

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT MASTERTON**

**FAM-2017-035-000072
[2017] NZFC 7713**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN [SAMI AZOULAY]
 Applicant

AND [HARRIET NELSON]
 Respondent

Hearing: 26 September 2017

Appearances: B Inglis for the Applicant
 A Hewton for the Respondent
 V Pearson as Lawyer for the Children

Judgment: 27 September 2017

RESERVED JUDGMENT OF JUDGE A P WALSH

Introduction

[1] The Central Authority has applied on behalf of [Sami Azoulay] (the father) under the Hague Convention 1980 and s 105 Care of Children Act 2004 (the Act) seeking the return to Australia of his daughters, [Poppy Azoulay] born [date deleted] 2006 and [Naomi Azoulay] born [date deleted] 2013.

[2] The respondent, [Harriet Nelson] (the mother), opposes the application and relies on the defences in ss 106(1)(c)(i) and (ii) and s 106(1)(d).

[3] In this case, in order to make an order requiring the return of [Poppy] and [Naomi] to Australia, the Court must be satisfied:

- The grounds set out in s 105 of the Act are established by the applicant; and
- None of the defences set out in s 106 of the Act can be established by the respondent.

[4] The hearing proceeded on a submissions-only basis. As there was no cross-examination, I am unable to make any findings of fact and of credibility relating to the allegations the parties have made against each other.

[5] Extensive affidavit evidence has been filed documenting the nature and history of the conflict which led to the breakup of the relationship between the parties.

[6] The Court directed a s 133 report be obtained to address issues relevant to the defences under ss 106(1)(c) and (d).

Background

[7] The parties have lived in a de facto relationship for a number of years. The father is [nationality deleted] and is a New Zealand citizen and [country deleted] permanent resident. The mother was born in New Zealand. She is a New Zealand citizen and an Australian permanent resident.

[8] The parties moved to Australia on [date deleted] 2004. Both children were born and raised in Australia. They have dual Australian and New Zealand citizenship.

[9] On [date deleted] December 2016 the mother and the children travelled to New Zealand for the agreed purpose of visiting her family over the Christmas holiday period for approximately 30 days. The mother advised she would make arrangements for returning to Australia with the children while she was in New Zealand, but that did not eventuate.

[10] On [date deleted – one week later] December 2016 the mother applied without notice and obtained a temporary protection order against the father for the protection of herself and the children. She also obtained an interim parenting order granting her the day-to-day care of the children. The Court made an order preventing the removal of the children from New Zealand and directed travel documentation was to be surrendered.

The Father's Position

[11] The father claimed the parties and the children had been living permanently in Australia until [date deleted] December 2016. He maintained the children were habitually living in Australia.

[12] On [date deleted] December 2016 he received an email from a New Zealand lawyer advising details of the temporary protection order and interim parenting order. The mother advised the father in a Facebook message on [date deleted – the next day] December 2016 the relationship was over. The father claimed he made a number of attempts to have communication with the children but had been unsuccessful.

[13] When the parties moved to Australia, the father claimed, it was intended this would be a permanent move. He could not recall any discussion with the mother about returning to New Zealand. She had a job as [occupation deleted] at [employer deleted] in [Australian location deleted]. [Poppy] had started attending a public school.

[14] The father claimed he was involved in all aspects of parenting and shared parental responsibility with the mother.

[15] As a result of the mother obtaining a temporary protection order and interim parenting order, the father filed an appearance under protest to jurisdiction. He denied there was any risk of harm to the children in returning to Australia, and he particularly denied there was any basis for a defence under s 106(1)(c).

[16] The father confirmed he had not consented or acquiesced to the mother and the children remaining in New Zealand. He was concerned the mother would alienate the children and alleged the maternal grandmother may undermine his relationship with them.

[17] He had arranged a rental accommodation in [Australian location deleted] which would be suitable for the children and maintained he was able to support the children financially.

The Mother's Position

[18] The mother described how she was concerned the father could stop her and the children leaving for New Zealand after his threats to kill her and the children if she ever left him. She described it was "like walking on eggshells." About a week before she and the children left Australia on [date deleted] December 2016, there had been "an enormous row," which she had detailed in her affidavit evidence filed in support of her application for a temporary protection order.

[19] While the father had produced extracts of Facebook entries, the mother maintained he had been very selective; she alleged he had sent her "horrible stuff – manipulative, swearing and threatening."

