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**IN THE FAMILY COURT  
AT WHANGAREI**

**I TE KŌTI WHĀNAU  
KI WHANGĀREI-TERENGA-PARĀOA**

**FAM-2016-088-000634  
[2020] NZFC 8327**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ASHIA SETH] Applicant
AND	[JWALA BHAVE] Respondent

Hearing: 29 September 2020

Appearances: R Harte for the Applicant  
T Manuel-Belz for the Respondent  
D Shanahan as Lawyer for the Child

Judgment: 29 September 2020

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**ORAL JUDGMENT OF JUDGE L KING**

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**Introduction**

[1] When Ms [Seth] flew from NZ to Fiji with her [child] [in mid-2014], leaving behind her husband and 12-month-old son, for a period of what she thought was five days to resolve immigration difficulties, she had no idea she would be unable to return to New Zealand.

[2] [Anil], who is now seven years old, has not seen his mother these past six years other than some irregular, infrequent and very limited video contact, despite what I find have been his mother's best endeavours to maintain contact with her son.

[3] [Anil] (also known as [Anil]) was born in New Zealand on [date deleted] 2013. His parents are Fijian nationals. The respondent, Mr [Bhave], immigrated to New Zealand in [the late 1980s]. At the time the parties married in [late 2006], Ms [Seth] lived in Fiji. She moved to New Zealand in October 2009 bringing her [under-10-year-old child] from a prior relationship. Upon arrival, the parties lived together with the birth of their son arriving four years later.

[4] There is a dispute as to whether the parties separated in late 2013 as pleaded by Mr [Bhave]. Ms [Seth]'s evidence is that the parties were still in a relationship when she was required to leave New Zealand [in mid-2014]. Her evidence is that she was persuaded by her husband, Mr [Bhave], to travel to Fiji for five days to renew her work visa. Upon her arrival in Fiji, Ms [Seth] says that Mr [Bhave] revoked his sponsorship of her work visa in New Zealand and she has been unable to return since then. Her repeated applications to New Zealand, her immigration status and request to return via work visa have all been declined.

[5] This matter concerns Ms [Seth]'s application for an order pursuant to s 113 Care of Children Act 2004.<sup>1</sup> Ms [Seth] resides in Fiji and has participated in today's hearing via AVL arranged by the Fijian Central Authority. Counsel for the Fijian Central Authority has been in attendance for most of today's hearing in an observing capacity, with Mr Harte as counsel for the New Zealand Central Authority.

### **Delay**

[6] The matter was set down for a two-day hearing commencing today, nearly four years after Ms [Seth]'s application to enforce her rights to access was filed. The fact that Ms [Seth]'s application has been outstanding for so long is a cause for concern particularly when matters involving the Hague Convention are required to be dealt with as quickly as possible.

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<sup>1</sup> Application dated 21 December 2016.

[7] This is a matter where the applicant seeks an enforcement of a right to access as opposed to seeking return of a child on the basis of wrongful removal from the jurisdiction of another country.

[8] The reasons for the delay are:

- (a) Ms [Seth]'s application was filed in December 2016, two years and four months after she departed New Zealand. Ms [Seth] says that for the first 12 months she believed her and Mr [Bhave] were working together and that he supported in returning to live in New Zealand. Further, the applicant was not aware of the Hague Convention or the ability of the central authority in Fiji to assist her.
- (b) For most of 2017, Ms [Seth], with the assistance of counsel, was attempting to negotiate both video and face to face contact with [Anil] through Mr [Bhave]'s counsel.
- (c) Those discussions did not resolve matters and instead, concerns then arose for [Anil] in his father's care. In December 2017, the Ministry for Oranga Tamariki applied for a place of safety warrant and then obtained a s 78 interim custody order on 29 December 2017. [Anil] was initially placed in his paternal grandmother's care for a brief period before being placed in foster care due to noncompliance with an agreed care plan.
- (d) [Anil] was formally returned to his father's care on 1 August 2019 where he has remained. The care and protection proceedings for [Anil] were formally concluded earlier this year at which stage this application was timetabled to hearing.

