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IN THE FAMILY COURT
AT PALMERSTON NORTH

I TE KŌTI WHĀNAU
KI TE PAPAIOEA

FAM-2015-054-000496
[2023] NZFC 3350

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[NATALIE ANDREWS] Applicant
AND	[FRANCIS BUCKLEY] Respondent

Hearing: 2 February 2023

Appearances: J Sutton for the Applicant
D Vincent for the Respondent
C Davidson as Lawyer for Child

Judgment: 5 April 2023

RESERVED DECISION OF JUDGE K BROUGHTON

Application before the Court

[1] The applicant, Ms [Natalie Andrews] ([Ms Andrews]), on her own accord, has applied for an order pursuant to s 105(2) of the Care of Children Act 2004 (COCA), for the return of her son, [Thomas Buckley] ([Thomas]), born [date deleted] 2010, to Australia.

[2] The respondent, Mr [Francis Buckley] ([Mr Buckley]), is [Thomas]'s father. [Mr Buckley] has had the exclusive care of [Thomas] since March 2020. [Mr Buckley] and [Thomas] are resident in New Zealand.

Background

[3] [Thomas] was born in New Zealand, but moved to Australia with [Ms Andrews] and [Mr Buckley] in early 2013. In late 2013, the parties separated. Shortly after, the family moved to New Zealand. In early 2014, the family relocated back to Australia.

[4] In 2015, [Mr Buckley] and his mother, [Ms Sweet], took [Thomas] to New Zealand without [Ms Andrews]'s consent. Following a successful Hague Convention application, [Thomas] was returned to Australia.

[5] In 2018, [Mr Buckley] again took [Thomas] to New Zealand without [Ms Andrews]'s consent, and in breach of an Australian court order. They returned to Australia later that year.

[6] In 2020, [Mr Buckley] took [Thomas] to China, again without [Ms Andrews]'s consent. While [Thomas] was in China, [Ms Andrews] had video calls with him once a month for around 30 minutes. Those calls were supervised by [Mr Buckley]. While in China, [Mr Buckley] says he lost [Thomas]'s Australian passport.

[7] In 2021, [Mr Buckley] took [Thomas] from China to New Zealand, without [Ms Andrews]'s consent or knowledge. She did not discover this until August 2022, when, during phone call, she deduced that [Thomas] was not in China due to his unseasonable clothing. She promptly filed a without notice application for orders preventing [Thomas]'s removal from New Zealand. At this juncture, [Mr Buckley] then ceased facilitating video contact between [Thomas] and his mother.

[8] In November 2022, [Ms Andrews] applied for orders to return [Thomas] to Australia. The same month, she flew to New Zealand to see [Thomas]. She states that she was not once left unsupervised with [Thomas].

Issues for determination

[9] The issues for determination can be summarised as follows:

(a) Has [Thomas] been removed from a contracting state?

(b) Are the grounds of s 106(1)(a) and s 106(1)(d) of the COCA made out?

(c) Are Hague Convention proceedings bound by the best interests of the child under s 4 of the COCA?

(d) Should the Court exercise its discretion?

The law

[10] Section 105 of the COCA sets out the requirements for an application for an order for the return of a child:

> **105 Application to court for return of child abducted to New Zealand**
>
> (1) An application for an order for the return of a child may be made to a court having jurisdiction under this subpart by, or on behalf of, a person who claims—
>
> (a) that the child is present in New Zealand; and
>
> (b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and
>
> (c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and
>
> (d) that the child was habitually resident in that other Contracting State immediately before the removal.
>
> (2) Subject to section 106, a court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—
>
> (a) an application under subsection (1) is made to the court; and
>
> (b) the court is satisfied that the grounds of the application are made out.
>
> …

[11] Section 106 sets out the grounds for refusal of an order under s 105. Relevant grounds are as follows:

> **106 Grounds for refusal of order for return of child**
>
> (1) 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; or
>
> (b) that the person by whom or on whose behalf the application is made—
>
> …
>
> (ii) consented to, or later acquiesced in, the removal; or
>
> …
>
> (d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or
>
> …

[12] Section 95 of the COCA defines "removal" as "the wrongful removal or retention of the child within the meaning of Article 3 of the Convention". Article 3 of the Hague Convention states that removal is 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.

[13] Section 4, which provides for the paramountcy of the welfare and best interests of the child, does not limit sub para 4 of pt 2, which relates to international child abduction.

Section 105(1)

[14] The onus of satisfying the jurisdictional criteria under s 105(1) lies on the applicant, [Ms Andrews]. [1]

[15] It is common ground that [Thomas] is now present in New Zealand, and that he was originally removed from Australia, a contracting state. It is not in issue that [Ms Andrews] was exercising her custody rights at the time of [Thomas]'s removal, and by resiling from claims of acquiescence, I infer that [Mr Buckley] does not challenge that [Ms Andrews] had custody rights at the time. The sole jurisdictional issue remaining is whether [Thomas] was habitually resident in a contracting state immediately before his removal.

Has [Thomas] been removed from a contracting state?

