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

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IN THE FAMILY COURT
AT KAIKOHE

I TE KŌTI WHĀNAU
KI KAIKOHE

FAM-2022-027-000100
[2023] NZFC 2584

IN THE MATTER OF	THE CARE OF CHILDREN ACT
BETWEEN	[LEROY PETERSON] Applicant
AND	[HELENA PIRIPI] also known as [HELENA BREWER] Respondent

Hearing:	6 March 2023
Appearances:	Applicant Appears in Person R Hart for the Respondent
Judgment:	19 March 2023

RESERVED JUDGMENT OF JUDGE M S HOWARD-SAGER

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[1] "…He tamaiti, he taonga; every child is precious, every child is a taonga of their entire whānau, hapū and iwi – and as such tamariki are the responsibility of all of them" [1].

[1] Waitangi Tribunal *He Pāharakeke, he rito whakakikinga wharuarua, Oranga Tamariki urgent inquiry* (Wai 2915, 2021) at 14 – 15 per Waihoroi Shortland as referred to in the report of lawyer to assist, Corin Merrick, 3 Feb 2023.

[2] This quote is particularly pertinent to the little girl at the centre of these proceedings, [Gina Peterson]. [Gina] is clearly a cherished and much loved little girl.

[3] [Gina] was born in Australia on [date deleted] 2016. Until [date 1] 2021, [Gina] lived in Australia with her father, [Leroy Peterson] and her mother, [Helena Piripi]. Also living with them was her brother [Jeffrey], who is aged 3.

[4] On [date 1] 2021 [Gina] travelled to Aotearoa New Zealand with Ms [Piripi] and [Jeffrey]. The purpose was for a holiday and to meet [Jeffrey]'s biological paternal whānau. [Gina], her Mum and [Jeffrey] were due to return to Australia on [date 2] 2021.

[5] Despite Ms [Piripi] advising Mr [Peterson], prior to their return, that they would be back in Australia earlier than anticipated, on [date deleted – five days before date 2] 2021, they did not return.

[6] There was ongoing communication between Mr [Peterson] and Ms [Piripi] about the children's return and restrictions on travel due to COVID-19.

[7] On [date 3 – three months after date 2] 2021, Ms [Piripi] advised Mr [Peterson] that she planned to relocate to either [Australian city A] or Aotearoa New Zealand. The children have not been back to Australia since their departure on [date 1] 2021.

[8] Mr [Peterson] now seeks the return of [Gina] to Australia pursuant to the Hague Convention.

[9] Ms [Piripi] opposes return and asks the Court to defer the making of a decision, until the school holidays, so that a plan for care and contact can be developed, with input from the paternal grandparents, maternal grandparents and Mr and Mrs [Pikari], who Ms [Piripi] says are whāngai grandparents to [Gina].

[10] The hearing proceeded by way of submissions only, as is usual in Hague Convention cases. Mr [Peterson] attended via VMR from Australia and was accompanied by his solicitor, Ms Gibson. Ms [Piripi] appeared in her own right with assistance from Mr Faulkner, who appeared as a McKenzie friend. There were a

number of support people in attendance, on behalf of Ms [Piripi], from [hapū name deleted].

Background:

[11] I will set out the background to this matter, before I set out the issues pertaining to this case, the law and provide an analysis with findings.

[12] Mr [Peterson] is an Australian citizen. He was born in [Australian city B] on [date deleted] 1995. His parents reside in [Australian city B], as do his brothers. Wider paternal whānau also reside in [Australian city B]. Mr [Peterson]'s evidence is that the children enjoy a relationship with their wider paternal whānau.

[13] Ms [Piripi] is also an Australian citizen, although she is of Māori heritage. She was born at [Australian city A] on [date deleted] 1998. Ms [Piripi]'s parents reside in [Australian city B]. She has two brothers and a sister who also reside there. According to Mr [Peterson]'s evidence there is also wider maternal whānau living in the same area who the children enjoy a relationship with.

[14] The parties met in about 2013 and commenced a relationship a few months after their initial meeting. Mr [Peterson] and Ms [Piripi] started living together in 2016, when Ms [Piripi] was 6 months pregnant with [Gina].

[15] [Gina] was born on [date deleted] that year.

[16] In March 2019 the parties separated for a period of time. Ms [Piripi] had a brief relationship with [Simon Pikari], who is [Jeffrey]'s biological father. The pleadings filed by Mr [Peterson] state that upon learning of the pregnancy, Mr [Pikari] advised Ms [Piripi] that he did not want any contact with the baby. [Jeffrey] was born in [Australian city B] on [date deleted] 2019.

[17] Late in October 2019 Mr [Peterson] and Ms [Piripi] reconciled, although the submission of Ms [Piripi] is that the parties did not resume living together until 6 months after [Jeffrey] was born. Nevertheless, Mr [Peterson]'s position is that he

brought [Jeffrey] up as his own. That is not disputed on the evidence. Mr [Peterson] sees himself as Dad to both children.

[18] In April 2021 Mr [Peterson] and Ms [Piripi] talked about visiting New Zealand so that [Jeffrey]'s biological paternal grandmother, Mrs [Pikari], could meet him. It appears that despite the biological father not wanting a relationship with his son, Mrs [Pikari] sought that connection. It was decided that Ms [Piripi] would travel to Aotearoa New Zealand with the children. Mr [Peterson] stayed behind to work.

[19] On 3 July 2021 a physical incident occurred between the parties. Mr [Peterson] describes an argument where Ms [Piripi] tried to prevent him from going to work. He says that she ripped the keys out of the car ignition and tried to pull him out of the car. He describes the parties yelling at each other. He says that Ms [Piripi] punched him in the mouth, causing a deep cut inside his mouth and bleeding. Mr [Peterson] stated that he then pushed her away and shut the car door.

[20] Whānau members were called, and the police were involved. An incident report, attached to Mr [Peterson]'s affidavit evidence, confirms the incident. It lists him as the victim and the other party, who is blanked out, the suspect. It was noted by the Police that neither party wished to make a statement. No further action was taken.

[21] Shortly after this incident, on [date 1] 2021 Ms [Piripi] brought the children to Aotearoa New Zealand, as had been planned. She has not returned to Australia and wishes to remain here.

[22] On 14 December 2021 Mr [Peterson] signed an application, in accordance with the Hague Convention, for the return of [Gina] to Australia. The application was filed with the Australian Central Authority.

[23] Evidence was obtained from Alexandra Howard, a Lawyer of the Supreme Court of Australia, on 12 May 2022. Ms Howard confirms that Mr [Peterson] retains parental responsibility for [Gina], in accordance with Australian law, for the purposes of a Hague Convention application. The application was sent to the New Zealand Central Authority for consideration. That application was however rejected, as it

pertained to the return of not only [Gina], but also [Jeffrey] over whom Mr [Peterson] has no rights of custody.

