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

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IN THE FAMILY COURT
AT NAPIER

I TE KŌTI WHĀNAU
KI AHURIRI

FAM-2019-041-060
[2020] NZFC 10248

IN THE MATTER OF	CARE OF CHILDREN ACT 2004
BETWEEN	[SRIYA ISHAN] Applicant
AND	[ARUSH KRITHIGAN] Respondent

Hearing:	23-20 November 2020
Appearances:	Mr S Kang for Applicant Respondent by AVL Mrs S L Hayward for Child Mr M E Macfarlane Counsel to Assist the Court
Date of Decision:	15 January 2021

RESERVED DECISION OF JUDGE P J CALLINICOS

Introduction

[1] [Abira Arush] was born to the parties in Malaysia. She is now [under 10] years of age. Her parents, the applicant mother Ms [Ishan] and respondent father, Mr [Krithigan], are both Malaysian. They had an unhappy marriage and many disputes arise as to events within the marriage.

[2] However, the most material event cannot be in dispute, this being the wrongful removal of the child by the mother from Malaysia to New Zealand on [date 1] 2016. As will become evident, this removal is but one of many acts of deception by the mother. This decision explores how the conduct of the mother impacts the welfare and best interests of the child as that is assessed according to the various principles in s 5 of the Care of Children Act 2004. The actions of the applicant have carried far-reaching consequences for the child's relationship with the father, the paternal family and her connection with her country of birth.

[3] The conduct of the mother has involved a multitude of deceptions; deliberate false statements, misleading information and half-truths. The nature and extent of her actions enters the nefarious, driven solely by achieving her own ends, while unconcerned for the immense consequences for her child and others. This decision culminates in the difficult issue of whether this Court should endorse such wrongful conduct by granting to her the orders she seeks or order a return of the child to her country of birth. There is no simple solution to the traumatic situation that the mother's actions have created.

Background

[4] Drawing from the extensive evidence, I present a background to key events. Given the gravity of my concerns regarding the actions of the applicant, a fuller presentation of factual findings and reasons for them will follow. All findings have been made on the balance of probabilities.

[5] The documentary evidence is comprised in three bundles, to which extensive reference will be made. These are:

(a) Paginated Common Bundle 1 (referred to in the Footnotes to this decision as B1),

(b) Paginated Common Bundle 2 (B2),

(c) A supplementary unpaginated Bundle provided by Mr Kang for the applicant (K).

[6] The parties met in April 2008. In August 2009 the applicant visited New Zealand and remained here for a year. This visit caused her to have a desire to move here, an ambition which she would later pursue.

[7] In February 2011, the respondent's family invited the applicant to live with them due to her statements that she had been mistreated and abused by her own family[1]. I have determined that, like many of her deceptions, this claim was in all probability false and designed by her as an emotional hook to attract sympathy from others and with it, gain advantage. As she departed the home of her family for that of the respondent's on 5 February 2011, she made a statement to Malaysian Police that she did not want her family 'disturbing' her life 'anymore'. That statement to Police is somewhat different from statements to the witness Mr [Gokul] that she had been abused and mistreated by her family. This pattern of the applicant's varying statements to different people continues to this day and is unlikely to abate.

[8] Given the strong social mores of Malaysian culture, it was a rare situation where an unmarried couple would be permitted to live under the same roof. Despite those societal pressures, the respondent's family took the applicant into their home reliant upon her stories of abuse. This emotional device by her has been repeated with a variety of persons since that time, with considerable effect.

[9] The parties married on [date deleted] 2011 and lived with the paternal family throughout the marriage.

[10] On [date deleted] 2012 [Abira] was born. She is the only child born to the parties.

[11] The applicant alleges a range of abusive behaviours towards her by the respondent throughout the marriage. Although these will later be examined in more detail, the following summary is appropriate for introductory purposes. She alleges that Mr [Krithigan] "never worked" throughout the relationship and that it was her who financially provided for the family. She deposes he drank alcohol to excess, to

[1] Bundle 1, page 390 (B1/390), evidence of [Dinish Gokul], B1/212, evidence of respondent and B1/218 Malaysian Police report 5.2.11..

the point where he would soil their bed. She also alleged that he sexually abused [Abira] while he was heavily intoxicated. She states that in 2013 she started making secret plans to leave the respondent and "escape from him with [their] daughter"[2].

[12] On 26 June 2013, there was an incident between the parties in which a window in their bedroom in the paternal family home was broken. The applicant contacted the Police, who investigated, took photos but never laid any charges. That incident will be discussed further in this decision. Despite the applicant's extensive range of serious allegations against the respondent, she made no other complaints to the Police alleging violence by him.

[13] Without either the consent or knowledge of the father, the applicant obtained a Malaysian passport for [Abira], this issuing on 29 May 2015.

[14] In July 2015 she travelled to New Zealand to visit her sister and brother. This journey was supported by her sister, [Sumathy], who had been told by the applicant of the respondent's alleged abuse of her and the child. The journey was to be for two to three months. He believed the journey was to enable the applicant to visit her siblings in New Zealand. It is clear the respondent did not know of the schemes of the applicant and her sister.

[15] Significantly, despite the extensive allegations now made against the respondent and having obtained a passport for her, the applicant left the care of [Abira] with him. Given she then held a passport for the child, she could have removed the child from this alleged abuser, but elected not to. This act reasonably supports the finding that there was little merit to her later allegations. Although she has repeatedly asserted that she left [Abira] in the care of the respondent's parents, rather than with the respondent, given they resided in the same home, the applicant's assertions are less than credible or plausible.

[16] She arrived in New Zealand on 2 July 2015. Within a month of her arrival in New Zealand, the applicant had met [Nathan Glass], a vulnerable person with severe [medical condition deleted]. On [date deleted] 2015, merely two months after arriving

[2] B1/28

in New Zealand, she began living together with Mr [Glass]. However, the applicant never told her husband of this relationship. As will become apparent, she did not tell him for the reason that his knowledge of such a significant circumstance would likely have caused the respondent to have adopted a far more cautious approach when she subsequently returned from her purported holiday.

[17] On 30 May 2016, the applicant returned to Malaysia to attend [a family event]. She denies that she was returning to the marriage, describing it as being "broken ages ago"[3]. That may have been her perception, but it was not one that she had ever shared with the respondent. The evidence is strong in demonstrating that the applicant deceptively led her husband to believe that she was returning to the marriage. This is supported by the following circumstances:

(a) She advised him of her return flight time and date,

(b) She asked him to collect her upon arrival,

(c) He collected her from the airport,

(d) She purchased gifts for him,

(e) He drove her back to the family home where he believed she was returning and had arranged a family event for dinner,

(f) The father and his family attended the [family event],

(g) Even her current partner, Mr [Glass], was honest enough to accept that the mother used the fact of [the family event] as an opportunity to effect removal of the child from Malaysia[4].

[18] The applicant then told the respondent that she had to stay at her family's home for the [family event] and had [Abira] stay with her there. This was not an unusual thing to do given the family event. It was part of the applicant's ruse.

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[3] Notes of Evidence Page 160, line 34 (NOE 160/34)
[4] NOE 239/17-35

[19] On [date 1] 2016, she then departed Malaysia taking [Abira] with her. On the way to the airport the mother stopped at a Police station and lodge a somewhat vague complaint against the respondent[5]. As with many of her actions, it was an exercise in half-truth, presented in a manipulative and calculated manner. She alleged that the father had been threatening to "take the child", rather than stating that he was requesting the return of the child to him. There is a difference. She correctly says that the parties had not been cohabiting for a year. However, but not surprisingly, her report made no mention of important aspects:

(a) She failed to mention that for the immediately preceding 11 months she had actually left the child in the care of the respondent,

(b) It failed to disclose that she had actually been living in New Zealand for those 11 months,

(c) She made no mention that she was actually on her way to the airport to permanently remove the child from Malaysia to New Zealand without the knowledge or consent of the father,

(d) She gave her parents' address as her residential address, despite her actually living at Mr [Glass]'s home for the previous 10 months.

[20] This misleading complaint was a deliberate device created by the applicant on the way to the airport which she could draw upon if confronted at the airport about removal of the child. She could then refer to the Police complain as some form of mandate for the removal. She has used this same misleading report in her dealings with the New Zealand Immigration Service and her applications to this Court.

[21] The mother was able to remove [Abira] from her country of birth without any obstacles. However, problems for her began after the father contacted New Zealand Immigration Service (INZ) after learning of the removal. In June 2016, he advised INZ that the child was removed from Malaysia without his consent and that the mother may be in a fraudulent relationship for the purpose of gaining residency. The father's

[5] B1/24

complaints had a reasonable basis. As will later become apparent, INZ effectively shelved the father's complaint, which has served to contribute to significant delays in trying to secure return of the child to Malaysia[6].

[22] The Timeline prepared by INZ demonstrates that the Service initially did little to investigate the father's valid concerns. They logged 'warnings' on their system, but despite his clear and valid report to INZ of a child abduction to NZ, they did not request evidence from the mother of the father's consent to [Abira] being in New Zealand. This inaction continued even after the father engaged a NZ lawyer, Mr Don McKay, to pursue the issue with INZ. On 2 August 2017 Mr McKay had written complaining that the mother may have been using false information to gain visas for herself and the child.

[23] It was not until after the respondent's parents wrote to the Minister of Immigration on 8 March 2018 that INZ implemented assertive steps to investigate the father's concerns. The following day INZ commenced a fuller investigation which established that as long ago as 13 September 2016 the mother had fabricated a letter in which the father had purportedly consented to the applicant having custody of [Abira] and for her to be removed from Malaysia to live with her. The investigation disclosed that not only had the applicant forged the father's signature, but she had given INZ false residential and email addresses for him. This device of making it difficult for authorities to contact the father to verify matters was also utilised by the mother in proceedings initiated by her in Malaysia. Greater detail on that will follow.

[24] The INZ investigation disclosed that the mother again used the forged consent in January 2017. It is concerning that such a blatant fraud was not detected at the outset, especially as the New Zealand authorities had received the father's concerns almost from the day [Abira] arrived in the country. Early detection of the mother's fraud could have averted the significant trauma that has subsequently arisen for the father, the child and the paternal family. The prevarication in investigating the mother's actions has caused consequences beyond Mr [Krithigan] and [Abira].

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[6] K 0272, INZ Timeline May 2017 – Susannah Nye-Picknell

[25] After removing [Abira] to New Zealand, the mother returned to the relationship with Mr [Glass] and, shortly thereafter, she became pregnant with the first two children she has had with him. As will be seen from my full analysis of the mother's deceptive actions, it is not unreasonable to view this act as another device to achieve her goal of residence in New Zealand, for it has now led INZ to consider whether humanitarian grounds exist to permit the mother and [Abira] to remain in the country to which the child was wrongfully removed.

[26] Following INZ investigating the father's allegations, the mother was charged with two offences under the Immigration Act 2009. She pleaded guilty, was convicted and sentenced to Home Detention. In the hearing before me she asserted that the summary of facts was incorrect and that her lawyer had not advised her that the summary could be amended. Her contentions matter little, as the evidence of her deceptive and criminal actions is cogent and clear. The summary of facts is a reasonable summary of her actions and deceptions.

[27] On [date deleted] 2020 in the District Court at Napier, His Honour Judge Rea sentenced the mother to 8 months home detention with six months post detention conditions. In his sentencing notes[7], the Judge recorded that the mother had endeavoured to cast the blame for her situation in every direction except her own and that such a characteristic was evident in the content of the probation officer's report. He noted that the applicant repeated the same story and was "good at telling" it, but that:

> "…standing back and looking at the factual situation, the only conclusion that I can come to is that you are consistently fraudulent, you will say and do anything that you can to further your own interests, and when you stand back and look at the accusations you made and then look at the way you actually behaved, they do not gel and they can only be at least partially false, if not totally false".

[28] The Judge continued:

> It saddens me to have to impose a sentence of home detention on somebody such as you, with your family commitments. However, you need to stop blaming other people and realise that you have brought this entirely on

[7] *Ministry of Business, Innovation and Employment v [Sriya Ishan]* [2020] NZDC 1505, at [2]

> yourself, and the way that you have operated throughout the entire proceedings, quite frankly has only made it worse" (Emphasis mine).

[29] As will become evident in my full analysis of the substantial evidence before me, Judge Rea's assessment of the applicant in the window of opportunity he had to assess them, was wholly accurate. It is reasonable on the evidence to conclude that her propensity for deception enters the pathological. It is concerning, but perhaps unsurprising, that the applicant learned nothing from her pathway through the criminal Court, for the capacity to present an accurate account of relevant circumstances still evades her.

[30] Immigration New Zealand issued deportation notices against the mother and child, but subsequent appeal or review processes have effectively put a hold on matters while the mother pursues a parenting order in this Court. She and her new partner have confirmed that the only reason she has applied to this Court is to enhance her immigration chances of remaining in New Zealand[8].

Pathway of the Applications

[31] On 1 April 2019 the mother filed without notice applications for the following:

(a) a s 48 parenting order granting to her the day to day care of the child, with contact to the respondent, supervised by an approved provider,

(b) a s 46R guardianship direction that the child's habitual residence be in [region deleted], and

(c) an order under s 77 that the child not be removed from New Zealand (OPR).

[32] The duty Judge declined to grant an interim parenting order or the guardianship direction as he had noted that the applicant had apparently taken the child from Malaysia without a Court Order and had been charged with providing false information to INZ. He did make an order preventing removal.

[8] NOE 246/8-11

[33] As with all documents filed by the applicant with the New Zealand Court and with the Malaysian Courts, the mother has adopted the tactic of disclosing only matters which are favourable to her, except in situations where there was little chance of her successfully hiding certain facts. Fuller discussion will follow. The degree to which a strategy of half-truth and omission has been adopted by her is of alarming proportion.

[34] After being served with these applications, the respondent father filed a notice of response to all applications and filed an application on 3 December 2019 to remove the s 77 order preventing removal from New Zealand. He filed a second such application on 25 June 2020.