The law

[16] In *H v H*, Grieg J held that "habitual" is to be construed in the ordinary meaning of the words: "The essence of 'habitual' is customary, constant, continual. The opposite of that is casual, temporary or transient".[2]

[17] In *Punter v Secretary for Justice (No 2)*, the Court of Appeal held that determining a child's habitual residence is a broad factual enquiry, in which parental purpose in residing in a particular country is important, but not determinative.[3] In the first *Punter* case, Glazebrook J opined that a longer period of residence in a country with an unfamiliar language and culture may be necessary to establish a habitual residence than one with a familiar language and culture.[4]

[18] In *SK v KP*, Glazebrook J opined that, even using a "settled purpose" test, residence for a limited period may result in a change of habitual residence, provided that the limited period is sufficiently long as to describe the residence as "settled".[5]

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[1] *Basingstoke v Groot* [2007] NZFLR 363 at [10].
[2] *H v H* (1995) 13 FRNZ 498 (HC) at 501.
[3] *Punter v Secretary for Justice (No 2)* [2007] 1 NZLR 40 at [189].
[4] *Punter v Secretary for Justice (No 1)* [2004] 2 NZLR 28 at [86]; see also *Langdon v Wyler* [2017] NZHC 2535 at [14].
[5] *SK v KP* [2005] 3 NZLR 590 at [77].

Case law

[19] In *HJG v SRG*, the parties and their child originally resided in Argentina, a contracting state.[6] After some relationship difficulties, the family moved to Malaysia, a non-contracting state. The mother then took the child to New Zealand, without the father's consent.

[20] The father contended that the mother orchestrated the move to Malaysia to facilitate the abduction to New Zealand, avoiding jurisdiction under the Convention. The Court considered that it did not have jurisdiction, the child not having been immediately resident in a contracting state prior to the move to New Zealand, and there being no evidence to support the father's allegation.[7]

[Ms Andrews]'s position

[21] Counsel for [Ms Andrews] submits that [Thomas] was habitually resident in Australia immediately prior to his removal, without her consent, to China, and eventually New Zealand.[8]

[22] Counsel submits that [Thomas] was not settled in China for the following reasons:[9]

(a) [Thomas] no longer had Chinese citizenship;

(b) [Thomas] was unable to formally enrol in school;

(c) China's COVID response; and

(d) [Thomas] was alienated by [Mr Buckley].

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[6] *HJG v SRG* FC Wellington FAM-2011-085-000569, 2 September 2011.
[7] *HJG v SRG*, above n 6, at [23], [33].
[8] Bundle of Documents at 2, 6, 17; [Natalie Andrews] – Synopsis of Submissions of Counsel for the Applicant, 31 January 2023 at 6-7.
[9] [Natalie Andrews] – Synopsis of Submissions of Counsel for the Applicant, 31 January 2023 at 8.

[Mr Buckley]'s position

[23] Counsel for [Mr Buckley] submits that, during the 20 months he spent there, [Thomas]'s place of habitual residence changed from Australia to China for the following reasons:[10]

(a) [Thomas] attended school in China, which he told the psychologist he enjoyed;

(b) [Thomas] was involved in extracurricular activities in China;

(c) [Thomas] had contact with his paternal grandparents, which he told the psychologist he enjoyed; and

(d) [Thomas] identifies as "a Kiwi", and "Chinese".

[24] Affidavit evidence provided by Mr Jie (Jerry) Yu, an expert on Chinese law, for [Ms Andrews], is of the opinion that [Thomas] would have been enrolled in school as an international student, and that, under Chinese law, [Thomas] was habitually resident in China. The test under Chinese law is roughly analogous to that under New Zealand law, requiring continuous residence for one year, and entailing a factual enquiry as to whether the person concerned "takes such place as his/her living centre".[11]

Lawyer for Child's position

[25] Ms Davidson submits that [Thomas] was habitually resident in Australia immediately prior to his removal.[12] She does not address the issue of habitual residence in China in written submissions but in oral submissions was clear as to why this was the case.[13]

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[10] [Francis Buckley] – Submissions of Counsel for the Respondent, 31 January 2023 at 2-3.
[11] Bundle of Documents at 126.
[12] Lawyer for Child – Legal Submissions, 30 January 2023 at [7].
[13] Notes of Evidence, p 33, lines 20-30.

[26] Ms Davidson suggests that [Mr Buckley]'s claimed motive for moving to China, China's response to COVID-19, is facetious, and had the effect of defeating [Ms Andrews]'s ability to assert her parental rights.[14]

Analysis

[27] Section 105(1)(d) requires that the child in question was habitually resident in the contracting state from which they were removed *immediately* before the removal. If [Thomas] was, in the intervening 20 months, habitually resident in China, then the jurisdictional requirement under s 105(1)(d) is not satisfied.

[28] There is no definition of "habitually resident" in statute, nor is there a clear authority as to the relevant factors to be considered in determining habitual residency. In the absence of guidance, I will assess favours weighing for and against a finding that [Thomas] was habitually resident in China prior to his removal to New Zealand.

[29] I consider that the following factors weigh in favour of finding that [Thomas] was habitually resident in China:

(a) [Thomas] was in China for approximately 20 months; and

(b) [Thomas] was attending school and extracurricular activities.