[24] On 27 July 2022 Mr [Peterson] filed an application without notice for an Order preventing removal of [Gina] from New Zealand, for her Passport to be surrendered to the court, for a reduction of time for filing a defence, and, for an interim order as to contact. Those without notice applications were accompanied by an on notice application for the return of [Gina] to Australia and for a warrant to enable the Police or a social worker to take possession of [Gina] and deliver her to Mr [Peterson] or another appropriate person for the purposes of return to Australia.

[25] On that same day, 27 July 2022, the without notice applications were considered by a Judge. An Order preventing the removal of [Gina] from this country was made. It was ordered that [Gina]'s passport be surrendered to the Court at Kaikohe and that this was not to be released until further order of the Court. The time for filing a defence was reduced.

[26] Those orders were made without reference to Ms [Piripi] due to the urgent nature of the situation. The Judge who dealt with the applications on a without notice basis, declined to make an order for contact at that time though, due to Mr [Peterson]'s most recent affidavit evidence being dated 25 February 2022; some five months prior to the application.

[27] Despite the lack of an order as to contact, it would appear based on Mr [Peterson]'s updating affidavit, dated 21 December 2022, that he has maintained a relationship with [Gina] via video contact on an almost daily basis.

[28] In advance of the submissions only hearing, Lawyer to Assist the Court, Ms Corin Merrick, was appointed to report on the application generally; and, specifically in relation to tikanga, whakapapa and in the context of a whāngai situation. Ms Merrick's report was thorough and provided great assistance to the Court.

[29] Mr Harte, on behalf of the New Zealand Central Authority also filed thorough submissions, which were of assistance.

[30] Despite being afforded the opportunity to file submissions, Ms [Piripi] did not do so. She sought to rely, at the hearing, on an affidavit dated 5 March 2023, which had not been filed. Irrespective of that, she was permitted to go through the affidavit as this formed the basis of her submissions, in conjunction with a memorandum that she had prepared. Both documents were later handed up to the Court. Whilst timetabling directions had been made on two separate occasions, on 11 August 2022 and 31 October 2022, which afforded Ms [Piripi] an opportunity to file further evidence and submissions, she did not fully avail herself of that opportunity. That said, she is a self-represented litigant, and it was of assistance to me, as the presiding Judge, to receive a copy of her documentation so that I could fully understand the nature of her submissions.

[31] Ms [Piripi] challenges the jurisdiction of this Court to make decisions in relation to [Gina] and raises three defences to any proposed return. I will now set out the issues for determination by this Court.

The Issues:

[32] Mr [Peterson] seeks an Order for the return of [Gina] to Australia pursuant to s 105 of the Care of Children Act 2004 ("the Act").

[33] He says that the grounds for bringing such an application have been satisfied:

- [Gina] is resident in New Zealand;
- [Gina] was removed from another Contracting State (Australia) in breach of his rights of custody;
- That at the time of [Gina]'s removal he was exercising those rights or would have been but for the removal; and,
- That [Gina] was habitually resident in Australia immediately before her removal.

[34] Mr [Peterson] says that, those grounds having been satisfied, [Gina] must be promptly returned to Australia in accordance with the Act[2].

[35] Whilst Ms [Piripi] does not dispute that the grounds are made out to bring an application, she does not agree that [Gina] should be returned[3]. As stated, she challenges the Court's jurisdiction to make decisions for [Gina] and raises three defences pursuant to s 106 of the Act.

[36] The issues I must determine are:

1. Does this court have jurisdiction to determine matters for [Gina]?

2. Per s 106(1)(a), was Mr [Peterson]'s application for the return of [Gina] filed more than 1 year after her removal?

3. Per s 106(1)(c), is there a grave risk that [Gina]'s return would expose her to physical or psychological harm; or that it would otherwise place her in an intolerable situation?

4. Per s 106(1)(e), whether [Gina]'s return is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms?

[37] At the commencement of the hearing, I spoke with Ms [Piripi] about the Court's jurisdiction to determine matters for [Gina]. I will now provide a reasoned analysis for why I believe that this court has the ability to decide whether [Gina] should be returned to Australia. Following that, I will set out the legislative requirements in relation to Hague Convention applications generally and determine each issue in turn.

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[2] See Care of Children Act 2004, ss 105(1) & (2).

[3] I specifically note at this juncture, that the affidavit evidence of Alexandra Howard dated 12 May 2022, provides clear evidence of Mr [Peterson]'s rights of custody at Australia law. Ms [Piripi] has not disputed that [Gina] was removed to Aotearoa-New Zealand in breach of those rights, that he was exercising those rights or would have been but for the removal, nor that [Gina] was habitually resident in Australia prior to her removal to this country.

Does this court have jurisdiction to determine matters for [Gina]?

[38] Ms [Piripi] says that she and her children are members of [the Pikari hapū] , by reason of whakapapa. She claims that three hapū, of which [the Pikari hapū] is one, enacted He Whakaputanga in 2015 and are proclaimed a sovereign state.

[39] Accordingly, Ms [Piripi] submits that whilst Statutes made by Parliament apply to the realm of Aotearoa New Zealand, [the Pikari hapū] is bound by their hapū tikanga and is not subject to the Crown's jurisdiction. In fact, Ms [Piripi] submits that as a hapū, [the Pikari hapū] fully support "the Hague and their convention on children and their protection. After all it aligns with our Hapū tikanga on the care and protection of taonga tamariki. However, as a sovereign state in our own right we have not ratified the Hague Convention and thus are not legally or lawfully bound by it."[4]

[40] She says that the hapū has never ceded their right to self-determination, nor sovereignty nor their "prerogative right". Ms [Piripi] argues that as a sovereign state, members of the hapū do not fall under the jurisdiction of the New Zealand Crown, nor the Australian Crown nor the Hague Convention.[5] It is her position that this Court has no jurisdiction to determine matters for [Gina].

The Law:

[41] Sovereignty in New Zealand rests with Parliament.

[42] The Family Court must obey Parliament and the laws developed by it and apply those laws consistently with the approaches taken by the superior Courts of New Zealand.

[43] The superior Courts have refused to accept claims that He Whakaputanga, the Declaration of Independence, means that Māori are not bound by the statutes of New Zealand.

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[4] Affidavit of [Helena Piripi] 5 March 2023 at [4].
[5] Affidavit of [Helena Piripi] 31 Aug 2022 at [7].

[44] Acts of Parliament, such as the Care of Children Act, which implements the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") in New Zealand law, are binding on all persons within the geographical territory of New Zealand whether Māori or non-Māori.

