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

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IN THE FAMILY COURT
AT TAURANGA

FAM-2017-079-000015
[2017] NZFC 6923

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[HANS KRUGER] Applicant
AND	[KATHERINE WINKEL] Respondent

Hearing:	18 August 2017
Appearances:	L Kearnes and Ms Barnes for the Applicant A Ashmore for the Respondent D Blair as Lawyer for the Child
Judgment:	1 September 2017

RESERVED JUDGMENT OF JUDGE S J COYLE
[In relation to application of return of child under the Hague Convention; s106 (1)(a), (c)(i) & (ii), and (d) Care of Children Act 2004]

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[1] Mr and Ms [Winkel] live in [North Island location 1]. Living with them is Ms [Winkel]'s daughter, [Leah Kruger], born [date deleted] 2007, and their [child]. Although Mr and Ms [Winkel] are German nationals, they love New Zealand and love living in [location 1]. For them they have an idyllic life, and it had been their intention to remain living there for the foreseeable future with [Leah] and [their child].

[2] Ms [Winkel] has, however, unlawfully removed [Leah] from Germany, and once [Leah]'s father, Mr [Kruger], found out where Mr and Ms [Winkel] were living, he commenced proceedings under sub-part 4 of the Care of Children Act 2004. That sub-part implements into New Zealand domestic law the Hague Convention on the Civil Aspects of International Child Abduction.[1] Mr [Kruger] has therefore applied pursuant to s 105 of the Act for the return of [Leah] to Germany. Mr Ashmore, for Ms [Winkel], accepts that jurisdiction is established in terms of s 105(1) of the Act. As a consequence, pursuant to s 105(2), this Court must make an order that [Leah] be returned promptly to Germany. The Supreme Court in *Secretary for Justice v HJ* referred to the Courts "duty to order return in terms of s 105."[2]

[3] Section 105 however is subject to s 106 which sets out the grounds for refusal of an order for the return of a child, codifying what have become known as the "defences" under the Hague Convention. Ms [Winkel] relies on the following defences:

(a) That the application is made more than one year after the removal of [Leah], and that [Leah] is now settled in a new environment;[3]

(b) That there is a grave risk that [Leah]'s return would expose [Leah] to physical and psychological harm, or would otherwise place [Leah] in an intolerable situation;[4]

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1 COCA, s 94.
2 *Secretary for Justice v HJ* [2006] NZSC 97 at [48].
3 COCA s 106(1)(a).
4 COCA s 106(1)(c.)

(c) That [Leah] objects to being returned, and that she has attained an age and a degree of maturity of which it is appropriate to weight to [Leah]'s views.[5]

[4] If Ms [Winkel] is able to establish any of those defences, the Court then has a discretion whether to make an order for the prompt return of [Leah] or not.

[5] Thus the issues I have to determine in this hearing are as follows:

Twelve months and settled

(a) Is [Leah] now settled in her new environment?[6]

(b) Is there any relevance of the Deportation Liability Notices issued by Immigration New Zealand and served on Mr and Ms [Winkel] to the issue of whether [Leah] is settled or not?

(c) Should it be established that [Leah] is settled, how should the Court exercise its discretion in relation to return?

Child objection

(a) Does [Leah] object to being returned?

(b) If so, has [Leah] attained an age and maturity requiring the giving of weight to her views?

(c) What weight should be given to her views?

(d) How should the Court exercise discretion?

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5 COCA s 106(1)(d).

6 It is accepted by Ms [Winkel] that the application was made more than one year after the removal of [Leah] from Germany.

Grave Risk/Psychological Harm

(a) Is there a grave risk that the return of [Leah] to Germany would expose [Leah] to psychological harm?

(b) Is there a grave risk that the return of [Leah] to Germany would otherwise place [Leah] in an intolerable situation?

(c) If either of those grounds are established, how should the Court exercise its discretion in relation to return?

Is [Leah] settled in her new environment?

[6] [Leah], [her sibling], and Mr and Mrs [Winkel] left Germany on [date deleted] 2014. When they left Mr [Kruger] had no idea that they had left Germany or that they intended to leave permanently.

[7] On [date deleted – the following month] 2014 the District Court at Fürth made an order placing [Leah] in the custody of Mr [Kruger].[7] A translation of the decision of the Fürth District Court set out at pp 22 to 30 of the Bundle of Documents. At the start of the judgment the Fürth Court sets out that custody is awarded to Mr [Kruger], and then sets out its reasons for making the decision. The Court concluded:

> The transfer of parental custody to the father is in the best interests of the child. The ingrained resentment the mother of the child holds against the father of the child, by now significantly impairs the mother's ability to raise her daughter. … With her actions, the mother wilfully and significantly disregards the interests of her daughter.[8]

[8] At the time that decision was issued Mr and Ms [Winkel] had left Germany with [Leah]. Notwithstanding that she had left Germany, Ms [Winkel] was clearly

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7 The German Courts refer to custody and access as supposed to the New Zealand concepts of day-to-day care and contact.

