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IN THE FAMILY COURT
AT WAITAKERE

I TE KŌTI WHĀNAU
KI WAITĀKERE

FAM-2021-090-000063
[2021] NZFC 3340

IN THE MATTER OF	CARE OF CHILDREN ACT 2004
AND IN THE MATTER OF THE	RATIFICATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980
BETWEEN	[BLAKE SCOTT] Applicant
AND	[ARIANNA JENKINS] Respondent

Hearing: 13 April 2021

Appearances: I Blackford for the Applicant on behalf of New Zealand Central Authority
E Stenhouse-White for the Respondent

Judgment: 15 April 2021

RESERVED JUDGMENT OF JUDGE B R PIDWELL
[Reasons for order returning children to Australia]

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[1] [In mid-December] 2020, Ms [Jenkins] flew to New Zealand from Victoria, Australia with her two young children, [Vance], aged three,[1] and [Julian], then eight months.[2]

[2] On 16 December 2020, she sent a text message to the children's father, Mr [Scott], telling him that she and the children would be going to New Zealand for Christmas and the New Year holidays.

[3] He sought legal advice. On 21 December 2020, his solicitor sent Ms [Jenkins] a letter stating that Mr [Scott] did not consent to the travel and suggesting her behaviour constituted an abduction of the children.

[4] Ms [Jenkins] wants to remain in New Zealand with the children permanently. She must establish either that:

(a) Mr [Scott] consented to the children permanently being removed from Australia; or

(b) There is a grave risk that returning the children to Victoria, Australia will place them in an intolerable situation.

[5] On 13 April 2021, I heard the opposed application by the Central Authority for the return of children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Convention) and made an order returning both children to Victoria, Australia by 13 May 2021.

[6] My reasons are set out in this judgment.

Preliminary jurisdiction

[7] It is agreed that a prima facie case for return has been established as the jurisdictional criteria set out in s 105(1) of the Care of Children Act 2004 (COCA) have been met, namely:

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[1] [Vance Scott], DOB [date deleted] 2017.
[2] [Julian Scott], DOB [date deleted] 2020.

(a) The children are present in New Zealand;[3]

(b) The children were removed from Australia in breach of the father's rights of custody;[4]

(c) At the time of removal, the father was exercising his rights of custody or would have been so but for the removal;[5] and

(d) At the time of removal, the children were habitually resident in Australia, a contracting State.[6]

[8] In those circumstances, the court must make an order for the children to return promptly to Australia unless one of the grounds set out in s 106 has been established.

[9] The burden of proof rests on Ms [Jenkins] to satisfy the court on the balance of probabilities either that Mr [Scott] consented to the removal or that there is a grave risk that the children's return would place the children in an intolerable situation.[7]

[10] Establishing an objection to return pursuant to s 106 is a question of fact. If one of the defences raised is proved to the requisite standard, the court retains a residual discretion as to whether the children are to return. If the court is not satisfied that a defence has been made out on the evidence, there is no discretion. It must order the return of the children.[8]

Factual background

[11] Ms [Jenkins] is a New Zealand citizen. She lived in New Zealand until 2012. From 2012 to December 2020 she lived in Australia. She met Mr [Scott] in 2016. In

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[3] Section 105(1)(a).
[4] Section 105(1)(b).
[5] Section 105(1)(c).
[6] Section 105(1)(d).
[7] Care of Children Act 2004, ss 106(1)(b)(ii) and (c)(ii).
[8] Section 106(2); *KS v LS* [2003] 3 NZLR 837 (HC); *Secretary for Justice v HJ* [2006] NZSC 97, [2007] 2 NZLR 289; and *Olliver v Richardson* [2018] NZHC 2696 at [30].

2017, [Vance] was born and, in 2020, [Julian] was born. The parties separated on or about 10 or 11 October 2020 when [Julian] was six months old.

[12] The family lived in Victoria, Australia. Mr [Scott] was born in Australia and is an Australian citizen. He has never left Australia.