[45] In the 2000 High Court case of *Manukau v Attorney-General* Chambers J stated the following:[6]

> [6] It is established beyond question that sovereignty in New Zealand resides in Parliament. Many cases could be cited for that proposition. The Court of Appeal's decision in *New Zealand Māori Council* v *Attorney-General* [1987] 1 NZLR 641 will suffice. All the council's arguments to the contrary have been debated in the New Zealand Court's before and failed.
>
> [7] The council relied on the Declaration of Independence 1835. That document has no legal effect in New Zealand today….

[46] Further, in the 2017 case of *Easton v Wellington City Council* Ellis J stated:[7]

> "… the District Court was right to hold that He Whakaputanga does not affect the jurisdiction of the courts of New Zealand and does not alter the applicability of the statues passed by the New Zealand Parliament to all who live in New Zealand, including Mr Easton"

Analysis and findings:

[47] In light of the comments of Chambers J and the multitude of decisions that reinforce the fact that sovereignty rests with Parliament, and that all people within New Zealand are subject to its laws, Ms [Piripi]'s submission that this Court has no jurisdiction, must fail.

[48] Despite the fact that she did not base her argument on Māori sovereignty, but rather on a contention that [the Pikari hapū] is a sovereign state and therefore not subject to the laws of Aotearoa New Zealand, the same principles must apply. There has been no case law provided which would persuade me otherwise. Despite Ms [Piripi]'s strong conviction that the hapū has never ceded their sovereignty and that she has not been provided with any documentation to evidence authority over the hapū;

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[6] *Manukau v Attorney-General* [2000] NZAR 621 (HC)
[7] *Easton v Wellington City Council* [2020] NZHC 3351.

as people within the geographical territory of Aotearoa New Zealand, the Act and its implementation of the Hague Convention, applies to Ms [Piripi] and her children.

[49] It is my finding based on the dicta of the higher Courts, as noted at [45] and [46], that this Court has jurisdiction to determine Mr [Peterson]'s application.

[50] I will now turn to the law as it applies generally to Hague Convention cases and will then move to consider each defence and its particular nuances.

The Law:

[51] In order to determine an application for return of a child under the Hague Convention, a 3-step approach is required[8].

1. First of all, the applicant must establish that the jurisdictional requirements in s 105 of the Act have been made out[9]. If they have, then the child must be promptly returned to the person or country specified in the order, *unless* one of the defences apply.[10]

2. A defence can be established under s 106 of the Act. The onus at this stage shifts to the respondent, in this case Ms [Piripi], to establish that defence to the satisfaction of the Court[11].

3. Thirdly, if a s 106 defence has been established to the Court's satisfaction, on the balance of probabilities, it will be for the Court to exercise its discretion as to whether or not the child should be returned. How that discretion is exercised and what factors are to be considered differs from defence to defence.[12]

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[8] The Convention is implemented in New Zealand law by sub-Part 4 of pt 2 of the Care of Children Act 2004.
[9] *Basingstoke v Groot* [2007] NZFLR 363 (CA) at [10].
[10] My emphasis added.
[11] *Basingstoke*, above n 9, at [16]
[12] The decision of *LRR v COL* [2020] NZCA 209, is noted in particular in relation to a s 106(1)(c) defence. At [119] the Court states: *"it is inconceivable that return would be ordered where the s 106(1)(c) exception is made out".*

[52] As already mentioned above, Ms [Piripi] does not dispute that the s 105 grounds have been met. Jurisdiction for the application has therefore been established.

[53] The question for this Court will be whether any of the defences pled by Ms [Piripi] are proved. If not, then I must order the prompt return of [Gina] to Australia. If any or all of the defences are made out, then I will need to exercise my discretion as to whether a return should still be ordered.

[54] Because there is no challenge to jurisdiction, I will now consider each defence raised, in turn.

Was Mr [Peterson]'s application for the return of [Gina] filed more than 1 year after her removal?

[55] Whilst this defence was raised by Ms [Piripi] in her pleadings, she did not make submissions to advance this defence at the hearing.

[56] That said, it is worth analysing the timeline of events to ensure that there is no possible defence available.

[57] I will need to determine the date of [Gina]'s removal to Aotearoa New Zealand, as it is that date from which the 12-month period, to file an application, begins.

The Law:

[58] Section 106(1) of the Act states:

> If an application under section 105(1) is made to a court in relation to the removal of a child from a Contracting State to New Zealand, the court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the court –
>
> (a) That the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; …

[59] Section 95 of the Act defines what is meant by "removal", in the context of an international child abduction case.

[60] It states: "**removal**, in relation to a child, means the wrongful removal *or retention* of the child within the meaning of Article 3 of the Convention.[13]"

[61] Article 3 of the Convention states:

> The removal or retention of a child is to be considered wrongful where –
>
> (a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of an agreement having legal effect under the law of that State.

[62] The 2006 High Court case *Secretary for Justice v SB* provides assistance in determining the date of removal.[14] That case involved a child who had been removed to New Zealand from Spain in breach of the father's rights.

[63] At [51] the Court stated:

> Wrongful retention ordinarily arises from the actions of one party, in that their conduct externally confirms a decision and resolve to retain the child or children in breach of the other's rights. Perhaps, there may be cases where the point of dissent represents the time of retention. That would depend upon the nature of any earlier statements by the other party concerning his or her unwillingness to return to the previous place of residence. If such statements were equivocal, such that it was only at the point of dissent by the left behind parent that the fact of non-return crystallised, then the dissent may be central to the retention…

Analysis and findings:

[64] Ms [Piripi] left Australia on [date 1] 2021.

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[13] My italicising, to emphasise the inclusion of retention.
[14] *Secretary for Justice v SB (Retention: Habitual Residence)* [2006] NZFLR 1027 (HC).

[65] It was initially intended that, together with the children, she would return to Australia on [date 2] 2021, although there was some discussion about a possible return slightly earlier on [date deleted – five days before date 2], which did not eventuate. The purpose of travel was for a holiday and to meet with [Jeffrey]'s biological paternal whānau. The holiday was undertaken with the consent of Mr [Peterson], and on the understanding that [Gina] would return. Accordingly, the date of [date 1] 2021 cannot be considered as the date of removal of the children.

[66] The intended date of return of [date 2] 2021 came and went. Mr [Peterson] deposes that he had been notified by Ms [Piripi] on [date deleted] 2021 that return was not possible due to Covid-19 restrictions and international flight cancellations. A credit note was apparently obtained with a hope that international travel would resume by the end of August. Ms [Piripi] would remain in New Zealand until permitted to travel[15]. It is clear on the evidence, that the parties maintained contact. There was ongoing discussion about financial assistance for Ms [Piripi] and the children, from Mr [Peterson], throughout August 2021. On the evidence presented, there is nothing to suggest that Mr [Peterson] had been given any indication that Ms [Piripi] intended to remain in Aotearoa New Zealand at that point.