[20] The mother maintained the father had little to do with the children. He was not actively involved in the community as he claimed. She contended it was never intended to live permanently in Australia. The mother alleged the father had been physically and psychologically abusive to her and to the children. She believed the

children had no legal status in Australia. She was particularly concerned about the father's attitude towards [Poppy] and how he treated her. She disputed parental responsibility was shared, as she carried out the primary parenting of the children.

[21] Addressing the nature of conflict in the relationship, the mother alleged the father was a compulsive gambler and had been unable to provide financial support.

[22] There were a number of risk factors which worried the mother. She no longer had permanent residence in Australia, nor employment. The house owned by the parties in Australia was on the market for sale. She believed neither she nor the children were entitled to government benefits or help. She claimed the father threatened if she obtained an apprehended violence order, he would kill her before the police arrived.

[23] The mother believed she would not be safe if she returned to Australia, given the alleged behaviour of the father and the threats he had made. The children had settled well in New Zealand and she had family support available; there was no family support available in Australia. Addressing risks for the children, the mother believed they would be at extreme risk because of the father's history of abuse of the children involving psychological and physical abuse, his misogynistic beliefs and extremist views. She was worried he had mental health issues, as he suffered from depression and was financially unstable.

[24] During the period the parties lived together, the mother was concerned the children, particularly [Poppy], had been exposed to domestic violence comprising psychological abuse. She described occasions when the father had physically abused [Poppy] and recalled when he had struck her on the head with a ruler and had whipped her with an electrical cord. The psychological abuse involved the father making derogatory and offensive comments about the mother and the children. In parenting, difficulties had arisen because the father would adopt an oppositional approach. The mother was concerned [Poppy] had particular food allergies which the father deliberately ignored. Concerns for [Poppy] heightened after she began self-harming. The mother was troubled by the father's favouritism of [Naomi] and the way he continued to treat [Poppy].

The Law

[25] Section 105 addresses the requirements for an application for return of a child abducted to New Zealand:

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—
 - 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.

[26] In this case there is no dispute under s 105(1) the children are present in New Zealand. They were removed from Australia, which is another contracting state, and it is accepted such removal was in breach of the father's rights of custody in respect of the children. At the time of their removal, those rights of custody were being actually exercised by the father. Before the children came to New Zealand on [date deleted] December 2016, they were habitually resident in Australia.

[27] Under s 105(2), the Court must make an order for the children to be returned promptly to the father if it is satisfied the grounds of the application under s 105(1) are

established and there is no ground for refusal of order for return of the children under s 106.

[28] The relevant provisions of s 106 in this case are as follows:

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—
- (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.

The s 133 Report

[29] Ms F Towsey, a registered clinical psychologist, prepared a s 133 report 23 August 2017. She interviewed the parents and set out the perspectives each parent had as to the breakdown of their relationship.

[30] The mother advised she had been subjected to longstanding abuse by the father. She alleged he became controlling and abusive – verbally, psychologically, financially, and physically. She reported feeling extremely fearful of the father, claiming he terrified her. She alleged he had threatened frequently to kill her. She described how she believed the father would kill her if she returned to Australia. She alleged he was “vengeful” and believed he would perceive her not returning with the children as a “betrayal”, which made him “very dangerous.” She considered if [Poppy] was returned, because she had gone against him, he would take out some form of revenge on her. The father had a longstanding history of gambling which had caused ongoing debt and depletion of the family’s financial resources and assets.

[31] The mother alleged the father had become verbally and psychologically abusive towards [Poppy] from a young age. In recent years he had been physically abusive, which included using an electric cord to hit her. She claimed the father used

[Naomi] as a “pawn”, favouring her and encouraging her to annoy [Poppy] and to hit the mother and [Poppy]. The mother said the father started to be very critical of [Poppy] when she was about five years old; he began rejecting and ignoring her. He treated her like “a thing, not a person”, leading to her feeling “unloved”, and that feeling still persisted.

[32] The father denied he had been abusive in any way towards the mother or the children. He denied all the mother’s allegations, claiming he had never abused the children and had never had anything to do with violence. He acknowledged there had been an issue with gambling, causing conflict in the relationship, and there were some financial difficulties because of his gambling. He had done his best to stop, but it appeared gambling issues still remained a concern.

[33] The father believed the maternal grandmother had influenced the children and “alienated [Poppy] completely” from him. He referred to having a bad relationship with the grandmother. He did not seek to be the primary caregiver of the children but wanted contact.

