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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2023-009-001697
[2024] NZFC 4524

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	[LOCHLAINN BARCLAY] Applicant
AND	[GINA CARRAN] Respondent

Hearing: 5 April 2024

Appearances: C Fogarty for the Applicant
Y Park for the Respondent
J Wren as Lawyer for the Child

Judgment: 15 April 2024

RESERVED JUDGMENT OF JUDGE P W SHEARER

Introduction

[1] This Hague Convention case and decision relates to the parties' son, [Felix], who is [9] years old.

[2] The parties, [Lochlainn Barclay] ("[Mr Barclay]") and [Gina Carran] ("[Ms Carran]") are Irish citizens and had a relationship in Ireland from June 2012 to April 2016, but never married. [Felix] was not quite 2 years old when the parties separated. There are disputed allegations of family violence in respect of the relationship.

[3] [Ms Carran] also has an older child from a previous relationship, [Elliot], who is now 14 years old. [Elliot] was 2 when [Ms Carran] commenced a relationship with [Mr Barclay] and was nearly [4] when [Felix] was born. I heard expert psychological evidence contemporaneously on 5 April 2024 and have decided separately a Hague Convention application brought by [Elliot]'s father, [Mr Maguire]. [Elliot] has a very clear objection to returning to Ireland, which I have upheld.

[4] After [Mr Barclay] and [Ms Carran] separated each continued to reside in [County A], in the province of [deleted], and [Mr Barclay] had regular access with [Felix].

[5] In November 2022 [Ms Carran] brought [Felix] (and [Elliot]) to New Zealand for a holiday, which was ostensibly to visit her sister who resides in Christchurch. [Ms Carran] has remained in New Zealand with [Felix] (and [Elliot]) and has since married, in December 2023, her new partner, [Mr Archer], who is a New Zealander.

[6] The application before the Court is brought by [Mr Barclay] pursuant to the Hague convention, seeking an order for the return of [Felix] to Ireland.

[7] A jurisdictional issue in this case is whether [Mr Barclay] had "rights of custody" in Ireland at the time [Felix] was removed. The parties were never married and as at the date of removal, [Mr Barclay] was not a legal guardian and there were no court orders.

[8] [Ms Carran] has also pleaded the "grave risk" and "child objection" defences in respect of [Felix], as she did in [Elliot]'s case.

[9] [Mr Barclay]'s application seeking an order for return to Ireland was filed in the Christchurch Family Court on 24 October 2023. A hearing was initially scheduled for 6 December 2023 but following the filing of the further application by [Elliot]'s father, the appointment of a lawyer for both boys and [Ms Carran] raising the defence of child objection, it was necessary to obtain a s 133 psychological report.

[10] Ms Abrahamson completed a s 133 report dated 27 February 2024 and was required for cross-examination at the hearing on 5 April. Thereafter, the hearing proceeded by submissions-only in the usual way. [Ms Carran] was present in the courtroom and [Mr Barclay] attended by AVL from Ireland.

Background

[11] The parties agree that they commenced a relationship in June 2012 and there is no dispute that [Felix] was born two years later on [date deleted] 2014. The parties separated [in April] 2016.

[12] [Ms Carran] has deposed that the relationship was toxic and that [Mr Barclay] was abusive. She alleges that the abuse began with [Mr Barclay] shouting and screaming at her, and escalated to him kicking and punching doors and walls, and eventually to physical abuse. She claims that [Mr Barclay] was an alcoholic and that their relationship was on and off as a result of [Mr Barclay]'s abuse and that she should have ended the relationship sooner.[1] She alleges that they separated [in April] 2016 after an incident where [Mr Barclay] choked her.[2]

[13] [Ms Carran] deposed that when she found out she was pregnant in [2013] she wasn't sure if [Mr Barclay] was the father because they broke up for long periods of time and she saw someone else during that time. She said she decided not to record [Mr Barclay] as [Felix]'s father on the birth certificate.[3]

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[1] Bundle of Documents ("BOD") page 99 at [4], [5] and [6].
[2] At [6].
[3] At [8].