[67] In September 2021, text messages between the parties illustrate that Ms [Piripi] was still receiving some form of benefit from Centrelink in Australia. She stated to Mr [Peterson] that she needed to get her payments sorted and that as a result of what appear to be part payments, she advised that she was in "struggle town". Ms [Piripi] was hopeful that by the following week, that being after 7 September 2021, her payments should have been reinstated.[16]

[68] On 7 October 2021 there was discussion between the parties about rent payments due on their home. Mr [Peterson] stated, "I've put $1120 in your bank can you please pay rent n water bill n there's $200 for the kids". Ms [Piripi] replied "Didn't I pay rent on weekend for you? It was that a fortnight ago or did you just pay that late…" Mr [Peterson] replied stating that he had paid the rent late, that he was trying

[15] Affidavit of [Leroy Peterson] 25 Feb 2022 at [26].
[16] At attachment JSH-14.

to work on his budget and asked Ms [Piripi] to let him know how much "we owe on electricity and [Gina]'s school fees so I can work something out".[17]

[69] The significance of this evidence is that it suggests an intention to return to Australia. There was ongoing discussion about rental payments on the home and both parties working together to pay the household bills. Money was also provided by Mr [Peterson] for the children. There is no suggestion on the evidence that any indication had been given that [Gina] would not return to Australia.

[70] By November 2021 it appears that Mr [Peterson]'s patience, in relation to return of the children, runs thin. On 15 November 2021 he sent a message to Ms [Piripi] stating, "Air New Zealand has heaps of direct flights back to [Australian city B] at the beginning of December and you are eligible to home quarantine". Ms [Piripi] replied, "That's what it says on air New Zealand"? Mr [Peterson] replied "Yes. The flights are on air New Zealand and I've looked into all the new laws regarding travel between New Zealand and [Australian city B]. For in vaccinated people. Un*. You've been gone 4 months now [Helena] you need to start organising to come home".[18] His evidence is that around [date 3] 2021 Ms [Piripi] notified him that she planned to relocate herself, [Gina] and [Jeffrey] to either [Australian city A] or New Zealand.[19] That is not disputed by Ms [Piripi]. This date is the first indication, on the evidence, that Ms [Piripi] intended to remain in Aotearoa New Zealand with the children.

[71] When I reflect on the dicta of Panckhurst J in *Secretary for Justice v SB*, as referred to above, it is clear in my view, on the evidence, that it is at this point that Ms [Piripi]'s conduct and her text messages, confirm a decision not to return to [Australian city B]. Whilst it could be debated that she may still have intended to return to Australia, that is to [Australian city A], it is also clear on the evidence that remaining in Aotearoa New Zealand was very much an option.

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[17] At attachment JSH-14.
[18] At attachment JSH-10.
[19] At [31].

[72] It is my determination, on that basis, that the date of [Gina]'s removal from Australia was [date 3] 2021.

[73] On 14 December 2021 Mr [Peterson] signed an application seeking return of both children to Australia, in accordance with the Hague Convention. The application was filed with the Australian Central Authority. However, it appears, based on the submissions of Mr Harte, that that application was not sent through to the New Zealand Central Authority until May 2022.[20] The application was then rejected due to both children's return being sought. The evidence of Ms Alexandra Howard, of the Commonwealth Attorney-General's Department in Canberra, confirmed that Mr [Peterson] only retained parental responsibility for [Gina], to enable an application to be brought pursuant to the Convention.

[74] On 27 July 2022, Mr [Peterson]'s application for the return of [Gina] to Australia, was filed in the New Zealand Family Court.

Conclusion:

[75] For the reasons set out above, I have determined the date of removal of [Gina] as [date 3] 2021. Mr [Peterson]'s application for return of [Gina] to Australia pursuant to the Hague Convention was filed in the New Zealand Family Court on 27 July 2022.

[76] That was well within the 1-year time limit for bringing an application; and, on that basis the first defence must fail.

[77] I now turn to the second defence raised.

Is there a grave risk that [Gina]'s return would expose her to physical or psychological harm; or, that it would otherwise place her in an intolerable situation?

[78] Ms [Piripi] believes that if [Gina] is returned to Australia there is a grave risk that she will be exposed to physical or psychological harm.

[20] Submissions of Mr Harte 24 Feb 2023 at [18].

[79] In a memorandum dated 10 August 2022, Ms [Piripi] stated that the main reason for leaving Australia was that she was "caught in an abusive and at times violent relationship with [Gina]'s father [Leroy Peterson] and I feared for my safety and that of my children."[21] Ms [Piripi] stated that her concerns had been recorded with the Police in Australia and whilst she did not press charges, out of concern that this may antagonise the situation, she was concerned for her children's safety.

[80] Her evidence is that a return of [Gina] to Australia "would definitely put her in a grave risk or intolerable situation. Due to previous abuse and sometimes violence towards myself within our home this would definitely be placing [Gina] in an intolerable situation."[22]

[81] Mr [Peterson] denies that the relationship was characterised by abuse and violence.[23] Further, he says that he is unaware of any risk to [Gina] in his care, and states that she will not be at risk in his care if returned.[24]

[82] Before I deal with the conflict of evidence, I remind myself and the parties that this hearing is not about the return of the child to a specific parent or a determination of care and contact arrangements. The hearing was to determine whether [Gina] should be returned to Australia in accordance with the Hague Convention, which would then mean that she is under the jurisdiction of the Australian Family Court to hear those very arguments, as to who should provide care and what contact the other parent should have.

[83] I need to determine whether there is a grave risk of physical or psychological harm to [Gina] if returned to the State of Australia, not Mr [Peterson].

[84] In terms of the conflict of evidence, I will now consider the law as it relates to that situation; and then, in relation to the defence of 'grave risk' itself.

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[21] Memorandum of Ms [Piripi] 10 Aug 2022 at [3].
[22] Affidavit of Ms [Piripi] 31 October 2022 at [1].
[23] Affidavit of Mr [Peterson] 6 Oct 2022 at [4].
[24] Affidavit of Mr [Peterson] 21 Dec 2022 at [4].

The law:

[85] It is for the applicant, Mr [Peterson], to prove the jurisdictional requirements in s 105 of the Act. He has done so without challenge from Ms [Piripi].

[86] As stated at [51] [Gina] must therefore be promptly returned to Australia unless one of the defences in s 106 of the Act can be established by Ms [Piripi] on the balance of probabilities.

[87] In a case, such as this, where there is a conflict of evidence i.e., where Ms [Piripi] states that Mr [Peterson] was violent towards her and she was concerned for her safety, as opposed to his belief that the relationship was not marred by abuse and violence and there is no risk to [Gina], the Court of Appeal case of *Basingstoke* v *Groot* provides assistance.