[35] On 3 December 2019 the mother made an interlocutory application for discontinuance of her "parenting proceedings". In her affidavit in support she stated that she had pleaded guilty to a charge of providing false information to INZ, that her application for a discharge without conviction had been declined and that she was awaiting sentence on 30 January 2020. She confirmed that she had been advised that the Family Court in New Zealand might have issues with her credibility and that it that it would be very difficult for the Court to determine her applications in those circumstances. She added that she did not think that the respondent would attempt to come to New Zealand and uplift the child, and that she did not need to the orders that she had originally sought.

[36] On 12 November 2019 the father applied on notice for an order discharging the s 77 OPR. That application remains to be determined.

[37] In essence, both parties had been awaiting the outcome of INZ criminal proceedings and had reasonably believed that the applicant and a child would likely be deported back to Malaysia. Hence, neither sought to advance the proceedings in this Court.

[38] On 17 January 2020 I considered the mother's application for discontinuance and noted that until her criminal proceedings had been finalised, the Family Court was not in a position to make a final determination on her active applications. I indicated that I was reluctant to discharge the s 77 order preventing removal in case the mother

then removed the child to another country to further defeat the father's rights and those of the child. I adjourned determination of her discontinuance application until the outcome of the criminal proceedings.

[39] Following her conviction and sentence to home detention, it became apparent that INZ processes to return the mother and [Abira] to Malaysia were stagnating and that it appeared the Immigration service were awaiting to see the outcome of Family Court proceedings. In an effort to progress matters, I directed an Issues Conference in order to establish what the state of play was and what, if anything, was now required of this Court.

[40] At that conference on 29 July 2020 I inquired as to which of the New Zealand or Malaysian Courts was most appropriate to determine the parenting issues in respect of a Malaysian child, born to Malaysian citizens. I appointed Mr Macfarlane as Counsel to Assist the Court as I was concerned that Mrs Hayward's role as [Abira]'s counsel could be confronted by a conflict between a best interests approach and the child's views. That issue of forum conveniens was determined by me in a decision delivered on 7 October 2020[9]. I determined that the New Zealand Court was the appropriate forum, in part because by that date there were no live proceedings extant in Malaysia. I made various directions towards a hearing of the substantive applications. A two-day hearing was anticipated. As will be seen, the hearing required 5 days of evidence and a half day for closing submissions.

[41] By the time of hearing, the mother had modified her position on the issue of the father's contact and advised that she was seeking the following:

(a) a s 48 parenting order providing her with day to day care of [Abira] with specified contact to the father,

(b) a s 46R guardianship direction that the child's habitual residence be [region deleted], New Zealand,

[9] *[Ishan] v [Krithigan]* [2020] NZFC 8000

(c) a s 77 order preventing the child's removal from New Zealand, except by the mother and an order discharging the direction that the child's passport be surrendered, and

(d) leave to seek further orders or directions to give effect to the orders sought including a direction that the orders be sent to the Malaysian Authority for them to consider and issue a passport for the child.

Relevant Law

[42] Given this is a proceeding pursuant to the Care of Children Act, the starting point for determination is s 4, which requires that it is the welfare and best interests of a child, in his or her particular circumstances, that must be the first and paramount consideration in the application of the Act in proceedings involving guardianship of, day to day care of, or contact with a child.

[43] That provision highlights the need for a child specific approach of the assessment, not a globalised view of child welfare[10].

[44] The need to assess the child's welfare and best interests against the particular circumstances in which they exist, necessarily requires the Court to first identify the particular circumstances in which the subject child exists. Once those circumstances have been identified, the Court is then equipped to move to determine what outcome best accords with the child's welfare and best interests.

[45] In *C v W*[11] her Honour Judge O'Dwyer observed that the addition of the term "best interests" in s 4 of the Act underlines that a decision must focus not only on the immediate day to day welfare of the child, such as care and nurture, but also the long term interests of maintaining a relationship with both parents. She added that the inclusion of that term highlighted the importance of the Court looking at the longer term developmental, educational, cultural and familial needs of a child.

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[10] *Bashir v Kacem* [2010] NZFLR 865, at [50] (CA) and *Kacem v Bashir* [2010] NZFLR 884 at [8]
[11] *C v W* [2005] NZFLR 953, at [24]

[46] In determining what outcome will best meet the welfare and best interests of a given child, the Court must take into account the principles in s 5. The Court of Appeal in *Bashir v Kacem* discussed the proper application of the s 5 principles and held[12] that a Court should first consider each of the s 5 principles to determine if it was relevant and, having identified the principles of relevance, should then take account of them in determining the best interests of the subject child. Because an analysis must be undertaken in the context of the circumstances of the particular case, the Court must evaluate how the relevant principles should be taken into account, an assessment which must necessarily be highly individualised and which cannot be undertaken in a formulaic way.

[47] Section 5(a) is interesting in its wording. The principle is broken into two components, the first being that the child's safety must be "protected", without specific statement as to the range of possible concerns for which the protection is required. The section moves to the second component, which is an express reference to protection from all forms of violence as defined in the Family Violence Act 2018. In terms of that first component, the simple statement that "a child's safety must be protected" must be seen as a legislative indication that the Court should not adopt a narrow approach to consideration of matters of child safety.

[48] As to what protect means, it is defined in the Oxford English Dictionary as being:

> "that enjoys protection (in various senses); shielded or defended from attack, danger, damage, etc."

In a similar vein, the Collins English Dictionary 2009 Edition defines the word "protect" means:

> "To defend from trouble, harm, attack etc. …"

[49] This broad statutory scope of "protection" requires an all-encompassing approach by the Court to protect a child's safety from attack, danger, trouble or harm, not merely the express forms of violence within the scope of the Family Violence Act.

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[12] At [50]

[50] Pursuant to s 6, the Court must also take into account any views expressed by each child subject to the determination. This does not mean that a child's view will be determinative of the outcome, for the statute envisages an holistic consideration of the particular circumstances and the application of relevant principles in order to achieve the requisite highly individualised assessment of what will best meet the welfare and best interests of each child.

[51] Given the present case involves significant issues of the conduct of the mother in the wrongful removal of the child from Malaysia, and associated acts of deception, the provision in s 4(2)(b) becomes relevant. It provides:

> (2) Any person considering the welfare and best interests of a child in his or her particular circumstances …
>
> (b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests. (Emphasis mine)

[52] Of assistance in guiding the practical application of that provision are the observations of the High Court in *Baker v Harding*[13] and *Allen v Wade*[14]. In *Baker v Harding* the applicant was found to have relocated the child unilaterally to another part of New Zealand, contrary to the terms of a Court order and without the other party's consent. The High Court considered the conduct of the applicant and asked whether it was predictive of the way she will behave in future, and in particular in relation to the s 5(c) assessment (namely capacity to interact cooperatively with the other parent). The Court saw that the examination of conduct was relevant to the welfare and best interests of the child in terms of the inevitable predictive assessments required of Courts.

[53] In a similar vein, while not referring expressly to s 4(2)(b), the High Court in *Allen v Wade* endorsed the approach of the Family Court in its consideration of issues of the applicant's conduct by reference to specific s 5 principles. That case involved a finding by the Family Court Judge that the applicant mother had acted to cause the subject child to reject the respondent father. In addition to commenting upon the relationship between the conduct of a party and the particular principles under s 5, the

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[13] *Baker v Harding* [2018] NZHC 2885
[14] *Allen v Wade* [2018] NZFLR 893

High Court rejected the appellant's criticism of the Family Court Judge's analysis of whether the case was one of realistic estrangement or post-separation parental rejection. The High Court determined that the child's rejection and estrangement from his father was either a consequence of the father's abusive conduct towards her son, or the appellant's divisive conduct and that into which category the conduct fell was always going to be determinative of the outcome.

[54] It is apparent from these authorities that, in applying s 4(2)(b), the Court must do so by specific reference to whether any conduct has impacted achievement of any of the principles found in s 5. Although it does not appear to have been considered in either of those decisions, I would add that because s 6 requires the Court to take into account any views of the child in making its ultimate determination under s 4, it follows that the Court is also entitled to consider how the conduct of a party may also have impacted the views expressed by a child. That view is supported by the High Court's endorsement of the approach of the Family Court Judge in *Allen v Wade*.

[55] Situations may often arise where the interests of a child may not align with the interests of a parent. The structure of the Act, particularly the paramount provision in s 4, is such that where a conflict arises, the welfare and best interests of the child must trump those of the parent. This does not mean that the interests of a parent or any perceived rights possessed by them, are not taken into account. The mandatory principles in s 5 accord full consideration of how the role of parents, guardians or 'other persons' having a role in the care of a child is to be considered. The scheme of the Act demands a refined holistic assessment of these principles, the views of the child against the particular circumstances in which that particular child exists, all under the umbrella of an outcome which is in the welfare and best interests of that child.

The Hearing

[56] The hearing commenced on 11 November 2020. I heard the evidence of the parties and 7 supporting witnesses over 5 days. The respondent and his 5 witnesses partook by way of audio-visual link from Malaysia. An interpreter, Ms Venkatachalam, provided immense assistance during examination.

[57] I was provided with a common bundle of pleadings and documents amounting to 700 pages and a further supplementary bundle provided by Mr Kang totalling approximately another 400 pages (the Kang Bundle). The latter bundle comprised some, but not all, of the documents filed by the applicant in two different High Courts in Malaysia and extensive documentation from the applicant's INZ file.

[58] Accordingly, in reaching my factual determinations I was provided with an extensive range of evidence, both oral and documentary.

The Witnesses

[59] I present now my assessment of the reliability of the various witnesses who were examined before me.

The Applicant's Evidence

[60] Commencing with the applicant mother, I found her to be the least reliable witnesses I have observed in my career in the law, including 18 years as a Judge. Given the consequence of such a finding, I have a responsibility to present a full analysis of the many ways in which her evidence was contaminated by direct falsehoods, exaggeration, intentional half-truths, omissions of material matters and an ingrained pattern of manipulative behaviours and strategies. Her false evidence extends beyond mental confabulation, instead she is driven by achievement of her needs and is quite prepared to make false statements to people and agencies to achieve her goals.

[61] During the hearing, I had hoped to have observed some signal that the mother had a capacity to appreciate the far-reaching consequences of her concerning conduct and regret for how she caused those consequences. If some indication of regret and remorse had been forthcoming, I could have drawn some comfort that the applicant had capacity to change her behaviours in the future. Regrettably, that was not to be. I did not observe anything that indicated that she was possessed of a conscience or a capacity to see beyond her own objectives. Her presentation throughout mirrored how Judge Rea perceived her to be in the criminal proceedings. Put simply, the applicant

was devoid of any regret for the immense consequences her series of wrongdoings have carried for others.

[62] In reaching what is a somewhat candid determination, I emphasise that I have looked beyond her actions when she forged the consent document and, in making my assessments, have reminded myself that merely because a person may have been shown to have acted untruthfully in one situation, does not mean they will act in that way in others. In the case before me, this is a rare situation where it was difficult, if not impossible, to identify any significant matters upon which the applicant's word could be accepted as accurate recitation of reality.

[63] In examination before me, she gave often fanciful answers to simple events. By way of one example, after she departed Malaysia in July 2015 she said in her timeline she drafted for INZ[15], that she left because she was "in fear of" her life and that of [Abira]'s and that she felt suicidal. It was because of such stated fears that her sister [Sumathy] wanted her and [Abira] to go to New Zealand, but contended that the respondent and his parents would not let her take [Abira], so she left the child "behind and went to New Zealand".

[64] She was challenged by the respondent as to why, if she was escaping him out of fear for her life, she had asked him to drive her and [Abira] to the airport for the NZ trip[16]. She gave varying answers for why it was she asked this abuser to drive her to the airport, taking the child to farewell her. She acknowledged that she was in a car with him and [Abira]. But after she recognised that it would be unlikely that she was escaping his violence by getting him to drive her to the airport to escape, she then said she was in a car with her parents, while he was in a different car. This story changed for a third time, when she stated that she was in a car with him, but her parents followed in a separate car. This was but one of many examples where her stories changed as and when the significant inconsistencies in her stories became apparent to her.

[65] The applicant demonstrated the problem which arises when a party gives their evidence drawn from the picture they wish to create, rather than simply drawing from

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[15] K 0181
[16] NOE pp 20 and 21

honest recollection. In her case, there were many instances where false statements had been made by her, which made it difficult for her to keep track of them. In short, the applicant was a very unreliable and untruthful witness and no reliance could be placed upon any evidence given by her.

[66] Her new partner, Mr [Glass], was a moderately reliable witness, but had clearly drawn his point of reference from things that he had been told by the applicant. He loves her, has had two children with her and understandably wishes her to remain in New Zealand. He is a vulnerable person who has a severe [medical condition] and is dependent upon the applicant for many things, including the primary care of their two children. This predicament did influence his evidence in that his evidence was influenced by the goal of securing his partner's situation in New Zealand. In any event, there were no issues in this proceeding upon which his evidence was pivotal.

[67] The applicant's sister, [Sumathy Ishan] gave evidence in her support. This witness was wholly unreliable and was heavily influenced by what her sister had told her. The sister possessed similar characteristics to the applicant, although they were far less sophisticated than the applicant. She was instrumental in supporting the applicant coming to New Zealand in 2015 and was actively involved in colluding with the mother to remove [Abira] from Malaysia in 2016. There were a number of inconsistencies between her affidavit evidence and that given in Court. But one example arises in respect of her affidavit statement that after the one pivotal alleged incident of abuse by the respondent to the mother, her sister "ran to [her] house for her safety". It transpires that no such event occurred, instead the applicant was taken to her home by car. An element of exaggeration, similar to that of the applicant, was evident throughout this witness' evidence.

[68] She gave further conflicting accounts of her visit to the parties' home in Kuala Lumpur to purportedly get [Abira] after an incident in June 2013 where a window was broken. In her affidavit[17] she swore that she and her husband drove to the home where they witnessed the broken window. No mention was made that her sister was also with her, instead she said that only her husband was with her. She swore that no one

[17] B1/114/9 Affidavit of [Sumathy Ishan].

was at the home when she got there. However, her evidence in examination varied significantly from that in her affidavit. In examination, she stated that her sister was now with her. She proceeded to present an implausible story of how she had been told by the applicant of a window being broken during the incident, which led her to go to the house in order that she could discuss the incident with the respondent's parents. That rationale varied from that in her affidavit statement, where she swore that she went to the home to collect the child.