[14] [Mr Barclay] completely denies that the relationship was toxic or that he was violent or an alcoholic. He says those allegations are an attempt to discredit his name.[4] He notes that there are no records of any police callouts or family violence reports.[5] [Ms Carran] acknowledges that she did not ever report any abuse to the police.[6]

[15] [Mr Barclay] says that he did not know until 2017 that he was not on [Felix]'s birth certificate and that it has never been disputed that he is [Felix]'s father.[7] [Mr Barclay] deposed that when he found out he wasn't on the birth certificate he got the necessary form to re-register the birth[8] and gave the form to [Ms Carran] which she completed, but he said that [Ms Carran] refused to attend with him to sign the form in front of the appropriate (court) official.[9]

[16] [Ms Carran] deposed that after the parties separated they had a verbal agreement that [Mr Barclay] would have [Felix] in his care on a fortnightly basis as follows:[10]

(a) Week 1: 6 pm Thursday to 8 am Monday; and

(b) Week 2: 6 pm Thursday to 10 am Saturday.

[17] Clearly that was a significant sharing of [Felix]'s care (ie an 8/6 split per fortnight) but [Ms Carran]'s evidence is that the arrangement was inconsistent due to [Mr Barclay] continually requesting changes to the schedule. She said he worked six days a week and prioritised drinking at the pub when he had the chance. She said there were multiple occasions when [Mr Barclay] would ask to drop [Felix] back early or where he failed to pick [Felix] up.[11]

[18] [Ms Carran] deposed that there were a number of problems with [Mr Barclay]'s contact and his behaviour with [Felix], and that [Felix] asked her multiple times not

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[4] BOD, page 81 at [10], [12] and [13].
[5] BOD, page 81 at [16].
[6] BOD, page 101 at [18].
[7] BOD, page 81 at [14].
[8] BOD, page 19.
[9] BOD, page 24 at [13].
[10] BOD, page 103 at [36].
[11] BOD, page 103 at [37] to [41].

to make him go to [Mr Barclay]'s house.[12] She says that after months of [Felix] not wanting to go to contact she and [Mr Barclay] agreed in 2021 to reduce the contact to two nights every second weekend, from 6 pm Friday to Sunday morning.[13]

[19] [Mr Barclay] did not respond to those allegations in his affidavit in reply. The general statement that he made was "*I had my son [Felix] regularly in my care up until November 2022 and there was never once a complaint against me.*"[14]

[20] In his earlier (first) affidavit [Mr Barclay] said that the first shared care agreement remained in place from 2016 until September 2022 when [Ms Carran] moved [Felix] to a new school in [town name deleted], 20 km from where [Mr Barclay] resided.[15] He said he has shared the care of [Felix] and has been involved in every aspect of [Felix]'s life before and after his separation from [Ms Carran].[16]

[21] [Mr Barclay] filed supporting affidavits from his mother and from his partner, [Michelle Carey]. She deposed that she and [Mr Barclay] have been in a relationship since 2019. She said that she would look after [Felix] while [Mr Barclay] was at work. She deposed that [Ms Carran] left [Felix] in their care for 3 to 4 weeks in 2021 and that they would have [Felix] for long periods in the school holidays, and frequently stayed in her aunt's holiday home on the coast (80 km away). [Ms Carey] said that [Mr Barclay] has never been abusive in any way and that the accusations [Ms Carran] has made against him are not true.[17]

[22] [Felix]'s paternal grandmother, [Moira Barclay], deposed that [Felix] came over to her house every weekend since he was 2 years old and right up until November 2022. She said that [Felix] has been a big part of their family from day one. They all miss him dearly.[18]

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[12] At [43] and [44].
[13] At [46].
[14] BOD, page 80 at [3].
[15] BOD, page 28 at [50].
[16] At [41].
[17] BOD, page 85 – 86.
[18] BOD, page 88.

