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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM 2023-009-001779
[2024] NZFC 4523**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
AND IN THE MATTER OF	THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980
BETWEEN	[HUGH MAGUIRE] Applicant
AND	[GINA CARRAN] Respondent

Hearing: 5 April 2024

Appearances: A Logan for the Applicant on behalf of the New Zealand Central
Authority
Y Park for the Respondent
J Wren as Lawyer for the Child

Judgment: 15 April 2024

RESERVED JUDGMENT OF JUDGE PW SHEARER

Introduction

[1] This case concerns the Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”), which is implemented in New Zealand through the Care of Children Act 2004 (“the Act”).

[2] The parties, [Hugh Maguire] (“[Mr Maguire]”) and [Gina Carran] (“[Ms Carran]”) are the parents and legal guardians of [Elliot], who is now aged [14 years]. All three are Irish nationals, from [County A] in the province of [deleted]. [Mr Maguire] and [Ms Carran] had a relatively brief relationship in Ireland between 2007/2008 and 2010. They separated shortly after [Elliot] was born in [early] 2010.

[3] [Elliot] had lived his whole life in Ireland until he came to New Zealand with [Ms Carran] and his younger half-brother, [Felix] (now aged [9 years]), in mid-November 2022 for what was ostensibly a holiday.

[4] [Ms Carran] has remained in New Zealand with [Elliot] (and [Felix]) and in December 2023 married her new partner who is a New Zealander. The application before the Court is brought by [Mr Maguire] pursuant to the Hague Convention, seeking an order for the return of [Elliot] to Ireland.

[5] [Felix]’s father, Mr [Barclay], has brought a corresponding application seeking an order for [Felix]’s return to Ireland. I have decided Mr [Barclay]’s application separately and am issuing both decisions contemporaneously. There is a jurisdictional issue in [Felix]’s case because Mr [Barclay] did not have “rights of custody” in Ireland.

[6] On behalf of [Ms Carran] it is conceded that a prima facie case for [Elliot]’s return has been established, as the jurisdictional criteria set out in s 105(1) of the Act is met, namely:

- (a) [Elliot] is present in New Zealand; and

- (b) He was removed from Ireland, which is another Contracting State to the Hague Convention, in breach of [Mr Maguire]’s “rights of custody;” and
- (c) At the time of removal [Mr Maguire] was exercising his rights of custody, or would have been but for the removal; and
- (d) At the time of removal [Elliot] was “habitually resident” in Ireland.

[7] In these circumstances s 105(2) directs that I must make an order for [Elliot] to return to Ireland unless one of the grounds for refusing to do so, as set out in s 106, is established. [Ms Carran] has pleaded two grounds or “defences” of “child objection” and “grave risk”, as they are commonly known and abbreviated in Hague Convention cases.

[8] Referring to the statutory criteria, [Ms Carran] says that:

- (a) [Elliot] objects to being returned to Ireland and has attained an age and degree of maturity at which it is appropriate to give weight to his views;¹ and/or
- (b) There is a grave risk that [Elliot]’s return to Ireland would place him an intolerable situation.²

[9] I have to evaluate and determine these defences. If one is proved to the requisite standard I retain a residual discretion as to whether [Elliot] is to return to Ireland. If I am not satisfied that a defence has been made out, there is no discretion. I must then order [Elliot]’s return.

[10] I heard the opposed application by the Central Authority on behalf of [Mr Maguire] on 5 April 2024. The hearing proceeded by way of submissions-only, as is normal practice with Hague Convention proceedings. I did, however, hear oral

¹ Care of Children Act 2004, s 106(1)(d).

² S 106(1)(c)(ii).

evidence from the s 133 psychological report writer, Ms Abrahamson, who completed a report dated 27 February 2024,³ and in addition to submissions from counsel for each party,⁴ I had the benefit of written and oral submissions from Mr Wren who was appointed by the Court as lawyer for [Elliot] (and [Felix]).

[11] I met with [Elliot] myself the afternoon prior to the hearing.⁵

Background

[12] As I mentioned, both parties are Irish citizens. [Mr Maguire] is 41 and [Ms Carran] is 37. They would, therefore, have been in their early twenties when they commenced a relationship in either 2007 (according to [Mr Maguire]’s first affidavit)⁶ or 2008 (according to [Ms Carran]).⁷

[13] The parties agree that they separated very soon after [Elliot] was born on [date deleted] 2010. [Mr Maguire] says that [Elliot] was a month old.⁸ [Ms Carran] says that the separation was within a week of [Elliot]’s birth and was “*due to his continued abuse.*”⁹ She alleges that during the relationship “*I was subjected to verbal, physical and emotional abuse from [Hugh]*”¹⁰ and attached to her affidavit statements she made to the Irish Garda (Police) on 16 August 2018 and 17 December 2018 in respect of various alleged incidents of verbal abuse and/or threats by [Mr Maguire].¹¹

[14] [Mr Maguire] in his affidavit in reply says that “*we did not break up because of alleged abuse by me. [Gina Carran] terminated the relationship and immediately made it difficult for me to see my son.*”¹² He completely refutes all allegations of violence and notes that the police never spoke to him or took any action against him.¹³ He says, “*it is not in my character to be violent.*”¹⁴

³ The report was completed in respect of both [Elliot] and [Felix].

⁴ Written and oral.

⁵ With Mr Wren.

⁶ Bundle of Documents (“BOD”) page 27 at [13].

⁷ BOD page 382 at [5].

⁸ BOD page 27 at [15].

⁹ BOD page 382 at [5].

¹⁰ At [6].

¹¹ BOD pages 399-402.

¹² BOD page 453 at [4].

¹³ Ibid.

¹⁴ At [5].

[15] [Mr Maguire] obtained an order from the District Court of [County A] appointing him as a guardian of [Elliot] on 13 December 2010 when [Elliot] was then [under 1 year old].¹⁵ The same day he obtained a further order under the Irish Guardianship of Infants Act 1964 (the equivalent of our Care of Children Act) granting him access rights. The order, which was made by consent, granted [Ms Carran] “*primary custody, care and control*” and gave [Mr Maguire] access as per the parties’ handwritten agreement signed that day.

[16] Initially access was each Tuesday from 11am until 5pm and alternating Saturdays and Sundays from 11am until 5pm. From 1 May 2011 the agreement provided for access each Wednesday from 11am until 5pm, and from 11am Saturday until 5pm Sunday every second weekend, as well as at any other times agreed.¹⁶

[17] [Mr Maguire] deposed that “*access improved as [Elliot] got older*” And he said [Elliot] “*developed a great relationship with me and my family.*”¹⁷ [Mr Maguire] explained that his parents, two brothers and sister all live in [County A] and that [Elliot] has five first cousins on his side of the family.

[18] [Mr Maguire] referred to his younger son, [Nathan] born in [2021], from a subsequent relationship, and said “*[Elliot] really enjoyed being an older brother.*”¹⁸ [Ms Carran] stated in her recent affidavit of 20 March 2024, that “*[Hugh] has not seen [Nathan] for the last two years. That was confirmed by [Nathan]’s maternal grandmother to my mother.*”¹⁹

[19] In January 2013, [Ms Carran] took steps to change [Elliot]’s surname from “[Maguire]” to “[Carran Maguire]” by deed poll.²⁰ [Ms Carran] says that “*[Hugh] was notified of my intention to change [Elliot]’s name to include mine and he never contested it.*”²¹ [Mr Maguire] has deposed that he did not know how the surname was changed.