[34] Ms Towsey then addressed issues relating to each of the children. The mother described [Poppy] as being “extremely bright, articulate, very strong willed, not innocent. She had to grow up quickly.” She believed [Poppy] had “more knowledge about the world than others her age because of what she had seen” and had to deal with emotional turmoil and stress. The mother said [Poppy] “used to be such a delight, recently she is more difficult, very withdrawn at home while sociable and outgoing at school.” The mother believed and understood [Poppy] was angry with her for not leaving the father earlier. She claimed over the last two years [Poppy] had begged her to leave him. She now believed [Poppy] was happy with her leaving and happy that she was safe.

[35] Inquiries with [Poppy]’s school revealed her peers were a “huge importance to her... the most important.” It was noted [Poppy] wanted to be part of a structure and she got security from all the structures. The school was a “protective” factor and “the most constant thing in her life.” When the mother had obtained out-of-town contract work, [Poppy] had stated clearly to her she wanted to remain in her current school for

Years 7 and 8. The school indicated removing her from the school would be moving her from her “happier situation” and doing so could negatively affect her mental health.

[36] At paragraphs 16 and 17 of her report, Ms Towsey made the following observations relating to [Poppy]:

16. In the meeting with the writer it was evident that [Poppy] was an intelligent, articulate girl as both parents and school agree. She presented as a sensible mature girl, who displayed a well developed ability for her age to be thoughtful and reflective, which was likely in part due to the life experiences she described. At the same time, she was developmentally appropriate in the tone and description of her many interests and social (peer / cousin / carer) relationships.

17. The writer listened to [Poppy] describe her experience of her father. The content was wholly consistent with the physical and psychological circumstances her mother describes. However, [Poppy]’d narrative and language was her own and she used examples from her own experience to explain her situation. At times, particularly when describing the impact of her father’s behaviour towards her, her mother and her sister, [Poppy] became distressed, quiet and appeared sad. Nonetheless, she was able to articulate and convey how much she felt unloved (accompanied by a sad, quiet slightly tearful demeanour), fearful (tense and alert) and angry, though also somewhat resigned.

[37] Ms Towsey considered [Poppy]’s account contained “a range of symptomatology consistent with exposure to trauma (e.g. fear, sleep disturbance, anxiety, avoidance, irritability).” She believed her father favoured [Naomi], which made her feel deeply unloved, and she reported her father also hit [Naomi].

[38] [Poppy] described how she would hide in her room under the sheets. If the father found her, he would punish her by taking her phone away or not let her go to her friend’s birthday. She said she spent all her time “frightened”, in her room, and reading. She appeared to feel angry towards her father and her mother for what she perceived as each of their unavailability. In contrast, she now found her current care, home, and school situation extremely positive.

[39] Ms Towsey noted [Poppy] had stated repeatedly and adamantly she did not want to return to Australia. She did not want to see or speak to her father again. When asked, she said she might change when she was an adult. Her conception of being an

adult appeared to be in the distant future, which was a reflection of her developmental level.

[40] When [Poppy] was asked to draw her family, she drew herself, her sister [Naomi], her grandmother, and her mother, and then her grandfather, who had died [number of months deleted] months previously. She drew them with smiles. When asked about the father, [Poppy] would not draw him but indicated he would be on the bottom page of the drawing pad.

[41] [Naomi] had started attending preschool at the beginning of 2017. She had weekly Skype contact with the father, although engagement was variable due to her developmental level and her ability to attend for long periods of time.

[42] The father described as [Naomi] as being “a wonderful, bubbly, lively thing.” He rejected the allegations of the mother and [Poppy] that he favoured [Naomi], claiming he loved his daughters equally. The mother described [Naomi] as being “very bright, intelligent, bubbly, talkative, sings a lot, a delight, draws, very happy”. Since being in New Zealand she considered [Naomi] had changed a lot; she used to be “violent and bossy”, allegedly as a result of the father encouraging her to hit her mother and [Poppy], but now she had stopped this and had settled.

[43] In her interview, Ms Towsey found [Naomi] was an “articulate, animated, delightful little girl” as both parents and preschool agreed. Preschool had no concerns about her, noting she was always well cared for and arrived in the morning settled and with the day’s requirements. At preschool she had not talked about her father nor, particularly, her mother. This reflected her development, where preschool children are developmentally self-focused and presently the father and mother were not currently her primary caregiver.