8 Bundle of Documents p 27.

aware of that decision as, on [date deleted] 2015, she filed an appeal against the custody order. The appellate judgment of the Nüremberg Higher Regional Court (before three Judges of that Court) is set out in its translated version at pp 207 to 211 of the Bundle. The Appellate Court upheld the decision of the Fürth District Court.

[9] After leaving Germany, the evidence of Ms [Winkel] was that they initially stayed in [overseas location 1] with friends. However on [date deleted – two days later] 2015 Mr and Ms [Winkel] arrived in New Zealand on a visitor's visa and travelled around New Zealand for two months, ending up in [North Island location 1] where they remained between [months deleted] 2015. They then returned to [overseas location 1] on [date deleted] 2015 for a five week holiday in [city deleted], but at the end of that trip returned to [North Island location 1] where they have remained ever since. On [date deleted] 2015 [Leah] was enrolled at [school 1]. At that time the evidence of Ms [Winkel] was that they were living at a house on [address 1 details deleted]. However in [month deleted] 2016 they moved to a new house in [address 2 details deleted], where they remained living until recently. I accept the evidence of Ms [Winkel] that they had to leave [address 2 details deleted] property as their landlord required the property to be sold. In mid February 2017 [Leah] started at [school 2] where she remains.

[10] During this period Mr [Kruger] had no idea where his daughter was. It appears on the evidence that through a coincidence, in part helped by an extensive media and internet campaign in Germany, he was alerted to the possibility that [Leah] may be in New Zealand, and eventually he ascertained her whereabouts. In December 2016 Mr [Kruger] filed a request for the return of [Leah] with the Central Authority in Germany. Subsequently applications were made by the New Zealand Central Authority on behalf of Mr [Kruger] on 14 February. The New Zealand Family Court made orders for the immediate surrender of [Leah]'s travel documents and an order preventing [Leah] being removed from New Zealand.

[11] The formal application for return under s 105 of the Act was filed on 23 February 2017. [Leah] has therefore been in New Zealand from [month deleted] 2015 and in the [location 1] area since [month deleted] 2015. The issue that arises is whether she is now settled in that environment or not. Ms Kearns for Mr [Kruger]

submits that she is not settled and that the evidence is inadequate to enable the Court to make such a finding. Mr Ashmore for Ms [Winkel] submits that [Leah] is clearly settled in that environment, a submission supported by Mr Blair as [Leah]'s counsel.

[12] What is meant by the word "settled" has been determined by the New Zealand Supreme Court in *Secretary for Justice v HJ*.[9] The Court held:

> Whether a child is now settled in its new environment involves a consideration of physical, emotional and social issues. Not only must a child be physically and emotionally "settled" in the new environment, he or she must also be socially integrated.[10]

[13] When considering whether a child being settled it is the date of hearing which is relevant.[11]

[14] In *Re N (Minors)(Abduction)* Bracewell J held: [12]

> The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving, attachment. That can only be relevant insofar as it impinges on the new surroundings.

[15] I adopt that reasoning as it is consistent not only with the New Zealand approach, but also the approach of the Family Court of Australia.[13]

[16] Ms Kearns submits [Leah] is not settled. She submits that the evidence shows that following her removal from Germany, [Leah] has been entirely unsettled. In support she refers to Mr and Mrs [Winkel] initially residing in [overseas location 1], then arriving in [South Island location], travelling from [South Island location] to [North Island location 1], returning to [overseas location 1 – city deleted] for six weeks, before returning to [North Island location 1]. She further submits that the three changes of residence and two changes of school since February 2016 are relevant. Thus Ms Kearns submits there is no evidence that [Leah] is settled at

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9 *Secretary of Justice v HJ* above n 2.
10 *Secretary for Justice,* above n 2, at [55].
11 *Secretary for Justice v HJ,* above n 2, at [57].
12 *Re N (Minors)(Abduction)* (1991) 1 FLR 413.
13 See for instances *State Central Authority v Ayob* (1997) 21 Fam LR 567; *Graziano v Daniels* (1991) 14 Fam LR 697.

school, that Mr and Mrs [Winkel] are in stable employment, and no evidence of extra-curricular activities.

[17] In her cross-examination of Ms [Winkel], Ms Kearns asserted that [Leah] had missed six days in 2016 of school; this, Ms Kearns submits, was "a reasonably significant number of days."[14] I do not accept that six days missed over the total school year are a significant number of days missed. Nor do I accept that the three changes of residence within the same geographical area from June 2015 to May 2017 are significant either; such is the lot of tenants that their tenure is uncertain. From May 2015 until February 2016 (9 months) the [Winkel]'s lived in a property at [address 1 details deleted]. Then from February 2016 to May 2017 (15 months) they lived in [address 2 details deleted]. They had to move in May 2017 to [address 3 details deleted] because the tenancy agreement in relation to [address 2 details deleted] was terminated by the landlord.[15] That evidence is more consistent with stability rather than instability, and I determine that it is evidence of [Leah] being settled in that locale of the [North Island location 1] region.