¹⁵ BOD page 32.

¹⁶ BOD pages 35-37.

¹⁷ BOD page 27 at [16].

¹⁸ At [21].

¹⁹ BOD page 541 at [30].

²⁰ BOD page 408.

²¹ BOD page 385 at [25].

[20] Notwithstanding that [Elliot]’s surname is “[Carran Maguire]” as a result of the change of name by deed poll in 2013, it is apparent that [Elliot] has been known as “[Elliot Carran]” since that time. [Elliot]’s New Zealand school reports that have been filed in evidence are all in the name of “[Elliot Carran]”²² and that is what [Elliot] calls himself.²³

[21] [Ms Carran] applied to the Irish District Court in February 2019 and obtained an order dispensing with consent of [Mr Maguire] (whose address she said was unknown) to obtain a passport for [Elliot] in the name of [Elliot Carran].²⁴ In her affidavit [Ms Carran] deposed that *“it is usual practice in Ireland to seek to have one parent’s signature dispensed with in order to obtain a passport for a child when the other parent fails to either respond or to sign the application form.”*²⁵

[22] [Mr Maguire] has deposed that he was not aware of that order and had never seen it until it was annexed to [Ms Carran] affidavit of 23 November 2023.²⁶ He says his whereabouts were never unknown to [Ms Carran] as he has always resided in [County A].²⁷

[23] A subsequent access order, dated 13 April 2015, was made by consent providing for [Mr Maguire] to have access every weekend from Friday until 6pm on Sunday.²⁸ Incidentally, that order also provided that *“neither the Applicant nor the Respondent is permitted to remove the infant from the jurisdiction of the Republic of Ireland without leave of the Court.”*

[24] [Ms Carran] noted in her first affidavit that [Mr Maguire] had not disclosed a later order made by the Irish Court on 24 April 2019, granting [Mr Maguire] parents’ application for access with [Elliot] every second weekend from 2pm Saturday until

²² BOD page 411-414.

²³ Eg, BOD page 410.

²⁴ BOD page 407.

²⁵ BOD page 539 at [16].

²⁶ BOD page 455 at [8].

²⁷ BOD page 455 at [9].

²⁸ BOD page 376.

4pm Sunday. A condition of that access order (which [Ms Carran] provided a copy of) was that [Mr Maguire] was not to be present.²⁹ [Ms Carran] deposed that:³⁰

... this order was made as a result of years of unstable and inconsistent contact between [Elliot] and [Hugh] and as a result of [Hugh]'s continued alcoholism and abusive behaviour.

[25] In her affidavit [Ms Carran] went on to say that “*eventually, I had no choice but to allow access between [Hugh] and [Elliot] because at the time, [Elliot] was so addicted to his PlayStation and [Hugh] was fuelling this addiction at his house.*”³¹

[26] [Mr Maguire] subsequently deposed that the order of April 2019 was simply an “interim access order” and that [Ms Carran] had not disclosed a copy of the final order which was made approximately eight months later on 9 December 2019, and which removed the condition preventing his presence. A copy of the signed “access order” dated 9 December 2019 has been filed by [Mr Maguire] and provides for [Mr Maguire]'s parents (as the applicant) to have access with [Elliot] every second weekend from Friday after school until 7pm on Sunday.³² It seems that was the current Court order in Ireland.

[27] [Ms Carran] deposed that she had raised safety concerns in the Irish Family Court in about 2018, and that [Mr Maguire] was directed to complete an anger management course and a parenting course, as well attending AA for his alcoholism. She said he did not satisfy those conditions.³³ She said that was why [Mr Maguire]'s parents sought and obtained an access order in 2019, because at the time [Mr Maguire] was unable to have access himself.³⁴

[28] In response to that evidence [Mr Maguire] said that he had voluntarily commenced a residential treatment programme for alcohol difficulties and that the Court did not make any orders for him to attend AA or an anger management or

²⁹ BOD page 403.

³⁰ BOD page 383 at [15].

³¹ At [18].

³² BOD page 472.

³³ BOD page 383 at [16].

³⁴ At [17].

parenting courses. He says access with [Elliot] resumed after the Court obtained an expert report which recommended the reinstatement of access.³⁵

[29] Access between [Elliot] and [Mr Maguire] broke down in or about May 2022, although there is again a conflict in the evidence as to why.

[30] In his affidavit of 3 November 2023, [Mr Maguire] said that in the weeks leading up to May 2022 [Elliot] was spending three or four days a week with him. He said [Elliot] was spending too much time playing on his PlayStation, that he wasn't getting enough exercise and was staying up late, which was affecting his school work. He said he explained to [Elliot] that he was going to put the PlayStation away for a while, which upset [Elliot] who threatened that he wasn't going to visit him anymore. [Mr Maguire] said "*I ignored the threat and put the PlayStation away as [Elliot] would often get irate like this and he would always come around.*"³⁶

[31] In or about mid-June 2022, [Ms Carran] travelled to New Zealand for a holiday for approximately six weeks to visit her sister in Christchurch. She left [Elliot] (and [Felix]) in Ireland with her family. [Mr Maguire] deposed that prior to [Ms Carran] leaving on holiday he asked [Ms Carran] about [Elliot] and if he was still refusing to visit, and "*[Ms Carran] informed me that she wasn't going to tell [Elliot] what to do and that [Elliot] is old enough to make up his own mind.*" [Elliot] did not see his paternal family at all while [Ms Carran] was away, apart from when [Mr Maguire] and his mother attended [Elliot]'s graduation from [School 1] at the end of June 2022, and "*spoke to [Elliot] briefly on this date.*"³⁷

[32] [Mr Maguire] says that he spoke to [Ms Carran] again at or about the end of July 2022 when she returned from New Zealand, and that he indicated he would have to go back to Court if she did not encourage and secure [Elliot]'s return to access.³⁸ He said he spoke to his solicitors in or about September/October 2022, regarding new access proceedings but "*due to the costs involved in same and the previous distress and hassle that was caused having to go to Court and my own belief was that [Elliot]*

³⁵ BOD page 454 at [6].

³⁶ BOD page 62 at [2].

³⁷ BOD page 63 at [5] and [7].

³⁸ At [8].

would come around and would come back to me, I didn't initiate proceedings in advance of [Ms Carran] leaving the jurisdiction with my son."³⁹

[33] [Ms Carran]'s evidence is that the reason access stopped in mid-2022 is because "[Elliot] decided that he did not wish to see his father or have a relationship with him any longer, due to the way that he has been treated by him in the past."⁴⁰ She provided a screenshot of text messages between [Mr Maguire] and [Elliot] in June 2022 which she said was their last communication. The text messages read:⁴¹

[Mr Maguire]: Morning buddy

[Elliot]: Go away

[Mr Maguire]: No bother c u next week ... dnt ring me she fucked off to New Zealand so get on with it u fuck off c u Friday week 2 weeks ring ur mother cum hme now u fuck off

[Mr Maguire]: Go get fit fuck off

[Mr Maguire]: Dnt contact me again I removed d internet bye d way

[Elliot]: I'm not coming over anyway u stupid ape

[Mr Maguire]: So wnt b sein u

[34] [Ms Carran] left Ireland and arrived in New Zealand with [Elliot] (and [Felix]) on 15 November 2022.

