

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

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**IN THE FAMILY COURT
AT NORTH SHORE**

**I TE KŌTI WHĀNAU
KI ŌKAHUKURA**

**FAM-2022-044-000052
[2022] NZFC 5581**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SADRA PATHAN] Applicant
AND	[IHAAB SARBANI] Respondent

Hearing: 16 June 2022

Appearances: C O'Donnell for the Applicant
I Blackford and L Aspin for the Respondent
L Kearns QC as Lawyer for Children

Judgment: 17 June 2022

**RESERVED JUDGMENT OF JUDGE S J MAUDE
[Application for parenting order as to contact involving
travel for children to USA]**

[1] Dr [Sarbani], who resides in [the USA], seeks an order allowing him to take his children [Ismet], aged nine, and [Mava], aged five, to [the USA – US state 1] for the upcoming July school holiday period.

[2] The children's mother, Ms [Pathan], opposes the application.

Background

[3] Both parents are Pakistani by ethnicity.

[4] Dr [Sarbani] lives in [US state 1].

[5] Ms [Pathan] has lived in New Zealand since 2002.

[6] Dr [Sarbani] met Ms [Pathan] in New Zealand when she was 17 and he 19 years of age.

[7] The parties married in July 2010 and Ms [Pathan] moved to live in [US state 1] with Dr [Sarbani].

[8] Both children were born in the United States where Ms [Pathan] operated as a stay-home mother.

[9] The parties separated in January 2018.

[10] A parenting plan was entered into in the Circuit Court of [US state 2] in July 2018, Ms [Pathan] having as a result full-time care of the children, they allowed to return to live in New Zealand.

[11] The children and Ms [Pathan] moved to New Zealand.

[12] Dr [Sarbani] has visited the children in New Zealand on three occasions.

[13] As a result of application to enforce resolved in the [US state 2] Circuit Court, USA on 8 July 2021, provision was made for Dr [Sarbani] to collect the children from New Zealand on 26 December and return them after completion of their mother's [profession deleted] exams, Ms [Pathan] to travel to [US state 1] to collect them from him.

[14] In accordance with the above plan, the children travelled to [US state 1] for holiday contact on 5 November 2021 (the collection date moved forward by agreement).

[15] The children were not returned as provided for on 26 January to Ms [Pathan].

[16] On 2 February 2022, Ms [Pathan] applied on a without notice basis to the New Zealand Family Court for a parenting order.

An interim order was made on the court's eDuty platform granting Ms [Pathan] interim day-to-day care of the children.

[17] On the same day, Ms [Pathan] applied in the United States to set aside the orders made there, hearing having now occurred and decision awaited.

[18] The children in fact were returned to New Zealand on 10 February 2022 where they completed isolation in New Zealand MIQ facility with Ms [Pathan].

Dr [Sarbani] facilitated the children's return once MIQ slot became available.

[19] Dr [Sarbani] denies trying to retain the children in [US state 1], indicating that issues arose around the obtaining by Ms [Pathan] of MIQ facilities for the children's isolation (the July 2021 orders imposed upon Ms [Pathan] that responsibility).

He applied for the children to be schooled in the United States, not wanting there to be a hiatus of time during which they would not be schooled.

[20] Dr [Sarbani] seeks parenting orders as to contact.

[21] Not for consideration in this judgment is Dr [Sarbani]'s application to prevent relocation of the children from Auckland to [a city in the South Island].

[22] Ms [Pathan], who has in fact now relocated with the children to [the South Island city], is not willing to allow contact in the United States without her against what she says are the children's wishes.

The law

[23] Section 4 of the Care of Children Act (the Act) prescribes that it is the welfare and best interests of the children that must be the court's first and paramount consideration.

[24] Section 5 of the Act sets out certain principles that the court is required to have regard to when making decisions as to a child's welfare and best interests.

