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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT PAPAKURA

I TE KŌTI WHĀNAU
KI PAPAKURA

FAM-2019-055-000087
[2019] NZFC 6196

IN THE MATTER OF	CARE OF CHILDREN ACT 2004 & THE HAGUE CONVENTION OF THE CIVIL ASPECT OF INTERNATIONAL CHILD ABDUCTION 1980
BETWEEN	NEW ZEALAND CENTRAL AUTHORITY on behalf of [JOSHUA SPARROW] of [address deleted], [occupation deleted] Applicant
AND	[CLAIRE WALDERGRAVE] of [address deleted], [occupation deleted] Respondent

Hearing: 2 August 2019

Appearances: Ms L Soljan for the Applicant
Mr J Sutton for the Respondent

Judgment: 14 August 2019

RESERVED DECISION OF JUDGE A-M SKELLERN
[Hague: Consent, Grave risk]

Introduction

[1] This is a Hague Convention application for **[Jean Sparrow]** and **[Alice Sparrow]** [dates of birth deleted] ("the children") to be returned to Australia pursuant to s 105 of the Care of Children Act 2004 ("the Act").

[2] Section 105 is contained in Part 4 of the Act which incorporates the Hague Convention on the Civil Aspects of International Child Abduction, into New Zealand domestic law.

[3] The father of the children ("the applicant") seeks the return of the children to Australia. The mother of the children ("the respondent") opposes the return on two of the grounds set out at s 106 of the Act. She says first, that the Applicant consented to the children's removal to New Zealand. Second, that there is a grave risk a return would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation.

[4] The children were born in [location A], Western Australia on [birth dates deleted]. They are Australian citizens by birth and New Zealand citizens by descent. From the children's birth until [date 1] 2018, they resided in [location A], Western Australia.

[5] The respondent and the children left [location A] to travel to New Zealand with the respondent's mother [Sybil Waldergrave] on [date 1] 2018.

[6] The applicant has subsequently travelled to New Zealand to see the children but given that there is a Protection Order in force against him in New Zealand[1], there is a legal impediment to his making direct contact with the respondent.

[7] The applicant's affidavit in support of his application to have the children returned was sworn on 20 April 2019.

[8] The application for return of the children was formally made on 21 May 2019.

[1] Made on the respondent's application without notice on 11 December 2018

[9] On 21 May 2019, orders preventing removal of the children from New Zealand and for substituted service were made on a without notice basis.

[10] The respondent was directed to be served by email and for a notice of defence or request for an appearance fixed at seven days from the date of service.

[11] Service was effected on the respondent on 22 May 2019. On 4 June 2019, counsel for the respondent filed a notice of defence to the application. He noted the respondent contacted him on 29 May, met with him on 31 May and on 4 June sought a direction for a further 21 days to file affidavit evidence in support of her notice of defence.

[12] That application, although opposed by the applicant, was granted.

[13] As is customary, the application for return was heard at a Submissions Only hearing[2] in the Manukau Family Court on 2 August 2019.

[14] Before the court is able to deal with an application, the following jurisdictional requirements must be met.

The jurisdictional requirements of s 105

> 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

[2] Basingstoke v Groot [2007] NZFLR 363

(d) that the child was habitually resident in that other Contracting State immediately before the removal.

(2) Subject to section 106, a court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—

(a) an application under subsection (1) is made to the court; and

(b) the court is satisfied that the grounds of the application are made out.

(3) A court hearing an application made under subsection (1) in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a court of that State, or a decision of a competent authority of that State, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State, and may adjourn the proceedings for that purpose.

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

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

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

[15] The respondent accepts that the requirements of s 105 are met[3].

[16] This court is satisfied that;

(a) The children are present in New Zealand,

(b) The children were removed from a Contracting State in breach of the applicant's rights of custody,

[3] Submissions of respondent 31 July 2019 at paragraph 23

(c) That at the time of that removal those rights of custody were being exercised by the applicant or would have been but for that removal, and

(d) The children were habitually resident in Australia immediately before the removal.

[17] The Court therefore has jurisdiction to determine these proceedings.

[18] Given that s 105 has been satisfied, the onus shifts to the respondent to establish one of the possible defences under s 106 of the Act.

> **106 Grounds for refusal of order for return of child**
>
> (1) If an application under section 105(1) is made to a court in relation to the removal of a child from a Contracting State to New Zealand, the court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the court—
>
> (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or
>
> (b) that the person by whom or on whose behalf the application is made—
>
> (i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or
>
> (ii) consented to, or later acquiesced in, the removal; or
>
> (c) that there is a grave risk that the child's return—
>
> (i) would expose the child to physical or psychological harm; or
>
> (ii) would otherwise place the child in an intolerable situation; or
>
> (d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in

accordance with section 6(2)(b), also to give weight to the child's views; or

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

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

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

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

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

Background to these proceedings

[19] The background circumstances to the relationship are largely undisputed.