[30] I consider that the following factors weigh in favour of finding that [Thomas] was not habitually resident in China:

(a) [Mr Buckley] stated, and told [Ms Andrews], that he wanted to move to China because of its perceived better management of the pandemic, suggesting a temporary relocation;

(b) [Thomas] retained Australian citizenship;

(c) [Thomas] continued attending Australian school classes online for a period;

[14] At [17].

(d) [Mr Buckley] wrongfully removed [Thomas] from Australia.

[31] Though [Thomas] spent a significant period of time in China and appears to have led a normal life for a child of his age, I consider that [Mr Buckley] did not have a settled purpose in moving to China. Taking [Mr Buckley]'s submissions at their most favourable, he moved to China because of China's management of COVID-19 at the time. It is also notable that he retained his Australian citizenship.

[32] Though the absence of a settled purpose is not determinative, I consider that, in the circumstances, and noting the policy considerations in cases of child abduction, [Thomas] was not habitually resident in China in the 20-month period between leaving Australia and arriving in New Zealand. I consider that, in the words of the Court in *H v H*, while [Thomas]'s residence in China was reasonably constant and continual, it was not customary due to his wrongful removal from Australia. I further determine that this move was likely intended to be temporary.

[33] Given this conclusion, and the fact that [Thomas] was habitually resident in Australia prior to his removal to China, I find that his removal to China was the operative "removal" for the purposes of s 105, and that s 105(1)(d) is satisfied.

[34] This being the only jurisdictional requirement in issue, I consider that [Ms Andrews] has established all of the requirements in s 105(1), thus the Court has jurisdiction.

Section 106 – Grounds for refusal of order for return of child

[35] Where the applicant has satisfied the jurisdictional requirements under s 105(1), the onus then lies on the person opposing the return of the child, [Mr Buckley], to satisfy the Court that one of the grounds under s 106(1) is established.

[36] While it was originally contended by [Mr Buckley] that [Ms Andrews] consented to, or later acquiesced to [Thomas]'s removal, this ground for refusal is no longer pursued.

[37] Accordingly, [Mr Buckley]'s opposition is based on the following grounds:

(a) The application is made more than one year after [Thomas]'s removal, and he is now settled in New Zealand (s 106(1)(a)); and

(b) [Thomas] objects to being returned to Australia, having attained an age and degree of maturity at which it is appropriate to give weight to his views (s 106(1)(d)).

Child settled – s 106(1)(a)

The law

[38] While the fact that an abducting parent has concealed the removal of a child may go to the residual discretion, I conclude that it does not influence the date at which the period begins to run. The defence under s 106(1)(a) has been described as a defence of substance, rather than one of limitation.[15] However, where an abducting parent has concealed the child's removal, it may be difficult for that parent to establish that the child is settled in New Zealand.[16]

[39] There is no definition of "settled" in the Act, nor the Convention. From the authorities, it can be gleaned that the following factors weigh in favour of finding that the child is settled:[17]

(a) the child attends school or pre-school;

(b) the child is engaged in extracurricular activities;

(c) the child has connections with family in New Zealand;

(d) the child is developing friendships and interests; and

(e) the child has an established abode.

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[15] *HJ v Secretary for Justice* CA140/04, 11 April 2006, [2006] NZFLR 1005 at [53].
[16] At [29]; *Simpson v Hamilton* [2019] NZCA 579 at [48], [54].
[17] See *Tonlioli v Pata* [2015] NZFC 5151; *Degarmo v Nathaniel* [2016] NZFC 3974.

Case law

[40] In *Tonlioli v Pata*, the mother sought to rely on the defence under s 106(1)(a), the father's application being made two years after the initial removal.[18] The father argued that he had acquiesced to the child remaining in New Zealand until a date within the one-year period. The Court did not accept this argument, finding that the father's acquiescence was not sufficiently clear and cogent.[19] Though the mother's conduct was criticised, the Court found that it was not so egregious as to uphold the principles of the Convention over the best interests of the child.[20]

[41] In *U v R*, the mother sought to rely on the defence under s 106(1)(a), the application being made after the one-year period had elapsed.[21] Judge Green observed that the ground was technically satisfied, but that the one-year period had only expired due to the mother's abilities to conceal the children in New Zealand. The Court opined that, in the circumstances of the case, this ground alone could not provide the basis for removal; however, the Court declined to make an order for the return of the children on other grounds.[22]

[42] In *Simpson v Hamilton*, the mother had removed the child from Germany, in breach of access orders made by the German courts.[23] The mother took a number of steps to conceal the child's whereabouts from the father, including deceiving immigration authorities as to her rights of custody (rendering both liable to deportation), changing the schools the child attended, and moving to a remote part of New Zealand. The Court held that the mother had not discharged the onus of proving that the child was settled in New Zealand, observing that the defence was founded on a strategy of concealment and deceit. It noted that, like many children, she quickly adjusted to her new surroundings, but that did not necessarily mean she was settled.[24]

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[18] *Tonlioli v Pata*, above n 16.
[19] At [39].
[20] *Tonlioli v Pata* at [65].
[21] *U v R* [1998] NZFLR 385.
[22] At 395.
[23] *Simpson v Hamilton*, above n 15.
[24] *Simpson v Hamilton*, above n 15, at [53].