[69] She then stated in Court that no one was home and deduced this because the door was locked. She says she did not knock on the door, despite repeating that the very reason she went to the home was to speak to the respondent's parents[18]. When I inquired of her as to why she did not knock on the door, she replied that when she saw the broken glass she did not want to go and talk. Her evidence was a moving feast as each implausibility was pointed out to her. In this example, as she already knew from her sister before she went to the home that a window had been smashed, the sighting of the broken window on arrival would hardly be a reason for not carry through with her stated intentions of either collecting [Abira] or speaking to the respondent's parents about the incident, whichever of those explanations, if either, might be true.

[70] A somewhat bizarre situation arose when she made emphatic denials of Mr [Krithigan]'s reference in his affidavit that her husband was known by [a nickname]. Indeed, she declared the respondent's comment to be a false statement[19]. In her examination, she repeatedly denied that any person had ever called her husband by that name, whether they be friends, family or church members. She also denied that her sister knew him as [his nickname]. I warned her to be cautious with her answers. When asked if people on her husband's Facebook page call him by that name, she stated she has never, ever, looked at his page.

[71] Her emphatic denials flew in the face of substantial evidence that her husband was indeed known to many people as [a nickname]. Even her sister had acknowledged in her evidence[20] that this was how her brother in law was known. Her husband's

[18] NOE 260/30-34 and 261/1-4
[19] B1/116/18
[20] NOE 64/12-18

Facebook page demonstrated that several people referred to him by that name. However, when this abundant evidence against her position was presented to her, she eventually responded with an incredulous answer that sometimes people would tease her husband by referring to him as [a slightly different nickname], as if this was somehow different than simply [his nickname].

[72] The extent to which her evidence was contradictory and implausible was such as to render it wholly unreliable and I could not safely place any weight upon it.

[73] Despite the unreliability of her evidence, one significant aspect of it was that despite her view that the respondent was a monster and a violent man, she accepted that at no time had she ever seen the respondent hit her sister, never see him physically attack her or [Abira] in any way and that all her evidence as to the respondent's violence was based on hearsay[21].

[74] The overwhelming picture of this witness was of a person who had blindly accepted whatever her sister told her. Despite never having seen the respondent be violent to the applicant and not having read all her sister's contradictory and misleading affidavits filed in the Malaysian and New Zealand Courts, her view of the respondent appeared rigid and inflexible. She did not seem open to the possibility her sister may have also misled her. Indeed, she explained away her sister's less than honest affidavits as possibly being the result of not being properly advised by lawyers.

The Respondent's Evidence

[75] In contrast to the unreliable evidence of the applicant and her witnesses, the respondent and his witnesses were impressive. They each gave evidence which was consistent throughout. The respondent was consistent on all significant matters, of which there were many. His viva voce evidence was consistent with the substantial amount of statements and affidavits which he had filed. Unlike the applicant and her sister, there were no instances of exaggeration in his statements. He had a detailed recollection of incidents and events. He was fair-minded and reasonable with his

[21] NOE 297/13-23

answers. I held no reservations about the reliability of his evidence and his account of matters.

[76] His supporting witnesses were likewise very impressive witnesses. They were all people of dignity and integrity, where their word meant something to them. It was of great benefit for me to see and hear from these witnesses, not merely to assist in the determination of disputes of fact, but to allow an assessment of the paternal family from whom [Abira] has been removed and distanced. It also provided significant ability to assess how this family and support network would likely respond if the child returned to Malaysia. These supporting witnesses impressed for their intelligence, honesty and humanity, features sorely absent with the applicant and her sister.

The "Particular Circumstances"

Applicant's Deceptive Behaviours and Statements

[77] As indicated from *Bashir v Kacem*, the ultimate determination of what outcome will best serve the particular child's welfare and best interests requires an assessment of the s 5 principles in the context of the particular circumstances in which the subject child exists. That necessarily requires a Court to first determine, on the balance of probabilities, what those particular circumstances are. In the present case, almost all factual matters were in dispute and were intrinsically linked to the issue of the applicant mother's conduct. Given the many acts of deception committed by her, the determination of the relevant particular circumstances has involved a somewhat detailed analysis. Manipulative behaviours can rarely be captured in a single instance or example.

[78] I commence with my findings of those deceptive actions. These include my determinations of the applicant's allegations against Mr [Krithigan], allegations which I have determined to be intentionally false, rather than mere points of difference on disputed incidents. They were intentionally false, to the point of callousness, to bolster the applicant's strategy of convincing people to believe in her false cause, in order to extract outcomes favourable to her. Her strategy throughout, to the Courts of New Zealand and Malaysia, to her family and to INZ has been to portray herself as a victim of physical, sexual and economic abuse from an alcoholic, indigent, malingerer. She

has created this false picture of the respondent in order to both wrongfully remove a child from her country of birth and to better secure her prospects of immigration tenure in New Zealand. There is no evidence, least of all of a reliable quality, to support even one of her serious allegations against Mr [Krithigan]. Unfortunately, her nefarious conduct has been successful to date in winning over her family and supporters and to successfully delay immigration processes. She has used the delay to her advantage.

[79] Many of these findings pertain to issues of conduct, which are relevant to s 4(2)(b). They also support my adverse finding of her credibility and are material to the ultimate predictive assessment that is required when determining likely future behaviours and outcomes and how they impact upon the welfare and best interests of the subject child.

[80] Fortunately, the Court does not often encounter a party who is so inherently manipulative and untruthful. But where such persons are encountered, it is often observable that for a person to deceive another they will generally rely upon a kernel of truth and build layers of falsehood around that kernel. They will often rely upon use of emotional situations as a form of bait to draw in other people to their cause, such as being the victim of abuse from others. Manipulative people adopt the role of victim in the sure knowledge that most people will feel awkward challenging the story of the victim. A manipulative person will often present outwardly plausible explanations when their statements or actions are challenged. Hence, manipulative behaviours can be difficult to detect. It is for this reason that a close analysis is required of the actions and evidence of this applicant.

[81] My findings of fact also serve to support the evidence of the respondent that the applicant has shown herself to be a very manipulative person throughout the time he has known her. This is relevant to whether the circumstances underpinning the wrongful removal of [Abira] from Malaysia were merely a one-off aberration, or were instead indicative of the way the applicant might conduct herself in the future.

[82] I have identified many layers to the applicant's strategy of deceit and will attempt to present them in a chronological sequence. This strategy includes;

deliberately false statements, half-truths, omission of material matters and contradictions in statements or actions.

Commencement of Relationship

[83] When the applicant first met the respondent, she presented a story to his family and friends that she had been abused and mistreated by her own family and needed the support of the respondent's family to protect her. She said she had nowhere else where she could live. The respondent and his family accepted her statements as true and took what was a far-reaching step in Malaysian society of permitting her to reside in the home of her then new boyfriend. I find on the balance of probabilities that her statements of abuse and mistreatment were false. Indeed, in evidence before me she said that she had a close relationship with her family. I prefer the unchallenged evidence of Mr [Gokul] on this point.

[84] The salient point is that from the first time she met the respondent she has used her purported emotional plight as a tool to extract support of others. It is relevant to predictive assessments.

Deceptive Obtaining of Passport for Child

[85] After her marriage to the respondent became unhappy, she commenced plans to leave Malaysia for New Zealand, a place where she had wanted to live for some time. Unbeknown to the father and indeed to her sister [Sumathy], who assisted in her journeys to New Zealand, in early 2015 she obtained a passport for [Abira]. The sole purpose of obtaining that passport without the knowledge or consent of the respondent, was so she could extract the child from Malaysia at short notice and without the respondent's ability to obstruct that plan. These actions demonstrate a person capable of planning a deception in a calculated manner a long time before acting upon it. These are not impulsive actions, instead they are calculated and deceitful.

[86] The father only learned of the applicant's intended trip to New Zealand on 11 June 2015, after the applicant had already surreptitiously obtained a passport for [Abira], taken the child's jewellery into her possession and had purchased air tickets for herself.

Pretence of Ongoing Marriage

[87] After she came to New Zealand in 2015 she quickly entered a relationship with Mr [Glass]. She had been in the relationship with him for approximately ten months before returning to Malaysia for [a family event]. There is no evidence that, at any time, did the applicant tell the respondent that the marriage was over.

[88] Because she had already made her covert plan to wrongly remove [Abira] from Malaysia, she did not tell the father that she had in fact been living with another man for ten months. Instead, she portrayed to him the actions of a wife who was returning to the family home to her husband, all with the goal of ensuring that he would not be alerted to the possibility of his child being abducted. She did this by asking him to collect her from the airport, buying gifts for him and returning with him to the family home. Again, well planned, calculated deceit.

Selective Complaint to Malaysian Police

[89] On the day of the abduction, on the trip to the airport she decided to stop at a police station to file a report. The report[22] is self-serving, selective and reflects only a small portion of reality. It complains that her husband had wanted to take the child back to his home and that he threatened to do something bad to her if she refused. While the report said that they had not been living together for a year, it failed to mention the salient points that:

(a) she had in fact been away in New Zealand for a year,

(b) that she had left the child in the care of the father for that time, and

(c) was in fact taking the child to the airport to remove the child from Malaysia without the husband's knowledge or consent.

[90] Given that her report was less than a half-truth and the overall tenor of her deceptive actions, it is reasonable to conclude that she made this complaint to the police as a mechanism to use in her defence if she were to be stopped from leaving

[22] B1/24

Malaysia and as a tool to use in New Zealand should she need to establish that the respondent had been abusive to her. Indeed, she has used this a very report, one which is at a significant distance from the truth, in her first without notice application to the Family Court and in her dealings with INZ. For the avoidance of doubt, that report made to the police by the applicant was deceptive, misleading and untruthful. It was a mere device.

[91] I also reject her sworn statements to this Court that she told the Malaysian police officer that she and [Abira] were leaving Malaysia to get away from the father and that the officer "did not see any problem with that"[23]. Her statements may be generously described as fanciful. Given the police report contains a variety of somewhat generalised assertions by the mother, it is inconceivable the officer would not have recorded such a major statement that the mother was about to remove the child from her country of habitual residence to get away from a violent husband.

Misleading Statements to INZ

[92] After her and [Abira]'s arrival in New Zealand on [the day after date 1] 2016 the applicant completed various Visa application forms for herself and that the child. In the Visitor Visa application for [Abira] dated 8 August 2016, which was completed by the applicant, she made a variety of untruthful statements as follows:

(a) she stated[24] that the child's "most recent overseas address" was that of the maternal family in Malaysia. That statement was palpably false, as [Abira] had been living at the address of the father and the paternal grandparents throughout her life right up until the time of her wrongful removal from Malaysia. The fact that the applicant stated a false address must be seen as part of her deceptive strategy to reduce the possibility that the respondent father might be contacted by New Zealand authorities regarding the child's arrival in New Zealand,

[23] B1/120/9
[24] K 0105

(b) in the section of the application as to Visa type[25], in answer to the question as to the purpose of [Abira]'s visit to New Zealand, the applicant has written "to visit my mum". That statement is again false, for the applicant has accepted throughout these proceedings that the reason she brought [Abira] to New Zealand was to live with her permanently, rather than for a mere visit. If she had stated the true intentions of the trip, namely that she had unlawfully removed the child from Malaysia with the long held plan of residing here, then INZ may well have declined the Visa application. Hence, she made a false statement,

(c) nowhere in that application was it mentioned by the applicant (on behalf of the child) that the child had been removed from Malaysia without the consent of the other parent.

[93] In other documents completed by the applicant and submitted to INZ, she again gave the child's address as being that of the maternal family, despite the child never having lived at that home.

Misleading Letter from Mr [Glass] to INZ

[94] In a letter signed by Mr [Glass] to INZ dated 8 August 2016[26], he stated that he was in a genuine and committed relationship with the applicant, that they have been living as a couple since [date deleted] 2015 and that they were "planning to get married in October of this year", namely 2016.

[95] It is reasonable to assume that the applicant was aware of the content of this letter from Mr [Glass], for she named him in the Visa applications as the person who was supporting the application. He signed the Visa application as the person who assisted the mother with it. From extensive INZ material filed in this Court, it may be seen that Mr [Glass] was heavily involved in the communications with INZ.

[25] K 0113
[26] K 0096

[96] Mr [Glass]'s statement that the couple were planning to get married in October 2016 is a deceptive and false statement, for the reason that it was not possible for them to marry at that time. For them to be married, the applicant would first need to dissolve her marriage to Mr [Krithigan]. Under New Zealand law, for her to obtain a dissolution would require proof that she and Mr [Krithigan] had been living apart for two years and that the marriage had broken down irreconcilably. At best, the applicant and respondent may possibly have separated in June 2015 when she travelled to New Zealand. However, given that she had returned to Malaysia in June 2016 never having told Mr [Krithigan] that she was in fact living with Mr [Glass] and had presented herself to the father as being still married to him, it is highly improbable that a Court, knowing of that, could determine separation to have been in June 2015. Whichever interpretation is taken, despite Mr [Glass]'s statement to INZ, it was impossible for Mr [Glass] and Ms [Ishan] to be lawfully married in October 2016 as New Zealand law would require the applicant and respondent to have lived separately since September or October 2014.

[97] Given that Mr [Glass] accepted in evidence[27] that the applicant told him in August 2015 that she was still married to the respondent, his written statement to INZ that he and the applicant were to marry in October 2016 was false and misleading. It was a deliberate misstatement to INZ to enhance the strength of the applicant's Visa application. The commitment ceremony occurred on 12 November 2016[28]. Mr [Glass] and Ms [Ishan] must have known when they wrote to INZ merely 3 months earlier that the ceremony was not a marriage in any sense of the word.

[98] While the applicant and her partner may, as they were prone to do, brush aside the reference to marriage as a mere poor choice of words, there is a significant difference between marriage and a mere symbolic ceremony. They were acutely aware of such a difference, as the applicant responded to Mr [Krithigan]'s concerns that bigamy may have occurred by casually deflecting the issue in stating: "We are just partners living together…I think the respondent is mistaken because there is no concept of partnership in Malaysia"[29].