[88] In resolving the issue of conflict of evidence Glazebrook J stated:[25]

> [37] In this case there was no application for cross-examination on the affidavits. Given the summary nature of the proceedings and the fact that the parties can be in different jurisdictions, it is not usual in Hague Convention cases for there to be cross examination…. The matter must therefore be decided upon the basis of written evidence.
>
> [38] We were referred by counsel for Mr Groot to the case of re F (a Minor) (Child Abduction)…, where Butler-Sloss LJ sets out her view of how conflicts of evidence based on affidavit evidence should be resolved. She said that, if it is necessary to decide conflicts of evidence on affidavit evidence, the first step is to see if there is independent extraneous evidence in support of one side. She said, however, that this evidence must be compelling before the Judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit must be inherently improbable and so unreliable that the Judge is entitled to reject it. If there are no grounds for rejecting the written evidence of the other side, the applicant will have failed to establish its case.
>
> [39] We consider that the approach of Butler-Sloss LJ is too extreme. The fact that the evidence has not been tested must be taken into account. However, the standard of proof remains on the balance of probabilities and Butler-Sloss LJ's approach risks raising that standard. In our view, deciding on conflicts of evidence is done in the usual way, taking into account such factors as

[25] *Basingstoke*, above n 9.

any independent extraneous evidence, consistency of the evidence (both internally and with other evidence) and the inherent probabilities.

[89] With respect to the defence that there is a grave risk that [Gina]'s return would expose her to physical or psychological harm, or that it would otherwise place her in an intolerable situation, the Court of Appeal case of *LRR v COL* assists.[26] In that decision the Court made 8 observations about the grave risk defence:[27]

1. That there is no need for any gloss on the language of the provision. The terms "grave risk" and "intolerable situation" set a high threshold.

2. The Court must be satisfied that return would expose the child to a "grave risk". This requires something more than substantial risk. A grave risk is a risk that deserves to be taken very seriously.

3. A situation is intolerable if it is a situation "which this particular child in these particular circumstances should not be expected to tolerate".

4. The inquiry 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 must make a prediction about may happen if the child is returned. Certainty is not required; the Court needs to be satisfied that there is a risk which warrants the qualitative description "grave".

5. It is not for the Court to judge the morality of the abductors actions.

[26] *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610.
[27] At [87] – [99].

6. The burden is on the person asserting the grave risk to establish that risk, as the language of article 3 (of the Convention) and s 106 makes plain.

7. The impact of return on the abducting parents may be relevant to an assessment of the impact of return on the child.

8. Section 106(1) confers discretion on the Court to decline to make an order for return of the child if one of the specified exceptions is made out. However, if a grave risk of an intolerable situation is made out, "it is impossible to conceive of circumstances in which … it would be a legitimate exercise of the discretion nevertheless to order the child's return".

Analysis and findings:

[90] I turn first to consider the conflict of evidence.

[91] Ms [Piripi] is consistent in her evidence that her relationship with Mr [Peterson] was abusive and violent and that she was concerned for the safety of the children. She reiterated her concern in oral submissions and told the Court that she had had to stay in a women's shelter during the relationship and that the parties had attended relationship counselling. She said that it was not until she got to Aotearoa New Zealand however, that she realised how much she had been trying to leave for some time.

[92] The difficulty with Ms [Piripi]'s evidence, though, is that it is non-specific and there are no reports or independent evidence to corroborate her view. There is no reference to specific incidents nor dates of the alleged violence. Whilst that makes it difficult for Mr [Peterson] to respond to the allegations, it also leaves the Court in a position where the evidence simply becomes a bald assertion.

[93] An attempt to assist Ms [Piripi], to obtain corroborative evidence, was made when the matter was called in a Judicial Conference on 31 October 2022. Mr Harte for the Central Authority offered to try and obtain information from the Australian

Police when he made enquiry on Mr [Peterson]'s behalf, provided Ms [Piripi] gave the police incident number to him and a consent. Whilst Ms [Piripi] stated at the hearing that a police reference number had been provided in a previous memorandum, she did not provide Mr Harte with the necessary consent to obtain police information.

[94] By contrast, Mr [Peterson] attached to his affidavit evidence, a copy of the incident report for the altercation which occurred on 3 July 2021.[28] That report clearly shows that a physical incident occurred between the parties on that occasion but identifies Mr [Peterson] as the victim and Ms [Piripi] (despite her name being blanked out) as the 'suspect'. It confirms that Ms [Piripi] had tried to prevent him from leaving the home and that when he pushed her away from the car door, she became angry and punched him in the mouth, causing his lip to bleed. The report notes Mr [Peterson]'s advice that the argument was mutual and that both parties 'gave as much as they received'. Neither Ms [Piripi] nor Mr [Peterson] wished to make a statement to the Police.

[95] What concerns me, is that it appears the children were present, although inside the home during the incident. The report at Page 6, states that the Officer was invited into the residence, where limited details of the incident were provided. It states the Officer observed (detail blanked out) who was in good spirits waving "hello" to Police. In that context it is presumed that this was one of the children.

[96] There is no other evidence of specific incidents of family violence between Ms [Piripi] and Mr [Peterson].

[97] When I reflect on the evidence that has been provided to the Court, there is a lack of evidence to satisfy me that the relationship was abusive, violent and that Ms [Piripi] feared for her safety, as claimed by her. If anything, the only corroborative evidence suggests that Ms [Piripi] may have been the aggressor on this occasion; and, that Mr [Peterson]'s evidence should be preferred.

[28] Affidavit of Mr [Peterson] 21 December 2022, attachment B.

[98] When I consider the defence of grave risk of exposure to physical or psychological harm I am, similarly, not satisfied that there is a grave risk to [Gina], if returned to Australia.

[99] Ms [Piripi]'s evidence is scant and amounts to an assertion without any specificity around the allegation.

[100] Whilst any family violence, in any form, is not acceptable and raises significant concern for children should they be exposed to this type of behaviour, the corroborative evidence tends to suggest that it is Ms [Piripi] who was the aggressor and not Mr [Peterson].

[101] I am also mindful that when the incident occurred on 3 July 2021, Police attended and it would appear based on their report, took appropriate action in speaking with both parties, sighting and ensuring that the children were ok. There is no evidence before the Court to suggest that the State would not act in a protective manner if [Gina] were returned to Australia and a similar incident occurred.

[102] As stated above, the Court of Appeal in *LRR v COL* has determined that the term "grave risk" sets a high threshold. I am not satisfied that that threshold has been reached, for the reasons articulated.