[25] Section 6 of the Act prescribes that the court must give to a child the opportunity to have his or her views made known to it, such views to be considered by the court though not necessarily determinative.

[26] Copies of the above sections are **annexed** to this judgment for the benefit of the parties.

The children's views

[27] In April of this year the children expressed views to their lawyer's agent in [the South Island city] as follows:

[Mava] could not recall her time in the US and was unable to express a view.

[Ismet] did express views when questioned, though the questions asked of him were not as to the prospect of future contact time in the United States. His views expressed were as follows:

- (a) He had suffered COVID whilst in the United States.
- (b) When asked about the America trip he recalled going to Disney World and Universal Studios with his dad whilst there. He recalled that they went on the VIP tour because it was [Mava]'s birthday and went on the

Harry Potter rides and the pirate show at Disney World, but not the rollercoasters. He said that they “had to wear masks on the rides”.

- (c) He said that he enjoyed spending time with his dad building Lego while he was there. They had made a big “TIE Fighter” creation. He said he would “kind of” like living in America.
- (d) In terms of contact with his paternal family he said that he had spoken to his paternal grandmother on video calls and had also mailed her a letter as she came to his ninth birthday party in the United States. He could not recall where she lived there, but it was not where dad lived.
- (e) When in New Zealand, [Ismet] has frequent contact with his father with them both playing the video game “Fortnite” together and texting and video calling dad whenever he liked or felt like it.

[28] By this month, when visited to obtain views, [Mava] was unwell and not able to be seen. [Ismet] was recorded as:

- (a) Being quite anxious throughout his meeting, such anxiety not consistent with his presentation when interviewed earlier in the year.
- (b) He stated that he would like dad to have a holiday in New Zealand.
- (c) When asked what sorts of activities the above would involve he said that he would like to go to a comic book store, watch movies on dad’s iPad on Disney Plus and go to the movies. He also thought they could kick a ball around outside.
- (d) Asked if he had any worries about either holiday options (USA or [the South Island city]) he said, “being trapped”. When asked to elaborate he said that this was what happened last time when he went to America because, “dad didn’t want me to go back”.

Parties' positions

Dr [Sarbani]

[29] Dr [Sarbani] argued that his consent to the family relocating to New Zealand in 2018 was premised on the assumption that the children could spend time with him in the USA.

[30] He argued that travel for the children to the United States for contact with him was sanctioned by the [US state 2] court.

[31] Since the relocation of the children to New Zealand they had, he argued, been to their country of birth with him on only one occasion (the 2021/2022 holiday period).

[32] He did not accept that he had attempted to retain the children in the United States in February.

[33] He proposed that he collect the children from Auckland International Airport on [date 1] July, they returning on [date 2] July.

[34] He proposed that the children stay on the evening prior to uplift and upon the evening of return with their maternal grandparents, who live in Auckland.

[35] He urged that he was prepared to:

- (a) Pay a \$10,000.00 bond.
- (b) Agree that New Zealand is the children's habitual residence.
- (c) Provide undertakings as to return.

Ms [Pathan]

[36] Ms [Pathan] referred to what she described as a disaster as to the children's return in February of this year.

[37] She said that the risk of non-return if the children travelled to the United States in the July school holidays was too great.

[38] She urged that the children were opposed to the travel.

[39] She insisted that any undertakings provided by Dr [Sarbani] as to return would not be enforceable in the United States and through counsel indicated that that was the view relayed by counsel in the United States.

[40] If Dr [Sarbani] was travelling to New Zealand for the purpose of collecting the children and returning for the purposes of returning them, she questioned why he could not stay and have contact with them in New Zealand.

[41] She argued that a \$10,000.00 bond was significantly insufficient matched against what she described as Dr [Sarbani]'s US income of \$600,000.00 per annum.

[42] She held the view that Dr [Sarbani] had contact only when it suited him.

Consideration

[43] I refer at first instance to the principles set out in s 5 of the Act.