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[27] NOE 174/26-32 to 175/ 1-4
[28] K0183 – Ms [Ishan]'s Timeline
[29] B1 63/15

[99] Likewise, Mr [Glass] deposed that they were merely living together but were not legally married. He added:

> We have had an informal ceremony to confirm our relationship but it does not satisfy New Zealand marriage requirements. For example, we had not applied for a marriage licence before the ceremony".[30]

[100] Such statements by the couple that they were aware that the New Zealand requirements meant they could not be married, supports the finding that they must have known full well that their statement to INZ on 8 August 2016 of intended marriage in October 2016 was false.

[101] While such circumstances may appear trivial when viewed in isolation, the intent of such otherwise innocuous misstatements is clearer when one views the actions of Ms [Ishan], her family and Mr [Glass] in totality. There is a consistent strategy of manipulation and deception at play in all their actions and interactions.

Plans to Reside in NZ made well before Respondent or INZ advised of such

[102] It is apparent that the applicant's plans to remain living in New Zealand were made a significant period before she wrongfully removed [Abira] from Malaysia in June 2016. In a letter sent to INZ by Mr [Glass]'s father, [Hamish], dated 30 October 2015, he confirmed to the Immigration Service that he had purchased a property in [location deleted] so that his son [Nathan] and his partner, the applicant, would have a long-term place in which to live. This statement was made merely 2 to 3 months after the applicant arrived in New Zealand, purportedly for a holiday of that duration to see her family.

[103] This is further tangible evidence that the applicant is capable of making long-term plans of deception and manipulating people to support her for that purpose. The deception is that as at October 2015 she was still portraying to the respondent that she was married to him while, at the same time, was advising INZ of a totally different situation.

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[30] B1 66/1

[104] The totality of evidence supports a conclusion that Ms [Ishan] entered New Zealand with the clear intention of finding a way in which she could become resident here and secure [Abira]'s removal into her care. She effected this by quickly finding a new potential partner, one with significant vulnerabilities and starting a new life with him, all the time without informing the father who remained in Malaysia caring for the child. Once Ms [Ishan] gained a foothold in New Zealand and wrongfully secured [Abira] into her care, she quickly became pregnant to Mr [Glass] and has had two children to better cement her chances of remaining here.

[105] While a person of manipulative qualities would declare such an analysis as being mere cynicism, there is abundant evidence to support the finding that Ms [Ishan]'s many actions and omissions have not been merely accidental or innocuous. She has demonstrated a long term strategy since at least early 2015, if not earlier, and has given good effect to it.

Wrongful Removal of [Abira]

[106] I have provided a full account of the many deceptions of the mother, supported by her family members, to return to Malaysia under the guise of attending [a family event] and returning to the marriage with Mr [Krithigan].

[107] The applicant effected the child's removal by a range of strategies, including:

(a) misleading the respondent to believe that she was returning to the marriage upon her arrival in Malaysia for [the family event],

(b) the respondent was duped by that deception, which is evidenced by him having collected the applicant upon arrival at the Kuala Lumpur airport and having planned family events, including going out for dinner with the applicant and [Abira] for his birthday,

(c) however, the applicant took [Abira] to the home of her parents under the plausible pretence that they had to be at that home to assist with [the family event],

(d) the applicant's family was heavily involved in the deception, as evidenced by the fact that after [Abira] had been wrongfully removed from Malaysia without the knowledge of the father, he contacted the applicant's parents on [the day after date 1] 2016 to enquire where the applicant was[31]. They informed him that their daughter had been angry in the house, had stormed out with the child and that they did not know where she was. It is readily apparent that the maternal family knew full well what was occurring, but continued to provide false information to the respondent who was entitled to know where his daughter was.

[108] I need not repeat the all the components of that deception. It is sufficient to state that the actions of the mother and her family give no confidence that any trust can be placed on any assurances they may give for supporting the child's ongoing relationship with their father. They have not supported that relationship to date.

The Forged Letter of Consent

[109] The applicant has sworn[32] before this Court, and stated to INZ[33], that when she returned to Malaysia in June 2016 she gave the respondent a draft letter consenting to her taking [Abira] to New Zealand. She swore[34] that the respondent agreed to sign the consent, but that he then declined to do so. Mr [Krithigan] denies that the applicant either showed him the draft letter or asked for his consent to permit [Abira] being removed to New Zealand.

[110] As I have not found the applicant to be a reliable witness, I do not accept that her sworn statements to this Court or her statements to INZ to be truthful. I much prefer the father's account, one which is more consistent with the mother's ongoing deceptive strategies. Given the mother had been planning since early 2015 to remove the child and, unbeknown to the father, had deliberately returned to Malaysia on 1 June 2016 to effect that removal, it is inconsistent that she would have then alerted the

[31] B1 223 Mr [Krithigan] statement to Malaysian Police
[32] B1 94/28
[33] K 0182 [Ishan] Timeline to INZ
[34] B1 124/17

father to a potential removal by asking him for a consent to something she knew he would never have agreed to.

[111] On all the evidence, I determine that if the mother had asked the father to sign a consent on 1 June 2016, he would have immediately taken steps to protect the child from removal from his care. Instead, it was only after the mother and child reached New Zealand that she emailed the respondent on 19 June 2016 requesting that he sign the draft letter of consent[35]. He declined. I determine that this was the first occasion that the applicant had asked the respondent for consent to [Abira] travelling to New Zealand. It was a request first made after the fact of removal. The request was made because the applicant realised that the wrongful removal may impact her immigration intentions.

[112] Accordingly, the applicant's many statements to this Court and INZ that the father had given verbal consent on 1 June 2016 are patently false. Such a discussion never occurred.

[113] Documents produced by the applicant at the request of the Court show[36] that on the day following the applicant's email, 20 June 2016, INZ received the allegation from the father that the applicant had brought [Abira] to New Zealand without consent. She phoned the father on 23 June 2016, again asking that he sign the consent. When he refused, she terminated his contact with [Abira].

[114] The INZ file discloses[37] that on 1 September 2016 INZ wrote to the applicant requesting evidence that she held custody and that the other parent had consented to the child's removal from her country of residence. This request caused the applicant some concern, as lack of consent to the removal would likely lead to the child's immigration application being declined.

[115] On all the evidence, it was this INZ letter to her that prompted the applicant to create the false letter of consent in early September 2016. Contrary to her sworn evidence, that letter was never drafted and presented to the respondent on 1 June 2016.

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[35] B1/223 – Mr [Krithigan]'s complaint to Malaysian Police
[36] K 0121
[37] K 0122

The content of the letter is significant, as it demonstrates the levels of deception employed by the applicant, levels which she would later also utilise with the Malaysian Court. The letter discloses:

(a) She used a false date of 1 June 2016, to make it appear the father signed when she was in Malaysia,

(b) She misspelt the respondent's name, making it harder for INZ to locate him (she being unaware at that stage that the father had already been in contact with INZ),

(c) She used a false address for Mr [Krithigan], stating he lived at her sister's address in Malaysia. Again, this was a calculated device to make it harder for INZ to verify with him whether he had consented,

(d) She used a false email address for him. The calculated nature of her deception is indicated where, in the purported consent, she has cynically written; "If you have any enquiries kindly email me to the above email address", knowing full well that any enquiry would never reach the father at that address,

(e) To conclude the fraud, she forged his signature.

Ms [Ishan]'s Allegations against Mr [Krithigan]

[116] A significant component of the applicant's strategy of manipulation and deception has been her making of serious allegations to Courts of New Zealand (including in the criminal proceedings for the Immigration fraud), the Malaysian Courts and to INZ against the respondent. These have included; that he was physically abusive to her, that he was physically abusive to [Abira], that he was sexually abusive to the child, that he demonstrated no interest of any kind in maintaining a relationship with [Abira] or in supporting her and that he was unemployed throughout the entire relationship and provided no financial support to her or to the child.

[117] An analysis of the substantial evidence before me, both in documentary form and from examination of the witnesses, shows the applicant's many allegations to be wholly lacking in evidentiary support to the point where they are unquestionably false. Again, while these findings of fact pertain both to witness credibility and in demonstrating the mother's modus operandi, they are also material to determination of what best serves the welfare and best interests of the child, as determined according to the s 5 principles.

1. Physical and Sexual Abuse

[118] The first allegation is that the father was physically and sexually abusive to the applicant and to [Abira]. There is no reliable evidence to support that allegation. Instead, there is abundant evidence to show that the allegation is false and malicious and is designed to draw sympathy to her cause and to bolster her preordained plan of residing in New Zealand.

[119] In her affidavits filed in both the Family and District Courts of New Zealand, she alleged that there was often physical abuse of her by Mr [Krithigan]. The only specific allegation was that on 26 June 2013 he pushed her head through a glass window, causing it to break.

[120] She alleged that on one occasion in November 2014 she saw him rub [Abira] sexually while he was intoxicated and that, when confronted, he denied it. She claims that he watched pornography and would masturbate in front of her and the child. She never made any complaint to the Police or any other person at the time of such a serious allegation.

[121] Given the parties always lived in the same house as the paternal grandparents, this means these serious acts of partner and child abuse occurred in close proximity to other family members. She claims that his parents pleaded with her not to call the police and that her family members knew of this abuse, but did not know all the details. For the avoidance of doubt, the only maternal family member who filed evidence was her sister, [Sumathy]. Even she confirmed[38] that she had never witnessed the

[38] NOE 297/13-23

respondent being physically violent to either the applicant or child. Instead, her perception was solely a result of what the applicant had told her. Accordingly, the applicant's whole case rests on her word alone.

[122] The respondent presented evidence from five supporting witnesses. None of them deposed as to having seen any violence of any kind by the respondent to the applicant or child. Mr Kang required all five witnesses to be cross-examined but, with the exception of the respondent's mother, did not challenge any of them regarding anything they may have seen or known in terms of violence. They were all impressive witnesses, persons of dignity and integrity. I am in little doubt if they had been aware of any abuse by the respondent to either the mother or child, they would have acted in some way to intervene and they would not have been afraid of disclosing concerns to the Court.

[123] In her timeline[39] drafted for the benefit of INZ, the applicant also asserted that in April 2013 she had heard the respondent beating up his mother and that the mother was "begging him to stop". Mr Kang put this allegation to the paternal grandmother, who denied the event had occurred. I accept the credible evidence of the grandmother.

[124] Aside from the incident on 26 June 2013, all other allegations by the applicant were vague and unspecific as to time, date, place and detail. At best, she stated the alleged year of the incident and the alleged abuse in very general terms. In essence, her allegations were mere assertions, ones which could not be answered except by bland denial or general acceptance.

[125] The applicant pointed to various Malaysian Police reports as purported support of her allegations. As already discussed, she had also made an earlier complaint that she left her parents to live with her boyfriend. All that the reports produced by her demonstrate is that she made assertions to the Police. None of them prove any assaults and it is clear the Police did not think the allegations credible enough to lay any charges. In summary, the reports filed by her record;

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[39] K 0181

(a) 5 February 2011[40] - the applicant complained that on 2 February 2011 she had voluntarily left her family home to live with her boyfriend (the respondent). She stated that the purpose of her report was that she *"did not want my family to disturb my life anymore and I am safe staying with my boyfriend's family. For that reason I came to Nilai police station to make this report."* The report self-serving in nature and does not record the allegations she made to the respondent's family and friends that her family were abusing and mistreating her, an omission which strengthens my finding that she made false allegations to the respondent's family to garner their sympathy and support.

(b) 26 June 2013[41] - the applicant reported to the Police the alleged assault on her on this date. She alleged he verbally abused her before trying to strangle her neck, pull her hair and throw her into the glass window before punching her repeatedly in the back of her body. She says she called the emergency number and that the respondent locked himself and the child in his room. She said the police then took her to the station to lodge a report. As will be seen, this account varies with other versions presented by her and, despite her assertions of a serious assault, there were no signs of any injuries to her (except a palpably false account by her sister) in the photographs or any action by officers who attended and photographed the scene,

(c) [date 1] 2016 – as indicated, this report was made by the applicant as she was removing [Abira] to the airport in order to remove the child. The report is a self-serving creation in the hope her 'complaint' could be used to support her attempts to leave Malaysia with the child. The report contains no allegation of any violence by the respondent, it merely alleges that he was demanding the return of the child and that he would 'do something bad' if she did not. Significantly, it omits to advise the Police that (1) the child had been left in the care of the father for the previous 12 months, (2) the mother had in fact been living in

[40] B1/218
[41] B1/22

New Zealand for that time, and (3) she was in the course of wrongfully removing the child from her country of birth.

[126] The specific incident relied upon by the applicant is that of 26 June 2013, where the applicant made the allegations to which I have referred to in the preceding paragraph. This event was the subject of substantial evidence of the parties, the applicant's sister and the paternal grandmother. It is sufficient to record my finding that the applicant and her sister's accounts were so peppered with contradictions that they were wholly unreliable. Specifically, I reject the evidence of the applicant and her sister as to this incident for the following reasons:

(a) Her account to the Police is different from her other accounts (such as the INZ timeline and her affidavit sworn on 30 October 2020 in this Court). In her INZ timeline she stated that she was taken from the police station to her parents' house and left the child with the father and his family. However, her other evidence is that she was taken from the police station to her sister's home by a friend, before going to a medical clinic. In her affidavit[42] she swore that the father had taken the child away from her and locked him and the daughter in his room before the Police arrived. She gave ever changing accounts of a relatively straight forward event.

(b) She alleged that after the Police arrived at the paternal home, the respondent "absconded with [Abira]…for four days"[43]. There was no credibility to that statement. Instead she wished to paint a sinister impression of the father's actions when, in reality, he acted in an entirely child focussed manner. What occurred was that when the paternal grandmother went to the parties' room to inquire as to what the noise was about, the respondent took [Abira] away to a park to get her away from the parental dispute before taking her for dinner. He returned in the early evening.

[42] B1/91/13
[43] B1/92/13

(c) Despite her allegations of a serious assault, the police photos of her (which comprise the only independent evidence of her physical state), do not show any sign of injury to any part of her body, or head. It should be noted that despite the applicant being directed for some months to obtain Police records, she failed to do so. It was the respondent father who obtained these photos from the Police. The photos show no signs of bruising anywhere; whether on her hands, face or neck. She and her sister alleged that the photos showed red markings down both her hands, but I accept the respondent's statement that these were cultural henna markings, which indeed they appear to be.

