mr Hall asks Fiona to keep secrets from her mother and swears at her. She notes Fiona is now less willing to speak to her father.

[58] Ms Slate submits that if Fiona were able to remain in New Zealand she could fly to Australia to see her father and she would then see both sides of her family.[21]

[21] Oral Submissions of Counsel for Ms Slate

The applicant's argument

[59] He says the threshold for proof of grave risk of exposure to physical or psychological harm or an intolerable situation is by definition very high.

[60] Because the order is for a return to Australia rather than to father's care, the harm must be of such magnitude that the Australian infrastructure cannot be assumed to be able to deal with it.

[61] There is absolutely no evidence before the Court of grave risk to Fiona should she be returned to Australia; however vague issues are now raised which it is suggested cannot be addressed in the Australian context.

[62] The Court of Appeal decision in *HJ v Secretary of Justice* (2006) 26 FRNZ 168 is the leading New Zealand authority on the interpretation of the grave risk defence.

[63] The case can be summarised as follows:

(a) The grave risk raised must be associated with return of the child to the home country;

(b) The ability of the Courts in the home country to protect while not to be assumed as an absolute, will be a highly relevant factor in determining whether or not the child will be safe upon return.

(c) Whether the defence is made out will be an interpretive, fact finding and evaluative exercise –i.e. a question of evidence.

(d) These factors mean the defence is by its nature difficult to make out. No presumption rests on the respondent against the defence but it will be factually difficult to establish.

Analysis

[64] The applicant correctly identifies *HJ* as the current authority on the grave risk defence.

[65] Ms Slate bears the onus of establishing that an order for the return of Fiona to Australia would expose her to physical or psychological harm or place her in an intolerable situation.

[66] Consideration and an evaluation of Ms Slate's evidence are required.

[67] The risk of physical or psychological harm must be substantial and more than transitory. It must be more than the inevitable stress which occurs when a child is uprooted from a settled situation and forced to return to the country of habitual residence.[22]

[68] To satisfy the court that an order for return would otherwise place a child in an intolerable situation has been described by the High Court in *H v H*[23] as;

> 'intolerable' connotes something more than disruption and trauma, inconvenience of anger and refers to something of a lasting or serious nature which cannot be tolerated.

[69] In response to Ms Slate's contention that Mr Hall is unable or unwilling to promote a relationship between her and Fiona, Mr Hall has adduced evidence to the effect that at times, he found it difficult to facilitate contact between Fiona and her mother due to Ms Slate's periodic unavailability.

[70] There is some, albeit limited, evidence that at times, this was the case. The two examples available are; the text message from Mr Hall encouraging Ms Slate to contact Fiona and the fact that the message to Ms Slate's partner advising of Fiona's imminent arrival in New Zealand (at a time where Ms Slate would be expected to be vigilant about checking messages) was not found by Ms Slate until well after it was sent and she had failed to collect Fiona from the airport.

[71] Ms Slate took no steps during the time Fiona was in Mr Hall's care to change the care arrangements or implement contact arrangements with Fiona.

[72] Mr Hall met the cost of Fiona's travel to spend time with her maternal family in [name of Australian city deleted] during 2015 and travelling to New Zealand to

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[22] *Clarke v Carson* [1996] 1 NZLR 349
[23] (1995)13 FRNZ 498 Greig J

spend time with her mother and siblings in March 2016. His failure to send Fiona to New Zealand at Christmas 2015-2016, which he signalled to Ms Slate well in advance, whilst disappointing for all concerned, appears to have been redressed by his sending her in March, three months later.

[73] Mr Hall's violence, to which Ms Slate's refers, pre-dates her agreement for Fiona to travel to Australia on three occasions to visit her father in 2014 or indeed her agreement for Fiona to live with him in 2015.

[74] There is no evidence of any harm coming to Fiona during the time spent with her father. Ms Slate describes Fiona's three trips to Australia to her father as proceeding "…very well."[24]

[75] Ms Slate also makes the point that Fiona "ran up" a $2,000 phone bill, making calls to her father in Australia which would tend to suggest a close relationship between them.

[76] Fiona's Australian school reports do not indicate any concern about her well-being or behaviour.

[77] Ms Slate proposes Fiona remains in New Zealand but continues to travel to Australia to see her father. Such a proposal is incongruent with the concerns she raises as to Fiona's likely exposure to physical, psychological harm or an intolerable situation.

[78] In terms of the current telephone contact between Fiona and her father, it is not difficult to deduce that Fiona will currently feel very anxious about the situation in which she has been placed.

[79] Fiona will most certainly have been very unsettled by first moving to live permanently in Australia, and then having that situation abruptly changed by her mother's refusal to return her to Australia as she would have been expecting.

[80] There is no evidence which approaches a question of Fiona's being exposed to grave risk of either psychological or physical harm. Neither is there any evidence

[24] Affidavit of Ms Slate, paragraph 8

which approaches Fiona being otherwise placed in an intolerable situation upon a return to Australia.

[81] The correct forum for Ms Slate to address any difficulties she perceived in having contact with Fiona was through the Australian Courts.

[82] The grounds for refusal are not made out.

[83] Fiona will therefore be returned to Australia.

Order

[84] I order the prompt return of Fiona Slate-Hall born on [date deleted] 2007 to Australia.

[85] The Order Preventing Removal from New Zealand will need to be discharged to enable her to travel.

[86] The discharge should be ordered when the travel details are settled.

[87] I decline the application for a Warrant to Enforce the Order for return at this juncture.

[88] Counsel are to confer as to the logistics of the return (including the question of cost) and if necessary an urgent telephone conference can be arranged with me by the Registry to expedite.

A-M Skellern
Family Court Judge