[18] Nor do I accept it is significant that at the end of 2016 [Leah] changed from [school 1] to [school 2]. That has only been one change of school in just over two years she has been living in the [North Island location 1] area. The reasons advanced for shifting school are set out in the notes of evidence.[16] Those reasons are entirely appropriate and child focused.

[19] Ms [Winkel] has employment in [North Island location 2] in [occupation deleted], which requires her at times to work in [North Island location 2] and at other times to work [details of employment deleted]. Mr [Winkel] is [occupation details deleted]. In relation to Ms [Winkel]'s employment she has taken what she terms as a sabbatical; I apprehend it to be more leave without pay while these proceedings remain unresolved[17].

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14 Notes of Evidence p 7, line 7.
15 Notes of Evidence p 32, line 25 to p 33, line 9.
16 Notes of Evidence p 9, line 14 to p 10, line 2.
17 Notes of Evidence, p 24.

[20] The evidence of Ms [Winkel] is that [Leah] is [activity details deleted]. Ms [Winkel] gave evidence about the number of friends [Leah] has and the fact that her friendships and social circles has increased since [details deleted].[18]I accept her evidence in this regard, and it was not seriously challenged in cross-examination.

[21] The family also all attend [details of activity deleted]. Further it is quite clear to me when I read the affidavit of the principal of [school 1], as well as the s 133 report, that [Leah] is very happy and settled in school in New Zealand. Indeed Ms Lightfoot in her report records the principal of [school 2] stating:

> [[Leah]'s] totally happy to be a kiwi girl, she loves the outdoors, enjoys the environment, she loved planting trees at [location deleted]. She plays [activities deleted] at school, and she was going to [activity deleted]. She is just amazingly well-adjusted, she is neat, I wish we had more [Leah]s.[19]

[22] To Mr Blair and Ms Lightfoot, [Leah] expressed a clear view that her life is in New Zealand and that she sees herself as a "kiwi kid". In Ms Lightfoot's evidence it is that sense of a kiwi outdoors life that is important to [Leah], and particularly the ability to be involved with animals.

[23] I find that [Leah] is physically and emotionally settled in her new environment in the [North Island location 1] region, and that she has achieved a high level of social integration given the factors I have referred to above. I reject Ms Kearns' submission that she is not settled as the evidence, not only that from Ms [Winkel], but the other evidence that I have referred to, shows a clear and consistent pattern of [Leah] being clearly settled both factually and legally.

What is the relevance (if any) of the immigration issue?

[24] Subsequent to the filing of these proceedings Mr and Mrs [Winkel] have been served with a Deportation Liability Notice issued by Immigration New Zealand. They have filed an appeal with the Immigration and Protection Tribunal although there appears to be no indication as to when their appeal is likely to be heard.

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18 Notes of Evidence p 25, lines 1 - 14
19 Bundle of documents p 362

[25] Mr and Ms [Winkel] have been in New Zealand under different visas. Ms [Winkel] has been here under [visa details deleted], with Mr [Winkel] here under [visa details deleted]. Mr [Kruger] has filed an affidavit from Mr McBride, a specialist immigration barrister. Mr Ashmore indicated that it is accepted that Mr McBride is an expert in terms of s 25 of the Evidence Act 2006, and certainly his evidence has been substantially helpful to me.

[26] Mr McBride sets out at [14.6] of his affidavit his understanding that the DNL's have been served on Mr and Ms [Winkel] on the basis that they incorrectly disclosed Ms [Winkel]'s legal status concerning custody of [Leah] in Germany. It appears that when arriving in New Zealand in [month deleted] 2015, [Leah]'s passport was shortly to expire. To remain in New Zealand she needed a passport which was current, and the allegation is that Ms [Winkel] applied to the German Embassy in Wellington for a passport for [Leah] asserting that she had legal custody of [Leah]. She by this time knew that the Fürth District Court had placed [Leah] in the custody of Mr [Kruger]. The allegation therefore is that she deliberately misrepresented the factual and legal situation in relation to [Leah]'s custody to the German Embassy. The Embassy have now revoked [Leah]'s passport on the basis that it had been misled by Ms [Winkel].

[27] Mr McBride was available for cross-examination. It is clear from Mr McBride's evidence that the IPT, in deciding whether to grant the appeal or not, must consider s 207 of the Immigration Act 2009. This section requires the tribunal to be satisfied that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for [Ms [Winkel]] to be deported from New Zealand, and it would not in all the circumstances be contrary to the public interests to allow Ms [Winkel] to remain in New Zealand. Mr McBride at [18] of his affidavit gave his opinion that "based on that information I would say that the chances of the respondents or her husband's deportation appeal succeeding resulting in resident visas are minimal."

[28] However as he acknowledged there were a number of important documents that he had not seen. He also appeared to be under the misapprehension that there were current proceedings before the New Zealand Family Court in relation to

[Leah]'s day-to-day care. What became apparent during his cross-examination was that Mr McBride thought that a possible outcome would be either:

(a) That the appeal be dismissed, but that the IPT order that Mr and Mrs [Winkel] be granted a temporary visa, which is valid for a period not exceeding 12 months; or alternatively

(b) T heir appeal is allowed and that they are granted a temporary visa for a period not exceeding 12 months. The effect of the temporary visa is that they would then remain in New Zealand lawfully, and during the 12 month period could apply for another form of visa including a residence visa.