(d) The evidence of her sister may best be described as creative. She stated that the signs of strangulation were only at the very back of the neck, at one point, directly in the middle, being the one area of which there were no police photos. She could not reasonably answer Mrs Hayward's questions as to how a single mark, if in fact there was one, could be evidence of strangulation as that would require two points of pressure and would hardly be at the spine area at the back of the neck.

(e) The applicant stated that she would obtain records from the medical centre that she purportedly attended. Again, she failed to obtain the records. When I inquired of her why she had not obtained these records despite 19 months elapsing since she commenced the proceedings, I was informed that a request had only been made a few weeks before hearing. As with similar concerns about the failure of the applicant to produce copies of relevant documents filed by her with Malaysian Courts, I found the fact she could not produce medical records most likely indicative of her knowledge they would not support her false sworn statements.

(f) Her fanciful evidence included a statement that her sister had taken a photograph of her injuries[44], but that she had misplaced them. There

[44] NOE 8/12-13

> was no evidence that such were ever taken and certainly none were produced. The best evidence available to me were the police photographs obtained by the respondent, which disclosed no sign of any injury.

[127] In summary, I reject the allegation that the respondent was violent during this incident. The evidence of the respondent and his mother as to this incident were consistent. I determine that there clearly was a heated argument, during which Mr [Krithigan] broke the window. He says it was accidental when his ring on his finger caught the edge of the window, causing it to break. I accept his evidence and determine that during the heated verbal exchange, he was angrily flailing his arms around and caught the window. However, there is no evidence that the respondent forced the applicant's head through a glass window. No witness gave any evidence of seeing any blood. Only the applicant's sister said she saw some swelling on top of the applicant's head, but no evidence was available from the police reports or photos, or from any medical clinic to support a conclusion that the applicant's head was pushed through a glass window. As already determined, I had no confidence that the evidence of the applicant and her sister was credible and despite significant opportunity, the applicant has failed to obtain any reports from the police or medical clinic to verify her assertions.

2. Sexually Inappropriate Behaviours

[128] Of all the applicant's allegations of abuse, the most concerning is that in November 2014, while intoxicated, the father sexually abused [Abira] by touching her. Associated with that, is her allegation that he watched pornography and masturbated in front of her and the child.

[129] There is not a skerrick of evidence to support this serious allegation. Instead, there are a number of factors which support the finding that this allegation is a malicious and false accusation to bolster the impression the respondent is a danger to the child and mother. The factors in support of this finding are:

(a) The allegation was made almost in passing, as if it was one point on a checklist of complaints to discredit the father. The allegation forms part

of the applicant's 'Timeline', a document she has produced to support her application for a Visa. That timeline aside, she has not given any detailed account of such a serious incident to this Court. Again, her allegations are very general in nature, easy to make, but hard to refute because of a lack of specificity,

(b) Such an event, if it ever occurred, would attract much greater focus throughout a case than it has before me, as such behaviour would indicate a very serious risk to a child. Yet, despite only a vague reference to the incident in her first affidavit, her fuller affidavit which was sworn on 30 October 2020 to provide her full evidence for this hearing made no reference, at all, to such a concerning event. This lack of any detail supports the conclusion that the allegation was simply that, a mere assertion to portray the father as dangerous,

(c) If the sexual incident did occur, then the applicant's response to it does not indicate the actions of either a credible or responsible person. There is no evidence that the mother ever complained to anyone about the alleged abuse, yet the mother has demonstrated she has little hesitation in going to the police when her need to do so arises. She then left the child in the care of this alleged abuser for nearly a year, merely 7 months after the alleged date of the abuse. These are not the actions of a person who held an honest belief that the husband was an abuser. Although the applicant has attempted to portray her inaction as being the result of the respondent's violence, unlike genuine victims of sustained family violence, there is no evidence before me which remotely supports that he was violent.

(d) This finding is also supported by reference to the applicant's current proposals as to the father's contact if she was awarded day to day care[45]. She has proposed that the father may see the child in Malaysia twice a year for a minimum of a week during school holidays. It would be

[45] B1/98/48

'monitored' and be at her aunty's home, before progressing slowly to overnight unsupervised contact at the respondent's home. These are not the proposals of a person who claims they witnessed the father sexually abuse their child. They reflect the proposals of a person who does not hold a genuine belief the father is an abuser, but who now wishes to be viewed as a reasonable parent who supports the child's relationship with that other parent.

(e) Finally, the mother's many allegations of abuse of [Abira] by the father are inconsistent with the fact that after the applicant left Malaysia for 11 months in June 2015, she only had 3 Skype sessions with the child. Although she asserts that she had more telephone discussions with the child and that the father obstructed her contact, her statements lack credibility. The father had no reason to believe the mother had left the marriage for good. She had stated she was going to NZ for a visit to her family of 2 to 3 months. Given the turmoil in their marriage, he was happy for some respite and there was no reason for him to try and sever [Abira]'s relationship with the mother. I reject her evidence and determine that her desire to make a new life overrode any great concern for her daughter left behind in Malaysia. The lack of effort by the mother to maintain contact with the child is again inconsistent with her statements that she was concerned about [Abira] being abused, sexually or physically.

3. Lack of Economic and Financial Support

[130] Throughout the applicant's statements to all Courts and to INZ, she has claimed that the respondent "never worked"[46] during their 9 year relationship, that he never supported her or the child and that she was a person who financially supported the family. She has sworn statements before this Court to that effect and has even stated to be Malaysian High Court at Shah Alam[47] that he *"refuses to pay even a single cent for the needs of the child".* She tendered such documents to INZ in support of her

[46] For instance, AS letter to INZ 14 April 2018 p 3 (In Kang Bundle of INZ documents)
[47] K 0196

Visa applications in order to reinforce her assertions to INZ that she was a desperate person who was living without any support from her malingerer husband.

[131] She has made claims to INZ and this Court which are patently false. In her letter to INZ dated 14 April 2018 she stated that the respondent had *"never worked while we lived together. I supported the family… He has not had any contact with that [Abira] since she has been in New Zealand (nearly 2 years)".* She proceeds to say that if she were to be deported she has no family or financial support in Malaysia and nowhere to live.

[132] As with all her evidence to this Court, the Malaysian Courts and to INZ, the overwhelming evidence demonstrates her statements to be false. The overwhelming evidence before me as drawn from documents provided by the respondent and the evidence of his supporting witnesses, shows that throughout the marriage the respondent has been fully employed. He provided verification of job offers[48] and evidence of various vehicles which are owned in his name. He provided evidence to show that he had loans for his home and for his vehicles, which would never have been advanced if he did not have a stable income stream.

[133] It is of considerable concern that in a situation where the respondent has clearly had stable employment throughout his adult life, he has been portrayed by the applicant to be an indigent and lazy person who is not supporting his child or his wife. The applicant has used such false statements as part of her strategy to achieve her goal of residence in New Zealand, with her having the care of the child. Such a level of deception is extremely concerning.

4. Child Neglected by Father

[134] The applicant, supported by Mr [Glass], stated that when [Abira] arrived in New Zealand she was very poorly cared for, she was skinny, had a bruise on her face, said her father beat her, was not toilet trained and was still drinking milk from a bottle. Mr [Glass] deposed that she *"looked very malnourished"*[49].

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[48] Exhibits I as produced in Court
[49] B1/106/20

[135] Despite such graphic descriptions, the Court was provided with numerous photographs of [Abira] when in Malaysia. In all photos she has the appearance of a happy, well cared for child. In addition, having had the advantage of hearing the evidence of the paternal family, they impressed as intelligent and decent people, possessed of self-respect and competence. They did not present as people who were likely to neglect a child. The applicant had left [Abira] in the care of the father and his parents, and stated in evidence that she had no concerns about the quality of care of the grandparents. Her sworn statements of [Abira]'s purported appearance upon arrival in New Zealand do not match either the photos or her decision to leave the child in the paternal home for 11 months.

[136] As with much of the evidence of the applicant and Mr [Glass], there was a high degree of exaggeration to it. In Mr [Glass]'s case, he has very poor eyesight, which was evident to me when he was struggling in the Courtroom to even locate where the witness box was situated. He confirmed that he found it very difficult to see photographs, without a reading machine he must have others read documents to him. It is very doubtful that he could make any real assessment of how [Abira] appeared and it is more likely that he has, as with all matters, relied upon what Ms [Ishan] has told him.

[137] In addition, it is significant that despite these witnesses expressing such serious about [Abira]'s state of health and development and the alleged bruise, they did not take the child for any form of medical treatment or assessment[50]. Instead, they sent her off to attend a kindergarten. Those are not the actions of reasonable people confronted by evidence of such serious neglect.

5. Child's Statement about being hit

[138] Both the applicant and her partner said that immediately upon [Abira]'s arrival in Mr [Glass]'s home, the first thing she stated spontaneously was that [her father] had beaten her. Mr [Glass]'s evidence was that she would keep repeating this statement.

[50] NOE 234/12 to 27

[139] On all the evidence before me, it is my determination that on the balance of probabilities, during the time between [Abira]'s abduction from Malaysia and arrival at Mr [Glass]'s home, the applicant had coached the child to make this allegation. This finding is supported by the manner in which the child spontaneously came out with the allegation, before she said anything else. I determine that the child had been instructed to say this and, given her age at the time, it became a form of mantra.

[140] There is no evidence to support a conclusion that the child was ever beaten by the respondent. To the contrary, the overwhelming evidence is that [Abira] received high quality care, love and stability when in the care of the father and his parents.

6. Allegation that Father an Alcoholic and Drug User

[141] The mother has asserted that the father is both a drug abuser and an alcoholic. Although she had not previously made allegations that the father was a drug abuser, in her sixth affidavit she suddenly alleged that in or about 2014, she found a small black pouch with white coarse salt looking crystals in it. She inferred it was methamphetamine, and suggested the respondent indicated it was to improve sexual performance. She accepted that use of methamphetamine or cannabis in Malaysia can lead to the death penalty.

[142] She also made a variety of allegations that the father was such an alcoholic that on one occasion, perhaps in 2012, he was so intoxicated that he urinated in the bed[51]. The precise details of her allegation were difficult to ascertain, but her affidavit would suggest she was alleging this occurred at the parties' home. However, in her final affidavit she then produced a photograph of what she suggested was a mattress stained with urine. When examined by the respondent, she said[52] it was a mattress at her parents' home, although it does not appear she ever alleged that he urinated in a bed at that home.

[143] Her evidence was unusual to the point of being fanciful. She then acknowledged that it was her sister in Malaysia who had taken the photo only two or

[51] B1/90/7
[52] NOE 46/25-27 to 47/1-23

three weeks before the hearing. Aside from issues over admissibility of a photograph not taken by the witness, if her evidence is to be accepted then it would mean that her family had retained a mattress which was heavily stained with urine since 2012 or so. Unlikely indeed. Her evidence was implausible.

[144] The respondent's supporting witnesses had never observed the respondent in a state of intoxication which remotely resembled the descriptions of the applicant. As noted, I had no cause to reject their evidence.

[145] In respect of drug use, the respondent acknowledged in cross-examination by Mr Kang that he had once tried when he was at college. He denies ever having used drugs since being in the relationship with the applicant. There is no reliable evidence to doubt his word on this issue.

[146] It follows from my findings that the applicant's somewhat belated allegations that Mr [Krithigan] was a drug abuser were less than credible. Likewise, although he accepted that he had been intoxicated in the past, he said it was never to a point where he lost control of his bodily faculties. There is no evidence he has any problematic use of alcohol.

Proceedings in Malaysia

[147] As prefaced, from the limited documents that have been provided by the parties in respect of the proceedings in the Malaysian Courts, it is evident that the applicant has made false statements to those Courts. In addition, she acted in a deceptive manner by filing proceedings in the High Courts in both Shah Alam and Ipoh, when she knew that the respondent resided in Kuala Lumpur where a High Court was also located.

[148] The applicant explained away the filing of her proceedings in Courts distant from where the father lived by saying that her lawyers were based on those cities. Such explanation, if viewed in isolation, may appear plausible. However, given the degree to which this applicant has gone in order to deceive people and agencies, I determine that she deliberately filed her applications in Courts away from where the respondent lived in an effort to reduce the possibility that he would learn of those

proceedings. It is a similar device to that when she gave INZ false contact details for the respondent in order to reduce the possibility that he would be contacted by them.

[149] In addition, I accept the respondent's evidence that the applicant fabricated documents for the Malaysian High Court at Ipoh to show that the respondent had been served with their proceedings, when in fact he had not. A hearsay document[53] from a Malaysian lawyer engaged by the respondent, indicates the probability that the purported signature of the respondent on an affidavit of service was in all likelihood forged. Given the propensity of the applicant to create false documents, and the preferred evidence of the respondent, I determine that such fabrication is probable on the civil standard of proof.

[150] Although the High Court at Ipoh later formed the view that the respondent had been served[54], there were no documents produced to indicate whether that Court was relying upon documents that may have been the subject of some fabrication. Certainly, the position of the respondent is that he was not served and that a false affidavit of service may have been filed by the applicant. In the absence of any evidence to the contrary, I prefer the evidence of the respondent that he had not been served.

[151] Analysis of the documents filed by the applicant in the Malaysian Courts demonstrates the same strategy of omission of material circumstances, such as; the nondisclosure that the applicant had left the child in the care of the father from 1 July 2015 until 1 June 2016 and that she then wrongfully removed the child from Malaysia without the consent of the father. The materiality of such circumstances cannot be disputed, and the omission by the applicant to such significant circumstances was done in the clear knowledge that her applications would likely have been unsuccessful if either Court had been advised of the true picture. It is highly unlikely that any Court would grant the care or custody of a child to a parent in a situation where that parent had informed the Court that, firstly, they left the child in the care of the other parent for a year and, secondly, then returned to the country for the purpose of unlawfully removing the child from their country of birth. That is why she omitted any reference to such pivotal circumstances.