[35] In the separate but related Hague Convention proceeding for [Felix], [Ms Carran] has deposed that she and boys travelled to New Zealand to visit her sister, [Jolene].⁴² [Ms Carran] said that the rest of her family in Ireland travelled to New Zealand with them. My understanding is that they were all in New Zealand for Christmas (2022). In her affidavit [Ms Carran] states:⁴³

[25] I initially went to New Zealand with the intention of returning to Ireland. I had booked our return tickets to return to Ireland in about three months' time ...

³⁹ At [10].

⁴⁰ BOD page 384 at [20].

⁴¹ BOD page 405.

⁴² [Jolene] swore an affidavit dated 8 November 2023 and advised that she moved from Ireland to New Zealand in 2012.

⁴³ Affidavit dated 8 November 2023.

[26] After I saw how much [Felix] and [Elliot] were enjoying themselves in New Zealand, I consulted the children about staying here permanently and both were overjoyed at the idea. I saw that staying in New Zealand was beneficial for my children because I firmly believed that I could provide a better life for them here ...

[36] [Ms Carran] enrolled [Elliot] at [School 2] and he started Year 9 on the first day of term 1 2023. He is now in Year 10. [Ms Carran] deposed that he is thriving and excelling at school, academically and in sports.⁴⁴ She said that [Elliot] loves mountain biking, hiking, and skiing. She said that during the New Zealand winter he had three weeks at [a ski field], [details deleted] and [Elliot] is now a competent skier. He also loves camping, going to [a mountain bike park] (mountain biking), swimming and the skate park.⁴⁵ She said:⁴⁶

It is in [Elliot]’s best interest and welfare that he is able to remain in New Zealand and not force him to return to Ireland, which holds many painful memories for him...

[37] [Ms Carran] also deposed the [Elliot] had spoken to [Mr Maguire] on the phone on 13 February 2023 and told him that he wants to stay in New Zealand. He said to his father “*you’re not taking my feelings into consideration*” and [Ms Carran] says that [Mr Maguire] then hung up.⁴⁷

[38] Referring to that phone call, [Mr Maguire] says “*it was blatantly obvious, from speaking to [Elliot], that his mother was standing beside him, coaching him fully on what she wanted him to say.*”⁴⁸

[39] There has been very minimal phone contact between [Elliot] and [Mr Maguire] since [Elliot] has been in New Zealand, and there has been no contact with the wider paternal family. [Mr Maguire] noted that “*myself and my family have been devastated by the illegal removal of my son [Elliot] from this jurisdiction...*”⁴⁹

⁴⁴ BOD page 385 at [28].

⁴⁵ At [32].

⁴⁶ At [33].

⁴⁷ At [34].

⁴⁸ BOD page 455 at [10].

⁴⁹ BOD page 456 at [12].

[40] [Ms Carran] married [Braden Archer] in December 2023. He was a friend of her sister and they met when she first visited New Zealand in 2015.⁵⁰ They spent more time together when she visited again in 2016 and in June/July 2022. By the time of [Ms Carran]’s affidavit dated 22 November 2023 they were engaged.

[41] [Ms Carran] and [Mr Archer] purchased a house together on [location deleted], on 15 September 2023. They each contributed \$40,000 although [Ms Carran]’s name is not on the title because [Ms Carran] is currently ineligible to own property in New Zealand. [Ms Carran] and [Mr Archer] are living together with [Elliot] and [Felix] and [Mr Archer] has his 4-year-old daughter in his care two nights per week.⁵¹

[42] In her affidavits, [Ms Carran] said that she has a fantastic job in Christchurch at a [workplace deleted], with flexible hours and good pay, and has recently been promoted to [occupation deleted].

[43] [Ms Carran] says that she had lived in fear of the boys’ fathers in Ireland for multiple years, and that the boys and her family had lived that life with her.⁵² She predicted that [Elliot] will not want to return to Ireland.⁵³ She said his personal circumstances have drastically changed for the better in New Zealand and “*he has never been this happy.*”⁵⁴

[44] [Ms Carran] deposed in her second and recent affidavit that soon after [Elliot] stopped having contact with his father his addiction to PlayStation stopped and “*he now hardly plays on it.*”⁵⁵ In that affidavit she states:⁵⁶

[Elliot] has flourished in New Zealand. He has settled with a consistent routine and support. He is open and relaxed. His physical appearance has changed drastically due to him being far more active. Emotionally, he has opened up to me and [Braden]. [Elliot] had been a closed book for a very long time. He now enjoys everything life throws everything at him. He loves mountain biking and skiing. He attends swimming lessons every [week]. This is notably different from his life in Ireland where I would struggle to get [Elliot] out of the house.

⁵⁰ At [36].

⁵¹ Affidavit of [Braden Archer] (in [Felix]’s proceeding) dated 8 November 2023.

⁵² BOD page 387 at [48].

⁵³ At [53].

⁵⁴ At [55].

⁵⁵ BOD page 539 at [15].

⁵⁶ At [32].

[45] [Ms Carran] disputes [Mr Maguire]'s advice to Mr Abrahamson, as recorded in the s 133 report,⁵⁷ that she did not inform [Mr Maguire] she was making the trip to New Zealand in November 2022. [Ms Carran] has deposed that [Mr Maguire] was informed of the trip in June 2022.⁵⁸

[46] Ms Abrahamson records in her report advice from [Ms Carran] that she will not return to Ireland herself, even if the boys are ordered to return.⁵⁹ Both boys are aware that is their mother's position.⁶⁰

[47] [Mr Maguire] deposed in his recent and final affidavit dated 15 March 2024, that if [Elliot] is returned to Ireland and [Ms Carran] elects to stay in New Zealand, [Elliot] would reside with him and be enrolled at the local secondary school. He said that his sister, brother and parents and [Elliot]'s first cousins all live within a 10-mile radius and there would be daily visits and support. [Elliot] will be encouraged and supported in engaging in extracurricular activities in the area, such as tennis, cycling, athletics, rugby, soccer, hurling, and Gaelic football.

[48] [Mr Maguire] says that if [Felix] is returned to Mr [Barclay]'s care in Ireland, they will be within five minutes of each other and [Mr Maguire] assures the Court that the sibling relationship will be nurtured. [Mr Maguire] deposed that he will also facilitate whatever contact [Elliot] wants and/or the Court directs with [Ms Carran].⁶¹

[49] [Mr Maguire]'s plea to the New Zealand Court is to return [Elliot] to his habitual home so that the Irish Court can deal with the matter in the appropriate fashion.⁶²

⁵⁷ S 133 report, page 7 at [17].

⁵⁸ BOD page 539 at [16].

⁵⁹ Report page 9, at [23].

⁶⁰ Page 16, at [48] and page 18 at [61].

⁶¹ BOD page 533 and 534.

⁶² BOD page 456 at [13].

Child objection defence

[50] Section 106(1)(d) of the Act provides the defence of “child objection” encapsulated by article 13 of the Hague Convention, the relevant part of which reads as follows:

... the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

[51] It is now well settled that the assessment of a child objection defence, requires a four-step process and analysis:⁶³

- Does the child object to return? If so;
- Has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views? If so;
- What weight should be given to the child's views? And;
- How should the residual statutory discretion be exercised?