[29] In Ms Kearns' submission the uncertainty as to Mr and Ms [Winkel]'s immigration status goes squarely to the issue of [Leah] being settled or not in New Zealand. Her submission is the very real chance that they will be deported, and thus cannot be said that [Leah] is settled in New Zealand.

[30] I determine that I cannot place any weight on the immigration issue as it concerns future possibilities rather than actual reality or certainties. While I accept Mr McBride's evidence that it is more likely than not that their appeal will fail, and at best they might be granted a temporary visa, that probability does not equate to a certainty or inevitability. Additionally should they be granted a temporary visa, as suggested by Mr McBride, then it may be that they obtain a residence visa during the intervening 12 month period. It is wrong for this Court to prejudge decisions yet to be made by the IPT, itself a judicial entity, nor any subsequent decisions yet to be made by INZ. I have to make my decision on the basis of the known evidence before me at this point in time. If [Leah] subsequently leaves New Zealand because a decision is made by the IPT to deport her parents, then that will come to pass. But it should not properly influence my decision as to whether [Leah] is settled in New Zealand or not.

[31] The only relevance would have been if the appeal had been rejected prior to the hearing before me and Mr and Ms [Winkel] were about to be definitely deported;

[Leah] then could not be said to be settled in her new environment. I note that subsequent to the conclusion of the hearing Ms Kearns filed a memorandum with the Court seeking a direction that Ms [Winkel] produce further evidence. It was not clear to me the basis upon which Ms Kearns sought this direction. For as Mr Ashmore sets out in his submissions in response, the review she referred to was not the outcome of the IPT appeal, and thus there was no new evidence that I needed to consider before issuing this judgment. I have placed no weight on the issues raised by Ms Kearns in her 30 August 2017 memorandum.

How should the subsequent discretion be exercised in relation to [Leah]?

[32] Ms [Winkel] has established the defence of [Leah] being settled in a new environment. Having done so there remains a discretion vested in the Court as to whether to order a return or not. The Supreme Court in *Secretary of Justice v HJ* stated in relation to the discretion:

> It is not appropriate to speak in terms of a presumption of return in a discretionary situation. This is because the exercise of the discretion must recognise, and set to balance, both the welfare and best interests of the child and the general purpose of the Convention.[20]

[33] The approach to be adopted by Courts in New Zealand is set out more fully by the Supreme Court at [85] to [87] inclusive. It is clear there is a balancing between the welfare and best interests of [Leah], and the general purposes of the convention. Issues such as concealment are relevant in relation to the exercise of discretion, but the Court is still required to find that that factor outweighs the interests of a child when deciding to make an order for return. The legislative basis for this is contained in s 4(4)(a) of COCA. Pursuant to s 4(2) this is an individualised assessment of [Leah] and her particular circumstances but must also take into account the relevant principles in s 5. An assessment of those principles must be undertaken however in light of the fact that this is a summary process, and the Court is not making a determination as to what is the ultimate outcome that will meet the best interests and welfare of [Leah].

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[20] *Secretary of Justice v HJ, above n 2,* at [68].

[34] For example, s 5(a) is centred in [Leah] being protected from all forms of violence; that there is violence is disputed on the facts. There is a dispute for instance as to whether Ms [Winkel] drove over Mr [Kruger]'s foot at a 2013 access changeover, or whether it was Mr [Kruger] who was the aggressor, deliberately moving in front of the vehicle. I am unable to resolve that factual dispute. Additionally whilst there is in the bundle of documents a decision of a German Court deciding that it was Mr [Winkel] who was violent and not Mr [Kruger], it is unclear to me whether that was a civil or criminal finding. In any event, I must assume that both the Fürth Court and the Appellate Court have determined that Mr [Kruger] presents no safety risks to [Leah] in awarding him [Leah]'s custody.

[35] The principles in s 5(b) to (c) are entirely aspirational on the facts of this case. For as the Appellate Court in Germany found there has been an ongoing lack of willingness by Mrs [Winkel] to engage Mr [Kruger] as a meaningful parent in [Leah]'s life, and certainly her actions in removing [Leah] from Germany and hiding from him where they were living so as to exclude him from [Leah]'s life mean that he has had no ability to be involved in her life.

[36] Sections 5(d) and (e) are important in the facts of this case. That is [Leah] should have continuity in her care, development and upbringing, as well as a relationship with both of her parents. However her ability to have a relationship with her parents is currently impossible because of the decisions of Ms [Winkel]. Additionally should the Court order return Ms [Winkel] has made it clear that she will not return with [Leah] and will remain in New Zealand with Mr [Winkel] and [her sibling]. Section 5(f) relating to [Leah]'s identity is important and the evidence in relation to her sense of identity has already been referred to above.