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[53] B1/268
[54] B1/40 – *[Ishan] v [Krithigan]* [2019] MLJU 575, at [17]

[152] I also reject the applicant's statements that she did not have any knowledge of the fact that the father had obtained an interim custody order of [Abira] from the High Court at Kuala Lumpur on [date deleted – four months after the applicant and daughter arrived in New Zealand] 2016. The evidence against such statement is strong. For the following reasons, the applicant's denials of knowledge of that order are rejected:

(a) She stated[55] her mother had told her that she had received some documents from the respondent and had signed an acknowledgement of receipt, but that her mother never opened the envelope because neither she nor the applicant's father could read. The applicant's hearsay statement is that her mother told her she had given the documents to her lawyer who advised her not to do anything,

(b) As with the respondent, the applicant had every opportunity of producing evidence from her mother on such factual disputes, but did not do so. I am not prepared to place any weight upon a hearsay statement, especially from this witness,

(c) However, reference to a document signed by the applicant's mother demonstrates the applicant's statements to be wrong. In a statement signed by the applicant's mother on 23 August 2016[56] and addressed to the Deputy Registrar of the High Court at Kuala Lumpur, the applicant's mother stated that she received the originating summons and an affidavit in support and that she had signed the acknowledgement of receipt. She stated that she realised the documents were in respect of a case involving her daughter and that her daughter was no longer residing with her. The statement then made reference to comments made by the respondent in the affidavit of support that she had been served with. Accordingly, contrary to the applicant's assertion that her mother could not read and had not opened the documents served on her, the statement shows that she was aware of at least part of the contents,

[55] B1/121/10 Ms [Ishan] affidavit 18 November 2020
[56] K 0071

(d) Accordingly, there is strong evidence that the grandmother was served with the father's Kuala Lumpur High Court proceedings and that she acknowledged awareness of some of the contents of them.

[153] Further evidence in support of a conclusion that the applicant's mother was aware of the Kuala Lumpur proceedings, is the respondent's statement that he saw her at the Kuala Lumpur Court when he was there for the hearing of his interim custody application. In his complaint to the Malaysian police on 10 December 2017[57] (which was produced by Mr Kang from the documents his client had given him) about the removal of [Abira] from Malaysia, the father made mention that the applicant must have been aware of the previous order of the High Court at Kuala Lumpur because the documents had been sent to the applicant's last known address (namely her parents' address) and also because the maternal grandmother was present at the Kuala Lumpur High Court for the hearing. That statement was made well before the respondent could have realised that the maternal grandparents' knowledge of the Kuala Lumpur proceedings may later be in issue in this Court.

[154] In evidence before me, the respondent confirmed that when he went to the Kuala Lumpur High Court, he was made to wait outside while his lawyer argued in support of his interim application. He stated that he saw both the maternal grandparents entering a lift at the Court.

[155] I accept the evidence of the respondent. Such evidence, when combined with the written statement by the maternal grandmother, provides strong support for the conclusion that, despite the assertions of the applicant, her mother was well aware of the Kuala Lumpur proceedings.

[156] The applicant has sworn that at no point did her mother ever tell her about the father's proceedings. I do not accept her sworn statement. That finding is supported by the fact that the grandmother visited New Zealand for the commitment ceremony between the applicant and Mr [Glass] in November 2016, merely a month after she had been seen by the respondent at the Kuala Lumpur Court hearing. In addition, the applicant accepted that she had telephone discussions with her mother before that

[57] K 0163

journey and had obviously spoken to her mother when she visited in November. Given the maternal grandmother had both received the Kuala Lumpur Court documents and had attended at the Court for the interim hearing, it is inconceivable that she did not advise her daughter of such matters in the many phone calls between them and when they met in person during the grandmother's trip to New Zealand.

[157] It follows from these factual determinations that the applicant's sworn statements to the Courts of New Zealand and Malaysia and her statements to INZ that she was not aware of the fact the respondent had obtained an interim custody order from the High Court at Kuala Lumpur are lacking in credibility.

[158] As already discussed, the applications to the Malaysian Courts were also misleading in that she asserted that the father provided no support for [Abira] and had no interest in her. It is apparent that such sworn statements contributed to the Malaysian Court granting an order in her favour.

[159] Such statements are, without question, false. The evidence against the veracity of her statements is overwhelming. The primary provider to [Abira] has always been the father. The father provided all care to [Abira] when the mother left her in his care for 11 months, a critical fact not disclosed to the Malaysian Court. The evidence provided by the father from the child's previous child education facility in Malaysia establishes that [Abira] had been at that facility from 7 January 2015 (4 months prior to the mother's first departure from Malaysia) and that all interactions with the facility were with either the father or his parents. Indeed, the letter from the school recorded that the mother had never been seen by the school[58].

[160] The evidence supports a conclusion that, contrary to the mother's sworn statements, she had no involvement in the care of [Abira] prior to her removal of her to New Zealand. Neither did the mother have any meaningful contact with her child in the 11 months prior to removal. This was her own election, as she was more focussed upon the new life she was planning in New Zealand than on maintaining a relationship with her daughter.

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[58] B1/199

[161] From the limited documentation available from the Malaysian Court applications, it can be seen that the applicant continued her pattern of providing false or misleading information. In her application to the High Court at Shah Alam dated 22 February 2017, she stated that she was residing at [address deleted]. However, she confirmed in evidence that she had never lived at that address.

[162] In summary, nowhere in her applications to the Malaysian Courts did she disclose;

(a) That she had actually removed [Abira] from Malaysia without consent, or

(b) That prior to removal she had in fact been living in New Zealand, and

(c) While in New Zealand, she had left the child in the care of the father and his family,

(d) That even when in Malaysia she had little if no involvement in the child's education matters,

(e) That it was the father and his family who were providing the material supports for the child.

[163] In conclusion, as with her application to the New Zealand Court, there were significant and deliberate omissions of highly material circumstances evident in the applications to the Malaysian Courts. Such is the pattern and degree of these omissions, that I determine that the applicant knew that an accurate statement of circumstances would not yield the outcomes she sought. These omissions and misstatements were deliberate and calculated to deceive the Courts.

Misleading Statements to NZ Family Court

[164] From the very commencement of her proceedings in the NZ Family Court, the applicant omitted material matters and swore to statements which were, at best, half-truths.

[165] The misstatements in her first affidavit sworn on 1 April 2019 in support of her without notice application for orders[59] included:

(a) She deposed[60] that since she brought [Abira] to New Zealand the father did not have "any substantive [sic] contact" with the child. However, she failed to inform the Court that when the father called to speak to the child, she had terminated all contact when he declined to sign a letter consenting to the child being in her care in New Zealand. Instead, she presented a false impression that the father did not care about the child,

(b) She failed to disclose that, in reality, the child had been wrongfully removed by her to New Zealand, without the knowledge or consent of the father. In the context of a without notice application, this was a significant and deliberate omission of a material circumstance,

(c) The affidavit contains a significant contradiction in that, on the one hand she says the father has no interest in supporting or contacting the child yet, on the other has "continuously been contacting my family in New Zealand until recently, threatening that he will come to New Zealand, uplift [Abira] from my care and return to Malaysia with her". The fact the father was trying to recover the child is starkly at odds with her other sworn statements that he had no interest for the child. She sought falsely to portray the father as wholly disinterested in [Abira], in order to enhance her application for day to day care,

(d) She states that she and Mr [Glass]*"are even applying for an Order to formally adopt [Abira] as parents"*. This statement was made to convince the Court that, first, the father had no interest in the child and, secondly, to demonstrate how secure her new relationship was. However, there was no possibility that she and her new partner could adopt the child without the consent of the father and especially in a

[59] B1/1-30
[60] B1/10

situation where the child had been unlawfully removed from her country of habitual residence. The statement was palpably false and designed to mislead the Court on significant matters.

[166] These many and detailed findings as to the particular circumstances in which [Abira] exists are pivotal to the analysis of what outcome will best serve her welfare when assessed against the s 5 principles and in determining predictive assessments as to likely future circumstances. I will shortly summarise the core findings as to particular circumstances but will first detail the child's views.

Section 6 – Child's Views

[167] In accordance with s 6 of the Act, Mrs Hayward has met [Abira] on three occasions in order to afford to the child the reasonable opportunity to express her views on the matters affecting her (namely the current applications). Mrs Hayward has filed various reports as to the child's views.

[168] No party sought that I meet with [Abira] and, given Mrs Hayward's extensive experience in the role of lawyer for children, I did not view it as appropriate to further interview the child. This is especially the case where, unlike Mrs Hayward, I did not have the advantage of previously meeting with the child in order to gauge any variations in views expressed over time.

[169] The material aspects arising from the three reports filed as to Mrs Hayward's meetings with [Abira] may be summarised as follows:

(a) *Report [date deleted] 2019*[61] - Mrs Hayward met with [Abira] on her [birthday]. This was prior to LFC having spoken to the father, hence the meeting seemed to have been one of introduction only. [Abira] enjoyed her half siblings and Mr [Glass]'s then 10 year old daughter. She had no worries at home.

[61] B2/590

(b) *Report 4 September 2020*[62] - [Abira] was very talkative, loves her school and family, calls Mr [Glass] 'Dad', is aware her mother wears an ankle bracelet (but is uncertain as to why) and is aware of some issues with 'Immigration'. She remembered that her birth father had smacked her with an open hand, but did not know on what part of the body she was smacked. Mrs Hayward recorded that she was concerned the child's statement did not seem to be the words commensurate with [Abira]'s age. [Abira] remembered the smacking because she had talked in recent times with her mother about it. She was uncertain how she would feel if she met her father. She misses relatives she remembers in Malaysia. There was 'no doubt' in Mrs Hayward's perception that [Abira] wanted to remain in New Zealand and that the only family she knows are here.

(c) *Report 18 November 2020*[63] - Mrs Hayward met [Abira] to update her views prior to this hearing. [Abira] told LFC that she did not wish to meet the Judge. She met her at the child's school. She recorded that the principal informed her that he had received an angry phone call from Mr [Glass] asking why he permitted LFC to meet [Abira] without his permission.

(d) I record at this juncture that Mr [Glass] confirmed in Court that he had been angry about some of the principal's statements and gave explanations which showed, without question, that he incorrectly viewed himself to have some form of parental rights which he clearly did not have[64]. It was also apparent from the evidence that [Abira] had been made aware that Mr [Glass] was unhappy with Mrs Hayward's interaction with the school and statements in her report. The evidence shows that [Abira] has been made very well aware of both the views of her mother and her partner on matters that no child should be privy to.

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[62] B2/612
[63] B2/626
[64] NOE 218-219

(e) [Abira] had a level of awareness of what was occurring in terms of the Court proceedings. Mrs Hayward asked [Abira] whether she would wish to visit Malaysia, to which she responded "only if [Arush] [her father] dies". Mrs Hayward was obviously concerned by such an extreme statement. [Abira] described her father as "mean" and that he "smacks you". She then added that her father smacks her "everywhere", not merely on the body, that it happened every day, "all day long". These comments have expanded considerably from her statements to her lawyer in the previous report.

(f) The child could not recall any happy memories in Malaysia. Neither did she have any memories of her mother in the year when she remained in the father's care. She believes she had called her mum to "pick her up". She claimed that "[Arush]" had left her home alone.

(g) Mrs Hayward asked if her mother talked about Mr [Krithigan], to which [Abira] advised that her mother "hates him".

(h) The child did not want to talk with her father even if her mother wanted her to. She had no wish to visit Malaysia. Mrs Hayward presented the child with a range of scenarios, including how she would feel going to Malaysia if her mother and half-siblings were also there. Again, the child said she would not go.

(i) Mrs Hayward then presented a number of concerns she had as to what degree of weight could be placed on [Abira]'s stated views.

[170] As to the important issue as to what weight, if any, ought to be attributed to [Abira]'s views, this is a rare case where there are so many concerns about the mother's entrenched and devious manipulative characteristics, that it would be unwise indeed to place any great weight upon the child's views. That is not to say that I have disregarded her views, but there are simply too many aspects which indicate that her views are likely to have been heavily influenced and manipulated by the mother and

by Mr [Glass]'s reinforcement of the mother's position. By way of summary, these include;

(a) All evidence shows that when [Abira] was in Malaysia she was much loved by the father and his family. The many photographs tendered in evidence do not have any appearance of a child who was smacked every day, "all day long",

(b) There was a significant increase in [Abira]'s description of the alleged smacking in the two-month period between her meetings with Mrs Hayward,

(c) As previously determined, there is a high probability that from the moment of [Abira]'s abduction from Malaysia, Ms [Ishan] has continually implanted the child with the notion of having been hit,

(d) The child acknowledged that her mother had spoken to her about being hit,

(e) The child's perception of the father is such that he has been effectively removed as a father figure. He is now referred to as [Arush], not Dad. Mr [Glass] has been improperly and inappropriately supplanted into that role. The child is aware that her new 'dad' has been taking a dominant role with the school, one which he has no right whatsoever to be performing. This replacement of the father with the mother's partner must impact the child's view of the father,

(f) Her memories of life in Malaysia are quite limited and most memories now relayed by her are, in all probability, likely to have been implanted in her by the mother,

(g) The child's original general poor view of the father had escalated within two months to one where she wished he was dead,

(h) The child is in an extremely vulnerable situation. From her perspective, she is wholly dependent upon her mother and Mr [Glass]. She would have no recollection of how well she was cared for in Malaysia or any capacity to fairly appraise how she would again receive such good care from the paternal family,

(i) Collectively, there is a wealth of evidence to support a conclusion that the child's now increasingly negative view of the father derives solely from her mother, supported by her sister, whom the child knows "hates" the father. Mr [Glass] has also played a significant part in influencing the child's views, but mainly through his paucity of insight than the more crafted influence of the mother.