[44] When [Naomi] started discussing Skype calls with the father, Ms Towsey noted her “chatty, responsive demeanour changed, she closed down, initially stared intently at the writer, looked very guarded then looked away and she did not respond.” This response indicated her Skype contact with the father could be a source of discomfort for her. The actual cause of her discomfort was unclear, but she made a quick recovery,

became chatty and engaged again as soon as Ms Towsey moved to another sphere of her interests.

[45] At a later stage in the interview [Naomi], spontaneously and without any prompting, advised Ms Towsey that her mother and father used to “fight” and she did not like this. When she was asked what she did, she had looked thoughtful and then put her hand up, demonstrating to stop, and then said, “Enough” and did not wish to discuss the matter any further.

Defence – ss 106(1)(c)(i) and (ii)

[46] The “grave risk” requirement is a high standard that must be demonstrated to the Court when the Court is required to consider whether a child’s return will expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation.

[47] In considering this defence in this case I have found the s 133 report to be significant. As noted when reviewing the positions of the parties, there is a conflict in their evidence as to the nature of their relationship and the reasons why that relationship broke down. The mother alleged the father had physically and psychologically abused her and the children. She alleged particularly the nature and history of such abusive behaviour used by the father against [Naomi]. The father denied all the allegations and maintained he had never used violence.

[48] At that stage I was confronted with allegations, counter-allegations and denials, and had no way of determining the credibility or reliability of the evidence of either the mother or the father. In her submissions, Ms Hewton argued as a result of supporting affidavits filed for the mother, her claims had been corroborated. But as I indicated, the fact these affidavits had been filed did not enable me to make any findings of fact or credibility.

[49] When I had regard, however, to the s 133 report, I considered it significant because of the observations made by Ms Towsey about matters disclosed by [Poppy] in her interview. As noted, at paragraph 17 of her report Ms Towsey had found, when

[Poppy] described her experience of her father, her description was wholly consistent with the physical and psychological circumstances described by the mother. I further noted Ms Towsey considered [Poppy]'s narrative and language was her own and there was no suggestion she had been influenced by the mother or any other person in what she was saying. [Poppy] was in effect describing events which she had personally witnessed and experienced.

[50] When Ms Towsey was asked what, if any, would be the psychological impact on the children of an order for return to Australia and in what ways, if any, could the psychological impact be addressed, Ms Towsey considered an order for return to Australia, even on a temporary basis, would have a very significant negative psychological and, possibly, physical impact on [Poppy], in particular. She further noted, through the impact on her mother and her sister, [Naomi] was also likely to be impacted negatively psychologically.

[51] At paragraphs 32 to 36, Ms Towsey made the following observations:

32. It is [Poppy]'s clear and firm belief, based on her reported experience of her father, that "he'd probably find us and take us away, me and [Naomi]. He's threatened to take us away"; "I'm afraid of him." It makes [Poppy] "upset to think about it." Any order to return to Australia (even temporarily) would be a major threat to the feeling of safety that she has established since, and as a result of, being in New Zealand.

33. It is likely to retrigger [Poppy]'s former symptoms (for example, fear, sleep disturbance, anxiety, episodic hair pulling), which appear to have largely resolved with the provision of safety. Additionally, it is likely to undermine her trust in adults (likely increasing her anger towards her mother; grandmother) and "authorities" (due to her experience with the Court, lawyers, 'counsellors').

34. Going to Australia would entail the loss of her primary caregiver figure, her grandmother, who appears to have been a key figure in providing a sense of safety, stability, availability and feeling cared for. So, not only would she feel physically under threat, she would be significantly impact psychologically and, at the same time, not have available a trusted person whom she has always experienced as protective and a (school) environment in which she feels confident and happy. In this intolerable situation, [Poppy] would likely undergo a significant regression. It would be a concern that her existing anger towards her mother could escalate, (with [Poppy] likely perceiving her mother as failing to protect her), risking a breakdown in the relationship with her mother, which would make her highly vulnerable as she moves into adolescence.

35. This exposure to grave risk of undoubted psychological and potential physical harm would be compounded by situational factors, such as: lack of financial security and resources (the mother has no job in Australia), difficulties with access to social / medical services or benefits (mother, children and father have New Zealand passports), restarting at another school / preschool.

36. Due to [Naomi]'s young age, she is not able to formulate or articulate views. It is likely that her sister's and mother's strong fear of Mr [Azoulay]'s possible retaliation towards them would be displayed and enacted in anxiety-driven behaviours which would have a negative effect on [Naomi]. Additionally, she would be exposed to the difficult environmental factors as above.