[23] Against that, [Ms Carran]'s mother, [Adrianne Foley], wrote a letter which [Ms Carran] attached to her second affidavit. While the letter is not sworn evidence, no witness' evidence has been able to be tested at a submissions-only hearing. [Ms Foley]'s letter confirms [Ms Carran]'s version of events in terms of [Mr Barclay] being "*a big drinker*" and providing [Ms Carran] with little support in [Felix]'s early years.

[24] [Mr Barclay] has deposed that [Ms Carran] made a request of him in early September 2022 asking that [Felix] be able to travel to New Zealand with her and her family for a Christmas holiday.[19] [Ms Carran]'s sister, [Jolene], resides in Christchurch, having immigrated here in 2012.[20] [Mr Barclay] said he had no difficulty with the proposed holiday provided [Felix] was brought back in time for the start of school in January.[21] [Ms Carran] left Ireland with [Felix] (and [Elliot]) on 15 November 2022.

[25] [Ms Carran], in her reply affidavit, says that she did not "request" to be able to travel to New Zealand with [Felix], and did not need [Mr Barclay]'s permission to travel overseas because [Mr Barclay] is not a guardian of [Felix].[22] It seems clear, however, that at the very least, [Ms Carran] "informed" [Mr Barclay] of the overseas holiday and that [Mr Barclay] did not oppose [Felix] having the holiday.

[26] [Ms Carran] acknowledged in her initial affidavit that "*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.*"[23]

[27] The short point is that [Ms Carran] and the boys have not returned to Ireland and have now been in New Zealand for 17 months. In her initial affidavit [Ms Carran] said:[24]

> After I saw how much [Felix] and [Elliot] were enjoying themselves in New Zealand, I consulted the children about staying here permanently and they both were overjoyed at the idea. I saw that staying in New Zealand was

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[19] BOD, page 25 at [19].
[20] BOD, page 148.
[21] At [20].
[22] BOD, page 101 at [20].
[23] At [25].
[24] BOD, page 102 at [26].

> beneficial for my children because I firmly believed that I could provide a better life for them here.

[28] She also said in that first affidavit that:[25]

> [Lochlainn] did not have guardianship rights or rights to custody when [Felix] and I decided to remain in New Zealand. I therefore did not need to seek his permission to stay.

[29] [Felix] has been attending [School 1] since the beginning of Term 1 in 2023 and is now in Year 5 of primary school. When I met with [Felix] the day prior to the hearing he told me that there are [over 500] children at [School 1] and [over 20] children in his class. [Ms Carran] deposed that [Felix] "*has adapted well to kiwi-living and has made many friends*".[26] He played rugby for [deleted] last year and participates in [extracurricular activities] and swimming.[27]

[30] [Ms Carran] met her now husband, [Braden Archer], when she first visited New Zealand in 2015. They spent more time together when she visited again in 2016 and in June/July 2022.[28] By the time of [Ms Carran]'s first affidavit dated 8 November 2023 she and [Mr Archer] were engaged and they have since married [in December] 2023. They bought a house together in Christchurch in mid-September 2023 and each contributed $40,000, although [Ms Carran]'s name is not on the title (or presumably the mortgage) because she is currently ineligible to own property in New Zealand.

[31] [Ms Carran] and [Mr Archer] are now living together with [Felix] (and [Elliot]) and [Mr Archer] has his 4-year-old daughter in his care two nights per week. In her affidavits [Ms Carran] says that she has a fantastic job in Christchurch at [workplace deleted], with flexible hours and good pay. She has recently been promoted to [occupation deleted]. She says that her personal circumstances have drastically changed for the better in New Zealand[29] and her position that she has subsequently made clear is that she will not return to Ireland herself even if the children are ordered to return.

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[25] At [79].
[26] BOD, page 106 at [60].
[27] BOD, page 138 at [4] and [5].
[28] BOD, page 138 at [4] and [5].
[29] BOD, page 108 at [82].