[103] It should also be noted, that this decision concerns a return to the country of habitual residence, as opposed to the return to a parent. [Gina] has both maternal and paternal grandparents in Australia; aunts, uncles and wider whānau, with whom she could reside whilst the Australian Family Court determines her long-term care and contact.

Conclusion:

[104] For the reasons set out above I am not satisfied that the defence of grave risk of exposure to physical or psychological harm has been made out. There is a lack of evidence to suggest that the Australian authorities would not act in an appropriate manner to ensure [Gina]'s safety if she were returned to her home, and there is a lack

of evidence upon which to conclude that there is a *grave risk* of exposure to harm. For those reasons, this arm of the second defence must fail.

[105] I now turn to consider whether there is a grave risk that returning [Gina] to Australia would otherwise place her in an intolerable situation.

Would [Gina] otherwise be placed in an intolerable situation?

[106] Ms [Piripi] argues that due to the previous abuse and violence towards her, within the home, returning [Gina] to Australia would place her in an intolerable situation.[29]

[107] In oral submissions Ms [Piripi] acknowledged that Mr [Peterson] was not a risk to [Gina], however, her submission was that if *she* were there, that that would place [Gina] "in an intolerable situation, or at grave risk".

[108] Ms [Piripi] also made submissions about [Gina]'s whakapapa links to [the Pikari hapū] and the immersion of [Gina] into her culture. She told the Court how settled [Gina] is and of her engagement in te reo. It is noted that, in an attached Pa Kooti record, there was discussion that it would be a breach of hapū tikanga for the children to be returned to a potentially violent relationship and alienate them from their whānau and culture.[30]

The Law:

[109] I have already set out the applicable law at [89], so I will not traverse that again. I will however refer to the law in my analysis.

Analysis and findings:

[110] It would be fair to say that Ms [Piripi] wants what is best for her daughter. In her memorandum to the court, she proposes a remedy to the current situation. That is, that wider whānau consult to develop a plan for contact and communication. The reality is though, as already pointed out, this decision is not about care and contact for

[29] Affidavit of Ms [Piripi] 31 October 2022 at [1]
[30] Memorandum of Ms [Piripi] 10 August 2022, attachment A

[Gina] with each of her parents. This decision is about whether [Gina] should be promptly returned to Australia for those very decisions to be decided in that jurisdiction.

[111] I am very mindful that for a situation to be intolerable, there must be evidence of a situation which this particular child in these particular circumstances should not be expected to tolerate. The threshold as noted at [89.1] is high.

[112] There is no evidence before the court which satisfies me that [Gina] may be exposed to abuse or violence, such that would place her in circumstances she should not be expected to tolerate. Whilst Ms [Piripi] submitted that the risk might arise if *she* were present, presumably as a result of the dynamics between herself and Mr [Peterson], there are other options available to Ms [Piripi] in terms of where she might reside if she returns with [Gina] to Australia. As already noted, there are a number of whānau members on both the maternal and paternal sides who reside in [Australian city B] and may be able to accommodate her whilst long term care for [Gina] is litigated or resolved.

[113] I am not satisfied, on the evidence provided, that [Gina] would be placed in an intolerable situation, simply by virtue of returning to Australia with her mother.

[114] A question arises though, as to what the situation might be if Ms [Piripi] chose not to return with [Gina] to Australia. Whilst Ms [Piripi] did not argue that she would not return to Australia, if an order was made for [Gina] to do so; it is worth noting, in her memorandum of 11 November 2022, that Ms [Piripi] states if [Gina] is to return to Australia an application may be made by the [Pikari] whānau to prevent [Jeffrey] from travelling with her. Ms [Piripi] goes on to submit:[31]

> I respect their position as I see every day just how important my children are to them all and how much they love them. It is however heart breaking to contemplate that my children may be split and end up in different countries because I can't split myself and be in two different countries at once and I don't know how I could ever possibly choose which child to be with, my children are my world both of them.

[31] Memorandum of Ms [Piripi] 11 November 2022 at [8] – [9].

[115] In that regard, Mr Harte referred the Court to the 2020 *Hague Good Practice Guide.* At [72] there is discussion about refusal by a parent to return with a child to the State of habitual residence. The rule, as emphasised in the guidance, is:

> "the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child".

Ms [Piripi] has created the current situation by travelling to Aotearoa New Zealand with [Gina] and then making the unilateral decision to stay, contrary to Mr [Peterson]'s request for them to return. Any argument that [Gina] would be placed in an intolerable situation if Ms [Piripi] chose not to return to Australia with her, if ordered by the Court, cannot be countenanced. Ms [Piripi] cannot create a situation and then make out a defence on the basis of her own actions.

[116] I respect the fact that Ms [Piripi] and the children are enjoying living in Aotearoa New Zealand and being immersed within their culture. Māori culture is unique to our country. It is steeped in traditional values and is rich in context. It may be argued that the return of [Gina] to Australia where she has no cultural connection would not be in her welfare and best interests, but I am not convinced that it would amount to an intolerable situation.

[117] The Pa Kooti record, referred to at [108], stated that a return to a potentially violent relationship would be a breach of hapū tikanga. According to the report of Ms Merrick, from a te ao Māori perspective, it is a breach of tikanga to expose children to violence.[32] However, there is a lack of evidence before the court to satisfy me that returning [Gina] to Australia, would mean that there is a risk of [Gina] being exposed to violence. The only evidence tendered from the Australian police suggests that it is in fact Ms [Piripi] who is the aggressor.

[118] Furthermore, any suggestion that it would be a breach of hapū tikanga for the children to be alienated from their whānau and culture, must rest with Ms [Piripi]. The children have already been removed to Aotearoa New Zealand, from their wider

[32] Report of Ms Merrick 3 February 2023 at [5.3]

whānau. If returned to Australia it will be incumbent on Ms [Piripi] and the whānau to ensure that the children's exposure to and involvement in their culture is maintained.

Conclusion:

[119] I am not satisfied that there is a grave risk that returning [Gina] to Australia would otherwise place her in an intolerable situation. There is a lack of evidence to support such a conclusion.

[120] If [Gina] were to return to Australia with her mother, there are potential accommodation options where they could stay if Ms [Piripi] did not wish to resume living with Mr [Peterson], for whatever reason.

[121] If Ms [Piripi] chooses not to accompany [Gina] to Australia if a return is ordered, she cannot rely on that decision to create an intolerable situation for [Gina]. [Gina] could reside with Mr [Peterson] whilst care and contact is resolved. Ms [Piripi] said that he does not present a risk to [Gina].

[122] Tikanga Māori suggests that [Gina] should be afforded an opportunity to connect with *all* of her whānau; the majority of whom live in Australia.

[123] For those reasons, I am not satisfied that [Gina] would be at grave risk of being placed in an intolerable situation if return to Australia were ordered.