[52] Ms Park also referred me to UK House of Lords decision in *Re: D* as long ago as 2006 where Baroness Hale said:⁶⁴

..there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

[53] All counsel referred me to numerous different cases, and to many of the same cases, but all cases under the Act and Hague Convention are necessarily fact specific.

[54] Mr Logan, in his submissions for [Mr Maguire], responsibly and appropriately conceded the first two steps of the four-step process identified above. [Elliot] is

⁶³ *White v Northumberland* [2006] NZFLR 1105 (CA) at [47] confirming on appeal the approach of Chisholm J in the Christchurch High Court in *W v N* [2006] NZFLR 793 at [46].

⁶⁴ *Re D* (a child) (abduction: rights of custody) [2007] 1 All ER 783 at [57].

objecting to return to Ireland, and he has attained an age and degree of maturity at which it is appropriate to give weight to his views.

[55] In the last several months, since the appointment of Mr Wren as [Elliot]'s lawyer in mid-November 2023, [Elliot] has clearly and consistently voiced to Mr Wren, to Ms Abrahamson, to me at my judicial interview, through his mother's evidence, and to his father in phone calls, an objection to returning to Ireland.

[56] At 14 years old and given the particular provision and wording in the Hague Convention itself,⁶⁵ the United Nations Convention on the Rights of the Child (UNCROC)⁶⁶ and ss 6(2)(b) and s 7AA of the Act, not to mention simple fairness and common sense, it is appropriate to give weight to [Elliot]'s views.

[57] The critical question, is how much weight should be given to [Elliot]'s views?

What weight should be given to [Elliot]'s views?

[58] The High Court considered this issue of the weight to be given to the objection of an 11-year-old child on an appeal from a Family Court decision to order the return of the child to the United States, in *Anderson v Lewis*.⁶⁷ Mander J said as follows:⁶⁸

[128] The next question is the weight that should be given to the child's views. In carrying out that exercise, a number of factors are required to be taken into account. These include the nature and strength of the child's objections, the extent to which they are authentically those of the child or the product of the influence of the parents, and the extent to which they align or conflict with other considerations relevant to the child's welfare, and the important policy objectives the Hague Convention seeks to advance.

Submissions

[59] Naturally, the parties and counsel differ as to how much weight should be accorded to what [Elliot] says.

⁶⁵ Hague Convention Article 13.

⁶⁶ Article 12.

⁶⁷ *Anderson v Lewis* [2023] NZHC 390.

⁶⁸ At [128].

[60] The brief summary of counsel's submissions that I will set out now does not do justice to the comprehensive written and oral submissions that I received from all three counsel and is given, as I have said, as a summary only:

- (a) In his written submissions Mr Logan detailed in 28 separate sub-paragraphs considerations that he submitted diminish the weight to be accorded to [Elliot]'s views.⁶⁹ He submitted that [Elliot] has inevitably become aligned with his mother and her views and that her decision to remain in New Zealand has had a significant influence on [Elliot]'s view as he knows his mother is not going to return to Ireland.

Mr Logan submitted that [Elliot]'s reasons for preferring New Zealand to Ireland seem simplistic and short-term, and that [Elliot] is swayed by things that give him immediate reward and/or pleasure. He noted that children tended to take a more simplistic view of the world.

Mr Logan emphasised the psychological evidence that [Elliot]'s reasoning is still more immature than an adult and retains limitations for complex decisions. He referred to Ms Abrahamson's report that [Elliot] is vulnerable to making decisions which may not be well balanced and/or which may not promote his positive development. He argued that [Elliot]'s views cannot be determinative.

- (b) Ms Park submitted that [Elliot] has been able to explain what a return to Ireland looks like, and what remaining in New Zealand looks like. She noted that [Elliot] has been able to recognise what is good for him, in terms of his lifestyle and leisure activities in New Zealand, and what was not good for him in terms of his addiction to PlayStation in Ireland.

Ms Park submitted that it is not fair or appropriate to characterise [Elliot]'s views as simplistic or naïve. She submitted that does not give [Elliot] enough credit in terms of his maturity and his ability to articulate his views.

⁶⁹ Submissions for the Applicant dated 2 April 2024 at [55].

Ms Park submitted that significant or determinative weight should be given to [Elliot]’s views and she supported the position that Mr Wren had put to Ms Abrahamson in cross-examination, which Ms Abrahamson agreed with.

- (c) On behalf of [Elliot], Mr Wren submitted that the reasons for [Elliot]’s objections have become very clear. Whilst it may be due in part to loyalty to his mother, his desire to remain in New Zealand is a clear reason, and difficulties in his relationship with his father is also a clear reason. Mr Wren submitted that [Elliot] is objecting to returning to Ireland after comparing his life in Ireland with his life in New Zealand as he has now experienced it. He said [Elliot] is also objecting to being in the care of his father. Mr Wren submitted that [Elliot] has been clear, concise and direct in reporting his view to him, to Ms Abrahamson, to me and to both of his parents directly. He submitted that [Elliot] showed “courage and forethought” to share his objection with his father.

Mr Wren submitted that [Elliot]’s objection is rooted in his reality and is not simplistic. He said it is the consequence of comparing his life in Ireland to his life in New Zealand and is the consequence of his reality as a 14-year-old teenage boy. He submitted that significant and determinative weight should be given to [Elliot]’s views.

Judicial interview

[61] Knowing that I would need to assess the nature and strength of [Elliot]’s objection and the authenticity of his views, I spent some considerable time talking to him (almost one hour) and asked him about his school, sports, activities, friends, and family, as compared between New Zealand and Ireland. In the interests of brevity I will again summarise as briefly as possible what [Elliot] said to me.⁷⁰

⁷⁰ I gave a full summary, reading from the notes I took at the time, to the parties and counsel (and Ms Abrahamson) at the beginning of the hearing.

[62] When I asked firstly about high school in New Zealand and Ireland, [Elliot] told me that [School 2] has approximately 2,500 co-ed students. He buses to school from Mum's house, which takes two buses, and leaves home at 7:30am and returns home about 4pm. He said there are "*way more options here*" in terms of the subjects and said it is the same with sports.

[63] [Elliot] had been at [School 3] in [County A] for only about 9 or 10 weeks before he came to New Zealand in 2022, noting that the Irish school year begins at or about the start of September. [Elliot] said that the school had 200 or 300 students and he used to walk to school from Mum's house. He thought it would be about a 20-minute car ride from Dad's house.

[64] On the subject of sports [Elliot] told me that he is now an "advanced" skier as a result of lots of days on [a ski field] last year where [details deleted]. He said he "*picked it up quick*" [Elliot] also loves mountain biking and said that he does that "*all the time.*" He said mountain biking is "*not a thing*" in Ireland. In New Zealand he is also in a swimming group and swims lengths every [week].

[65] When I asked about sport in Ireland [Elliot] said that he did hurling for several years and also played Gaelic football but hadn't played any sport for about two years before he left Ireland. [Elliot] said he been "*addicted*" to PlayStation because his Dad used to let him on it "*all the time*" and he didn't really do anything else.