## **Jurisdiction**

[9] On 23 June 2016, this court made a final parenting order providing for [Anil] to be in the respondent's day to day care with contact reserved to the applicant "as agreement and arrangement between the parties." That is the exact wording of the

order, however, there is agreement today that the order should read “contact as agreed and arranged between the parties”.

[10] Mr Harte, who acts for the Central Authority, submits the court has jurisdiction to vary the terms of Mother’s contact. Mr Harte’s submission is that with a child habitually resident in New Zealand, the Court may impose an access order of its own choice.<sup>2</sup>

[11] Furthermore, Mr Harte has referred me to *Eason v Rhodes* where an application to vary a parenting order as to contact was dealt with by replacement of parenting and order preventing removal with a single parenting order containing all agreements and findings.<sup>3</sup> Mr Harte makes the submission that this was done for practicality and would be appropriate in this instance.

[12] Any order which is made in response to a s 113 application is a New Zealand court order.<sup>4</sup> Therefore, I am satisfied that an application under s 113 must be determined in accordance with ss 4, 5 and 6 of the Act. I therefore have no hesitation in further defining contact. Mr Harte made the submission that if he had known there was a parenting order made on 23 June 2016, which provided for contact, then he would have applied to vary that order. It is my view that jurisdiction exists for me to simply vary the order on the basis of the agreement reached between the parties and counsel.

### **The child**

[13] [Anil] is now seven years of age and since COVID lockdown in March of this year has been home-schooled. As I understand from his court appointed lawyer, Mr Shanahan, [Anil] has continued to be home-schooled since then having received the necessary exemption from the Ministry of Education.

[14] At Mr Shanahan’s request, I met with [Anil] for the purposes of a judicial interview prior to the hearing. I will attach a copy of my notes of the interview to this

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<sup>2</sup> *Gumbrell v Jones* (2001) 20 FRNZ 304; [2001] NZFLR 593 at [35].

<sup>3</sup> *Central Authority v Rhodes* [2013] NZFC 4954.

<sup>4</sup> *Gumbrell v Jones* above n 2 at [35(e)].

decision. At the commencement of today's hearing, I advised [Anil]'s parents after meeting with their son, my impression is that [Anil] does want contact with his mother and that his feelings about contact were influenced by the level of support or otherwise that his father, Mr [Bhave], has towards such contact. Furthermore, that [Anil] appeared anxious about being removed from his father's care. When I asked [Anil] about video contact with his Mum, he replied that he wanted to live with his dad and wanted to stay in New Zealand. I can understand [Anil]'s anxiety about being separated from his father given he was removed from Mr [Bhave]'s care for a period of nearly nine months when Oranga Tamariki was involved.

[15] However, I wish to reassure Mr [Bhave], as I did [Anil], that the only application before this Court is for that of contact. The application is solely for contact and I spell that out to provide, hopefully, a level of reassurance to Mr [Bhave], who can then pass that on to his son, because what I want both Mum and Dad to focus on is [Anil] being able to enjoy and benefit from meaningful contact with his mother.

### **Today's hearing**

[16] Having relayed my impressions to counsel and the parties, I then stood the matter down to enable discussions as to a way forward. When I came back into court, I was heartened to hear there was broad agreement to [Anil] having regular video contact with his mother facilitated by Mr [Bhave]. Accordingly, although the matter has taken most of the day, there has been no calling of witnesses or hearing of evidence. Instead, there have been repeated opportunities for discussions between the parties and counsel which has resulted in the parties reaching agreement on the issue of contact.

### *Contact via electronic means*

[17] There is agreement for [Anil] to have contact via Facebook video messenger each Monday, Wednesday and Friday commencing at 4.30 pm Fijian time (which is currently our 5.30 pm given that we have just moved into daylight savings). In the event either parent is unable to facilitate a video call, then that person will

communicate the same to the other parent with a view to the missed call being made up the next day at the same time.

[18] Furthermore, Mr [Bhave] agreed to Ms [Seth]'s request for him to send a short video of [Anil]'s activities once a week, again, using the medium of Facebook Messenger. It is the quality of the messages, which may be made up of short videos of events that occurred during the week that is important. However, there seemed to be general agreement that the length of the weekly video would be no less than five minutes.