[124] The second defence pleaded therefore fails.

[125] I now turn to consider the third defence.

Whether [Gina]'s return is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms?

[126] Whilst Ms [Piripi] does not explicitly mount a defence in these words, it is clear from her pleadings that she believes any return to Australia would create a

situation where [Gina] is no longer surrounded and absorbed by the whānau hapū, culture, whenua, language and her birthright.[33]

[127] Ms [Piripi] declares that there are no ancestral ties for the children to Australia and that her intention is to reside on tupuna whenua. She is of the view that this will enable the children to live and be immersed in the enjoyment of their culture, language, customs and whānau in their ancestral territory.[34] She says this is their right.

[128] It is her position that the Crown, in both New Zealand and Australia, and through the Hague, in attempting to "usurp" her and the hapū determining their own affairs, seek to deny them their hapū tikanga, their "customary law, the very foundation of our societal order, our very subsistence."[35]

[129] It is her view that denying her and the [the Pikari hapū] the ability to determine where [Gina] should live, breaches their right to self-determination, which was never ceded.

[130] Ms [Piripi] refers to the International Covenant on Civil and Political Rights, which has been ratified by New Zealand subject to certain exceptions, but which appears to accept Article 1, which states that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[131] Ms [Piripi] also refers the Court to the United Nations Declaration on the Rights of Indigenous Peoples, which was ratified in New Zealand in 2010.[36] She notes that this Declaration recognises the right of indigenous people to self-determine.

The Law:

[132] Any argument that a return of [Gina] to Australia would breach hapū tikanga, and therefore the belief of the hapū that they have the right to determine where [Gina]

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[33] Memorandum of [Helena Piripi] 10 August 2022 at [5].
[34] At attachment F.
[35] Affidavit of [Helena Piripi] 31 Aug 2022 at [14].
[36] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

should reside, needs to be considered carefully. Tikanga is widely recognised and affirmed as being part of the common law of this country.

[133] In the case of *Hopkins v Jackson*, as referred to by Ms Merrick in her report, the High Court cited the decision in *Ellis v R* regarding the application of tikanga:[37]

> It is well established that tikanga is part of the common law in Aotearoa New Zealand. It is also the case that the Courts may assume that Parliament intends legislation to be interpreted in keeping with te Tiriti o Waitangi, Treaty of Waitangi unless Parliament expressly indicates otherwise…

[134] The case law pertaining to this defence is scant. The Court was not referred to any specific common law by either party which may assist in determining this specific issue.

[135] The *Family Law Service* commentary provides some assistance:[38]

> In determining this ground, the Court can consider whether or not return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees, or political asylum. The Court can also consider whether, if the child were returned, the child or any other person would suffer discrimination on any of the grounds on which discrimination is not permitted by the United Nations International Covenant on Human Rights. This ground involves the Court making some delicate assessments of the Human Rights performances of other countries. To argue this ground it will be necessary to gather evidence of Human Rights breaches by a Particular State to show that the child or any other person would be likely to suffer discrimination.
>
> It is the situation in a particular overseas country that is envisaged by this ground, rather than the situation of an overseas home or household, which is covered by other grounds. The ground could be used if there was evidence that the children were involved in the production or trafficking of drugs.[39]
>
> It has been argued that return of an aboriginal child to Australia will subject that child to discrimination.[40] The argument was rejected through lack of evidence of Human Rights breaches in Australia.

Analysis and findings:

[136] [Gina] is not a refugee. Political asylum is not sought. There has been no argument advanced that [Gina] would be discriminated against if returned to Australia.

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[37] *Hopkins v Jackson* [2022] NZHC 2649; *Ellis v R* [2022] NZSC 114.
[38] *Family Law Service* (online ed, Lexis Nexis) at [6.165.06].
[39] *S v M* [1993] NZFLR 584 (FC).
[40] *B v S* (1994) 12 FRNZ 473 (DC).

[137] However, Ms [Piripi] is concerned that if [Gina] is returned to Australia, her right to engage with her cultural heritage may be impacted upon. As I have stated, earlier in this judgement however, [Gina] has many maternal whānau members in Australia, who may be able to assist with ensuring that her cultural connection is maintained, until such time as long term decisions about care and contact can be made by the Court.

[138] In Ms Merrick's report, she states that tikanga Māori provides that [Gina]'s whānau have whānaungatanga obligations to her and she to them. It is the responsibility of [Gina]'s entire whānau to ensure that she is engaged with her culture. [Gina]'s maternal whānau, who reside in Australia, appear to have been involved in her upbringing, before she was removed to Aotearoa New Zealand. As parents to Ms [Piripi], [Gina]'s maternal grandparents may be able to assist with ensuring she knows her culture. Similarly, there are obligations on Ms [Piripi] to ensure her daughter's cultural connection and, although not as intense or freely available as in our country, there are opportunities for cultural engagement within Australia, such as through kapa haka. There may also be opportunities to ensure regular travel to Aotearoa New Zealand to build cultural connections, if it is decided that [Gina] should reside in Australia long term.

[139] In my view, [Gina]'s right to engage with her cultural heritage should not be impacted on simply because of a return to Australia, provided the whānaungatanga obligations are observed. This will be a matter for [Gina]'s mother and the wider whānau.

[140] Whilst Ms [Piripi] argues that any decision for a return of [Gina] to Australia usurps the sovereignty of the hapū, and their right to self-determination; with respect, this decision is about [Gina] and not the hapū.

[141] In addition, it appears questionable as to whether in fact [Gina] is able to whakapapa to [the Pikari hapū], whose tikanga Ms [Piripi] claims applies in this instance.

[142] Ms [Piripi] did not file evidence of [Gina]'s whakapapa. That is not surprising as whakapapa may be considered tapū. At the very least it is a taonga and to be respected. It is therefore understandable that Ms [Piripi] may not want her whakapapa to simply sit on a court file to be accessed by people with whom she does not wish to share this information, or who may not understand the significance of being privy to such a taonga. The difficulty that this presents, however, is that the cultural connections for [Gina] have not been established in evidence.

[143] Ms [Piripi] made submissions that [Gina]'s whakapapa link is 'ancient'. She referred to [whakapapa details deleted]. She submitted that the grandparents of her [details deleted], provide that link. It appears, however based on the report provided by Ms Merrick, that this link is, at best, tenuous. In the absence of evidence from a Kaumatua or Rangatira, the Court is simply left in the position where the evidence does not support a strong link between [Gina] and [the Pikari hapū]. It is therefore questionable what right they have to assert their own tikanga and decision making over [Gina].