[20] The applicant and respondent met in Australia in May 2017 and moved in together as a couple in June 2017.

[21] The applicant is a New Zealander by birth. He has resided in Australia since 2008 and is a permanent resident of Australia. The respondent, is a New Zealander by birth, and is also an Australian Permanent resident. She resided in Australia from 2010 to 2018.

[22] The applicant financially supported the respondent and the children by working as [occupation deleted], until the respondent left Australia. During their time together, the respondent was at home looking after the children.

[23] The parties' relationship was volatile. There are numerous texts annexed to the affidavits filed in the proceedings, some positive and affectionate and others indicative of a troubled relationship. There were times when the applicant canvassed the respondent about her and the children going to live in New Zealand for the respondent to receive the support she required.

[24] The applicant says the root of the difficulties between the parties was alcohol and substance abuse by the respondent. The respondent says that the applicant was violent towards her.

[25] It is not contested that the applicant was violent to the respondent on 23 November 2018, although the parties' accounts of the incident differ. He was charged with an assault on her. In breach of his bail conditions, the applicant returned to the parties' home to collect some belongings. He received what appears to be the equivalent of a suspended sentence in New Zealand and has had no conviction entered against him.

[26] He says he has sought professional psychological assistance and is on the waiting list for a Stopping Violence Programme known as "Changing Tracks".

[27] Having been required to leave the parties' home as a result of the assault upon her, the applicant stayed with friends from 24 November 2018 until 5 December 2018.

[28] The parties agree that from around August 2018, they discussed whether it would be better for the respondent to return to New Zealand with the children.

[29] In September 2018, the applicant sent the respondent's mother text messages to the effect that he thought it was best that the respondent return to New Zealand with the children. He raised concerns about the respondent's alcohol problem and how poorly he was dealing with it.

[30] The parties agree they undertook counselling. They disagree as to the purpose of that counselling.

[31] It is undisputed however, that on 4 October 2018 they jointly entered into a residential tenancy agreement for a property in Western Australia. The tenancy was to commence on 21 November 2018 and end on 20 November 2019.

[32] Between 4 October and the morning of 23 November 2018 text messages of an intimate and loving nature were exchanged between the applicant and the respondent. They are annexed to the applicant's affidavit of 10 July 2019.

[33] The parties booked a trip to New Zealand for a holiday, leaving [location A] on 21 December 2018 and returning to [location A] on 28 January 2019 ("the flights").

Did the applicant consent to the removal of the children from Australia? - Section 106 (1)(b)(ii)

The respondent's case

[34] The respondent's evidence is that she removed the children from Australia to New Zealand with the applicant's consent. She says she believed consent to have been given, based on the following events:

(a) In August 2018 the applicant first told the respondent he did not believe their relationship was going to work and she should consider moving back to New Zealand to have family support.

(b) Later that month the parties agreed to the children moving back to New Zealand with the respondent. The applicant confirmed that decision to the respondent's mother in a message on 21 August 2018. That message was confirmed later that day advising the applicant and the respondent had planned out what would need to happen for "[Claire] to get home".

(c) On 15 September 2018 the applicant sent a further message to the respondent's mother reiterating that he was "pretty confident that the only resolution to [his] and [Claire]'s relationship was that she goes home with [Sybil]." The message

ended by saying he would try and get the children's passport sent off that day.

(d) On 24 September 2018 the applicant sent another message to the respondent's mother asking what date she was booked to leave [location A]. He offered to rebook the respondent and children's flights if she could pay the fee as he could not offer it at the time.

(e) The parties had multiple discussions about the respondent returning to New Zealand with the children and it was agreed the applicant would pay child support to help with the children's costs.

(f) The applicant discussed the respondent returning to New Zealand with the children with his mother.

(g) In about October 2018 the parties discussed it would be best for the children to move to New Zealand with the respondent on a permanent basis.

(h) Between October 2018 and 23 November 2018 the parties continued to look for someone to accompany the respondent and the children to New Zealand, without success.

(i) On 23 November 2018 the applicant assaulted the respondent. An Order was served on the applicant preventing his from coming near the respondent for 10 days. The applicant was arrested for breaching his bail conditions and the respondent was granted an instant Protection Order.