(a) *a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:*

[44] No safety issues for the children in the care of their father emerge.

(b) *a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:*

[45] Plainly, the principle that a child's care and development should be the responsibility of both parents suggests as much time for the children with each parent consistent with their welfare and best interests.

(c) *a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:*

[46] Consultation and cooperation has proved difficult for these parents, they engaged in litigation in both New Zealand and in the United States.

(d) *a child should have continuity in his or her care, development, and upbringing:*

[47] Care continuity suggests ongoing day-to-day care to be provided by Ms [Pathan] with contact with Dr [Sarbani] as practical.

(e) *a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:*

[48] Plainly, contact for the children in the United States affords to them the opportunity for their relationship with paternal family to be preserved and strengthened.

(f) *a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.*

[49] No issues were raised with relation to the children's identity.

[50] The thrust of Ms [Pathan]'s opposition to July school holiday contact for the children in the United States was:

(a) The difficulties that occurred for the children's return in February.

(b) Her lack of confidence that Dr [Sarbani] would return the children.

(c) [Ismet]'s views.

[51] I have viewed the evidence filed by the parties.

[52] What is clear is that the 8 July 2021 parenting orders made in the state of [US state 2] with the engagement of both parents provided for:

- (a) October 2021 parenting time for the children with their father in New Zealand.
- (b) Twenty one days' parenting time for the children with their father in [US state 1] during the 2021/2022 Christmas holiday period.
- (c) Two weeks for the children with their father in New Zealand each term 1 and term 3 holidays.
- (d) Term 2 holiday time with their father where he chooses, so long as returned to New Zealand three days prior to return to school.

[53] The term 4 holiday contact in the United States was by consent altered as to timing.

Return to New Zealand was delayed, but there was no evidence before me to suggest that the delay was with the intent of retention of the children in the United States.

It is clear that the delays occasioned (which were not extensive) arose from difficulties in obtaining MIQ facility slots for the children (the obtaining of which were the responsibility of Ms [Pathan]).

[54] Ms [Pathan] to support her argument that there had been an intention to retain the children in the United States referenced Dr [Sarbani]'s enrolment of the children at school there; however, such was not a unilateral step, rather prefaced by application to the court to allow the same and there is nothing in the evidence to suggest that his reason for doing so was anything other than as he suggested – that being to ensure that there was not, as a result of the delays in obtaining MIQ slots, a hiatus of time during which the children were not schooled.

[55] On a parent to parent basis, I am entirely satisfied that no claim is raised to justify the court not observing the 8 July 2021 orders made in the [US state 2] court.

[56] The court and Ms [Pathan] are offered the comfort of:

- (a) The presence of the [US state 2] court orders.
- (b) Undertakings by Dr [Sarbani].
- (c) The presence of a New Zealand order prescribing that the children are to live in the day-to-day care of Ms [Pathan] and any order made in this judgment as to contact and return.
- (d) Provision of a bond by Dr [Sarbani] (albeit, I accept, at a relatively minimal level given his alleged circumstances).
- (e) Dr [Sarbani]'s acknowledgement that the children are habitually resident in New Zealand.
- (f) The reality that both New Zealand and the United States are signatories to the Hague Convention.

[57] I am left only with the position taken by Ms [Pathan] and the children's lawyer, Ms Kearns QC, as to [Ismet]'s views and Ms Kearns QC's urging that the July holiday contact should occur in New Zealand as a means of avoiding anxiety for [Ismet] and a possible backward step in confidence for him with relation to future contact outside of New Zealand.

[58] While not questioned as to his views about future overseas contact when interviewed by Ms Kearns QC's agent in [the South Island city] in April, [Ismet] did not when expressing his views offer up any negative view about the time that he had spent in the United States with his father over the Christmas period.

It was suggested to me that the absence of negative views could be explained by the reality that [Ismet] was not questioned about the prospect of future overseas contact; however, in my view the interview took place so proximate to his return from the United States that had he, as he put it in June, felt trapped or fearful of non-return, he would have expressed such then.