[Ms Andrews]'s position

[43] [Ms Andrews] is extremely clear in her affidavit evidence that she did not consent to [Thomas]'s removal from Australia, nor did she acquiesce to his retention in China.[25]

[44] Counsel submits that the application was made within one year of [Thomas]'s removal from China, and the one-year period should run from that date.[26]

[45] Counsel submits that, if the time period is found to run from [Thomas]'s removal from Australia, the following impediments to [Ms Andrews] seeking [Thomas]'s return should be taken into account:[27]

(a) China is not a party to the Convention, which has not been incorporated into Chinese law.

(b) If [Ms Andrews] obtained an order for [Thomas]'s return from China, there would have been no feasible solution for his removal at the time.

(c) Chinese courts would have declined jurisdiction until 23 March 2021, at which point [Thomas] had been in China for one year.

(d) Even if the Chinese courts did have jurisdiction, [Ms Andrews] would not have been able to enter China, due to China's border control measures at the time.

(e) [Mr Buckley]'s removal of [Thomas] to China was not in breach of Chinese law, and would likely not have disqualified him as [Thomas]'s legal guardian.

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[25] Bundle of Documents at 7, 17, 19.
[26] [Natalie Andrews] – Synopsis of Submissions for the Applicant, 31 January 2023 at 8.
[27] At 8-9.

(f) If Chinese courts considered it appropriate to disqualify [Mr Buckley], they would not leave [Thomas] in a state of unattended custody and guardianship.

(g) If [Thomas] expressed a desire to the Chinese courts that he wished for [Ms Andrews] to have sole custody of him, it is unlikely that such an order would have been made.

(h) [Mr Buckley] concealed [Thomas]'s whereabouts from November 2021 to August 2022.

[46] It is submitted that the following grounds weigh against finding that [Thomas] is settled in New Zealand:[28]

(a) [Mr Buckley] has full control and influence over [Thomas], who, it is submitted, has no independence.

(b) Dr Tappenden made observations regarding [Mr Buckley]'s demeanour when [Thomas] spoke to other adults and wondered whether he had "heavily guided" [Thomas]'s interactions with [Ms Andrews].

[47] Counsel also addresses a number of points regarding [Thomas]'s potential resettlement in Australia. I will address these points when discussing the Court's discretion below.

[Mr Buckley]'s position

[48] Counsel for [Mr Buckley] submits that the one-year period began when [Thomas] was removed from Australia, and has now elapsed.[29]

[49] It is submitted that [Thomas] is settled in New Zealand for the following reasons:[30]

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[28] [Natalie Andrews] – Synopsis of Submissions for the Applicant, 31 January 2023 at 11-12.
[29] [Francis Buckley] – Submissions of Counsel for the Respondent, 31 January 2023 at 5.
[30] At 6-10.

(a) [Thomas] is a New Zealand citizen, and both [Mr Buckley] and [Ms Sweet] are permanent New Zealand residents.

(b) [Thomas] has a settled residence in New Zealand, which [Mr Buckley] has renovated.

(c) [Thomas] is settled socially, having many friends in New Zealand. It is reported by his teacher that he is well adjusted.

(d) Dr Tappenden observes that [Thomas]'s feeling of being settled is more than superficial.

(e) [Thomas] has been out of Australia for nearly three years.

(f) [Thomas] has had consistent contact with [Ms Andrews] following his removal from Australia.

(g) [Ms Andrews] is capable of visiting [Thomas] in New Zealand.

(h) [Mr Buckley]'s deception does not meet the level of that in *Simpson v Hamilton*.

Lawyer for Child's position

[50] Ms Davidson submits that the following factors support the view that [Thomas] is settled:[31]

(a) [Thomas] has a secure home.

(b) [Thomas] attends school.

(c) [Thomas] has developed friendships and interests.

(d) [Thomas] has a close relationship with family living nearby.

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[31] Lawyer for child – Legal submissions, 30 January 2023 at [13].

(e) [Thomas] has opportunities to engage in cultural activities, and mix with others in the same cultural group.

(f) [Thomas] wishes to remain in New Zealand.

[51] Ms Davidson submits that [Thomas] is settled in New Zealand, but that this is a result of his own ability to adapt, rather than the environment in which he lives.[32] She submits that [Mr Buckley]'s deception and concealment invalidate the argument that [Thomas] is psychologically and physically settled in New Zealand.[33]

Analysis

[52] [Thomas] was removed from Australia in 2020. [Ms Andrews] did not consent nor later acquiesce, to this removal. [Ms Andrews] commenced proceedings in late 2022, when she became aware that [Thomas] was no longer in China. It follows that this application is therefore outside the statutory period, thus I consider that it must be determined whether or not [Thomas] is settled in New Zealand.