[52] Ms Towsey considered the psychological impact could only be addressed by a very significant change in [Poppy]'s and her mother's belief about the father and his likely response to their presence in Australia. The provision of "guarantees", explanation or persuasion, either from the father or the Court, was unlikely to change that belief and would not address the psychological impacts.

[53] Ms Towsey observed [Poppy]'s beliefs had been formed and based on her continuous experience of the father over the years. The only thing which could change the belief was a major and continuous change in her future experience of him. It would likely take some years for [Poppy] and her mother to be persuaded the father had changed, given the longstanding nature of their experience of him. Any claim the father might make about having changed would not meet the need for [Poppy] to observe and experience it as permanent.

[54] Ms Towsey also considered what would happen if an order was made for the return of the children to Australia. She concluded [Poppy] would need to be watched and monitored closely. [Poppy] had indicated she would run away. An authority figure (such as Lawyer for the Child) could explain to [Poppy] exactly what would happen, if this was known, from a perspective and in terms she would understand. Whoever was managing the transition to Australia would need to be very mindful that [Poppy] would be at risk of increased anxiety. This anxiety was likely to be expressed as anger and a deterioration in trust in adults and was likely to be expressed as defiance and oppositional behaviour and/or withdrawn and internalising behaviours. This would threaten the likelihood of [Poppy]'s willingness to engage with any "helping"

adults in the future, which she would be highly likely to require, given this would be occurring at a pivotal time in her identity and self development.

Analysis and Findings – ss 106(1)(c)(i) and (ii)

[55] When I considered these observations of Ms Towsey, I was mindful of observations made in case law that the Court needed to take into account, in this case, that in Australia the welfare and best interests of the child was the primary consideration, as it is in New Zealand. There is no doubt the Family Court of Australia and the resources attached to that Court would be able to deal with the complex issues affecting [Poppy] if she was in Australia.

[56] I am satisfied [Poppy] has experienced psychological and physical abuse, for the reasons set out by Ms Towsey relating to how she expressed her concerns. It is evident, before [Poppy] came to New Zealand in December 2016, she was being adversely affected by the way the father treated her. I am mindful of the father's denials about any abuse of [Poppy], but given the assessment made by Ms Towsey of [Poppy]'s views, I consider considerable weight should be placed on this assessment.

[57] The reality is, [Poppy] has settled well in New Zealand, and I note the positive comments made by her school. The significance of the school is an important factor, in my view, as it is one place of safety for [Poppy]. It is also important to note the strong relationship which appears to exist between [Poppy] and the maternal grandmother.

[58] On the information before me, I find there is a grave risk that if [Poppy] is returned to Australia, it would expose her to psychological harm, given the fears she has expressed about the father and how she has been affected by his treatment of her. While practical measures may be able to be put in place to prevent physical harm to [Poppy], no such barriers can prevent the psychological harm which she would experience based on the assessment of Ms Towsey.

[59] Although [Naomi] was too young to express an informed view such as [Poppy] had done, it was evident from her reaction during the interview process that she

experienced discomfort in her relationship with the father. Her refusal to discuss matters indicated, in my view, distress for her when asked to consider her relationship with him.

[60] Given those concerns for the children in the context of psychological harm, I have also taken into account the nature of the conflict between the parties. The mother has obtained a temporary protection order against the father, which has since become final. The father did not have the opportunity to oppose the application for the temporary protection order, and I acknowledge he maintains the mother's allegations of him subjecting her to physical and psychological abuse are denied. What is significant in this respect is the mother's fear of the father. The reality is, if the mother remains in that state and is confronted with having to return the children to Australia, there is the potential for the children to be exposed to further conflict between the parties, and the mother's ability to parent them will be adversely compromised.

[61] These factors lead me to consider whether there is a grave risk of placing the children in an intolerable situation. As matters now stand, the mother has no employment in Australia. If she was to return to Australia with the children, she would need to find appropriate accommodation. Whether she would be able to obtain suitable employment, having regard to her caring obligations for the children, remains to be determined. Coupled with those factors is the ongoing dynamic of conflict between the father and the mother.

[62] When I take into account the totality and combination of these factors and their likely impact on the children, I find there is a grave risk that if the children were returned to Australia, they would be placed in an intolerable situation.