[59] While I do not reach the conclusion that Ms [Pathan] has in any way attempted to influence [Ismet]'s views between April and June of this year, during which time it appears that his views have changed, the reality is that he and [Mava] are living on a full-time basis with their mother, having relocated from Auckland to [the South Island city], no doubt (and [Ismet] is nine years old) aware of the conflict between their parents, he likely therefore anxious because of the existence of the proceedings.

[60] I asked Ms [Pathan]'s counsel if her opposition to July contact in the United States was specific to the upcoming July school holidays, and whether her position was that she was opposed to it but willing to accept that following holidays could be in the United States. Ms [Pathan]'s position through counsel was that she was not prepared at this point to commit to travel for the children to the United States in the future.

[61] I form the view that the overriding of the [US state 2] court order so as to provide that the children's contact with their father occur in New Zealand during the upcoming July school holiday period is not called for, given that:

- (a) It would appear that Ms [Pathan] will find difficulty supporting contact out of New Zealand in the immediately foreseeable future.
- (b) There is no basis on the evidence for concluding risk of non-return.
- (c) The children, it appears, enjoyed and benefitted from their 2021/2022 Christmas holiday period with their father and paternal family.
- (d) To not allow the children's travel to the United States in the upcoming July school holidays would send a message to [Ismet] in particular that there does exist a risk for him in having contact offshore with his father, that detrimental to his welfare and best interests.

[62] For the above reasons, I vary the 2 February 2022 interim parenting order of the court so as to provide that [Ismet] and [Mava] have contact with their father, Dr [Sarbani], in the upcoming 2022 July school holidays as follows:

- (a) From collection by him at Auckland International Airport, or such other place as is agreed, on [date 1] July until return to Ms [Pathan] or her parents at Auckland International Airport, or such other place as is agreed, on [date 2] July 2022.
- (b) The following conditions to the above contact are to apply:
- (i) Dr [Sarbani] is to lodge to the Trust account of Morgan Coakle solicitors a bond of \$10,000.00 to be held by them pending the children's return to New Zealand.
 - (ii) The children's US and New Zealand passports are to be returned to Ms [Pathan]'s possession following contact.
 - (iii) Dr [Sarbani] is to provide the undertakings proposed by him as attached to his 9 June 2022 affidavit to Ms [Pathan] and the court by 30 June 2022.
 - (iv) The children are to be able to have phone or video calls with their mother as requested by them.
 - (v) The children's mother may have phone or video contact with the children at her instigation on one occasion each three days of the period that the children are with their father.

[63] There remained the parenting proceedings before the court not in substance yet brought to a conclusion.

[64] I direct allocation of a directions conference in August of this year for the purpose of receipt of proposals from counsel as to the steps necessary to bring these proceedings to a conclusion.

S J Maude
Family Court Judge

Signed *June 2022 at* *am/pm*

ADDENDUM

Care of Children Act 2004

Section 4 Child's welfare and best interests to be paramount

Section 5 Principles relating to child's welfare and best interests

Section 6 Child's views

4 Child's welfare and best interests to be paramount

- (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
 - (a) in the administration and application of this Act, for example, in proceedings under this Act; and
 - (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
- (2) Any person considering the welfare and best interests of a child in his or her particular circumstances—
 - (a) must take into account—
 - (i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
 - (ii) the principles in section 5; and
 - (c) 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.
- (3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.
- (4) This section does not—
 - (a) limit section 6 or 83, or subpart 4 of Part 2; or
 - (b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

6 Child's views

- (1) This subsection applies to proceedings involving—
 - (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
 - (b) the administration of property belonging to, or held in trust for, a child; or
 - (c) the application of the income of property of that kind.
- (2) In proceedings to which subsection (1) applies,—
 - (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
 - (b) any views the child expresses (either directly or through a representative) must be taken into account.