[66] [Elliot] said that he had three friends in Ireland but didn't really hang out with his friends. He said "*I was too lazy. I didn't really want to do anything in Ireland.*" By way of comparison [Elliot] said he already has a lot of friends in New Zealand. He said he knows most of the students in his year group, which is about 500, and has already had one "girlfriend". He said he likes to hang out with his friends and go mountain biking and said, "*I always want to be outside.*" When I asked [Elliot] how many friends he would want to invite to his birthday celebration, he said "*about 20.*"

[67] In New Zealand [Elliot]'s family is his mother, brother [Felix], Aunty [Jolene] and his step-dad [Braden], and [Braden]'s daughter, [Georgie] (aged 4). [Elliot] said [Braden] likes the beach and mountain biking and he snowboards. He said [Braden]

“doesn’t call me bad names and doesn’t hit me.” He noted that [Georgie] is *“just like a 4-year-old and doesn’t really have any interest in me ... she likes [Felix] more cos he plays toys with her.”*

[68] [Elliot] explained that he has Mum’s parents (who are separated) in Ireland, and an aunty and uncle, and cousins on Mum’s side of the family, and Dad, his parents, and two uncles and an aunty and more cousins on Dad’s side of the family. All of Dad’s family live close by and he used to see them regularly, usually at his Nanny’s house. [Elliot] acknowledged that he hadn’t talked to his paternal family in about a year and a half but said *“I would talk to them if I stay here.”* He told me that he had phoned Dad two nights earlier and said, *“I was trying to let him know I really don’t want to go to back to Ireland.”* He said that he asked Dad to please stop this (the Court proceedings) but Dad ended up hanging up on him.

[69] When I asked [Elliot] to give me a summary of why he doesn’t want to go back to Ireland, he said:

There are so much more opportunities in New Zealand.

I like the beach, mountain biking and skiing. I have none of that in Ireland.

I don’t want to leave my friends. I never hang out with my friends in Ireland.

I don’t want to leave my Mum and my brother.

School in New Zealand is way better.

There are more sports opportunities.

The teachers and the people (at school) are better.

The school has better technology and facilities.

There are more classes (subjects).

[70] When I put to [Elliot] that even if he does stay in New Zealand he will still be going back to Ireland for visits, he acknowledged that and said, *“I told Dad I would come back for visits, but Dad didn’t care.”* [Elliot] said that notwithstanding having told me earlier in our discussion that he stopped visiting Dad in Ireland in mid-2022 because of the text messages from his father.⁷¹

⁷¹ Copied earlier at [33].

[71] [Elliot] said that Dad had hit him in the past and “*always called me bad names.*” [Elliot] put the abusive text messages down to his Dad “*being drunk probably*” at the time. He referred to a time, several years earlier, when “*the cops took him (Dad) away one night*” and when Nanny (Dad’s Mum) had to come over and pick [Elliot] up.

[72] [Elliot] and I discussed the distance and cost of flying between Christchurch and Dublin, and then the drive from Dublin to [County A] ([Elliot] said a drive of about 2 – 3 hours). He was aware that visits to Ireland will be relatively infrequent, perhaps once per year, and that he would need to stay for a few weeks when he does go. He said that he would want to stay with Nanny [Adrienne] (Mum’s mother) but would also stay with Dad. [Elliot] also commented that “*Dad can come here*” and that he had already said that to Dad on the phone.

Analysis

[73] In my view and assessment, [Elliot]’s views are reasonable and soundly based. He lived in Ireland for almost 13 years and has been in New Zealand for almost 18 months. He has experienced school, sports, extracurricular activities, friends, family, and life in general in each country. At 14 years of age he is able to discern which country and which lifestyle he prefers and why. He has been able to discern and articulate that he prefers the much larger school in New Zealand and the greater options of subject choice and sports. He has now experienced and is loving his skiing and mountain biking. He has enjoyed the beach and swimming and says these are all things that he can’t do in Ireland.

[74] Mr Logan noted in his submissions that PlayStation seems to have been a phase for [Elliot] in Ireland, and that mountain biking and skiing may equally cease to capture his attention in the future. Whilst this is speculative, the fact is that mountain biking and skiing are activities which will be available to [Elliot] for many years yet, should he remain in New Zealand and Christchurch in particular.

[75] I do not ignore the fact, as Ms Abrahamson identified in her report, that [Elliot]’s school reports from [school 2] revealed his academic progress is below the expected level in several areas and subjects. In particular, there have been eight times

that [Elliot] has been removed from class for disruptive behaviour, being loud, distracting or talking.⁷² Nonetheless the school describe [Elliot] as “*a lovely young man*” and as “*polite and listening to instructions.*” As I have mentioned, [Elliot] was certainly very clear that he much prefers [school 2] to his secondary school in Ireland. [School 2] is a large school and there will very likely be more options and opportunities there than at a much smaller and more rural secondary school.

[76] As Mr Wren noted in his oral submissions, [Elliot], at the age 14 and now well settled in high school, is “on the cusp” of moving away from reliance on either his mother or father. He is and will become more and more interested in hanging out with his friends, and doing activities with his friends and what he wants to do on the weekends and in the afternoons after school. That is entirely natural and normal at his age, but he has been very clear that there are more things to do and more friends to do them with here in Christchurch. The report from the [School 2] form teacher notes that [Elliot] is “*very social with a good friendship group*”⁷³ whereas [Elliot] himself was able to recognise that he didn’t do much and didn’t hang out with his friends in Ireland.

[77] I am satisfied that [Elliot] much preferring the lifestyle he has experienced in New Zealand, as compared to the lifestyle in Ireland that he is objecting to returning to, is authentically [Elliot]’s own view and not the product of influence from his mother or others.

[78] That said, there is no doubt that [Elliot] has been influenced by [Ms Carran], because he is obviously well aware of the position she has taken, setting up her own life in New Zealand and making it clear that she will not return to Ireland. It is inevitable that [Elliot] has been affected by that, but nonetheless [Elliot]’s experiences of respective schools, his sports and activities and his friendships are his own experiences and opinions because he has lived them.

[79] [Elliot] has been in some trouble at [School 2] and faced consequences due to poor behaviour at times, it takes him much longer to get to and from school by bus

⁷² S 133 report, page 10 at [31].

⁷³ Ibid.

every day, and he would have been a brand new to the school and therefore a small fish in a very large high school (pond) who did not know anyone at the beginning of the 2023 school year. Nonetheless, [Elliot] is very clear that he much prefers [School 2] and New Zealand in general. He wants to remain here and does not want to go back to what is also a known experience, in Ireland.

[80] A further factor that I find to be significant in the assessment of [Elliot]'s views and his objection to returning to Ireland, is his currently fractured relationship with his father.

[81] I note and heed Mr Logan's submission that I must carefully consider the evidence and not take everything at face value, given this has been a submissions-only hearing where evidence has not been able to be tested (other than the psychological evidence). I realise that [Mr Maguire] denies [Ms Carran]'s evidence and allegations of psychological abuse and I accept Mr Logan's further point that [Elliot]'s own evidence or reporting has not been able to be tested or challenged. However, [Elliot]'s evidence can never be tested in the true sense because he would never be a witness subject to cross-examination.