Summary of Key Findings and Determinations

[171] Given the extensive factual disputes and circumstances in this proceeding, I provide the following summary of key findings and determinations as they pertain to the forthcoming s 5 analysis. These findings constitute the 'particular circumstances' in which [Abira] exists and form the foundation from which the predictive determinations of likely future behaviours are drawn. I emphasise that the summary is merely that and is not in substitution for the detailed findings recorded by me in this decision:

(a) There is no evidence that the respondent father has been physically violent to the applicant or to the child,

(b) There is abundant evidence that the parties were in a very unhappy marriage, in which they were verbally abusive to each other in arguments. To that extent the parties were likely emotionally abusive to each other,

(c) In the key incident on 26 June 2013, the father did break a window while in a state of anger. Although he did not intentionally break the window, the fact such damage occurred during a verbal argument amounts to psychological abuse at the very lowest end,

(d) Although both parties sometimes smacked the child, such was an acceptable form of child discipline in Malaysia. That cultural context of another country cannot be ignored. Beyond such smacking, there is no evidence that either party has been physically abusive to the child,

(e) The mother's allegation that the father acted in a sexually inappropriate way was a false allegation by her, in respect of which there is no evidence in support. The making of a false allegation of sexual abuse of a child is an act of psychological abuse to the father and emotional abuse to the child, as it has been used as partial justification for severance of the father-daughter relationship,

(f) The mother's allegation that the father is an alcoholic and was regularly heavily intoxicated is rejected. Specifically, the allegation that he urinated over a mattress at the maternal grandparents' home is rejected,

(g) The applicant's allegation that the father was unemployed throughout the relationship is rejected. Instead, the extensive evidence of many witnesses and the documentary evidence to support his position, demonstrates the mother's allegation to be false and a fabrication,

(h) The abundant evidence shows that the father was the child's primary parent for a significant period of time up until to the child's wrongful removal from Malaysia,

(i) All the evidence supports a conclusion that the father, supported by his parents, provided a stable, secure and loving home to [Abira]. They were solely involved in supporting her education and extra-curricular activities,

(j) Prior to her departure from Malaysia, the mother had no involvement with the child's education facility,

(k) The applicant deceitfully obtained a passport for the child and wrongfully removed the child from Malaysia,

(l) The applicant was untruthful in her dealings with the respondent, leading him to believe they were still in a marriage relationship, albeit an unstable one. She did so in order to better effect the wrongful removal of the child,

(m) The applicant made and effected a long-term strategy to remove the child from Malaysia without the father's consent and to become resident in New Zealand. To better enhance her chances of obtaining residence in New Zealand, she intentionally entered a new relationship with a vulnerable person and gained his support for her immigration status, while all the time planning to remove the child,

(n) The removal of [Abira] from her only known home and country was, in all likelihood, very traumatic for her and, given her relationship with the father and paternal grandparents had been suddenly severed after they had cared for her during the mother's 11 month absence, she was very vulnerable to influence by the mother upon her arrival in a foreign land. The mother was the only person known to her and this young child was entirely dependent upon her,

(o) After removing [Abira] from Malaysia, she coached the child to allege that her father had beaten her, such statements being parroted by the child immediately upon arrival in New Zealand, and continued in that mantra fashion. There is no evidence of any kind to support a finding that the father ever beat the child,

(p) Such coaching of the child has likely continued during the pathway to this hearing, as evidenced by the shift to her more extreme statements that she wants the father dead if she has to visit Malaysia. There is no evidence of any kind to support the finding that the father has acted in any way which could remotely justify a child to hold such views. I

determine such views to be the product of the mother's continued alienation of the father, her strategy of aligning the child to her position, achieved by demonising the father. The child acknowledged to LFC that her mother "hates" the father,

(q) It was only after the mother had extracted [Abira] to New Zealand, that she asked the father to sign a consent to the child being in her care. When the father declined to sign the consent, the mother terminated the child's contact with the father. On the balance of probabilities, this act would also have enhanced the child's trauma of the severance from the father and made her even more dependent upon the mother,

(r) The applicant then set about the creation of a forged letter of consent for INZ,

(s) She also gained the support of her family members and friends by manipulatively portraying the respondent as a "monster"; a violent, alcoholic, unemployed person, when he was none of those things. She also falsely portrayed the father as such to Immigration New Zealand, to better her immigration approval status,

(t) Once she secured the wrongful removal of the child to New Zealand, she became pregnant with a child to the new and vulnerable partner, again as a calculated strategy to strengthen her chances of obtaining residence status on humanitarian grounds,

(u) She has presented many falsehoods to both INZ and Courts in Malaysia, using tactics such as false residential and email addresses for the respondent in order to make it difficult for those entities to locate the respondent and uncover her deceptions,

(v) She employed the largely unwitting support of Mr [Glass] to enhance these deceptions,

(w) From the moment [Abira] arrived in New Zealand, she and Mr [Glass] have implemented a strategy of excising the father from the child's life, with Mr [Glass] usurping the father's role. This has included:

(i) Encouraging [Abira] to call Mr [Glass] "Dad",

(ii) Enrolling the child under his surname in education facilities, [social activities], the Doctor, at [sporting] programmes,

(iii) Mr [Glass] assuming a role of self-appointed guardian in terms of his interactions with the child's school and to Mrs Hayward by asserting a purported right to information or to make decisions, when he had no such rights.

(x) The mother's actions of wrongful removal, coaching of the child, termination of paternal contact and excising the father from the child's life are actions of significant emotional abuse of the child,

(y) The nature and extent of the mother's deceptive and manipulative statements and actions are such that I determine such characteristics to be an inherent trait within her. In the significant opportunity I had to assess her, she demonstrated herself to be a person devoid of conscience, with no capacity to appreciate the enormous impact her actions have had on the child's rights to a relationship with the father and his family. There was no evidence, of any kind, to demonstrate even a remote likelihood of change in her insight, willingness or actions,

(z) Despite her asserting that she would fund the child's contact with the father, the applicant has no financial means, assets or income, to fund such contact, either in New Zealand or in Malaysia,

(aa) Although the applicant and Mr [Glass] state that they will borrow money from family members to fund the father's contact, such proposal is entirely dependent upon third parties, over whom this Court has no

power of direction. In addition, one can reasonably question whether such family members would now fund the father's contact when they view him as a 'monster',

(bb) On all the evidence, and despite the assurances of the mother, if [Abira] remains in New Zealand, she will have no relationship of any kind with the father or with the paternal family. Despite her promises to take [Abira] to Malaysia, given the mother's mode of operation, it is most unlikely that she will take [Abira] back to her homeland for fear that either; the father may unilaterally retain the child there (just as she has acted unilaterally) or that she may be charged with providing false or misleading statements to Malaysian Courts,

(cc) As a predictive assessment, made against a substantial weight of evidence, the mother's statements that if she is granted the day to day care of the child, she will now support the father's relationship with the child and permit contact to him, are most unlikely to be fulfilled. Her assurances are designed merely to enhance her immigration applications. Having regard to the intense and continual deceptions of this applicant, I determine that if she were granted day to day care then, as soon as Family Court proceedings are concluded and if she obtains immigration approval to remain in New Zealand with [Abira], she will finally terminate the father's relationship. Such is the intensity and dishonesty of her actions, that such an outcome is close to a certainty.

Application of s 5 Principles to the Particular Circumstances

Introduction

[172] In accordance with the approach to determination of parenting disputes as mandated in *Bashir v Kacem*, having detailed my findings of the extensive particular circumstances of this case and taken account of [Abira]'s views, I now assess how those circumstances weighed according to the s 5 principles, guide what outcome best serves the welfare and best interests of [Abira].

[173] That decision requires the Court to determine which of the s 5 principles are relevant to the particular circumstances of the case. In the present case, all the principles are relevant in varying degrees to the particular circumstances.

[174] By way of introduction, the choices for the Court are stark. There are only two options as to outcome. No other options were presented to me by any participant. Whichever of those two options is determined by s 4 to best serve the child's welfare, there will be unavoidable and significant impacts for the child. The options are:

(a) Order the return of [Abira] to Malaysia, into the day to day care of the father, with all contact to the mother to be in Malaysia. It is not an option to order the child to return to Malaysia into the care of the mother, for she has stated that if [Abira] is ordered to return to Malaysia then she will remain in New Zealand[65]. The only aspect that might lead to her returning to Malaysia would be her deportation, which is a matter outside the jurisdiction of this Court, or

(b) Grant the day to day care to the mother on the basis that the child resides in New Zealand, with contact provisions to the father.

[175] As undesirable as those options are, it is the analysis and application of the s 5 principles which ultimately guide which one better accords with s 4.

Section 5(a) - Protection

[176] Section 5(a) requires the Court to protect a child. As prefaced in the section on relevant law[66], the wording of the provision requires protection form all forms of harm. Assessed against the particular circumstances of this case, the following findings arise:

(a) There is no risk posed to the safety of the child by the respondent father. He is a responsible, intelligent and loving parent who was the primary parent of the child until he had the care removed from him. He

[65] NOE 134/11-14 and B1 97/43 affidavit [S Ishan] 30 October 2020
[66] Above [43] to [58]

conducted himself throughout this lengthy and intense hearing with a dignity and respect for others which is seldom observed in this often emotional forum,

(b) The father is supported by a loving paternal family, comprised of dignified people of integrity,

(c) The mother has perpetuated serious emotional abuse upon the child in the following ways: removed her from her stable and secure home, removed her from the country of her birth, severed her relationship with the father, immersed her into an entirely new family in which a stranger has now supplanted the respondent as the father. She has also coached the child to make false allegations against the father that he physically abused her. She has also perpetuated emotional abuse of the child by wrongfully alleging the father to have sexually abused the child. It is emotional abuse because such allegations are on the record and could well become known to the child, if not already known to her. Individually or collectively, these are a concerning range of acts of emotional and psychological abuse to the child. The s 5(a) principle demands the outcome be one which protects the child from such harm,

(d) The mother and her family have perpetuated to the child a very negative view of the father, describing him as a 'monster', when there is a poverty of any evidence to support that description. It is apparent that such an impression has been implanted in [Abira], evidenced by her most recent statement that she will only go to Malaysia if he dies. Courts have held that the exposure of the child to the negative views of one parent against the other is a risk to emotional safety[67],

(e) There is no evidence to support a conclusion that the mother has either the capacity or willingness to cease such abusive behaviours. Her attributes are ones which do not inspire confidence that things will change, despite her current promises to the contrary,

[67] *[Smith]v [Bartlett-Young]* [2017] NZHC 1019, at [65]

(f) The principle in s 5 guides an outcome which is most likely to protect the child from ongoing emotional and psychological harm posed by the mother alone. There are no risks to the safety of the child posed by the father. In order that this principle be fulfilled leans heavily in favour of an outcome which places the child into the care of the father, with limitations upon opportunities for the mother to continue her nefarious actions to undermine the child's stability.

(g) In making this finding, I have not ignored the almost certain trauma to [Abira] would suffer by a change in care, but I see s 5(a) as being directed more against protection from risks posed by a parent than from the outcome itself. In any event, the evidence demonstrated that the paternal family have every capacity to take requisite steps to support [Abira] through any trauma.

Section 5(b) and (c) – Upbringing and Co-operation

[177] The principles in s 5(b) and (c) are interrelated in the circumstances of this case. The legislative goals of ensuring that a child's upbringing is the responsibility of both parents and that it should be facilitated by ongoing consultation and co-operation are somewhat difficult to achieve where one of those parents engages a long-planned strategy of deception to remove the child from the other parent and take her to a distant country. The following factors were established by the evidence:

(a) The evidence did not support the conclusion that the mother will now suddenly involve the father in personal parenting the child, in parenting decisions or in matters of guardianship,

(b) This conclusion is supported by the fact that after the father declined to consent to the mother having the care of [Abira], she immediately stopped all his contact and, despite 4 years elapsing, has done nothing to give any meaning to these principles. Instead, since the moment of [Abira]'s arrival in New Zealand, the applicant placed another man into the position of the father and has excised the other parent's existence

from the mind of the child. Mr [Glass] lacked insight into how he has usurped the role of the father[68],

(c) The intention of these principles is to identify an outcome which gives practical application to those principles. There was no evidence to support a conclusion that permitting the child to remain in the mother's day to day care would enhance prospects of achieving either of these principles. Despite the mother's belated pre-hearing proposals for the child to visit the father in Malaysia, and vice versa, the applicant has no fiscal means of guaranteeing that such proposals could manifest themselves in reality. Fiscal limitations aside, given the intensity and duration of her wrongful actions, no trust could be placed upon her assurances to now re-engage with the father. They were hollow intentions created for the outcome she seeks,

(d) However, if the child were placed into the care of the father, he possesses a far greater willingness and capacity to permit the mother to have an ongoing involvement with the child. The only caveat is that he is rightly suspicious of the mother's ongoing actions and whether she would again retain the child if [Abira] returned to New Zealand for contact. Given that Malaysia is not a signatory to the Hague Convention, any retention of the child in New Zealand would require yet further Court proceedings to be filed, which has proven a lengthy process to date,

(e) If the child were in the care of the father in Malaysia, there is abundant evidence that Mr [Krithigan] and his family would promote the mother's involvement with [Abira], with appropriate safeguards against any future wrongful acts by her. He would be entitled to adopt a very cautious approach to any contact arrangements, as Ms [Ishan] has shown herself only too capable of making false complaints to achieve her goals. As there was no evidence to support the conclusion

[68] NOE 243/26-30

that she is likely to change, it is a sound prediction that she will repeat such a strategy in the future,

(f) Accordingly, achievement of these principles is more likely to be achieved if the child is in the care of the father.

Section 5(d) - Continuity

[178] Section 5 (d) provides that the welfare and best interests of a child must seek an outcome which provides continuity in the child's care, development and upbringing.

[179] [Abira]'s continuity of care, development and upbringing was severed in two ways by the applicant. First, in July 2015 she made the decision to leave the child in the care of the paternal family. That decision was motivated solely by her strong desire to live in New Zealand and was not one deriving from any concern for her child. The consequence was that she unilaterally disturbed the child's continuity in care arrangements.

[180] The second severance of continuity occurred in June 2016 with the wrongful removal of the child to New Zealand. In both instances, the mother had no regard for the impact upon [Abira]'s welfare and best interests. Both actions were undertaken to achieve Ms [Ishan]'s needs.

[181] The mother's wrongful actions have resulted in a new status quo, namely that the child has been immersed into a new country, a new family, with new siblings, while severed from her previous status quo with the father. Retention of the current status quo would ensure continuity of the new life, but at the same time continuing the severance from the old.