[32] [Ms Carran] stated in her first affidavit as follows:[30]

> My relationship with the [Lochlainn] was toxic, but I put my differences aside to be civil for the sake of [Felix]. It was difficult to communicate openly and clearly with [Lochlainn], which made it impossible to co-parent at times. I hold no animosity towards [Lochlainn], and I hope we can move forward in a positive way. I still firmly believe it is important for [Felix] to have strong relationships with [Lochlainn] and his family and I am willing to facilitate this will [Felix] lives in New Zealand.

[33] [Mr Barclay]'s Irish solicitor, Mr Morrissey, swore an affidavit dated 13 October 2023 as an expert in Irish law.[31] Mr Morrissey advised that because [Mr Barclay] and [Ms Carran] were not married, [Mr Barclay] is not an automatic guardian of [Felix] under Irish law.[32] He noted that had there been any dispute about the care arrangements for [Felix] when he was still resident in Ireland, [Mr Barclay] could have made an application to the Court to have those matters resolved, including making an application for a custody and guardianship order.

[34] [Mr Barclay] deposed in his first affidavit dated 26 October 2023 that:[33]

> There are no Irish Family Court orders in force as [Gina] and I have always reached any care arrangements by agreement between ourselves without the formalities of a Court order.

[35] Mr Morrissey advised in his affidavit that [Mr Barclay] applied to the Irish District Court for appointment as a guardian of [Felix] after [Ms Carran] had retained [Felix] in New Zealand. [Mr Barclay] deposed that he instructed his solicitor to file proceedings in January 2023.[34] An order appointing [Mr Barclay] as a guardian of [Felix] was made on 9 March 2023,[35] almost four months after [Ms Carran] and [Felix] had left the country.

[36] [Mr Barclay] deposed that he had regular phone and video calls with [Felix] via WhatsApp about three times a week between November 2022 and 14 February 2023.[36] He contacted [Felix]'s school in Ireland in early January 2023 and learned

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[30] At [80].
[31] BOD, page 1.
[32] The Guardianship of Infants Act 1964.
[33] BOD, page 32 at [102].
[34] BOD, page 24 at [15].
[35] BOD, page 41.
[36] BOD, page 29 at [67].

that [Ms Carran] had advised the school in mid-December that [Felix] would not be returning.[37] He said he challenged [Ms Carran] about that in January and there has been no further phone contact since mid-February. He said "*I have made numerous attempts to contact [Gina] to which there has been no reply.*"[38]

[37] [Ms Carran]'s evidence is that she had been facilitating phone calls. She said "*[Felix] was becoming increasingly anxious and fearful of speaking with [Lochlainn] because he would lose his temper and get so angry at [Felix]. He would interrogate [Felix] and stay horrible things, which would make him feel sad, scared and anxious. He would make [Felix] believe this was all his fault*"[39] [Ms Carran] went on to say that she had asked [Mr Barclay] several times not to speak to [Felix] in this way. She said "*[Lochlainn] did not stop, and one day, he was so aggressive towards [Felix] that [Felix] cried and ran away. I took the phone and told [Lochlainn] that the phone calls would not be happening anymore.*"[40]

[38] [Ms Carran] deposed that [Felix] has regular (weekly) video calls with her family. She said "*I am willing to facilitate contact with [Lochlainn] and his side of the family as long as the conversation is child-focused.*"[41]

[39] There had not been any further phone contact until early this year when Ms Abrahamson suggested to [Ms Carran] that she facilitate contact. [Ms Carran] has deposed in her updating affidavit dated 20 March 2024 that the call made did not go well.[42] [Ms Carran] deposed, however, that "*if [Felix] can remain in New Zealand with me, I would be willing to facilitate regular contact between [Felix], [Lochlainn] and the paternal family with some boundaries in place to ensure that contact is child-focused.*"[43]

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[37] At [65].
[38] At [72].
[39] BOD, page 105 at [51].
[40] At [54].
[41] At [56].
[42] BOD, page 169 at [31] to [34].
[43] At [37].

The legal framework and issues

[40] Part 4 of the Care of Children Act 2004 ("the Act") incorporates the Hague Convention[44] into New Zealand law.