[35] Against the abovementioned background, the respondent contends that the ultimate date of consent to the move to New Zealand was 23 November 2018. The respondent says that on the night of the assault the applicant told her to "hurry up and

fuck off back to New Zealand". She took this as consent to relocating permanently with the children to New Zealand.

[36] On 25 November 2018 the applicant phoned the respondent's mother in New Zealand to explain why he had hit the respondent. The respondent's mother asked the applicant if he was agreeable to the respondent and children coming back to New Zealand to live. The respondent's mother and father say he answered "yes" however there was no one available to accompany them and he could not offer to pay to change the flights or take time off work.

[37] The respondent says that the holiday arranged is distinct from the events in late November 2018.

[38] The respondent says that because the lease for the property was signed before the applicant consented to her relocation, the fact the parties jointly signed a lease is irrelevant.

The applicant's case

[39] The applicant asserts the respondent's use of alcohol was a serious problem. He says he sought the assistance from a clinical psychologist to deal with issues of concern to him, including relationship difficulties.

[40] He denies that there was any final agreement as to relocation of the children to New Zealand. The discussion was only at the point of discussing pros and cons.

[41] The applicant denies any agreement in October to a permanent relocation.

[42] The applicant says notwithstanding the difficulties, the parties were continuing to work on their relationship.

[43] The applicant disagrees about the detail of his conversation with the respondent's parents on or around 25 November. He says that the question put to him was whether he would be ok with the girls staying at the respondent's parents' home if it did not work out with the respondent, to which he answered yes.

[44] The applicant says that he learnt on 29 November 2018 through his mother, who had been advised by the maternal grandmother that the respondent was going back to New Zealand with the children.

[45] His evidence is that upon being advised that the children would be removed from Australia he made an immediate and concerted effort to prevent the removal. He tried to call the respondent, the respondent's mother and the respondent's aunt, without success. They did not answer his calls.

[46] Upon learning that the children were being taken to the airport the applicant immediately sent a text to the maternal grandmother confirming that he did not consent to the removal.

[47] He said "You are NOT taking the kids out of the country without my permission tho, please tread carefully on that matter".[4] The maternal grandmother says she did not receive that message until she and the children arrived in New Zealand.

The legal authorities on consent

[48] The Court of Appeal in *KMA v the Secretory for Justice* [2007] NZFLR 891 set out the relevant principles on the issue of consent. They are:

(a) The evidence in support of consent needs to be clear and cogent;

(b) The consent must be real, positive and unequivocal;

(c) There may be cases where consent could be inferred from conduct, but the evidence must be clear and cogent.

(d) An abusive response to a parent who indicates an intention to leave cannot be construed as consent.

[4] [Exhibit number deleted] affidavit of father sworn 20 April 2019.

[49] The High Court in *H v R* has commented as follows:

> "… the proper approach to consent permits the court to take into account a broad range of evidence. That is not, of course, to "water down" or otherwise diminish the requirement to reach a positive view that, on the balance of probabilities, consent was actually given. The question is not one of "implied" or "constructive" consent. Further, mere acknowledge of relocation will not amount to consent. Nevertheless, the approach recognises that the combination of a broad range of facts and circumstances may ultimately satisfy the court that, on the balance of probabilities, consent to relocation was actually given."[5]

[50] The question is can the court be satisfied at the time of removal of the children from Australia on [date 1] 2018 the father had given his consent to the removal.

Was consent given?

[51] The parties' relationship was troubled.

[52] I accept that they were having discussions in August and September about the children moving to New Zealand permanently with the respondent.

[53] I am satisfied that as at 4 October 2018, the parties intended to continue their relationship, evidenced by signing the tenancy agreement for a year long tenure.

[54] I note the content of the text messages between the parties from 4 October 2018 to 23 November 2018. There is no question of a separation being contemplated. The texts are positive and affectionate.

[55] The respondent does not deny that the applicant tried to call her, her mother and her sister before the children were taken to New Zealand and that they did not answer his calls. Given they were about to leave Australia permanently, this refusal to speak with him, is at the very least, unreasonable.

[56] The respondent's evidence of his text to the maternal grandmother where he sets out his opposition to the relocation of the children very clearly, is incongruent with a telephone call, four days before, agreeing to the move.

---

[5] [2017] NZHC 2617 at [32].

[57] The manner of removal of the children is suggestive of an aspect of furtiveness.

[58] Real, positive and unequivocal consent, is not supported by the evidence. There must have been at least a real doubt on the part of the respondent and her family as to whether the applicant was agreeable to the children permanently residing in New Zealand. The applicant's behaviour on discovering the children were leaving Australia is congruent with a lack of consent.