[144] I have also turned my mind to Ms [Piripi]'s assertion that Mr and Mrs [Pikari] are whāngai Grandparents to [Gina]. In that respect, I again refer to the report of Ms Merrick. Ms Merrick advises the Court that whāngai is the "tikanga practice of fostering or adopting a child. The tamaiti whāngai (adopted child) is raised by someone other than their birth parents. There are usually whakapapa connections between the whāngai parents and the whāngai child".[41]

[145] In her report, Ms Merrick refers to the decision of Judge Courtney in *Chief Executive for Oranga Tamariki v AR* where his Honour cited Dr Merata Kawharu, a Ngāpuhi academic.[42] Judge Courtney stated:[43]

> [197] Whāngai often involves placing a child with their grandparents, but it can also be another family member or someone unrelated. It can be a short term, long term or permanent arrangement. A child is never placed without discussion and never placed with people whom the whānau does not know.

[41] Report of Ms Merrick 3 February 2023 at [4.29]
[42] Report of Ms Merrick 3 February 2023 at [4.30]
[43] *Chief Executive for Oranga Tamariki v AR* [2020] NZFC 4046

> [198] Whāngai is intrinsically linked to whakapapa and whānaungatanga. Belonging is of great significance, especially with whom the child is connected as knowledge of a child's own ancestral history and lineage is important in a child's sense of self.

[146] The evidence before me is that Mr [Peterson] does not know Mr and Mrs [Pikari] and, on the pleadings, he was certainly not privy to the agreement that Mr and Mrs [Pikari] become whāngai grandparents of [Gina].

[147] There is no evidence to suggest that any of [Gina]'s wider whānau, including both maternal wider whānau nor paternal whānau were involved in such an important decision.

[148] The decision made by Ms [Piripi] and the [Pikari] whānau, that [Gina] is a whāngai grandchild, therefore, appears to be inconsistent with the tikanga regarding whāngai.

[149] In the absence of specific evidence from Ms [Piripi] in relation to [Gina]'s whakapapa and her link to [the Pikari hapū], I am not satisfied that their tikanga is applicable to [Gina].

[150] On that basis, there can be no argument that a return of [Gina] to Australia, in accordance with the Hague Convention, would usurp the right of the hapū to self determination and breach their tikanga.

Conclusion:

[151] There is a risk that returning [Gina] to Australia could see her divorced from her culture. However, it is incumbent on [Gina]'s parents and her wider whānau to ensure that this does not occur. The tikanga of whānaungatanga brings with it not only rights but also obligations. Ms [Piripi] and Mr [Peterson], as [Gina]'s parents, should foster her cultural connection irrespective of which country she resides in; whether that be within their respective homes, by ensuring she has opportunities to advance her connection with Aotearoa New Zealand or her exposure to Māori culture through kapa haka within Australia. It is my view, that if they fulfil those obligations any risk of cultural disconnection should be mitigated.

[152] The argument that this Court is "usurping" the rights of Ms [Piripi] and the Hāpu to determine where [Gina] should reside, must fail. The links between [Gina] and the Hāpu are tenuous. I am not satisfied that there is a whakapapa link nor that there is a whāngai link which would potentially justify [the Pikari hapū] tikanga applying. Ms [Piripi] does not have the right to unilaterally make decisions about where [Gina] should reside, without reference to Mr [Peterson], who still retains parental responsibility.

[153] Because [Gina] will have the ability to connect with her culture through guidance from her parents and wider whānau and there are opportunities for engagement in her Maori culture within Australia, I am not satisfied that a return to that country would result in a breach of her human rights and fundamental freedoms.

[154] On that basis, the third defence fails.

Overall conclusion:

[155] Because I have determined that none of the defences apply in this case, it is not necessary to take the third step, as set out at [51], and consider whether or not I should exercise my discretion to order a return of [Gina] to Australia.

[156] The law is clear. Mr [Peterson] has established that the jurisdictional requirements in s105 of the Act have been met. The defences relied upon by Ms [Piripi] have not been proven and have failed. On that basis [Gina] must be returned to Australia promptly.

[157] I, therefore, make the following Orders and directions:

1. In accordance with the Hague Convention, [Gina] must be promptly returned to the State of Australia.

2. Ms [Piripi] has 14 days in which to organise [Gina]'s travel to Australia.

3. The passport, currently held by the Kaikohe Family Court, is to be released to Mr Harte, for the Central Authority, so that he may assist Mr [Peterson] to

obtain a new passport for [Gina]. In that respect Ms [Piripi] is to arrange for [Gina] to have a new passport photo taken within 7 days and this is to be emailed to Mr Harte.

4. In the event that Ms [Piripi] does not make arrangements for [Gina]'s return within 14 days, the matter is to be referred back to the Court for a warrant to issue to enable a police officer or social worker to collect [Gina] and deliver her to Mr [Peterson] or another appropriate person for the purpose of return to Australia.

5. In order to effect travel, the Order preventing removal of [Gina] from New Zealand will be discharged from the date of confirmation of travel.

Addendum:

[158] I appreciate that Ms [Piripi] will be deeply disappointed by this decision. It is clear that she is connected with her culture and is enjoying being immersed within [the Pikari hapū]. They have shown her and her children aroha, whānaungatanga and manaakitanga.[44]

[159] However the law is clear; and the Hague Convention has been implemented in our Act to protect children from wrongful removal and retention and to establish procedures to ensure their prompt return to their State of habitual residence. In this case, for [Gina], that means a prompt return to Australia.

[160] I thank Ms [Piripi] and Mr Faulkner for the way that they presented Ms [Piripi]'s submissions. Despite not recognising the jurisdiction of this Court, they were respectful of the process and all involved.

[161] Similarly, Mr [Peterson] is thanked for his patience and his quiet, thoughtful attendance with Ms Gibson. It is now 20 months since he has seen his daughter face to face. That is a considerable length of time to wait to see a child who is so dearly loved by all involved.

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[44] Aroha – love; whānaungatanga – kinship; manaakitanga – respect, generosity and care

[162] Mr Harte and Ms Merrick are also sincerely thanked for their assistance to the Court.

[163] In the proverb referred to by Ms Merrick in her report about the pā harakeke or flax bush being likened to whānau, she stated that the older shoots surround the children in a way that ensures their growth. She says that it is the responsibility of the older members of the whānau to protect the children. Accordingly, with respect to tikanga Māori, decisions for children may be made with reference to wider whānau, to ensure that the best interests of the child are reflected in those decisions. In accordance with the law, at the very least, both parents and or any guardians are responsible for making those decisions. Unilateral decisions about where [Gina] resides should not and cannot be made. I ask Ms [Piripi] to respect the decision of this Court and ensure the prompt return of [Gina] to Australia, without incident. Her desire to do what is in the welfare and best interests of her daughter will be reflected in her actions.

_____
Judge M L Howard-Sager
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 19/03/2023