[41] In *LRR v COL* the Court of Appeal summarised the general principles relevant to the Hague Convention as follows:[45]

> [76] The Convention seeks to protect children from the harmful effects of their wrongful removal or retention from the State in which they are habitually resident. It does this by securing the prompt return of children who have been wrongfully removed or retained, unless one of the prescribed exceptions applies. Prompt return of children in cases where no exception applies can be expected to deter wrongful removals, and will in most cases ensure that the status quo is restored.
>
> [77] The Convention is framed on the assumption that prompt return, in cases where no exception applies, will be in the best interests of the child. The child will return to their familiar home environment, and to the place where the courts are best placed to determine matters of custody and access. The courts of the State in which the child is habitually resident can be expected to have better access to information about the interests of the child, the family situation, and the availability and effectiveness of measures to avoid risks of harm to the child.
>
> [78] However the Convention identifies certain circumstances in which the return of a child to its State of habitual residence may not be appropriate, because return would be contrary to the interests of that child. The presumption that the best interests of the child will be served by a prompt return to the country where they are habitually resident is displaced in these circumstances.
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> [79] It cannot be emphasised too strongly that the exceptions set out in Article 13 are as integral to the scheme of the Convention as the Article 12 provision for prompt orders for return. 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 in Re D:[46]
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>> … 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.

[44] The Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980, a copy of which is set out in Schedule 1 to the Act.
[45] *LRR v COL* [2020] NZCA 209.
[46] In Re D (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 AC 619 at [52].

[42] In the same case the Court of Appeal noted that the inter-relationship between the best interests of the child and the Convention were considered by the United Kingdom Supreme Court in *Re E*, where it was said:[47]

> 14 … the fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean that they are not at the forefront of the whole exercise. The Preamble to the Convention declares that the signatory states are "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention …" This objective is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this: see the Explanatory Report of Professor Pérez-Vera, at para 25.
>
> 15 Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right. As our own Children Act 1989 makes clear, in section 1(3)(c), the likely effect upon a child of any change in her circumstances is always a relevant factor in deciding what will be best. But it is also seen as likely to promote the best resolution for her of any dispute about her future, for the courts and the public authorities in her own country will have access to the best evidence and information about what that will be.
>
> 16 Those assumptions may be rebutted, albeit in a limited range of circumstances, but all of them are inspired by the best interests of the child. Thus the requested state may decline to order the return of a child if proceedings were begun more than a year after her removal and she is now settled in her new environment (article 12); or if the person left-behind has consented to or acquiesced in the removal or retention or was not exercising his rights at the time (article 13(a)); or if the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of her views (article 13); or, of course, if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation": article 13(b). These are all situations in which the general underlying assumptions about what will best serve the interests of the child may not be valid. We now understand that, although children do not always know what is best for them, they may have

[47] *Re E* [2012] 1 AC144.

> an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters.

[43] The jurisdictional requirements in order for the Court to make an order for the return of [Felix] to Ireland are set out in s 105 of the Act:

> **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.

[44] Pursuant to s 105(2), the Court must make an order for return if the four grounds set out in s 105(1) are made out, unless one of the exceptions or "defences" set out in s 106(1) applies, in which case the Court has a residual discretion.

[45] In this case, [Ms Carran] is pleading two of those defences, being those set out in s 106(1)(c)(ii) and (d):

> **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) ...
>
> (b) ...
>
> (c) that there is a grave risk that the child's return—
>
> (i) ...
>
> (ii) would otherwise place the child in an intolerable situation; 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
>
> (e) ...

[46] These defences I shall refer to by the abbreviations that they are commonly known by, which are "gave risk" and "child objection".

[47] [Ms Carran]'s initial defence and argument, however, is that [Mr Barclay] did not have "rights of custody" under Irish law at the time that [Ms Carran] brought [Felix] to New Zealand in November 2022. As such, [Ms Carran] argues that [Felix] was not removed from Ireland in breach of [Mr Barclay]'s rights of custody. If that is correct there is no jurisdiction for this Court to make an order for return.