[37] The other evidence in relation to [Leah]'s best interests and welfare is that set out by Ms Lightfoot. The central thrust of Ms Lightfoot's report and her evidence in cross-examination is that return to Germany for [Leah] would be cataclysmic. She bases that evidence on the following:

(a) [Leah]'s account of the motor vehicle incident referred to above. Ms Lightfoot was quite clear that [Leah] was experiencing post-traumatic

stress because of her perception of events in which she had witnessed. She said in response to a question from me "I mean [Leah]'s account of experiences from the view of a six year old and talks about the things that she directly experienced. She didn't talk about the things that Ms [Winkel] listed as the most scary parts of the situation. [Leah] had her own series of experiences.[21]

(b) "[Leah] had an account that is very consistent with a six year olds recount of trauma. She predominantly talked about sensations and sensory perceptions. She couldn't think at the time. There was no logicality or analysis of the events at the time she was experiencing it. She could say how she felt but not what she thought at the time and when she recounted her experience to me, which would be what three years later, five years later, she, she demonstrated the same range of feelings that she described having at the time. She regressed in her – in the logicality of her, of her account and overall her, account was very consistent of actual trauma."[22]

[38] Secondly she gave evidence about the effects of returning to Germany in terms of [Leah]'s psychological state. She described it has [Leah] leaving everything behind, and being akin to a death. Thirdly, [Leah] felt she would be leaving her primary attachment figure. Ms Lightfoot was challenged around that evidence at length. I accept her evidence that whilst it is clear from the psychological report provided to the German Courts that [Leah] was attached to her father, [Leah] has subsequently had a significant period in which she has had no contact with her father at all. Thus whilst she may have had a strong attachment with her father at that point in time, through the effluxion of time that attachment has lessened and the attachment with her mother in particular has increased.

[39] I acknowledge Ms Kearns criticisms around the failure of Ms Lightfoot to discuss matters with Mr [Kruger]. However whilst Ms Kearns highlights the number of phone calls between Ms Lightfoot and Ms [Winkel] (in contrast with none to Mr

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21 Notes of Evidence p 95, lines 25 – 27.
22 Notes of Evidence p 96, lines 15 – 25.

[Kruger]), I accept Ms Lightfoot's evidence that those phone calls were not information sharing or gathering but rather were simply to clarify appointment times and processes. There was email communication from Ms Lightfoot to Mr [Kruger] inviting him to meet with her which Mr [Kruger] replied that his counsel would contact Ms Lightfoot to make the arrangements. It is regrettable Ms Lightfoot did not follow that up in the absence of any further response from Mr [Kruger] or his counsel. The criticisms however do not detract from the substance of Ms Lightfoot's report, and those matters in which she specifically addressed the brief. Ms Lightfoot's evidence is "that severing of that primary attachment will be distressing to [Leah], or cause her trauma and she will be incredibly dislocated."[23] Ms Lightfoot concluded that returning [Leah] would place her in an intolerable situation.[24] I accept and rely on her evidence in that regard.

[40] The effect of returning [Leah] to Germany would be to separate her from her step-father [and sibling – age deleted]. The evidence of Mr and Mrs [Winkel], and of Ms Lightfoot, all point to a strong and supportive relationship between [Leah] and [her sibling]. Return therefore removes [Leah] from her mother, step-father, and [sibling], and returns her to her father whom she has not seen since 2013, and to a father she associates with trauma in her life.

[41] When looking at [Leah] and her particular circumstances it is my clear finding that it would be contrary to her welfare and best interests to require her to return to Germany for the reasons I have set out. The Supreme Court however has said that what is in the best interests of a particular child "cannot be the only or indeed the dominant factor in the exercise of a s 106 discretion."[25] The Supreme Court referred to the *W v W (child abduction)* decision[26] where the Court discussed the operation of the Convention so as to achieve stability for the majority of children and noted that that might have to be achieved "at the price of tears in some individual cases."

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23 Notes of Evidence p 97, lines 28 – 30.
24 Notes of Evidence p 104, line 31.
25 *Secretary of Justice v HJ*, above, n 2, at [50].
26 *W v W* [1993] 2 FLR 211 at 220.

[42] In the context of the policy and convention issues, the issue of concealment is relevant. The Supreme Court in *Secretary of Justice v HJ* has expressed a clear view that policy implications arising out of concealment should be dealt with "as a facet of the exercise of the discretion."[27] In this case Ms [Winkel] left Germany with Mr [Winkel], [Leah] and [her sibling] without advising Mr [Kruger] and in the face of orders which provided for him to have ongoing access to [Leah]. In the knowledge that Fürth German Court had awarded custody to Mr [Kruger] she came to New Zealand, and at no stage did she inform Mr [Kruger] where [Leah] was. She made no effort to contact Mr [Kruger] in the intervening period, and it was left for him to find out where [Leah] was living. She changed school once Mr [Kruger] became aware that [Leah] was in [school 1] without telling Mr [Kruger]. The fact that she had shifted from [address 2 details deleted] to [address 3 details deleted] only became apparent during Mr Blair's cross-examination. In relation to concealment the Supreme Court *Secretary for Justice v HJ* stated: [28]

> The mother wrongly removed the children from Australia. She failed to advise the father that she had taken them to New Zealand and where she was living. Beyond that failure, which hardly amounts to a form of concealment, the mother did little, if anything, which can reasonably be regarded as concealment.