*Face-to-face contact*

[19] By the end of the day the parties had also agreed to commit to face-to-face contact with Mr [Bhave] to travel to Fiji with [Anil] once a year for a period of three weeks to enable [Anil] to spend good quality and consistent contact with his mother. That contact will also include [Anil]'s older [sibling] and, obviously, other members of the maternal family.

[20] The parties were unable to agree on the specifics of face-to-face contact. Mr [Bhave] himself was a bit anxious about how [Anil] would respond to such contact given that he has not seen his mother in person since he was 12 months old and no doubt because of the unknown elements associated with contact in Fiji.

[21] Ms [Seth]'s position on the other hand was that she has continued to care for her older [child] with no concerns and, therefore, she seeks overnight and continued contact for the three week period.

[22] In terms of face-to-face contact, there are practical limitations as a result of COVID-19. Mr Shanahan has made enquiries and it is accepted that the border restrictions that apply in New Zealand are similar to those in Fiji. Currently, entry to Fiji is restricted to citizens and permanent residents of Fiji. Anyone else is required to obtain an exemption and either way, all persons entering Fiji are subject to a 14-day quarantine stay with costs to be met by that person. These are the same laws that apply in New Zealand. Therefore, it seems, to me, and it is accepted by the parties, that

[Anil]'s ability to have face to face contact with his mother will depend upon a lifting of the quarantine restrictions, given [Anil] is only seven years of age, and the ability for [Anil], who is a New Zealand citizen, to enter Fiji. Mr [Bhave] is a Fijian citizen so would have no difficulties entering Fiji.

*Communications counselling*

[23] Mr Shanahan seeks an interim order only be made and the parties referred for s 46G counselling with a review in six months. This will allow the parties time to attend communications counselling and to review the matter at that stage to see whether or not there is agreement around the terms of the contact that occurs in Fiji.

[24] There is a practical sense to what is proposed by Mr Shanahan and which I understand is endorsed also by both Mr Harte and Ms Manuel-Belz.

*Need for a s 133 psychological report?*

[25] There was a discussion earlier today about Mr Shanahan's request for a s 133 psychological report contained in his recent memorandum to the court. These proceedings have been on foot for nearly four years and there has been no earlier request. As the parties and counsel's discussion developed over the day, Mr Shanahan's position has changed whereby it may well be that the ability for the parties to discuss the matter themselves with an experienced counsellor will assist them to reach agreement.

[26] I am concerned about the delays that would occur if the Court directed a s 133 report today. Furthermore, I am not satisfied, at this stage, that it is essential for disposition of the application. I say that because what I have witnessed today is a measure of cooperation and agreement between Ms [Seth] and Mr [Bhave] which, with respect, has been lacking over the last four years that these court proceedings have been in place and possibly for the two years prior to Ms [Seth]'s application.

[27] I, therefore, consider the best way forward is to support the parties to access communications counselling and to give them the opportunity to be able to talk the issue through themselves.

### **Safety findings**

[28] There are cross allegations of family harm made by each party. As neither party has given evidence today, there has been no testing of the evidence.

[29] Mr [Bhave] alleges that on 28 May 2014, Ms [Seth] smacked [Anil]. Ms [Seth] has denied that allegation.

[30] In respect of Mr [Bhave], Ms [Seth] alleges that a month after she arrived in New Zealand, which would be November 2009, Mr [Bhave] punched her whilst being sexually abusive. She also made a general statement that Mr [Bhave] hit her “two to three times a week when I first moved to New Zealand.”

[31] Section 5(a) requires me to be satisfied that [Anil] will be safe in his mother’s care at all times. In this instance, the allegation, firstly, that Mr [Bhave] makes against Ms [Seth], is an allegation of smacking [Anil] when he would have been nine months old. That allegation is denied and in submissions from Ms Manuel-Belz, for Mr [Bhave], counsel accepted Ms [Seth] has continued to care for her older [child] who is now [under 20] years old and who travelled to Fiji at the same time as her mum, which was [in mid-2014]. Ms [Seth] has also provided a character reference from her local JP which all indicate Ms [Seth] is a safe person.