[13] Ms [Jenkins] travelled back to New Zealand during their relationship on a couple of occasions for holidays. When the parties separated, the children remained in Ms [Jenkins]'s primary care in the family home, which was subject to a lease that expired on 11 December 2020. Mr [Scott] moved in to live with his parents.

[14] In general terms, Ms [Jenkins]'s position is that Mr [Scott] consented to her relocating the children permanently to New Zealand through a series of phone calls and discussions that took place between them in the week following separation. Based on those discussions, she obtained a passport for their youngest son, [Julian], applied for an exemption to leave the State of Victoria on 28 October, booked flights to travel to New Zealand on 2 November and departed [in mid-December]. She sold her furniture, abandoned her car, and handed the family [pet] to Mr [Scott]. Her position is that Mr [Scott] agreed to her taking the children to New Zealand at the expiry of the lease of their property, as long as he could still see them.

[15] Alternatively, she argues that as she is not an Australian citizen, the financial situation for her personally in Australia will place the children in an intolerable situation. She is not in employment, has sold all her possessions and submits the funding available from the Australian government is insufficient to ensure the children are not placed at grave risk of living a life of poverty.

[16] Mr [Scott]'s evidence is that he never consented to the children relocating permanently to New Zealand. He last saw the children over the weekend of 12-13 December 2020. His father returned the children to Ms [Jenkins]'s care on Monday 14 December. He was due to see the children the following weekend. Mr [Scott] was aware that the lease on the family home had ended and thought that packing her furniture was simply a sign of her moving house rather than moving country. He was not told of any of the travel arrangements, was unaware that any passport had been

obtained for [Julian] and had not consented to the departure. He was advised of their departure after the children had arrived in New Zealand by a text message and immediately sought legal advice, invoking the process to obtain their return under the Hague Convention.

Did Mr [Scott] consent to the removal of the children from Australia?

[17] There is no suggestion that Mr [Scott] acquiesced to the children's removal.[9] Acquiescence represents an agreement to something which has already occurred. The focus, therefore, is on consent, and whether the evidence establishes that Mr [Scott] consented to the removal before departure.

[18] In this case, Mr [Scott] took immediate steps to seek the return of the children once he knew they had left Australia. He sought legal advice within two days, and a letter was sent by his solicitor five days from the departure, demanding the return of the children to Australia.

[19] The defence of consent is well-settled and the following principles apply:[10]

(a) Consent must be proved on the balance of probabilities by the person relying on the defence;

(b) The evidence relied on must be clear and cogent;

(c) If the court is left uncertain, then the defence fails;

(d) Consent must real, positive and unequivocal;

(e) The consent need not be in writing; and

(f) It may be possible to infer consent from conduct.

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[9] Care of Children Act, ss 105 to 106(b)(ii).

[10] *Re K (Abduction: Consent)* [1997] 2 FLR 212 (FC); *Chief Executive of the Department for Courts v Phelps* [2000] 1 NZLR 168 (CA); *DGH v MJT (Abduction)* [2009] NZFLR 49 (FC); and *KMA v Secretary for Justice* [2007] NZCA 223, [2007] NZFLR 891.

[20] Therefore, the court needs to be satisfied on the balance of probability that there is evidence of both clear, cogent and unequivocal consent. Any ambiguity or uncertainty is fatal.

[21] Ms [Jenkins]'s evidence is that there was verbal consent. Her evidence is general in form. She relies on two text messages to corroborate her recollection of (disputed) conversations. She says that the parties discussed her wish to return to New Zealand in the week after their separation. She says Mr [Scott] verbally agreed to her relocating to New Zealand after the lease on the family home expired on 11 December 2020. She relies on the following text messages:

(a) 15 October 2020 from Mr [Scott]:

> I need to get some agreement written up by a celitor (sic) and for you to sign first before I sign [Julian] passport so I'll sort that out tomorrow and once its signed by you then I will sign [Julian] passport papers.

(b) 18 October 2020 sent at 12.01 am:

> Well its up to you whether you go back home or not I can help out with rent here and there but not all the time.