[53] On the facts before me, there is significant evidence to suggest that [Thomas] is settled in New Zealand. I am not convinced by Ms Davidson's argument that [Mr Buckley]'s deception and concealment negates that state of settlement. I consider that the deception and concealment is instead relevant to the exercise of the Court's discretion. I refer to *U v R*, relied on by Ms Davidson, whereby while the Court stated that the concealment would render settlement alone insufficient to justify refusal, and declined to order the child's return, it did not state that concealment or deceit negates that state of settlement.

[54] I consider that *Simpson v Hamilton*, the other authority relied on by Ms Davidson, can be distinguished by a slim margin. While [Mr Buckley] certainly deceived [Ms Andrews], and concealed [Thomas] in New Zealand, his conduct is, by a slim margin, not as egregious as that of the mother in *Simpson*. The decision in *Simpson* regarding the child's settlement was also influenced by the disruption to the

[32] Lawyer for child – Legal Submissions, 30 January 2023 at [15].
[33] At [21].

child's life resulting from the mother's attempts at concealment, and their liability to deportation.

[55] Accordingly, I consider that the ground under s 106(1)(a) is made out. The application is made out of time. [Thomas] is settled in New Zealand.

Objection on the part of the child – s 106(1)(d)

The law

[56] The Court of Appeal, in *White v Northumberland,* set out a four-step approach to this ground of refusal:[34]

> (a) Does the child object to return?
>
> (b) Has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views?
>
> (c) What weight should be given to the child's views?
>
> (d) How should the residual statutory discretion be exercised?

[57] An objection on the part of a child must carry a notion of clarity and force in the way it is expressed. An expression of preference either does not necessarily amount to an objection.[35] Judge de Jong, in *Karly v Karly*, held that an objection:[36]

> (a) Must be stronger than a preference.
>
> (b) Is a question of fact.
>
> (c) Must be valid and reasonable.
>
> (d) Must be an objection to returning the originating country.

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[34] *White v Northumberland* [2006] NZFLR 1105 (CA) at [44].
[35] *Bayer v Bayer* [2012] NZFC 2878 at [63].
[36] *Karly v Karly* [2017] NZFC 10030 at [52].

[58] Chisholm J, in *W v N*, held that the change in wording in s 106(1)(d) to "give weight to" from "take account of" with the introduction of the COCA does not fundamentally alter the interpretation that should be applied.[37]

[59] The age of a child is an objective fact, however, maturity is a more nebulous concept. There is no guidance in the Convention, nor the Act. While the courts must be cautious not to put too much weight on the age of the child,[38] it has been observed that the views of younger children are more likely to be influenced by subjective factors.[39] Elias J opined that the point at which a child's views can be taken into account is "the time when they are able to reason".[40]

[60] Where a child is of sufficient age and maturity to take his or her views into account, the weight given to those views must then be determined. The child's reasons for objecting are a significant factor. Substantial weight has been given to a child's views where those views were considered "reality based",[41] or "cogent and rational".[42]

[61] Where the child's views are significantly influenced by a parent, limited weight ought to be given to those views.[43] The same can be said where a child's objection, though ostensibly reasonable, is not informed of the likely consequences of relocation to or retention in the proposed country of residence.[44]

Case law

[62] In *M v M*, an 11-year-old child objected to returning to Oregon to live with his mother.[45] The father wrongfully removed the child to New Zealand, in breach of an Oregon court order, and without giving notice to the mother. The child expressed "clear and articulate" reasons for his preference, though it was observed that many of his reasons for preferring New Zealand were also applicable to life in Oregon. He was settled in New Zealand, with friends at school.

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[37] *W v N* [2006] NZFLR 793.
[38] See *JRW v EW* HC Dunedin CIV-2006-412-720, 16 October 2006 at [49].
[39] See *M-SCN v JAW* FC Rotorua FAM-2010-063-851, 28 February 2011 at [98].
[40] *Clarke v Carson* [1996] 1 NZLR 349 at 354.
[41] *PIC v GCK* [2008] NZFLR 391 (FC).
[42] *Coates v Bowden* (2007) 26 FRNZ 210.
[43] *White v Northumberland*, above n 33 at [43]; *M-SCN v JAW* at [117].
[44] *Qamus v Rowley* [2017] NZHC 2260.
[45] *M v M* [2012] NZHC 874.

[63] The deciding factor for the child was alleged abuse at the hands of his mother. The Court found that his views were decisive, and his allegations of abuse were consistent and independent from the views of his father, and substantial weight was attached to his views.[46] The child's objections aside, the High Court held that the Family Court was right to order his return to Oregon. It observed that the abuse was not substantiated, that Oregon courts were able to ensure his welfare, and the object of the Convention clearly favoured his return. The father's conduct was described as egregious and flagrant and had the effect of denying the child a meaningful relationship with his mother.[47]

[Ms Andrews]'s position

[64] Counsel for [Ms Andrews] submits that, while [Thomas] objects to returning to Australia, limited weight should be given to his views because of his age, but particularly his maturity.[48] It is also submitted that [Thomas]'s objections are heavily influenced by [Mr Buckley], and that [Thomas] is unable to conceptualize his life in Australia.[49]

[65] It is submitted that no real weight should be given to [Thomas]'s views, those views being strongly influenced by his father. Regarding [Thomas]'s maturity and the weight to be given to his views, the following points are noted:[50]

(a) Dr Tappenden, the s 133 report writer, observed that [Thomas]'s decision making processes are likely influenced by short-term outcomes, rather than long-term ones.