Defence – s 106(1)(d)

[63] In *White v Northumberland*.¹ the Court of Appeal considered the correct approach in the interpretation and application of s 106(1)(d) of the Act and the exercise of the discretion contained in that provision. The Court approved the approach of

¹ *White v Northumberland* (2006) 26 FRNZ 189; [2006] NZFLR 1105 (CA)

Chisholm J when he dealt with the case in the High Court. Chisholm J expressed the view that consideration of a child's objection under s 106(1)(d) involved four issues:

- Does the child object to return? If so;
- Has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views? If so;
- What weight should be given to the child's views? And;
- How should the residual statutory discretion be exercised?

[64] The Court of Appeal confirmed it endorsed this analysis in all respects. The four steps reflected accurately the Court's tasks on "child objection" cases.

[65] As to the nature of the residual statutory discretion in s 106(1)(d) cases, the Court of Appeal accepted a Court could look at "general welfare considerations" but only to that limited extent indicated by the Court of Appeal, which noted a Hague Convention application remains a "summary trial"; the Court is not determining where the child should eventually end up living. Welfare considerations relevant to that question did not arise on what was essentially an inquiry as to the *better forum* for determining that question.

[66] Associate Professor John Caldwell addressed the law relating to the "child objection" defence in s 106(1)(d) in an article, "The Hague Convention and the 'Child Objection' Defence"². He noted, "As with all Convention defences, the 'child objection' defence is itself the sole and sufficient exception to the general rule of return." As with all the other defences, the importation "of any additional gloss in the exercise of discretion is both unnecessary and precluded."

[67] In the application of the defence under s 106(1)(d), the Court must have regard to the existence of the child's objection to being returned and whether the child has obtained an age and degree of maturity at which it is appropriate to give weight to the child's views.

[68] Professor Caldwell observed (page 22):

² (2008) 6 NZFLJ 84. The actual page/reference numbering in the judgment refers to the pages of the printed article provided by Ms Inglis.

From the express phrasing and wording of this defence, as found in both the Convention itself and the Care of Children Act 2004, it is clear that only two “gateway” conditions are in fact specifically provided for – namely, the existence of an objection and the attainment of appropriate age and maturity. Nevertheless, following the reasoning propounded by Chisholm J, the courts in New Zealand are additionally required to determine the appropriateness of according *some* degree of weight to the child’s views before undertaking, in the exercise of their residual discretion, the final step of determining the *actual* weight. Given the New Zealand Court of Appeal’s explicit endorsement of this approach, it is appropriate to examine here the courts’ assessment of the cogency and the circumstances surrounding the expression of the child’s views as a step that is both preliminary to and distinct from the exercise of discretion.

He noted neither the Act nor the Convention “address the quality and level of objection needed to bring the defence into play.” He observed, “Now the courts simply consider whether the child’s wish is to remain.”

[69] In addressing age and maturity factors, he noted (page 23):

... there is no halfway house; a child is either of a sufficient age and maturity to have his or her views taken into account or he or she is not. The question of a child’s maturity is obviously a matter of judicial judgment that needs to be formed on an individualised basis....

In addressing these factors, he noted the Court would have regard to non-statutory factors relating to the rationality and cogency of the child’s views and the independence of the child’s views. As to the strength of the child’s views, such strength nevertheless remains relevant in the question of weighting under the third step proposed by Chisholm J. Professor Caldwell considered the forcefulness of the child’s view would, along with matters of cogency and independence, remain part of the ultimate discretionary mix.

[70] In discussing *White v Northumberland*, Professor Caldwell noted (page 27):

The Court of Appeal definitively determined the establishment of the “child objection” defence did not give rise to any presumption *against* return in the exercise of discretion. This means the consequential discretion arising under s 106(1)(d) is entirely at large.... New Zealand courts must, in the exercise of their s 106(1)(d) discretion, balance the Convention considerations of comity, deterrence, and restoration of the status quo against factors such as the nature of the particular objection and the best interests of the child generally.

Professor Caldwell further observed (page 28):

The potential relevance of “general welfare” considerations in the exercise of discretion under s 106(1)(d) was certainly accepted by the Court of Appeal in *White v Northumberland*, but the judges did there reiterate the orthodoxy that these welfare considerations relate only to the period up to when the Court (be it that of the requesting or requested state) dealt with the question of where the child should live. The Court of Appeal was thereby affirming that Hague Convention proceedings essentially concerned forum rather than welfare. Nevertheless, it is clear from the cases that a number of specific welfare factors could play an important part in the exercise of the Court’s discretion for the “child objection” defence...