Did [Mr Barclay] have "rights of custody" in Ireland?

[48] "Rights of custody" is defined in s 97 of the Act as follows:

> **97 Rights of custody defined**
>
> For the purposes of this subpart, rights of custody, in relation to a child, include the following rights attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the child's removal or retention:
>
> (a) rights relating to the care of the person of the child (for example, the role of providing day-to-day care for the child); and
>
> (b) in particular, the right to determine the child's place of residence.

[49] "Rights of access" are separately defined in the interpretation section, which is s 95:

> **rights of access include—**
>
> (a) the right to visit a child (for example, under an order for contact made under this Act); and
>
> (b) the right to take a child for a limited period of time to a place other than the child's habitual residence (for example, under an order for contact made under this Act)

[50] It is clear that [Mr Barclay] had been having "access" with [Felix] in Ireland, in the traditional sense of that term, and ever since the parties separated. At times he had substantial access, for several days (and nights) at a time, and particularly in school holidays and on occasions that [Ms Carran] was away from Ireland herself.

[51] In my view it is semantics whether the time that [Mr Barclay] had with [Felix] in Ireland is described as "access", "contact", "care", "day-to-day care" or "shared care". It cannot be disputed that [Ms Carran] has always been [Felix]'s primary caregiver, but nor can it be disputed that [Mr Barclay] had significant periods of [Felix]'s care himself. Even two nights per fortnight, as [Ms Carran] has deposed the arrangement was from 2021, is a form of shared care, or at least it would be regarded as shared care, or a form of shared care, in New Zealand.

[52] It is also clear, however, that neither party ever sought a custody or access order from the Irish District Court, and nor was [Mr Barclay] appointed as a legal guardian of [Felix] prior to [Felix]'s removal from Ireland in November 2022.

[53] As at November 2022 [Ms Carran] was [Felix]'s only legal guardian, and therefore she had the sole right to determine [Felix]'s place of residence. Whilst that is an unfortunate outcome/reality for [Mr Barclay], it is not in dispute.

[54] On [Mr Barclay]'s behalf the submission has been made, which I accept, that [Mr Barclay] could have applied for a Court order at any point, but didn't because he didn't need to, given that [Mr Barclay] and [Ms Carran] were able to agree about access arrangements.

<u>New Zealand case law</u>

[55] Mr Fogarty referred me to a line of cases where New Zealand courts have found that fathers who were not legal guardians, or who did not have a Court order in their favour, have nonetheless been found to have "rights of custody".

[56] *Dellabarca v Christie* is one such case with not dissimilar facts.[48] Ms Christie took her two-year-old son Antony from New Zealand to Western Australia in November 1995, and Mr Dellabarca sought an order for return under the Hague Convention. Mr Dellabarca was not a legal guardian and did not have a court order, but after the parties separated and prior to the removal to Australia the parties had attended counselling together and reached an "agreement" about Mr Dellabarca's weekly access with Antony which the counsellor then recorded in a document.

[57] Ultimately, the Court of Appeal found that the document prepared by the counsellor was not an agreement having legal effect, as required by article 3 of the Convention.[49] Indeed, the Court of Appeal found that the counsellor's document/report did not amount to an agreement at all because, inter alia, it was not in the form of an agreement, it was not signed by the parties, and was imprecise in its terms.[50]

[58] Nonetheless, the Court of Appeal clarified that the term "rights of custody" does not have to be read as requiring that the claimants in question have the right to determine the child's right of residence:[51]

> Rather, it can be read in this alternative way: claimants may succeed if they show that they have *any* qualifying rights relating to the care of the person or the child, one of which rights *may* be the right to determine place of residence. That particular right, on this reading, is just one of the qualifying rights of custody, or, to adapt a common expression, the existence of that right is sufficient but not necessary.

[59] The Court of Appeal found that the removal of the child to Australia was in breach of Mr Dellabarca's rights of custody, assuming that he had rights arising "by reason of an agreement having legal effect under the law of New Zealand".[52] Mr Dellabarca's claim failed at that last hurdle, given the finding already mentioned that the counsellor's document was not an agreement having legal effect.