(b) Dr Tappenden observed that [Thomas] "may have inherited his father's tendency towards over-caution and potentially anxiety, which may further promote a desire to maintain the status quo".

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[46] At [45]-[47].
[47] *M v M*, above n 44, at [48]-[52].
[48] [Natalie Andrews] – Synopsis of Submissions of Counsel for the Applicant, 31 January 2023 at 16.
[49] At 17.
[50] At 16-17.

(c) Dr Tappenden commented that "there are also risks inherent in remaining with his father whose behaviour has been unilaterally undermining of [Ms Andrews]'s role as [Thomas]'s mother, and who may have difficulty differentiating his own needs from that of his son".

(d) Dr Tappenden observed that all of [Thomas]'s extracurricular activities are supervised by [Mr Buckley], who oversees each aspect of [Thomas]'s life. Counsel submits that this shows that [Thomas] does not have the independence that a 12-year-old ordinarily has.

(e) Dr Tappenden noted that "[Thomas] has aligned with his father may be apparent even to the untrained eye", and concluded that "…there is sufficient evidence to conclude that [Thomas]'s views … have been materially and significantly influenced by his father".

(f) Dr Tappenden observed that [Thomas] is unable to test his cognitive biases "because his contact with his mother … has been limited in its depth and quality".

[Mr Buckley]'s position

[66] Counsel for [Mr Buckley] submits that [Thomas] has expressed a clear desire to remain in New Zealand, and objects strongly to being returned to Australia, this objection being connected with the fact that he settled in his current environment.[51]

[67] Regarding [Thomas]'s maturity generally, counsel notes that Dr Tappenden observed that [Thomas] demonstrated a normal understanding of these proceedings for a child of his age, and that his cognitive maturity is age congruent.[52] It is also submitted that the views of a child aged 12 should be given significant weight, with *White v Northumberland* cited in support.[53]

[51] [Francis Buckley] – Submissions of Counsel for the Respondent, 31 January 2023 at 11.
[52] At 11.
[53] At 12.

[68] Regarding influences on [Thomas]'s views, counsel notes the following points:[54]

(a) Dr Tappenden found that [Mr Buckley]'s influence on [Thomas] is effectively unavoidable given the events leading to the relocation to New Zealand, and that it is common for children of [Thomas]'s age to internalise the perspective of one parent, effectively "picking a side".

(b) There is no little evidence demonstrating that this influence was overtly intentional, or as severe as comparable examples, *Simpson v Hamilton* being cited.

(c) While there is conflicting evidence as to the extent and quality of [Thomas]'s contact with [Ms Andrews], it is clear that there has been consistent contact since he has been away from Australia.

(d) The adverse impact of relocation on [Thomas]'s relationship with his mother can be overcome, the parties demonstrating a willingness to continue consistent contact.

(e) Dr Tappenden suggested that targeted intervention and increased contact might improve [Thomas]'s relationship with [Ms Andrews].

(f) Over and above any influence from [Mr Buckley], [Thomas] is primarily influenced by the extent to which he is settled in New Zealand. Dr Tappenden commented that, while [Thomas]'s views might have begun with significant influence from [Mr Buckley], they are likely now also perpetuated by social factors external to [Mr Buckley]'s influence.

(g) [Thomas]'s objection is fundamentally rooted in his identity as a "Kiwi teenager". Dr Tappenden noted that relocation will disrupt [Thomas]'s social group, and his sense of belonging and identity.

[54] At 12-13.

(h) Psychological impacts of relocation on a child ought to be given significant weight.[55] It is submitted that Dr Tappenden's report establishes that relocation will result in unduly detrimental psychological impacts.

Lawyer for child's position

[69] Ms Davidson notes that [Thomas] expressed his objection to return to her in an interview. She makes no submissions regarding [Thomas]'s age and maturity, though Dr Tappenden's observations, as referred to by both parties above, are noted.[56]

[70] Ms Davidson submits that the weight to be given to [Thomas]'s views is a matter for the Court to determine, however an excerpt of Dr Tappenden's report is included, in which [Thomas]'s cognitive biases against moving back to Australia, and the risk in allowing [Thomas] to remain with a parent who has undermined the role of the other, are noted.[57]

Analysis

[71] Applying the four-step process as found in *White v Northumberland*, I consider that [Thomas] has expressed an objection to returning to Australia, as defined by the Court in *Karly v Karly*. His expression is stronger than a preference, it is sufficiently valid and reasonable, and relates to returning to Australia generally, rather than remaining in [Mr Buckley]'s care.

[72] Based on Dr Tappenden's assessment, I consider that [Thomas] is of sufficient age and maturity that weight ought to be given to his views. The comments on [Thomas]'s short-term focused decision-making processes are, in my view, applicable to all children of [Thomas]'s age, and do not detract from a general assessment of his maturity.