[182] An order for the child to return to Malaysia would clearly sever any continuation of the status quo, but would recommence establishment of the former arrangement. The key point of difference between the options is that a return to Malaysia would achieve a much higher probability of the child developing a continuity

of enjoying a relationship with both sides of her family, whereas retention in New Zealand would continue the severance for the paternal family.

[183] Section 5(d) leans in favour of return to Malaysia, as difficult as that will be for the child. However, it cannot be ignored that the mother's wrongful actions have already caused the child to experience a traumatic situation by being wrenched from the previous stable situation with the father in 2016.

Section 5(e) and (f) – Strengthen and Preserve Family and Identity

[184] Sections 5(e) and (f) are also intertwined in this case. These principles carry a positive requirement that a child "should" continue to have a relationship with both parents and that his or her relationship with the wider family group "should be preserved and strengthened". Likewise, s 5(f) carries a similar obligation to preserve and strengthen a child's identity.

[185] It cannot be disputed that the mother's actions and deceptions have decimated achievement of both these principles insofar as the child's relationship with the paternal family and with Malaysian heritage and identity are concerned. There was no evidence that the applicant has done anything to "preserve and strengthen" [Abira]'s relationship with the paternal family. To the contrary, there is abundant evidence that she has gone to quite extraordinary lengths to excise the paternal family from the child's world. There was little evidence that she has done anything meaningful to preserve and strengthen her Malaysian identity. At best, the child speaks Malay language and sometimes eats Malaysian food.

[186] The evidence is strong in indicating that the only tangible way in which achievement of these principles is possible is by a return of the child to Malaysia. Retention of the child in the mother's care will render the principles, particularly s 5(e), unattainable.

Overview and Decision

[187] In introducing the s 5 principles to the Act, Parliament clearly intended that the ultimate determination of what outcome best serves the welfare and interests of a child

must be guided by these express and defined principles, taking into account any views expressed by the child. In *Kacem v Bashir* the Supreme Court referred to the s 5 principles as important legislative reminders to decision makers, whether they be parents, guardians or Courts, of the context in which the paramount consideration of welfare and best interests is to be considered[69]. The principles do not include any presumptive approach as to whether any particular principle dominates the other[70]. That said, the subsequent statutory amendment which reordered the principles and placed the s 5(a) child safety principle first, has been felt by both the Family and the High Courts to indicate that such principle should wisely assume additional emphasis[71].

[188] The importance and relevance of the principles is brought to life when the Court is confronted with such distressing options as evident in the case before me. Neither outcome is ideal. Both are fraught with risks and unknowns. But application of those principles to the particular circumstances confronting this particular child assists in demonstrating, by a significant margin, that the balance falls heavily in favour of a return of the child to her country of birth into the care of a capable and loving father. In short, if the child were to be permitted to remain in New Zealand then, despite the mother's last minute and somewhat glib promises to ensure a relationship with the father, the overwhelming evidence supports the predictive finding that such will never occur.

[189] If the child were to be placed into the day to day care of the mother in New Zealand then the overwhelming weight of evidence supports the conclusion that she will never experience or enjoy any relationship with the father or the paternal family. Neither will she experience her cultural heritage in Malaysia, for the mother has neither the means nor inclination to take her there. Granting of the mother's applications would not be in accordance with any of the s 5 principles, the closest one being 'continuity' of a wrongfully obtained status quo. [Abira] would continue to be the recipient of the mother's emotionally abusive conduct.

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[69] *Kacem v Bashir* [2011] 2 NZLR 1, at [5]
[70] At [36]
[71] *Lowe v Way* [2015] NZHC 93, at [9] – this decision was upheld on appeal in *Lowe v Way* [2015] NZFLR 547

[190] Conversely, placement of the child into the care of the father would better achieve all of the s 5 principles. It cannot be ignored that [Abira] would likely experience emotional upset by a change to the status quo, but the paternal family are possessed of sufficient resource and capacity to assist her to regain the very positive parenting that she enjoyed prior to removal. A key factor is that a return of her care to the father would better achieve the principles in s 5(b), (c), (d), (e) and (f) as, unlike the mother, the father and his family will ensure [Abira] had ongoing and meaningful relationships with the mother, the maternal family and [Abira]'s half-siblings. The extent of any contact will of course be affected by fiscal issues and the future of the current pandemic limitations. The salient point is that, unlike placement with the mother, all of the s 5 principles are capable of achievement in the father's care, whereas none have any prospect of achievement if with the mother.

[191] In terms of how issues of parental conduct play a part in the assessment of welfare and best interests under s 4(2)(b), several decisions have emphasised how conduct can be predictive of the way a party will behave in the future[72]. In the present case, the extent to which applicant mother has conducted herself is rare indeed. The Court often observes situations where a parent makes unilateral decisions and otherwise undermines the role of the other. However, the circumstances before me are unique in terms of the longitudinal and calculated manner in which the applicant has gone to destroy the child's relationship with the father. She has not only manipulated many people around her, but has actively misled Courts in two countries and the INZ.

[192] In *Baker v Harding* the question was asked as to whether the errant parent's conduct was predictive of the way that parent would behave in the future, in particular in relationship to the s 5(c) assessment. I have asked a similar question in respect of Ms [Ishan], namely does the evidence of her extensive improper conduct lead to a predictive assessment that if [Abira] remained in her care that she will behave in a similar way in the future? By a significant margin, I determine that there is a high probability indeed that once the applicant is no longer under the spotlight of the Court, she will resume her wrongful conduct and will do all she can do to continue severance of the father-daughter relationship. Aside from an 11th hour approach to the father, she

[72] *Baker v Harding* [2018] NZHC 2885 at [157] and [163]; *Malcolm v Lloyd* [2015] NZHC 1483, at [131]

did nothing to promote his contact with the child despite these proceedings having being extant for some 19 months.

[193] The s 4 assessment is ultimately a predictive determination as to which parent is most able to provide [Abira] with a sound emotional and psychological development, which must include the goal of growing into a functional, honest adult, possessed of compassion, integrity and empathy. The father and paternal family possess these qualities in abundance. Regrettably, both the applicant mother and her sister [Sumathy] were devoid of such characteristics. It is my determination that if [Abira] was to remain in the mother's care then, in all probability, she will be role modelled to likewise become an adult lacking a moral compass, a person who will use deceit and manipulative devices to gain advantage over others in order to feed her own needs. In light of the significant evidence of how the mother, supported by her sister, has behaved throughout this relationship and since, it is not possible to reach a different predictive conclusion.

[194] In reaching what is a difficult decision, I am guided by these principles, which lead overwhelmingly to a conclusion that the welfare and best interests of the child will best be served in the medium and long terms by an order of return to Malaysia. I am in no doubt that a return will be traumatic for this child in the short term, just as the initial wrongful removal will have been traumatic to her. Likewise, I am aware the father has been demonised by the mother and her family about the father. A reintroduction to his care will not be without difficulty. But, as indicated, he and his family are intelligent, insightful and respectful people. The evidence supports the conclusion that they will surround the child with love and support and permit her to have a relationship with the mother, in as much as that is possible due to her election to move to New Zealand and create a new family amid the turmoil she created.

[195] As for how the mother may maintain her relationship with [Abira], given her actions were wholly supported by her sister, a brother and Mr [Glass], it is for them to consider a wider moral duty to provide support for the mother and half-siblings to visit the child in Malaysia.

[196] In making the orders which follow, I recognise that there will be limitations as to when and how the return of the child might be effected given the obstacles posed by the current Covid-19 pandemic. However, as further directions may be required to better achieve compliance with these orders, I will continue Mrs Hayward's appointment and the parties may liaise through her to make arrangements.

Orders and Directions

[197] Against those extensive findings, I make the following Orders and directions:

(a) a parenting order under s 48 granting to the respondent father the day to day care of the child,

(b) a parenting order under s 48 granting to the applicant mother contact to the child at times and frequency agreed between the parties. Such contact may also include telephonic or electronic means. One on one contact in person ("in person contact") may occur in New Zealand or in Malaysia provided the following conditions will apply;

(i) The child is not to exercise in person contact in New Zealand for the period of at least a year following the date of her return to Malaysia. I make this condition to ensure the best opportunity for her to resettle in Malaysia. This does not prevent the mother having in person contact with the child in Malaysia within that first year,

(ii) Any in person contact by the child with the mother in Malaysia is to be exercisable during the day time only and [Abira] is to be returned to the care of the father for the evening,

(iii) The child is not to be removed from Malaysia by the mother in any circumstance,

(iv) After the expiry of one year from the date of the child's return to Malaysia, the child may have in person contact in New

Zealand on dates to be agreed in writing between the parties. If the child is to have any such contact in New Zealand, then it is only to occur if, not less than two calendar months prior to the commencement of any such contact, the mother has arranged pre-paid non-refundable air tickets for the child's return flight from New Zealand to Malaysia and has provided copies of such tickets to the father. This will require the parents to have made a prior agreement as to precise date when the child is to return to Malaysia. I make this condition to reduce the probability that if the child comes to New Zealand, the mother will not then arrange for her return,

(v) It is a condition of the order as to contact in New Zealand that the mother is to ensure the child returns to Malaysia on the agreed date and flight. Breach of this condition could invoke prosecution under s 78 COCA,

(vi) all costs of travel for the child to travel from Malaysia to New Zealand and return will be met in equal shares between the parties. This is best effected by the father being responsible for the arrangement and cost of the child's travel to New Zealand and the mother for the return trip to Malaysia,

(vii) the travel costs of the mother, or any accompanying adult, will be borne by her. If the father travels to New Zealand with [Abira], then he will likewise bear his own travel costs.

(c) Pursuant to s 46R, the following directions as to guardianship are made;

(i) The child's country of residence will be Malaysia,

(ii) The father is to arrange a new Malaysian Passport for the child and the Registrar is to release the expired Malaysian passport to

the father to assist in any application. The mother is to assist in such arrangements,

(iii) Apart from any occasion when the child requires her passport for the purpose of visiting New Zealand to exercise contact with the mother, the passport is to be retained by the father. If the child travels to New Zealand, then within 2 days of the child's arrival in New Zealand, the mother is to surrender the child's passport to the registrar of the Family Court at Napier for safe holding until the child's return journey. The Registrar is to hold such passport until the child's return trip to Malaysia and shall release the passport to the mother to facilitate that return,

(iv) The child is not to be removed from Malaysia by the mother in any circumstance.

(d) The s 77 order preventing removal of [Abira] from New Zealand dated 1 April 2019 is to remain in force until travel arrangements are in place for the return of [Abira] to Malaysia. Once travel documents are produced to the Registrar which verify that the child will be returned to Malaysia, and not to another country (except for transit purposes only), the Registrar may issue a Discharge of that s 77 order which is to become effective when the child is at the departure airport. For this purpose, the Registrar is to liaise with the New Zealand Airport Police to effect the child's safe return to Malaysia.

[198] In making these orders, the Court recognises the many and significant logistical factors impacting the implementation of it; the lack of a passport for [Abira], how she will travel to Malaysia, who will pay for the travel, quarantine issues in either country and so forth. While, ideally, the mother would travel with the child to Malaysia to help lessen the impact for [Abira], that is improbable given her likely reluctance to return to Malaysia due to possible actions for her false complaints to agencies of that State and her lack of any funding. It may transpire that the respondent or a member

of the paternal family may have to travel to New Zealand to collect the child. There are a number of unknowns and the role of the Court in these logistics is very limited.

[199] Given that the return of the child to Malaysia will require obtaining of a new passport for [Abira] and planning of other logistical matters. These will necessarily require the input of the applicant, for example, provision of [Abira]'s photograph for passport purposes. It is unclear whether the applicant will cooperate in such matters but given her actions to date, there is a probability she will not. This may require an application for [Abira] to be placed under the guardianship of this Court. I trust this will not be necessary as it is time that the applicant acts reasonably, especially if she wishes to have an ongoing and workable relationship with the father to facilitate meaningful contact. However, if any further orders or directions are required to give meaningful effect to the orders I am making, then I grant leave to either the respondent or Mrs Hayward to return to Court to seek any ongoing directions.

[200] As there has been significant involvement of INZ through the Ministry of Business, Innovation and Employment (MBIE) in the issues arising from the applicant's wrongful removal of [Abira] from Malaysia and fraudulent entry into New Zealand, a copy of this decision requires to be made available to relevant representatives of the Ministry. Key officers of MBIE in the criminal prosecution were Mr Richard Grover and Mr Ian Murray. The criminal section of this Court hold contact details for those officers and, in the first instance, the decision should be remitted to them and they can advise whether there is another more appropriate person to whom the decision should be sent.

[201] It may transpire that the return of the child will require the father travelling to New Zealand to collect her, which will necessitate the ongoing involvement of MBIE and related agencies to assist in that task. I sincerely hope that New Zealand agencies lend proper assistance given that proper attention to the father's expeditious and proper complaints to them about the child's wrongful entry to New Zealand does not appear to have generated an adequate response at that time. New Zealand agencies may require to consider whether special dispensations are granted to the father, or his family, to enter New Zealand for this purpose. This decision draws from INZ records and would tend to support a conclusion that a compassionate approach to border

requirements may be appropriate to consider within exercise of any discretion. These factors heighten the need for MBIE to receive a copy of this decision.

[202] In addition, given [Abira] does not have a current Malaysian passport and, as I understand it, is not eligible to obtain a New Zealand passport. The father, perhaps with the assistance of MBIE, may need to work with Malaysian authorities (such as the Malaysian High Commission in Wellington) to arrange appropriate travel documents. In light of my concerns about the unreliable actions of the mother and the fact the child has been ordered into his care, he should be the parent best placed to arrange such matters. Again, to assist the Malaysian authorities in understanding the issues between two Malaysian citizens in respect of a Malaysian child, a copy of this decision should be sent to the Malaysian High Commissioner in Wellington.

[203] I also permit either party to produce a copy of this decision to either the Malaysian Courts or Police should the need arise. A copy of the notes or evidence may also be available to any of the agencies to which I have referred if required by them.

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Judge P J Callinicos
Family Court Judge

Date of authentication: 15/01/2021
In an electronic form, authenticated electronically.