[43] In this case I find there has been concealment by omission. There is a clear difference in facts between the *Secretary of Justice v HJ* and this case. In that case the mother simply took the children to Australia and did not tell the father where she was living. In this case Ms [Winkel] has taken them in the face of the Court order changing [Leah]'s care, against the background in which the Appellate Court upheld the lower Court's determination that the mother had actively thwarted the child's relationship with the father, and in this case the mother has actively concealed the change of school and change of residence from the father. Concealment is a significant issue of this case which impacts upon the exercise of discretion.

[44] Section 94(1) specifically implements into New Zealand law the Hague Convention. The objects of the convention are set out in Article 1 namely:

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[27] *Secretary of Justice v H, above n 2,* at [69].
[28] *Secretary of Justice v HJ*, above n 2, at [111].

(a) To secure the prompt return of children who are wrongfully removed 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 respected in other contracting states.

[45] Thus, in this case the following relevant policy considerations that I need to consider:

(a) Respecting and implementing the decision of the German Court to grant custody of [Leah] to Mr [Kruger] by ordering the return of [Leah] to Germany to give effect to that order, and so as to enable the ongoing decisions about [Leah]'s welfare and best interests to be assessed by the German Family Courts.

(b) The fact that with Mrs [Winkel] has deliberately attempted to thwart the order of the German Court, and Mr [Kruger]'s ongoing involvement in the [Leah]'s life; and

(c) The desirability of ensuring that those who deliberately set out to thwart orders in one jurisdiction are not seen to be able, through the passage of time and their own efforts, to establish and seek to rely upon a new life for a child in another country.

[46] Those policy considerations are significant in this case but on the particular facts of this case it is my determination that the welfare and best interests of [Leah] outweigh these policy considerations and I therefore exercise my discretion and decline to make an order for the return of [Leah] to Germany as sought under this ground. That is I have reached the view that to require [Leah] to return to Germany would be too cataclysmic for her. It would require her to be in the primary care of her father whom she has not physically seen since 2013. It would require her to leave behind her mother, her stepfather and her [sibling]. It would require her to leave behind the life that she has in New Zealand and move to a life in Germany, the present realities of which are unknown to [Leah]. I agree with Ms Lightfoot's evidence that for [Leah] that would be an intolerable situation (in a psychological sense).

Does [Leah] object to returning to Germany?

[47] Whether [Leah] objects or not is a factual determination. Consideration of a child's objection under s 106(1)(d) involves four issues:

(a) Does [Leah] object to a return?

(b) If so, has [Leah] obtained an age and degree of maturity at which it is appropriate to give weight to her views?

(c) If so, what weight should be given to [Leah]'s views? and

(d) How should a residuary/statutory discretion be exercised?

[48] This approach was set out in *W v N [child abduction]*.[29] An objection is more than a mere preference for a mere wish; an objection carries with it a "notion of clarity in force in a way that it is expressed"[30]

[49] Ms Lightfoot expressed an opinion that [Leah] clearly objected to being returned to Germany and was cross-examined by Ms Kearns and Mr Blair in relation to that opinion. Ms Lightfoot described [Leah]'s objection to returning as, "there is resistance to being placed in the care of her father." But went on to say "as part of her overall reaction to being returned to Germany but overall I have to say that her choices are not anti-Germany, but pro New Zealand and everything that is here for her and in fact if you subtract everything that she would be leaving behind she is leaving behind herself, reality, her orientation on life and her day-to-day living. … So in that sense it is all about leaving everything that she knows here in New Zealand and gains nothing that she has in Germany."[31]

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29 *W v N [child abduction]* [2006] NZFLR 793 at [46] the High Court's approach and analysis was upheld on appeal with the Court of Appeals judgment cited as *White v Northumberland* (2006) NZFLR 1105

30 *Bayer v Bayer* [2012] NZFC 2878 at [63]; *White v Northumberland* (2006) NZFLR 1105 at [57].

31 Notes of Evidence p 102, line 19 to p 103, line 2.

[50] A summary of the basis of [Leah]'s objections as communicated to Ms Lightfoot are set out in her report at [7.1] where Ms Lightfoot stated: [32]

> [Leah]'s objections to return relate to the following:
>
> 1. She would be taken away from her mother who is very important to her;
> 2. She would be taken away from her family in New Zealand;
> 3. She would be taken away from her friends and other relationships;
> 4. She would be taken away from her home;
> 5. She is "kiwi", enjoys living in New Zealand, and prefers to live in this country in comparison to Germany; and
> 6. She would be returned to an overall context of her father's care in a country, in which she associates with adult conflict and being unhappy.