[82] I am not asked to make, and I do not make findings of fact, particularly in regard to what [Ms Carran] has said about [Mr Maguire], which I put to one side when assessing the validity of [Elliot]'s objection. I do note, however, that there is some significant corroboration for what [Elliot] has said about his father:

- (a) [Ms Carran]'s statements to the police in Ireland in 2018 detailed some incidents that, if true, [Elliot] would have been exposed to.
- (b) The fact is that [Mr Maguire]'s parents did apply for access in place of him in April 2019, and the initial interim access order did prevent [Mr Maguire] from being present, which indicates that there were safety concerns at that time.
- (c) [Mr Maguire] has acknowledged that he attended a residential treatment programme for alcohol difficulties at or about that time

(2019). [Elliot]’s reporting that Dad was always drinking may therefore have some validity.

- (d) The abusive text messages that [Mr Maguire] sent to [Elliot] in June 2022 cannot be denied or defended. On [Mr Maguire]’s behalf Mr Logan referred to “*an angry message exchange in which both could be considered at fault to varying degrees*” and submitted that “*it has the characteristic of a typical row between a parent and an early adolescent.*”⁷⁴ I do not accept those particular submissions. In the text messages I am referring to [Mr Maguire] told [Elliot] to “*fuck off*” three times and then said “*don’t contact me again.*” I do not attribute any fault or blame to [Elliot] when he responded “*I’m not coming over anyway u stupid ape.*” [Elliot] was 12 then and clearly it is [Mr Maguire] who is the adult and who was at fault.
- (e) Of more concern than the (verbal) abuse at the time is that [Mr Maguire] did not do anything to make amends or apologise. Mr Logan submitted that [Mr Maguire] has acknowledged that he was fault, but the text message he referred to was a text from [Mr Maguire] to [Ms Carran]’s brother in Ireland⁷⁵ where he said “*I abused him bck witch I shudnt but uno sumtimes when u need be a dad.*” That was not really an apology, and more to the point it was not an apology to [Elliot].

[Mr Maguire]’s evidence was that he had not seen [Elliot] since May 2022, when he took his PlayStation away,⁷⁶ which was approximately six months before [Ms Carran] removed [Elliot] from Ireland in mid-November. I have no doubt that [Mr Maguire] regrets his actions now, or lack of action, because the onus was surely on him as the adult, to endeavour to repair their relationship. [Elliot] is likely to have felt rejected and/or abandoned, in the context of regular weekly or fortnightly contact before that incident. Six months of no contact at all

⁷⁴ Submissions at [55.6].

⁷⁵ BOD page 424.

⁷⁶ BOD page 62 at [2] and page 424.

for a 12-year-old is a long time, and it is perhaps not surprising that [Elliot]’s views have now hardened.

[83] The fact that [Mr Maguire] has not been able to have contact with [Elliot] since mid-November 2022 is not [Mr Maguire]’s fault, and nor is the lack of regular phone/video contact, although [Mr Maguire] may not have handled the phone calls that have taken place as well as he could. Obviously it is [Ms Carran] who removed [Elliot] from Ireland and who has kept him in New Zealand.

[84] My assessment, however, in terms of the weight to be given to [Elliot]’s objection to returning to Ireland and to his father’s full-time care or even shared care, is that his views are again grounded in the reality of his own experiences which he still vividly recalls.

[85] The reason that I directed a s 133 report be obtained and that I vacated an initial hearing that had been scheduled for 6 December 2023, was because of the child objection defence that had then be raised and the pre-hearing ruling of the High Court in *Anderson v Lewis*⁷⁷ where Doogue J said:⁷⁸

It is only through the provision of such evidence that the Court can, in the case of an alleged objection, properly and forensically assess the authentic or inauthentic voice of the child.

[86] Hence, the brief for Ms Abrahamson to, inter alia, assess whether or not [Elliot] has sufficient maturity and understanding to recognise the implications of his objection. In response to this question in the brief Ms Abrahamson stated as follows:⁷⁹

At 14 years of age [Elliot] has many of the skills required for competent decision making. Decision making skills involve four main components: expressing a choice, understanding, reasoning, and appreciation ... While [Elliot] has well-developed language skills and understanding, his reasoning is still more immature than that of an adult. Specifically, while [Elliot] has now developed some ability to identify risks he retains limitations for complex decisions. The ability for self-regulation develops strongly from the age of 12 until the age of 18, but continues to improve into early adulthood. The neuropsychological ability to balance control functions such as planning ahead, weighing risks and benefits and in processing complicated decisions, requires realistic appreciation of rewards and associated emotional regulation

⁷⁷ *Anderson v Lewis* [2022] NZHC 1924.

⁷⁸ At [54].

⁷⁹ S 133 report, page 36 and 37.

which is not fully developed before early adulthood. This means that even though an adolescent can have intellectual maturity, this does not automatically imply the presence of emotional and social maturity. ... Thus in a dilemma in which there is a small chance of a reward, this reward can be attributed such a high value that the situation is no longer perceived as a dilemma by the adolescent and there is only one path to choose ... Adolescence contributes to [Elliot] being more vulnerable to making decisions which may not be well-balanced and may not promote positive development.

[87] Ms Abrahamson confirmed in her oral evidence that [Elliot] retains limitations for understanding and reasoning complex decisions.⁸⁰ An example Mr Logan put to Ms Abrahamson, which she agreed with, is that [Elliot] does not understand that this hearing is about forum for the substantive decision as to his ongoing care and contact arrangements and is not about where he ultimately resides. As Ms Abrahamson's answers demonstrated, that is not an easy concept for adults to understand either.⁸¹

[88] [Elliot]'s objection must therefore be assessed in light of the limitations identified by Ms Abrahamson that qualify his decision-making capability, because [Elliot] is only 14 and is not an adult.

[89] Noting that [Elliot]'s reasoning and brain continues to develop until early adulthood holds [Elliot], and children in general in Hague Convention proceedings, to a test or standard that can never be met if they are expected or required to have fully developed reasoning and appreciation. By definition, for the purposes of this legislation, a child is under the age of 16 so cannot have fully developed reasoning.

[90] Ms Abrahamson agreed, however, with Mr Wren when he put to her and asked her to comment on his submission to the Court that [Elliot]'s views should be given significant or even determinative weight:⁸²

Q. Court of Appeal authority dictates that part of the four-step process, the first step is to consider, does the child object to the return? My submission to the Court will be, in respect of [Elliot], there is a clear objection, would you agree?

A. Yes.

⁸⁰ Notes of Evidence ("NOE") page 20, line 29.

⁸¹ NOE page 20, line 30 – page 21, line 20.

⁸² NOE page 34, line 29 – page 35, line 20.

- Q. The second step is to consider whether the child, so in this case, we're talking about [Elliot], has obtained the age and maturity at which it is appropriate to give weight to the child's views. My submission to the Court on behalf of [Elliot] will be yes, that [Elliot] does have the age and maturity where it is now appropriate for the Court to give weight to his views, would you agree?
- A. Yes.
- Q. The next step, and perhaps the most important one in terms of my submissions to the Court, will be is what weight should be given to [Elliot]'s views? Now that's ultimately a decision for his Honour, but my submission to the Court will be when weighing up all the factors, that [Elliot]'s views should be given significant weight or even determinative weight, ie, the defence that's been pleaded on behalf of his mother, that there is an objection, should be upheld and, therefore, the Court should exercise its discretion not to return [Elliot] to Ireland. Would you consider that is an unreasonable submission or a submission that doesn't have merit on behalf of [Elliot] that I'm going to make to the Court?
- A. I would consider it reasonable and one of the reasons for that is that from my perspective as a psychologist, as I've identified in my report, there are risks specifically for [Elliot] of ignoring his expressed wishes.