[22] The context of the text message exchanges between the parties was not exhibited. Ms [Jenkins] says they should be read within the context of the parties discussing her permanently removing the children from Australia as that was the focus of discussion at the time. She states that Mr [Scott]'s request for a written agreement confirming he would maintain a relationship with the children was not a prerequisite to his consent and only related to obtaining a passport for [Julian].

[23] The parties have different views on the contents of their conversations of that week. Mr [Scott] refutes that he ever agreed to the children relocating to New Zealand permanently. He said he previously agreed to short trips (holidays) and was concerned that Ms [Jenkins] would try to leave Australia permanently without his consent with the children. That is why he raised the issue of a formal parenting agreement before he provided his consent for [Julian]'s passport to be issued. As he never received a passport application for signature, he erroneously thought [Julian] could not be issued

one. His evidence categorically is: "I certainly never consented to the children relocating to New Zealand".[11]

[24] Ms [Jenkins]'s evidence is that at the end of that week, namely by 18 October 2020, she believed Mr [Scott] had consented to the children permanently leaving Australia and going to live in New Zealand. However, her actions thereafter suggest otherwise. Had that been her belief, there would have been no need for her to conceal the fact that she sought authorisation from the Victorian Government to leave the State and country with the children. She also booked and paid for tickets using money from Centrelink Australia and without discussing it with the children's father. All the while, Mr [Scott] was seeing the children on a regular basis. She did not provide him with an opportunity to say goodbye to the children. She sent a text message advising him of her intention to leave Australia temporarily, for the holidays, *after* she had arrived in New Zealand. That text message was deceptive. It was only on receipt of the text that Mr [Scott] realised what had happened.

[25] I am not satisfied that there was any concrete discussion between the parties about the children's permanent removal to New Zealand. I accept that the parties are likely to have discussed the need for a passport to be issued for the youngest child. That would enable Ms [Jenkins] to travel to New Zealand with the children. However, the evidence fails to satisfy me that there was any conversation, let alone agreement, for Ms [Jenkins] to remove the children permanently from Australia.

[26] Ms [Jenkins]'s conduct from mid-October to mid-December 2020 of not consulting Mr [Scott] or providing him an opportunity to give full consent does not satisfy the court that his consent was clear, cogent, real, positive and unequivocal. Her evidence falls well short.

[27] There is uncertainty around the issue of consent. The defence must, therefore, fail.

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[11] Affidavit of [Blake Scott] filed on 22 March 2021, at [7].

Is there a grave risk that the children's return to Australia would otherwise place them in an intolerable situation?

[28] Ms [Jenkins] submits that there is a grave risk that returning the children to Australia would otherwise place them in an intolerable situation, relying on the defence captured in s 106(1)(c)(ii). The "grave risk" defence has been restated recently by the Court of Appeal in *LRR v COL*.[12] The Court sets out eight observations in respect of this defence, namely:[13]

> … [T]here is no need for any gloss on the language of the provision. It is narrowly framed. The terms "grave risk" and "intolerable situation" set a high threshold.
>
> … [T]he court must be satisfied that return would expose the child to a *grave risk*. This language was deliberately adopted by the framers of the [Hague] Convention to require something more than a substantial risk. A grave risk is a risk that deserves to be taken very seriously.
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> … [C]onsistent with the focus of the exception on the circumstances of the particular child, a situation is intolerable if it is a situation "which this particular child in these particular circumstances should not be expected to tolerate".
>
> … [T]he inquiry contemplated by this provision looks to the future: to the situation as it would be if the child were to be returned immediately to their State of habitual residence. The court is required to make a prediction, based on the evidence, about what may happen if the child is returned. There will seldom be any certainty about the prediction.
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> … [I]t is not the court's role to judge the morality of the abductor's actions.
>
> … [A]lthough the question is whether there is a grave risk that return will place the child in an intolerable situation, the impact of return on the abducting parent may be relevant to an assessment of the impact of return on the child.
>
> … [Section] 106(1) confers a discretion on the court to decline to make an order for the return of the child if one of the specified exceptions is made out.