[59] Even if it is accepted that the applicant told the respondent to f… off back to New Zealand, that does not constitute agreement to the children permanently leaving Australia.

[60] I do not find real positive or unequivocal consent.

[61] There is no conduct by the applicant from which an inference could be drawn that he did consent.

[62] The respondent has failed to satisfy the onus upon her to the requisite standard that the applicant consented to the children leaving Australia.

Retraction of consent

[63] Given that I find there was no consent by the applicant to the relocation to New Zealand on a permanent basis there is no need to consider the question of retraction.

Section 106(1)(c)(i) - a grave risk that the children's return to Australia would expose them to physical or psychological harm

[64] The respondent's evidence is that the applicant was physically and psychologically violent towards the children on a number of occasions.

[65] She says he had a short temper and would yell at the children and make them cry. She says the applicant would push the pram into things out of anger if the children were grizzling and when in the car he would drive fast and upset the children.

[66] She says he would turn the music in the car up loud and swear at the children.

[67] She says the applicant was physically abusive towards her in front of the children.

[68] There was an incident, says the respondent, when one of the children was screaming and the applicant referred to her in a very derogatory manner.

[69] The respondent denies any such behaviour to the children.

[70] He agrees that he assaulted the respondent.

The legal authorities on grave risk of physical or psychological harm

[71] The High Court has recently dealt with the question of physical or psychological harm in two cases, *Qamus v Rowley* [2017] NZHC 2260 and *Mikova v Tova* [2016] NZHC 1983.

[72] The authorities clearly establish that for the exception to apply the anticipated physical or psychological harm must be severe and substantial.

[73] The court must take into account the nature of the protection afforded to children in the country of origin. The High Court in *Mikova v Tova*[6] commented that:

> "The relevant question is whether a New Zealand court is satisfied that the system of applying and enforcing laws in the country of habitual residence of an abducted child is so defective that it is likely to fail to prevent grave risk of the child of being exposed to physical or psychological harm or from being otherwise placed in an intolerable situation. If so the court has a discretion to refuse to make an order for the child's removal under s 106(1)(c). But establishing that will not be an easy task. No court has done so in New Zealand yet."

Is there a grave risk of physical or psychological harm to the children?

[74] The Australian police were responsive to the respondent's concerns about the applicant when he was arrested and charged in relation to the 23 November incident.

---

[6] [2016] NZHC 1983 at [39]

[75] The parties will presumably be living separately in Australia and the respondent will likely have the care of the children.

[76] The parties will each have resort to the Australian Court, as required, to assist with resolution of care issues.

[77] The applicant has actively sought professional assistance to address his issues including attending with a clinical psychologist and enrolling for the Changing Tracks course.

[78] The tenor of the text messages between the parties, suggests that prior to the assault upon the respondent, the parties were making a real effort to repair their relationship.

[79] The respondent's evidence fails to meet the high threshold required.

[80] The respondent has not discharged the onus upon her in respect of this defence. This defence also fails.

Section 106(1)(c)(ii) grave risk that the children would otherwise be placed in an intolerable situation

[81] The respondent claims that she could not support herself and the children financially in Australia.

[82] The applicant has however provided evidence of support available to her including:

(a) His child support payments

(b) MEDICARE for the respondent and children

(c) Benefits to which the children are likely to be entitled

(d) International custody dispute payments available from WINZ where court proceedings are initiated in Australia

(e) Child care assistance from his aunt and cousin who regularly assisted with the care of the children before they left Australia

(f) He is willing to seek changes to his employment to assist more with a caregiving role of the children

(g) The respondent's parents would continue to financially support the mother and children regardless of which country they are residing in.

The legal authorities on grave risk of an intolerable situation

[83] The High Court in 1995 defined the meaning in this context of the word intolerable. Greig J said "Something which cannot be tolerated. It is not just a disruption or trauma, inconvenience, anger. It is something which must be of some lasting and serious nature which cannot be tolerated."[7]

Is there a grave risk that a return would place the children in an intolerable situation?

[84] Given the avenues of support available to the respondent on a return to Australia, her evidence falls short of satisfying me that the children at grave risk of an intolerable situation, if a return was ordered.

[85] There is no question of a situation which is long-lasting and serious, which cannot be tolerated.

[86] This defence also fails.

[7] (1995)13 FRNZ 498

Decision

[87] Given that the requirements of s 105 have been satisfied and both defences to a return, pursuant to s 106, failed, an order is made for the return of both children, to Australia.

[88] There will be a Judicial Conference allocated by telephone in 14 days to address any outstanding issues of implementation.

A-M Skellern
Family Court Judge