[91] I have already summarised what [Elliot] said to me when I met with him. As distinct from what he said, in terms of his reasons and thinking, I was also impressed with the way he presented. [Elliot] is quite a big boy, virtually the size of an adult already. He shook my hand when Mr Wren introduced us. He sat across the table from me and we talked continuously for nearly an hour. [Elliot] sat still, made direct eye contact throughout and answered all the questions I asked of him. He maintained focus and was polite, sensible and pleasant throughout. He presented to me as thoughtful and insightful.⁸³ I was impressed with [Elliot] and my assessment was that he is a mature 14-year-old.

[92] As already observed, I consider that his views have been validly informed by his own lived experiences. I am also conscious and take account of the impact of the now significant period of time that he has lived in New Zealand with his mother and effectively been excluded from his father and paternal family which has, undoubtedly, also had an effect on the views he has formed.

⁸³ For context I have a daughter who is 9 days older than [Elliot], and a son who is 16, so I am familiar with teenage behaviour.

[93] Adults and children alike have preferences and make decisions based on a variety of factors. As Mander J observed in *Anderson v Lewis*:⁸⁴

The fact there have been these influences ought not necessarily disqualify the child's views as not being genuinely held by him, or prevent his objection from being afforded appropriate weight, at least insofar as they can be discerned as reflecting his own authentic outlook on his situation.

[94] I find that [Elliot] has a firm and consistent objection to being returned to Ireland and notwithstanding the limitations on his ability (or any child's ability) to appreciate the potential impact of long-term consequences of his decision, I conclude that significant weight and indeed maximum possible weight should be afforded to his views.

[95] I am satisfied that [Elliot]'s views and his objection to returning to Ireland is grounded in his own actual experiences of having previously lived in Ireland for almost 13 years, and in comparison with the day-to-day life in New Zealand and the many experiences that he has enjoyed here over the last 17 months.

[96] [Elliot]'s views and objection to return cannot in itself be determinative. I turn now to the exercise of the discretion.

Residual discretion

[97] Notwithstanding that [Ms Carran] has established the defence of "child objection" there remains a discretion vested in the Court as to whether to order a return or not. The Supreme Court in *Secretary for Justice v HJ* noted:⁸⁵

... It is not appropriate to speak in terms of a presumption of return in a discretionary situation. This is because the exercise of the discretion must recognise, and seek to balance, both the welfare and best interests of the child and the general purpose of the Convention.

[98] Obviously the Hague Convention seeks to protect children from the harmful effects of wrongful removal or retention from the Contracting State in which they are habitually resident. The Court of Appeal has also said that it cannot be emphasised too strongly that the exceptions set out in Article 13 of the Convention, i.e. the

⁸⁴ Above n 67 at [84].

⁸⁵ *Secretary for Justice v HJ* [2006] NZSC 97 at [68].

“defences” in s 106 of the Act, are as integral to the scheme of the Convention as the Article 12 provision for prompt orders for return.⁸⁶ The Court went on to say:⁸⁷

The circumstances in which the Convention does not require an order for return of the child are carefully circumscribed. It is not the function of the requested State to conduct a wide-ranging inquiry into the best interests of the child. But the prompt and focused inquiry required by the provisions of the Convention is designed to ensure that the outcome does serve the interests of the particular child. As Baroness Hale said *Re D*:⁸⁸

... No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.

[99] I am mindful that [Ms Carran] has clearly breached the whole tenor of the Hague Convention by bringing [Elliot] to New Zealand for what was intended to be a holiday, and then making the unilateral decision to remain permanently in New Zealand and to enrol [Elliot] in school in New Zealand. [Ms Carran] has established a relationship (or perhaps furthered an existing relationship) with a New Zealand man whom she has since married, purchased a house with him and obtained a full-time job. She has made it clear that she is not going to return to Ireland even if [Elliot] returns, and inevitably [Elliot] has been exposed to that position. [Ms Carran] has also done very little, to date, to promote and facilitate contact for [Elliot] and [Mr Maguire] and the wider paternal family, and has no doubt been waiting for the outcome of this summary hearing before doing so. All of that flies in the face of the Hague Convention.

[100] Judges making decisions in Hague Convention cases are naturally wary that their decisions should not encourage potential abductors. Clearly, the basic Hague Convention premise is that [Elliot] should now be returned to Ireland, to have substantive parenting and/or relocation issues determined there, in his country of habitual residence. I also take into account the interests of other children generally, in that declining an order for return has the potential to send the wrong message to potential abductors.

⁸⁶ *LRR v COL* [2020] NZCA 209 at [79].

⁸⁷ *Ibid.*

⁸⁸ Above n 64 at [52].

[101] However, and as Mander J noted *Anderson v Lewis*, the Care of Children Act recognises that notwithstanding the wrongful retention of a child in breach of another parent’s custodial rights, there will be situations where the return of the child would be contrary to their interests.⁸⁹ He went on to say:⁹⁰

While the provisions of the Act which give effect to the obligations of the Hague Convention are expressly not limited by the fundamental statutory principle set out in s 4(1) - that the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration in proceedings under the Act - and the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, that does not mean they are not “at the forefront of the whole exercise.” If the assumption that the best interests of the child will ordinarily be served by returning a child to the country where they are habitually resident can be displaced by one of the statutory exceptions, that must only be because the particular circumstances of that child are such, that considerations relating to their welfare and best interests will best be served by them remaining where they are until the dispute between their parents is resolved.

[102] In conducting the balancing exercise, I consider and find that [Elliot]’s objection should be viewed as decisive.

[103] Notwithstanding the reservations that arise from [Ms Carran]’s flagrant breach of the Hague Convention general principles and her influence on [Elliot]’s position by refusing to return to Ireland herself, I have been satisfied as to the strength of [Elliot]’s objection and that his views and feelings about a return to Ireland are authentically his own. As I have commented already, he has lived both experiences (Ireland and New Zealand) himself and at the age of 14 years and almost 3 months, there appears to be an alignment between his welfare and best interests and his expressed view of wanting to remain in New Zealand and in his mother’s care. He is, as I have noted, in my assessment a mature 14-year-old and I am conscious that in as little as [under two years]’ time he will be 16 and outside the jurisdiction of the Act and adjudged old enough and able to determine his own care and contact arrangements.

[104] I refer again to Ms Abrahamson’s evidence and agreement (with Mr Wren) that [Elliot]’s views should be given significant weight or be determinative and her evidence that there are risks for [Elliot], if his clear and consistent expressed views are

⁸⁹ At [143].