[71] Ms Towsey assessed the objection raised by [Poppy] about the proposed return to Australia. She noted the rationale for her objection was based on these factors:

- Her fear of the father
- Her intense fear of her father abducting them
- Her experience-based understanding of her father, which included a strong conviction that her father could not change
- Her feeling of safety in New Zealand
- Her being very happy, settled and involved in her current school and friendships
- Her being happy and settled in her current care arrangement.

[72] Ms Towsey then considered whether the objection was likely to be reality-based and/or affected by undue influence and/or able to be addressed by explanation or intervention. As already noted by her, the content of [Poppy] description of her father’s behaviour was wholly consistent with the physical and psychological circumstances her mother had described. [Poppy] had also described symptoms including sustained fear, sleep disturbance, avoidance, and anxiety, which were consistent with exposure to trauma. Her pulling out her hair was a symptom indicative of high dis/stress levels and had been acknowledged by the father. These features taken together suggested her fears and her lack of safety were reality-based.

[73] Ms Towsey noted she could not comment on the likelihood of the father “kidnapping / abducting” the children. She observed, however, the fact [Poppy] firmly believed this was a possibility was sufficient to have a very significant negative psychological impact on her.

[74] Ms Towsey considered whether there was any undue influence on [Poppy]. She reported when she asked the father what he thought about her expressed wish to stay in New Zealand, he had responded that he did not believe her and said her best friends were in Australia. He did not believe she would want to stay in New Zealand.

[75] [Poppy] confirmed initially she was upset about losing contact with her friends after she came to New Zealand, but over time she has started making friends in New Zealand and acknowledged that she and her friends in Australia were “drifting apart”.

[76] Ms Towsey considered “the security, stability, social relationships, engagement and enjoyment [Poppy] derives from her current school and social environment” had been and continued to be a crucial factor in her recovery and healing from her stressful experiences. The school concurred with that view. She noted, “[Poppy]’s developmental stage, peer relationships and engagement are particularly and increasingly important... The school can provide stability when in other areas of a child’s life there is uncertainty and change.” With these consolidating and continuously in place, the risk of [Poppy] developing mental health and/or behaviour problems as she moved into adolescence would reduce.

[77] The father had alleged the maternal grandmother had subjected [Poppy] to undue influence and believed the grandmother was alienating her from him. Ms Towsey found, however, when [Poppy] described her situation, the narrative, the language and examples were her own and not those used by her mother. Her emotional presentation was highly congruent with the content and events she described. There was nothing in her presentation or narratives that suggested she was being unduly influenced by her mother, grandmother, or anyone else.

[78] Ms Towsey also assessed whether [Poppy]’s objection could be addressed by explanation or intervention. As she had already noted in her report, [Poppy]’s objection was based on her belief, and the belief of her mother, about the father’s likely response to their presence in Australia. [Poppy]’s beliefs had been formed and were based on her continuous experience of the father over the years. Ms Towsey considered the only thing which could change the belief was a major and sustained change in her future experience of the father. Given the longstanding nature of her

experience, it would likely take some years for [Poppy] and her mother to be persuaded the father had changed. Any provision of “guarantees”, explanation or persuasion, from whatever source, would not effect any change to [Poppy]’s objection. Ms Towsey was concerned if these were provided and on that basis an order for return to Australia was made, [Poppy] could be at high risk of deterioration in her mood and behaviour.

[79] Ms Towsey then addressed [Poppy]’s maturity and understanding to recognise the implication of her objection. She noted children of the same age may display different levels in factors relating to maturity and understanding of factors facilitating the process of making a decision. At [57] of her report she stated:

The following neurological skills / abilities develop over childhood at different ages and stages. It is the combination of these, typically developed by about age 10 to 12, which are required for the capacity for *understanding*:

- (i) the capacity to express a choice and to independently communicate views
- (ii) language proficiency
- (iii) the ability to attend to and focus on information
- (iv) memory and recall skills to process and integrate information.

Ms Towsey noted [Poppy] was aged 11 years 8 months. It was evident from her interview with her and the school and also reports from the school, [Poppy] possesses these neurological skills for understanding.