[32] The allegations that Ms [Seth] has made against Mr [Bhave] are denied. I note that those allegations arise out of matters which are said to have occurred in November 2009 and early on when Ms [Seth] moved to New Zealand. This was prior to [Anil]’s birth in [month deleted] 2013. Ms Manuel-Belz has referred me to the evidence that is before the Court from Oranga Tamariki which assessed her client as being a safe person prior to [Anil] returning to his father’s care.

[33] Mr [Bhave]'s evidence also includes an affidavit from a Daryl Hita, who is a dual diagnosis counsellor with Mental Health Services. His evidence is that he has been involved with Mr [Bhave] on and off for the last 10 years and that the reports from Mr Hita regarding Mr [Bhave] have been very positive.

[34] Mr [Bhave] described himself in one of his early affidavits as a recovering alcoholic. There was a relapse in late 2017 which was part of the reason why Oranga Tamariki was involved. However, I am satisfied that Mr [Bhave] has gotten on top of that issue again.

[35] Furthermore, Mr [Bhave] has provided evidence from a Janet Mako, an experienced social worker with Jigsaw, who has spoken about the programmes that Mr [Bhave] completed which includes the Building Awesome Whānau and the Circle of Security and described Mr [Bhave] as being able to keep appointments and engaging well.

[36] For all these reasons, I find that [Anil] is safe in Mr [Bhave]'s care. [Anil] is happy living with his dad and wishes to remain living with his dad. Furthermore, the order I am being asked to make today is in respect of Ms [Seth]'s contact, not Mr [Bhave]'s care. I find also that Ms [Seth] is a safe person and intend to endorse the agreement reached between [Anil]'s parents and supported by lawyer for child. That will enable [Anil] to have contact with his mother.

### **Welfare and best interests**

[37] Finally, in terms of s 6, Mr Shanahan has faithfully represented [Anil]'s views throughout these proceedings. My meeting with [Anil], which Mr Shanahan was also a part of, satisfies me that, firstly, [Anil] has had reasonable opportunities to express his views and, secondly, the agreement reached by Ms [Seth] and Mr [Bhave] reflects the broader views of [Anil] as well as what is in [Anil]'s best interests.

[38] I refer to the principles contained in the Act particularly around [Anil]'s care, development and upbringing being, primarily, the responsibility of his parents and that

the same should be facilitated by ongoing consultation and cooperation. The communications counselling will enable that to occur.

[39] Similarly, the agreement that the parties have reached will ensure continuity in [Anil]'s care, development and upbringing and will enable [Anil]'s relationship with his mother and maternal family to be preserved and strengthened.

[40] It is also part of [Anil]'s identity that both his parents come from Fiji. They are both of Fijian Indian descent. As well as his New Zealand identity, [Anil] should be afforded the opportunity to experience his Fijian identity and so the agreement reached will enable [Anil] to experience both sides of his family and his culture.

### **Where to from here?**

[41] Although counsel were united in their request to adjourn matters for six months, I prefer to undertake a review in December this year. Having read the pleadings, I am aware the parties have previously reached informal agreements about how things will take place but then one or both of their positions have changed, and time has simply passed.

[42] The fact that Mum and Dad have been able to reach this position themselves rather than have me impose the decision upon them, gives me faith that Mr [Bhave] and Ms [Seth] will be able to take the next step with the assistance of a counsellor and work out what contact in Fiji looks like for [Anil]. Not for Mr [Bhave], nor Ms [Seth], but for [Anil]. That has to be the priority at counselling.

[43] I will call for a report from Mr Shanahan, as [Anil]'s lawyer, to provide an update on contact between [Anil] and his mum, the weekly video messages from Mr [Bhave] to Ms [Seth] and progress regarding communications counselling to ensure matters are on track.

[44] Finally, Mr Harte made reference to the possibility of a Fiji Hague liaison judge being available to assist with orders that I make today. I ask that Mr Harte report on that matter further when I review these proceedings in December.