⁹⁰ At [144].

ignored.⁹¹ Ms Abrahamson acknowledged that [Elliot] would be distressed by an order for return,⁹² that [Elliot] does not want to live with his father,⁹³ that there are significant difficulties in their relationship,⁹⁴ and that [Elliot] may struggle to manage that stress, may struggle to seek adequate support and could develop low mood and mental health difficulties.⁹⁵

[105] Ms Abrahamson noted in her report that [Elliot]’s paternal grandmother raised concerns about [Elliot] attributing blame to the paternal family for being returned,⁹⁶ and that [Mr Maguire] had told her that he did not want to force [Elliot] to return to Ireland against his wishes for fear it will negatively impact their relationship.⁹⁷ Ms Abrahamson confirmed that evidence under cross-examination.⁹⁸ Ms Abrahamson agreed that if [Elliot]’s wishes are upheld by the Court, or alternatively by agreement between the parties, there is more likelihood of the relationship between [Elliot] and his father moving in a positive direction.⁹⁹ I suspect that is correct.

[106] Whilst I am not at this stage determining [Elliot]’s long-term care and contact arrangements, I have decided in the light of the strong “child objection” defence that the New Zealand Family Court is the appropriate forum to conduct a thorough assessment and determination of [Elliot]’s welfare and best interests if that is required.

Result

[107] Notwithstanding the Hague Convention policy considerations that are usually decisive in circumstances such as these, in the particular facts of this case and for the reasons already set out, I find that it would now be contrary to [Elliot]’s welfare and best interests to require him to return to Ireland.

⁹¹ S 133 report at page 37-38 and NOE page 35, lines 18-20.

⁹² Report at page 37.

⁹³ NOE page 13, line 14.

⁹⁴ NOE page 13, lines 20 and 29.

⁹⁵ NOE page 14, lines 7-16.

⁹⁶ Report at page 37.

⁹⁷ Page 30 at [105].

⁹⁸ NOE page 39, lines 9-19.

⁹⁹ NOE page 40, lines 1-5.

[108] The effect of returning him to Ireland would be to separate him from his mother and younger brother with whom he has lived his whole life. A return to Ireland would likely require [Elliot] to live with [Mr Maguire], who he currently has a strained relationship with, albeit a relationship that needs now to be preserved and strengthened, and it would take him away from the life he has in New Zealand where he is now settled and happy.

[109] In all the circumstances and in the particular facts of this case a return to Ireland is not in [Elliot]’s best interests and given his age of [14] and his clear objection to returning to Ireland, I exercise my discretion to refuse to order a return. Accordingly, [Mr Maguire]’s application is dismissed.

Grave risk defence

[110] Given that I have found the “child objection” defence to be made out, I do not consider it necessary to resolve the defence of grave risk of intolerable harm. But for the sake of completeness, I record that I would have found the defence of “grave risk” established.

[111] The Court of Appeal has previously said this is a difficult defence to make out.¹⁰⁰ More recently in *LRR v COL* the Court of Appeal clarified that “grave risk” requires “*something more than a substantial risk. A grave risk is a risk that deserves to be taken very seriously*” and “*turns on both the likelihood of the risk eventuating, and the seriousness of the harm if it does eventuate*”.¹⁰¹

[112] A situation is intolerable “*if it is a situation which this particular child in these particular circumstances should not be expected to tolerate*”.¹⁰²

[113] I do not think that [Elliot] would tolerate being returned to live and attend school in Ireland. All the reasons that I have already mentioned in the context of the “child objection” defence continue to apply.

¹⁰⁰ *HJ v Secretary for Justice* (2006) 26 FRNZ 168 at [33].

¹⁰¹ Above n 86 at [88].

¹⁰² *Ibid* at [89].

[114] [Elliot]’s relationship with [Mr Maguire] needs to be reinstated and strengthened, but [Elliot] does not want to live with his father full-time and would likely refuse to have anything but very minimal contact if he is forced to return to Ireland against his wishes. He does not want to return to the small rural secondary school that he briefly attended in 2022, where he says he has few friends, and in circumstances where he is now well settled and happy at a large high school in New Zealand where he says (and the school has verified) he has lots of friends.

[115] [Ms Carran]’s evidence is that [Elliot] has never been happier, and while it obviously suits her case to say that, it is verified by what [Elliot] has said and explained to me, to his lawyer and to Ms Abrahamson.

[116] I consider that a forced return to Ireland at [Elliot]’s age and at this stage of his secondary schooling, against his very clear and consistent views, would inevitably fail and would then place [Elliot] in a very difficult, stressful, and “intolerable” situation where he is likely to withdraw, fail at school and generally be very unhappy. That will not benefit him, or his relationship with [Mr Maguire] and the wider paternal family.

[117] Making a finding of a grave risk of an intolerable situation, I could not responsibly exercise the residual discretion to order return to Ireland.¹⁰³

Next steps?

[118] In the event I was to decline to make an order for return Mr Wren invited me to give consideration and a steer to the parties (and [Elliot]) as to what might be the next steps.

[119] I realise that [Mr Maguire] will need some time to absorb this decision and to take advice and give consideration to his rights and options. I invite and encourage [Mr Maguire], or [Ms Carran], to apply to the Christchurch Family Court for a parenting order, to formalise care and contact arrangements for [Elliot].

¹⁰³ *LRR v COL* at [96].

[120] [Mr Maguire] is entitled to seek relocation of [Elliot] to Ireland and/or day-to-day care of [Elliot], which [Ms Carran] would no doubt oppose, but what could not be opposed, in my view, is the formalisation of the contact that [Ms Carran] has offered in her recent affidavit and which I briefly raised in my interview with [Elliot].

[121] [Mr Maguire] will need to consider and put together his own proposal as to the contact that he seeks. I am not aware of [Mr Maguire]'s financial position or the financial position of his wider family, and often they might be able to fund flights to and from Dublin. It may be that [Mr Maguire] and/or paternal family can visit New Zealand from time to time as well.

[122] Thought will need to be given to whether or when [Elliot] can fly unaccompanied, given that he would need to transit between Christchurch and Dublin, and/or as to who would fly with him. Likewise, is it best to travel to Ireland in the UK summer, noting that the New Zealand school July term holidays are two full weeks, and that [Elliot] can likely miss a few more days of school for such important contact and relationships. Or is it preferable for [Elliot] to travel over the longer (New Zealand) Christmas school holidays, but which would be the middle of winter in Ireland. Travel arrangements for [Felix] will also be a factor.

[123] What I want to make clear, however, is that it is important to resurrect and strengthen the relationship with [Mr Maguire] and his family as an absolute priority now. That is the minimum that the Court will expect of [Ms Carran]. There should now be a weekly video call as she has proposed.

[124] I do not consider that [Mr Maguire] would need to travel to New Zealand to participate in a hearing about appropriate contact arrangements. Should there be a need for a hearing he could give evidence from Ireland by AVL, but any disputes may be able to be determined by submissions-only once evidence has been filed.

[125] I would be minded to case manage and prioritise any proceedings under the Act and naturally Mr Wren would be appointed as the lawyer for [Elliot], assuming he is available.

[126] It may be that there is a basis for finding “special circumstances” so that a parenting order can continue for [Elliot] past the age of 16 years, to continue to formalise and ensure appropriate care and contact arrangements.

[127] In the meantime, I ask Mr Wren to meet with [Elliot] immediately to explain this decision to him in appropriate terms and detail.

Costs

[128] Neither party nor counsel has mentioned seeking costs. I am not minded to make an order for costs.

Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 15/04/2024