[80] Ms Towsey considered:

[Poppy] experiences were likely to have contributed to a well developed ability for her age to be thoughtful and reflective. The writer observed instances which demonstrated a good ability to consider options and make a reasoned choice. For example, [Poppy] has made decisions about her current location and home situation (on which the writer would not elaborate in order to protect her privacy). [Poppy] had considered several competing factors, the feelings and interests of others as well as her own interests, not only in the short term but with a longer term time frame. The process of making this decision indicated that [Poppy] was capable of reasoning, using all available information, considering this information within its context and projecting the implications forward for some time. In the writer’s opinion, her decision was the optimal decision and reflected maturity in recognising the implications.

[60]

[81] Ms Towsey was concerned if the Court made an order for return despite her objection, [Poppy] was likely to be devastated and feel severely anxious and become angry. She commented:

Having disclosed what was happening to her, having achieved a sense of safety, been resettled in a new school, having thought carefully about her situation and having said repeatedly what she wants to those who have asked her; if there was an order for return to Australia, she would likely feel disregarded, not listened to and would likely have a strong feeling of injustice and of powerlessness. [Poppy] is highly likely to respond by either “acting out” / externalising or “acting in” / internalising, or a combination of the two. Having just achieved a positive situation of safety and stability, this would severely disrupt this stage of [Poppy]’s development, leaving her highly vulnerable to adopting dysfunctional coping strategies into the future (such as, running away, drug and alcohol use, self harm, associating with unsuitable peers). [62]

A key factor of [Poppy]’s situation is her fear, which is derived from her many years experience of her father. Despite [Poppy]’s well developed cognitive ability, her understanding and maturity for her age, it would be very hard for her to understand the rationale for an order to return. She may experience it as a significant betrayal. [63]

[82] In her submissions Ms Pearson argued the defence under s 106(1)(d) had been established, having regard to the observations made by Ms Towsey.

Analysis and Findings – s 106(d)

[83] I am satisfied, after considering Ms Towsey’s report, she very carefully explored in depth the basis for [Poppy]’s objection and assessed her degree of maturity. I find [Poppy] impresses as a mature young person who has given very careful consideration to her situation. In these circumstances I consider considerable weight must be given to her views.

[84] I am satisfied if an order was made to return [Poppy] to Australia, this would be exposing her to unacceptable risks to her welfare and best interests, given the possibilities as to how she would react, as described in Ms Towsey’s report.

[85] For these reasons I find the defence under s 106(1)(d) is established.

[86] I have taken into account the observations made by the Court of Appeal in *White v Northumberland* as to the exercise of the discretion in s 106(1)(d).

[87] Given the reasons set out in Ms Towsey's report, I find there are clearly general welfare factors relating to the children which I must take into account. When I do, I find the totality of those factors persuasive and justifies the Court exercising its discretion not to make an order for [Poppy] to be returned to Australia, given her objection and the findings I have made about the basis for that objection and her degree of maturity.

[88] I acknowledge the defence under s 106(1)(d) does not apply in the case of [Naomi]. I note, however, the observations made by Professor Caldwell when he stated (page 29):

The Courts must deliberate upon the objections of each abducted child within a family quite separately, but, in the exercise of their discretion, the closeness of the children generally, and their general family situation, may well be influential considerations in the judicial deliberation. Thus, at the final discretionary stage, when the Court comes to consider welfare issues, a child is not to be treated in isolation. The need to keep siblings together, by way of either ordering or declining the return of the children as a collective group, has often weighed heavily with the Courts.

In that respect he noted observations made in *Damiano v Damiano*.³, *U v D*.⁴, *Secretary for Justice v Penney*.⁵ and *U v R*.⁶

[89] I consider in this case I must have regard to the fact I cannot treat [Poppy] and [Naomi] in isolation. I consider there is a need to keep the children together, having regard to their general family situation and the fact they are settled in New Zealand.

Decision

[90] For the reasons I have set out, I find there are grounds for refusal of the orders for the return of the children which are established under ss 106(1)(c)(i) and (ii) and s 106(1)(d).

³ *Damiano v Damiano* [1993] NZFLR 548, 555

⁴ *U v D* [2002] NZFLR 529, 543

⁵ *Secretary for Justice v Penney* [1995] NZFLR 827

⁶ *U v R* [1998] NZFLR 385

[91] Accordingly, in the exercise of the discretion contained in ss 106(1)(c) and (d), I dismiss the application for the return of the children to Australia and confirm they are to remain in New Zealand.

A P Walsh
Family Court Judge

Signed at am/pm on 27 September 2017