[45] I have elected to deliver an oral decision today so that the parties know where they stand, particularly for Ms [Seth] who has participated via AVL link from Fiji. However, I reserve the right to review this decision once it is typed and to amend, add to or edit the decision. Of course, the end result will not change. However, I provide for that reservation given the complexities associated with this matter.

### **Orders and directions**

[46] The parenting order dated 23 June 2016 is varied by deleting the clause in relation to Ms [Seth]'s contact.

[47] Rather than vary the existing parenting order I make a **new interim parenting order as to contact** as I am unable to combine a final parenting order as to day to day care with an interim order as to contact. Accordingly, Ms [Seth] shall have contact on the following terms and conditions:

- (a) Ms [Seth] shall have video contact with the child via Facebook video messenger each Monday, Wednesday and Friday at 4.30 pm Fijian time (our 5.30 pm during daylight savings).
- (b) In the event either Mr [Bhave] or Ms [Seth] is unable to arrange for [Anil] to have video contact at the due time, then they shall immediately message the other parent to advise them of the same and instead the missed contact shall take place at the same time the very next day. It is important that both parents remain committed to these video chats and not allow missed chats to accumulate.
- (c) Mr [Bhave] is to send to Ms [Seth] each Sunday by 4.30 pm Fijian time a short video of the child's activities during the preceding week via Facebook Messenger. The video is to be for no less than five minutes.
- (d) There shall be face-to-face contact over a period of three weeks in Fiji on the following terms and conditions:

- (i) Mr [Bhave] shall travel to Fiji with the child and shall be responsible for [Anil]'s flights both to and from Fiji for the first annual trip and every alternate year thereafter.
- (ii) Ms [Seth] shall be responsible for the costs of [Anil]'s flights for the second annual flight and every alternate year thereafter.
- (iii) [Anil]'s flight to Fiji shall be for a three week period within six months of the COVID-19 restrictions being lifted or modified, both in New Zealand and Fiji, so that [Anil] can enter into Fiji and return to New Zealand without undertaking a period of quarantine.
- (iv) The terms of refinement of the face to face contact are to be the subject of discussion between the parties via the communication counselling.

[48] I direct the parties to counselling pursuant to s 46G. The purposes of counselling shall be both those purposes set out at subs (2) which is to improve the relationship between the parties so far as the communication is concerned and to ensure compliance with the directions and orders that I make today.

[49] I approve 12 sessions of counselling and I ask that Mr Shanahan liaise with the Family Court Coordinator to ensure the prompt assignment of a counsellor who is able to facilitate Ms [Seth]'s participation via video link from Fiji. If there are any difficulties associated with the same then Mr Shanahan is to file a memorandum which is to be referred to me immediately by the registry.

[50] If there are any delays in obtaining a counsellor in [the respondent's location], then it may well be that a counsellor from outside of the area may be appointed given that video technology will be utilised for Ms [Seth]. It may be available for Mr [Bhave].

[51] I set this matter down for a review hearing on 3 December 2020 at 2.15 for one hour before me. I declare this case as complex because of the issues this matter raises. Accordingly, this proceeding is to be managed by me with the ability to hold multiple case management conferences if required. I reserve the right to Mr Shanahan to request a further conference if required.

[52] Mr Shanahan is to file a report prior to the review hearing by 20 November to provide a general update in terms of how the interim access order has progressed in terms of the video chats, video messages and counselling and [Anil]'s updated views, if known.

[53] Counsel are to file submissions in reply to Mr Shanahan's report and any further directions or amendments to the order that they seek no later than 27 November.

[54] There has been a request by Ms [Seth] for Mr [Bhave] to provide to her a copy of [Anil]'s home-school education programme or profile and, as I understand, that is agreed to. That can be shared by Mr [Bhave] with Ms [Seth] by Facebook Messenger and shall be provided no later than 14 October 2020.

## **ADDENDUM**

[55] I grant leave for Ms [Seth] to attend the hearing on 3 December by AVL link. I direct Mr Harte's submissions to address the issue of whether a Hague liaison judge in Fiji is required and what their role may involve. I am certainly open to their participation if considered appropriate.