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[55] Counsel cites *PLG v PNG* [2010] NZFLR 437 at [29].
[56] Lawyer for child – Submissions, 30 January 2023 at [30]-[32].
[57] Lawyer for child – Submissions, 30 January 2023 at [34].

[73] I consider that limited, if any, weight should be given to [Thomas]'s objections. As observed by Dr Tappenden, his views are significantly and materially influenced by [Mr Buckley], such influence having been held to vitiate a child's objection.[58] While it is true that his objection is based in part on external social factors, I consider that [Mr Buckley]'s influence is the operative factor.

[74] Accordingly, I consider that the ground under s 106(1)(d) is made out; however limited weight should be given to [Thomas]'s objections.

Child's best interests – s 4

The law

[75] While grounds under s 106(1) have been established, submissions were made on s 4 of the COCA. For completeness, I address this issue.

[76] Where no grounds under s 106(1) are established, the Court's duty is not limited by the best interests of the child, and prompt return must be ensured. Where a ground under s 106(1) is established, the inquiry becomes whether the deterrent purpose of the Convention should prevail over the interests of the particular child.[59] The child's best interests are relevant, but cannot be applied as to limit the discretion under s 106, in that they should not be the dominant or only consideration.[60]

[77] Where an application is made in accordance with the Convention, it must be borne in mind that the judicial task is to decide "the appropriate forum for determination of the child's interests, rather than undertake a thorough investigation of those interests".[61]

[78] In her dissenting judgment in *Secretary for Justice v HJ*, Elias CJ rejected the balancing exercise favoured by the majority. She was of the view that, once a ground

[58] See *White v Northumberland*, above n 33 at [43].
[59] *Secretary for Justice v HJ* [2007] 2 NZLR 289 at [40], [48].
[60] At [49]-[50].
[61] At [131].

for resisting return is established, whether a child should be returned must be determined principally in accordance with their welfare and best interests. [62]

[Ms Andrews]'s position

[79] Counsel for [Ms Andrews] does not specifically address the role of the paramountcy principle in Hague Convention proceedings. However, it is submitted that, even where one or more of the exceptions in s 106 are made out, the Court must still undertake an overall assessment as to whether or not it is appropriate to refuse to make an order for [Thomas]'s return in the circumstances.[63]

[Mr Buckley]'s position

[80] Counsel for [Mr Buckley] submits that the position of Elias J can be reconciled with that of the majority in *Secretary for Justice v HJ*. It is submitted that the policy of deterrence in the Convention is not in conflict with the paramountcy principle but may instead be described as an assumption about how the best interests of the child might be achieved.[64]

[81] It is submitted that, in the Court's exercise of its discretion, the establishment of a 106 defence must be focussed on what is best for [Thomas], and that [Thomas]'s best interests must not give way to an assumption of prompt return unless it can be demonstrated this is in [Thomas]'s best interests.[65]

Lawyer for child's position

[82] Ms Davidson does not explicitly address the role of the paramountcy principle in Hague Convention matters. However, she notes that it appears that the function of the statutory discretion not to order return is to determine the appropriate forum for determining a child's best interests, rather than determining the merits of whether the child is better off in one country than the other.[66]

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[62] At [3].
[63] [Natalie Andrews] – Synopsis of Submissions of Counsel for the Applicant, 31 January 2023 at 18.
[64] [Francis Buckley] – Submissions of Counsel for the Respondent, 31 January 2023 at 4.
[65] [Francis Buckley] – Submissions of Counsel for the Respondent, 31 January 2023 at 4.
[66] Lawyer for child – Submissions, 30 January 2023 at [35].

Analysis

[83] I consider that the issue at hand is a matter of settled law as per *Secretary for Justice v HJ.* The paramountcy principle does not limit the Court's discretion under s 106. [Thomas]'s best interests are still relevant, however, they cannot be the focus of the exercise of the Court's discretion, nor act as a limitation to the assumption of return, as [Mr Buckley]'s counsel suggests. The role of the Court is to determine the appropriate forum for the consideration of [Thomas]'s best interests to take place.

Exercise of statutory discretion

The law

[84] The majority of the Supreme Court, in *Secretary for Justice v HJ*, held that in exercising the discretion under s 106, the judge must weigh the welfare and best interests of the child against the significance of the general purpose of the Convention. The fact that a child is settled in New Zealand implies that an order may not be in the child's best interests. Matters relevant to this assessment include:[67]

(a) The circumstances in which the child was settled.

(b) The circumstances in which the child came to be wrongfully removed or retained.

(c) The degree to which the child would be harmed by return.

(d) Any other matter logically capable of bearing on whether it is in the best interests of the child to be returned.

[85] If a judge considers that return is not in the best interests of the child, the issue becomes whether some feature of the case, such as concealment by the abducting party, requires the discretion be exercised in favour of return as to avoid perversity.

[67] *Secretary for Justice v HJ*, above n 58, at [85]-[87].