[51] It is clear from Ms Lightfoot's report that central to [Leah]'s concerns around seeing her father is the car incident that occurred on 20 September 2013. Mr Blair has in his memoranda and reports to the Court set out quite clearly that [Leah] has expressed to him an objection to returning to Germany. It is my finding that [Leah] has consistently expressed an objection to return to Germany. For her a return to Germany is inexplicably intertwined with loss of her relationship with her mother, and her moving to the care of her father in relation to whom she has traumatic memory. What did or did not happen outside [Leah]'s school in September 2013 is irrelevant. What is relevant is that [Leah] has a strong recollection of that event and for her it is traumatic and associated with her father. It is my finding that [Leah] has a strong objection to returning to Germany.

Has [Leah] obtained the age and degree of maturity at which it is appropriate to give weight to her views?

[52] I have a clear view that she has. Ms Lightfoot evidence that I relay upon is contained in [7.18] to [7.25] of her report where she concludes: [33]

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[32] Bundle of documents p 363.
[33] Bundle of documents p 368 to 371.

> In my assessment [Leah] has an advanced developmental ability for her age, and would be more mature than many children her age in most areas. I consider that she has made a decision that has been understandably, both emotionally logically based, and aimed at meeting her current needs.
>
> While [Leah] is perhaps yet too young to apply a high order analytical, multi-factorial assessment of her situation, her decision has been completely logical and appropriate for her. It is also likely to be the same decision most older children or adults would make in her situation.[34]

[53] Additionally when cross examined by Mr Blair she expanded upon that opinion and set out several reasons why she believed [Leah] was mature for her age.[35]That aspect of Ms Lightfoot's evidence was not seriously challenged in cross-examination. When questioned by Mr Blair, Ms Lightfoot stated:

> Over all of the kind of categories of maturity that you want to use, with a child of her age, she shows herself at an above level, if you like, of functioning.[36]

[54] [Leah] is at the date of hearing aged 10 years and [number of months deleted]. A number of decisions have been attached in the bundle of documents in which the views of children of different ages have been given weight by the Court. That [Leah]'s views are listened to is supported in terms of Article 12(1) of the United Nations Convention on the Rights of the Child.

[55] It is my finding [Leah] has obtained an age and degree of maturity which it is appropriate to give her views weight. The evidence establishes that notwithstanding her chronological age, she has a maturity level in advance of her chronological years.

What weight should be given to [Leah]'s views?

[56] In my view significant weight should be given to her views for the reasons articulated by Ms Lightfoot. There is a degree of logicality to her views and she has a clearly reasoned and well thought out basis for her views. There is no evidence that they have been influenced by Mrs [Winkel]. While Ms Kearns sought to discredit, through her cross examination of Ms Lightfoot, [Leah]'s views as being influenced by the presence and overtures of Mrs [Winkel], I accept the evidence of Ms

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34 Bundle of documents p 371.
35 Notes of Evidence, p 105, lines 5-30.
36 Notes of evidence p 105, line 24 and 28.

Lightfoot that there was no indicators that [Leah]'s views were anything other than her own.[37] I find that the defence of child objection is established on the evidence before me for the above reasons.

How should the residual statutory discretion be exercised?

[57] In my view the analysis undertaken in [32] – [46] above is equally applicable to the exercise of the discretion in terms of this defence, and for the same reasons, the welfare and best interests of this particular child in her circumstances outweigh the policy considerations.

Result

[58] I am satisfied that Ms [Winkel] has made out the child objection defence and I decline to make an order for return under s 106(1)(d).

Is there a grave risk that [Leah]'s return would either expose [Leah] to physical or psychological harm or otherwise place [Leah] in an intolerable situation?

[59] Given that I have found two of the defences made out I do not consider it necessary to resolve the defence of grave risk/intolerable harm. But for the sake of completeness, I record that I would not have found the defence of grave of risk established.

[60] The defence of grave risk requires a Court to be satisfied that there is a grave risk that [Leah]'s return would expose her to physical or psychological harm or otherwise place [Leah] in an intolerable situation. The two concepts; physical or psychological harm, and intolerable situation, are disjunctive and need to be considered separately. This is a difficult defence to establish.[38] The High Court has held that it must be a risk of more than just distress and harm as a result of moving countries.[39]

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37 See for instance Notes of Evidence, p 82, lines 23-31

38 *HJ v Secretary for Justice* (2006) 26 FRNZ 168 (CA) at [33].