[29] Ms [Jenkins]'s submission that the children would be exposed to an intolerable situation is based on her financial circumstances in Australia. She received Family Tax Benefit from the Australian Government in the amount of AUD$380.24 each fortnight but said this was inadequate for her to rent a house and cover the needs of the children. She says because she is a New Zealand citizen, and not an Australian citizen, she is unable to access other government support. She says it is unrealistic for

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[12] *LRR v COL* [2020] NZCA 209, [2020] NZFLR 98.
[13] At [87]–[96] (footnotes omitted).

her to seek employment as a solo parent and is ineligible for any other benefits. She says it is uncertain whether she would be granted legal aid in respect of any court proceedings, which would be required to determine final parenting orders or relocation of the children.

[30] Ms [Jenkins] says she has nowhere to live and would be forced into a women's refuge, having moved from the former rented family home. She has sold her furniture and car and has no savings.

[31] Ms [Jenkins] does not submit that the children are subject to any physical or psychological harm in Australia. The intolerable situation she relies on is purely her financial predicament. Although she makes some passing references to the children's father having an alcohol problem, this is not substantiated by any further evidence. This allegation is not submitted as a factor which would place the children in a situation of physical or psychological harm.

[32] To that end, Ms [Jenkins]'s situation is distinct from the fact scenario before the Court of Appeal in *LLR v COL* where family violence orders had been breached and the mother's mental health was fragile.

[33] Counsel for the Central Authority draws the court's attention to the following facts:

(a) Ms [Jenkins] is eligible to re-enter Australia on the well understood special category visa, being the same visa that she has been resident in Australia on for the past eight years;

(b) She is eligible for family income support payment from Centrelink Australia;

(c) She is likely to be entitled to additional rental assistance from Centrelink Australia;

(d) She is eligible for Family Tax Benefit support;

(e) The applicant would be liable to pay child support to her;

(f) Ms [Jenkins] told Mr [Scott] before she left that she was planning to return to paid employment when the youngest child turned one, which is on [date deleted] 2021;

(g) It is likely she would be eligible to obtain legal aid for Family Court proceedings in Australia; and

(h) Ms [Jenkins] is likely to be eligible for the entitlements under the International Custody Dispute Payment Entitlement, specifically set up to provide financial support for parents who are in another country because of the Hague Convention process.

[34] Ms [Jenkins] provided no evidence of her budget, her work prospects or why she cannot access the entitlements that appear to be available to her from the Australian Government. In addition, there is no evidence that she has sought financial support from Mr [Scott] or his wider family.

[35] The risk that the court must consider is whether the mother's perceived lack of financial assistance from the Australian Government puts the children in an intolerable situation. Ms [Jenkins] relies entirely upon a claim of undue financial stress should she be returned to Australia. I accept the submission that she cannot be the maker of her own intolerable situation and she must be expected to take such reasonable steps to ameliorate any possibility of that risk. Reasonable steps include properly accessing the financial support that is available to her such as exploring employment options and seeking child support.

[36] Ms [Jenkins] submits that the International Custody Dispute Payment is incompatible with the Family Tax Benefit in Australia and would be insufficient support. However, the Australian and New Zealand Governments have specifically created the entitlement for someone in her current situation. I cannot accept that this and other financial options available to Ms [Jenkins] in Australia do not meet her needs and puts her and the children in an "intolerable situation". Ms [Jenkins]'s position is

that the government assessed amounts are not enough to meet her financial needs but she has not provided evidence to the court of what those needs are.

[37] I am not satisfied that there is a grave risk that Ms [Jenkins]'s financial inconvenience upon return to Australia will place the children in an intolerable situation.

Conclusions and orders

[38] For the above reasons, both defences relied upon by Ms [Jenkins] must fail. That leaves the court with no discretion and must order the children to be returned to Australia forthwith.

Signed at Waitakere this 15th day of April 2021 at 2pm.

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Judge B R Pidwell
Family Court Judge

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