To allow parents who wrongfully remove children to successfully rely on s 106(1) would tend to reward "…those who kidnap children and disappear…".[68]

[Ms Andrews]'s position

[86] Counsel for [Ms Andrews] submits that this is a case of significant parental alienation in extraordinary circumstances, namely the pandemic, and a mother unable to travel to the country to which her child has been taken. It is submitted that the Hague Convention should not reward the actions of a parent who has succeeded in separating a child from a mother, who is desperate to have a relationship with her child. It is submitted that it is in [Thomas]'s best interests that his relationship with [Ms Andrews] is restored and strengthened, by moving back to Australia.[69]

[Mr Buckley]'s position

[87] Counsel for [Mr Buckley] submits that, where grounds under s 106(1) are made out, the Court should not exercise the discretion to order [Thomas]'s return unless there are strong countervailing factors making it appropriate. It is submitted that there are no such factors, and that the following points weigh in favour of [Thomas] remaining in New Zealand:[70]

(a) Dr Tappenden opined that removal may strengthen [Thomas]'s prejudices against [Ms Andrews], and blame her for his return.

(b) If [Thomas] is to return to Australia, he will be required to reconstruct his identity, and he may experience difficulty fitting into a new social group.

(c) [Thomas] may feel disempowered and unheard by the adults in his life if he is returned.

(d) There is no obvious benefit in having Australian courts resolve the substantive care issues. The New Zealand Family Court will be able to

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[68] *Secretary for Justice v HJ*, above n 58, at [77], [85]-[87].
[69] [Natalie Andrews] – Synopsis of Submissions of Counsel for the Applicant, 31 January 2023 at 18.
[70] [Francis Buckley] – Submissions of Counsel for the Respondent, 31 January 2023 at 13-15.

design a parenting order that provides for appropriate contact and the rebuilding of his relationship with his mother.

Lawyer for child's position

[88] Ms Davidson notes the high level of deception by [Mr Buckley], but balances that against [Thomas]'s current development phase, and the impact of return on a young person who is focused on the continuity of his peer group. It is noted that he has been away from Australia for nearly three years, and that his connection to Australia has likely eroded over this time.[71]

[89] [Thomas]'s relationship with his paternal grandmother is also noted. It is submitted that the disruption of his attachment to her would be significant for him and create further disruption for a child described as anxious by both parents.[72]

[90] Ms Davidson submits that this may be a case where the exercise of the discretion not to return [Thomas] may be exercised. She lists a number of substantive care matters that ought to be addressed if [Thomas] is to remain in New Zealand.[73]

Analysis

[91] To reiterate, I consider that two grounds for refusal under s 106(1) are established. [Ms Andrews]'s application was made more than one year after [Thomas]'s removal, and he is settled in New Zealand (s 106(1)(a)). [Thomas] objects to his return and is of an age and maturity at which it is appropriate to take his views into account, noting the comments made by Dr Tappenden's that such views are substantially a product of [Mr Buckley]'s influence. Consequently, I place cautious weight to these views.

[92] The fact that [Thomas] is settled in New Zealand is compelling. He has, by and large, a normal, settled life for a child. He is socially adjusted and attends schooling and extracurricular activities. He has healthy relationships with his

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[71] Lawyer for child – Submissions, 30 January 2023 at [37].
[72] At [40].
[73] At [41]-[42].

extended family, particularly his paternal grandmother, who it appears, he has as strong attachment to.

[93] I now address the factors relevant to the exercise of discretion with reference to the considerations mentioned in *Secretary for Justice v HJ*.

(a) *Circumstances of settlement*: [Thomas] was settled in New Zealand in the context of deception of [Ms Andrews], and in breach of Australian court orders. His presence in the country was concealed from [Ms Andrews], who only discovered his whereabouts due to her own inquiries.

(b) *Circumstances of removal*: [Thomas] was removed from Australia without [Ms Andrews]'s knowledge, in breach of Australian court orders.

(c) *Harm in return*: Dr Tappenden is of the opinion that [Thomas]'s return may result in some social and psychological difficulties for him.

(d) *Other best interest matters supporting return:* Upholding the integrity of the Convention.

[94] This case is incredibly finely balanced. The reality is that remaining in New Zealand or returning to Australia will result in some form of harm to [Thomas]. It is, in my view, unavoidable. If he is to return to Australia, he will face significant disruption to his life and loss of significant connections. If he is to remain in New Zealand, there is a risk of continued alienation from [Ms Andrews].

[95] I have laboured over this decision. When I weigh the welfare and best interests of the child against the significance of the general purpose of the Convention, I do not consider that the circumstances favour the discretion being exercised that [Thomas] return to Australia. His life (emotional and psychological) is rooted in New Zealand, despite the abhorrent behaviour of [Mr Buckley]. There is a real risk that further

upheaval and change of environment may very well have a significantly negative impact on [Thomas].

[96] It is important to note that this decision is not intended to reward [Mr Buckley]'s deception and concealment. His conduct was wrong. However, I find a return to Australia would be contrary to [Thomas]'s welfare and best interests.

[97] Accordingly, [Ms Andrews]'s application for an order to have [Thomas] returned to Australia is declined.

[98] The New Zealand Family Court is the correct forum to determine care and contact arrangements for [Thomas].

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Judge KNP Broughton
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhenga: 05/04/2023