39 *Clark v Carson* [1996] 1 NZLR 349 (HC) at [353]; approved in *Coates v Bowden* (2007) 26 FRNZ 210 (HC)

[61] I adopt the summation of the legal position of his Honour Judge Twaddle in *Mok v Cornelisson*[40] where his Honour stated:

> The burden of establishing that one or both of the exceptions apply rests on Ms Cornelisson. A standard of proof is on the balance of probabilities. The risk referred to in [s 13(1)(c)] must be serious, substantial and weighty: *Damiano v Damiano* [1993] NZFLR 548. Subject to some exceptions, it is generally assumed that the law of the originating country can provide adequate protection for a child; *Damiano, S v S*. "Physical or psychological harm" and "intolerable situation" are separate and disjunctive exceptions; the Court must be satisfied that there is a grave risk of either "physical or psychological harm" or an "intolerable situation." The kind of harm envisaged is "substantial", "severe" and "weighty"; *Re A (a minor) (abduction)* [1988] 1 FLR 365, and must be more significant than the harm a child might experience from being removed and then returned to the originating country: *C v C (minors: abduction: rights of custody abroad)* [1989] 2 All ER 465 (CA). The abducting parent cannot rely solely on a harmful situation being created by that parent, for example the mother refusing to return to the originating country with a child: *C v C* (above); *Clarke v Carson* [1996] 1 NZLR 349; (1995) 13 FRNZ 662; [1995] NZFLR 926. "Intolerable" in the context of s 13(i)(c)(ii) has been held to mean "simply and demonstrably not able to be countenanced": *Damiano*. In *H v H* 12/4/95, Grieg J, HC Wellington AP359/94, Greig J described intolerable to mean:
>
> > "that something cannot be tolerated. It is not just disruption or trauma, inconvenience or anger. It is something which must be of some lasting serious nature which cannot be tolerated."

[62] Mr Ashmore relies upon a decision of Judge Boshier in *Secretary of Justice v Penny;*[41] that is a decision of the Family Court and whilst persuasive is not binding. However Mr Ashmore himself in his submissions at [51] notes that the grave risk defence is often difficult to establish and at [53] he states:

> Notwithstanding all of the above the defence must not be interpreted in such a way as to render it meaningless. There will be situations where it could be established.

[63] I agree. Mr Ashmore acknowledges that Courts treat with some cynicism the position advanced by Ms [Winkel] that she will not return to Germany with [Leah] if an order for return is made. However Mr Ashmore submits that "the sheer remarkableness of the proceedings in Germany and its obvious affect on them gives considerable credence to her position."[42] However that submission ignores the

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40 *Mok v Cornelisson* [2000] 19 FRNZ 598 at 601.
41 *Secretary of Justice v Penny* (1995) 13 FRNZ 264 (FC).
42 At [58] of his submissions.

reality that this is a situation entirely of Ms [Winkel]'s creation as a consequence of her refusal to acknowledge, and her avoidance of, the decision of the German Courts that [Leah] is to be in the care of Mr [Kruger].

[64] Whilst I accept Ms Lightfoot's evidence that a return would create an intolerable situation for [Leah], given that her evidence was expert psychological evidence her comments can only be interpreted as being psychologically intolerable for [Leah] and not opinion as to the legal position. Indeed if Ms Lightfoot had expressed such an opinion it would be her expressing an opinion as to the ultimate outcome and such opinion would be entirely improper. I prefer to deal with the issue of separation of [Leah] from her mother and [her sibling], as I have done above, under the exercise of discretion as they are factors which impact on [Leah]'s best interests and welfare. I also note the comments of the Court of Appeal in *HJ v Secretary for Justice* where the Court of Appeal noted: [43]

> 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 systems of other countries will protect children from harm. In this context we think that references by Judge von Dadelszen to "heavy onus" … should simply be construed as a statement of the obvious – that the defence in question was, by its nature, difficult to make out.

[65] As Wylie J recorded in *ST v MW*[44] those observations by the Court of Appeal, notwithstanding the subsequent appeal of *HJ* to the Supreme Court, were not addressed on appeal and thus the law in New Zealand in this regard is that summarised by the Court of Appeal as set out above.[45]

[66] Thus I would not have been satisfied that the evidence establishes that the s 106(1)(c) defences would have been made out, and thus I would have, if required, dismissed that defence.

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[43] *HJ v Secretary for Justice*, above n 38 at [33].
[44] *ST v MW* HC Auckland CIV-2008-404-004916, 7 October 2008
[45] Above at [88]

Conclusion

[67] For the reasons set out above I decline to make an order for [Leah]'s return under s 106 of the Act on the grounds that the s 106(a) and (d) defences have been established. Further for the reasons I have set out above my decision, in relation to the exercise of the discretion, is that notwithstanding the strong policy considerations, [Leah]'s welfare and best interests favour not making an order for [Leah] to be returned to Germany. The application for an order for return is therefore dismissed.

[68] There is in force as a consequence of the original application filed on behalf of the Central Authority an order preventing [Leah] being removed from New Zealand. At this stage I do not intend to discharge that order, and note in any event there is no application before me to formally discharge it. However in light of the findings of the Fürth Family Court upheld on appeal, there is a real risk for [Leah] that if I were to discharge that order, then Mr and Ms [Winkel] may attempt to flee the jurisdiction of this Court in order to prevent Mr [Kruger] progressing proceedings under the Care of Children Act relating to day-to-day care and contact in relation to [Leah]. Mr [Kruger] is now entitled to file such proceedings in this Court.

[69] Nor do I intend to revoke the order requiring [Leah]'s passport to be held by the Court without hearing further from counsel, and I will issue a subsequent minute in relation to that issue within the next week.

S J Coyle
Family Court Judge