[56] On 30 September 2020, I issued a minute setting out conditions that would attach to the interim parenting order and other directions I considered important with leave for counsel to request to be heard in respect of such matters. No request was made. Accordingly, the following conditions are to be included in the interim parenting order as to contact:

- (a) Unless agreed otherwise, the first weekly video message is to commence this Sunday, 4 October 2020 with the video calls between Ms [Seth] and the child to commence Monday, 5 October 2020.
  
- (b) The parties shall cooperate to enable the child to have meaningful contact with his mother. Therefore, they agree that:
  - (i) Neither parent shall talk poorly about the other parent either to or in the presence of the child.
  
  - (ii) The parties' communication by Facebook messenger shall be for the sole purpose of facilitating the child's contact with his mother.
  
  - (iii) Neither shall use Facebook messenger as a means of questioning or challenging each other about their care or contact of the child. At this stage, any issues they may have shall be raised with their respective lawyers.
  
- (c) Lawyer for Child to meet with the child, with Mr [Bhave] present, to explain the agreement reached between the parties which the court has endorsed.

Judge L King  
Family Court Judge

Date of authentication: 19/10/2020  
In an electronic form, authenticated electronically.

## APPENDIX

### RECORD OF JUDICIAL INTERVIEW WITH CHILD – 29 SEPTEMBER 2020

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I met with [Anil] and his court-appointed counsel Mr Shanahan at 9am this morning prior to the commencement of the hearing following a request by Mr Shanahan for judicial interview. The meeting took place in the mediation room.

[Anil] turned seven years old on [date deleted] this year. He is a well-spoken and well-mannered child. He sat next to me with Mr Shanahan on his other side.

By way of an icebreaker, [Anil] and I spent some time initially talking about the [pets] that he and his father have. [Anil] talked mainly about his [pet] named [deleted] whom he told me was a [details deleted] and that [Anil] helps care for [that pet]. [Anil] went back to talk about the [pets] during our interview.

[Anil] told me that he has two older [siblings] who are [names deleted]. He said [names and ages deleted] and they both live in [location deleted]. He told me that he has a [cousin], who is [a few years older than him] and [another cousin in their teens] and that [the first cousin] lives with [Anil]'s nan (paternal grandmother) [not far] from where he and his dad live.

[Anil] likes living with his dad. A number of times he said to me that he wanted to be able to stay with Dad and to stay in New Zealand. These comments came up in the context of me talking to [Anil] about his views on video contact with his mother. The things that [Anil] told me he likes about living with his dad are:

- That it is next to his nan's.
- He has the [pets] at home.
- He loves his home and he has lots of room there.

He also said that it was cool when he did stay with his nan because he got to play with his [cousin].

[His cousin] said that he enjoyed the home schooling. Mr Shanahan explained this occurred following COVID lockdown and that [Anil]'s father has now been given the exemption so that home schooling can continue. [Anil] said he got to do maths stuff and he got to stay home and he saw these as positives for home schooling.

When asked about video contact with his mum, [Anil]'s initial response was no. However, when I introduced contact on the basis that both Mum and more importantly Dad supported video contact and wanted it to occur, [Anil]'s response was "okay". [Anil] couldn't remember when he last talked to his mum on video. He also told me that he did not know what his [sibling] looks like. However, when I asked Mr Shanahan how old [his sibling] is now, unprompted [Anil] said: "I'm pretty sure [in their teens]. I kind of remember calling [my sibling] with my dad."

Towards the end of the interview and whilst I was summarising our discussion, [Anil] appeared anxious when the topic of video contact with his mother came up. He again told me he wanted to stay with his dad and to stay in New Zealand.

In order to distract [Anil], I gave him my pen and notebook so that he could draw a picture. I asked [Anil] to write his name which he did. I then asked [Anil] if there was anything else he wanted to write. Unprompted by me [Anil] wrote: "To my mom."

[Anil] then went on to draw triangles which he said were greenstone and we then spoke about [details deleted]. [Anil] said [details deleted] and drew a couple of circles which appeared to represent [details deleted].

My impression is that [Anil]'s feelings about contact with his mum are impacted upon by the level of support or opposition that [Anil]'s father may have to contact.