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[48] *Dellabarca v Christie* [1999] 2 NZLR 549 (CA).

[49] Article 3 states that rights of custody may arise by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[50] At page 556.

[51] Page 552.

[52] Page 555.

[60] *M v H [Custody]* is another case where the parties were not living together when the child was born.[53] The parties had separated in the early stages of the mother's pregnancy but after the birth the father had regular contact with his son for the next four years and 10 months until the mother unilaterally removed him to London. The English Court sought a declaration from the New Zealand Court confirming whether the removal from New Zealand was wrongful within the meaning of the Hague Convention.

[61] The central issue on appeal to the High Court was whether Mr H was exercising "rights of custody" at the date of the removal. In the Family Court Judge Costigan had rejected the contention that because an agreement was oral it did not have legal effect. The High Court referred to the Court of Appeal decisions in *Gross v Boda*[54] and *Dellabarca v Christie* and upheld Judge Costigan's finding:[55]

> We agree with both the conclusion, and reasoning of the Family Court Judge. Section 18 of the Guardianship Act does not require that agreements providing for the care of children must be in written form, although that is unquestionably a prudent safeguard. We think it would be wrong to hold that the significant number of parents who through the exercise of judgment and common sense agree about care arrangements on an informal oral basis do not thereby conclude an agreement in terms of s 18. Provided there is proper evidence to establish the nature of such arrangements, and evidence to show that the relevant rights of custody were being exercised at the time of removal, then we agree that the existence of an agreement having legal effect is made out.

[62] The High Court went on to say:[56]

> The present is a good example of a case in which the informal rights of the father could have been perfected. However, there was no need for him to seek to do so, until too late. By then X had been wrongfully removed.

[63] That is exactly the argument that Mr Fogarty has made in this case for [Mr Barclay].

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[53] *M v H [Custody]* [2006] NZFLR 623.
[54] *Gross v Boda* [1995] NZFLR 49 (CA).
[55] At [30].
[56] At [32].

[64] *Fairfax v Ireton* is another case where the Court of Appeal found that a written and signed parenting plan was an agreement "having legal effect" under New Zealand law. The Court said:[57]

> It would be inconsistent with that purpose if s 40 agreements as to custody were accorded no status for Hague Convention purposes. It would mean that a non-guardian parent could never rely on a custodial agreement and would have to apply, quite needlessly, to the Family Court to have the agreement embodied in a court order before he could acquire peace of mind.

[65] The Court of Appeal acknowledged, however, that courts in other countries have interpreted the definition of "rights of custody" in article 5(a) of the Hague Convention differently.[58]

UK case law

[66] Mr Fogarty also referred me to the UK Supreme Court decision in *re K (A Child) (Reunite International Child Abduction Centre intervening).*[59] There Baroness Hale analysed a line of English cases on "inchoate rights", although the common thread running through those cases was that the mother had either abandoned the child or delegated his/her care to someone else. Baroness Hale said there was nothing in the authorities to suggest that an unmarried father (or anyone else) could acquire rights of custody while the mother, who had sole legal rights, remained the primary carer, whether alone or sharing it with the father.[60]

[67] In the course of her decision, and referring to the concept of "inchoate rights", Baroness Hale commented that there is "very little support for such an expansive view of rights of custody among the other states parties to the Convention".[61] She noted that Ireland had expressly refused to recognise it in an incoming case from the United States.[62]

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[57] *Fairfax v Ireton* [2009] 3 NZLR 289 at [58].
[58] At [65].
[59] *Re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] 2 WLR 1304.
[60] At [26] and [59].
[61] At [57].
[62] At [33].

The law in Ireland

[68] The wording of both article 3 of the Convention and s 97 of the Care of Children Act make it clear that it is rights of custody in relation to the child "*under the law of the State in which the child was habitually resident immediately before the child's removal*" which is relevant. The critical question and issue, therefore, is did [Mr Barclay] have rights of custody in Ireland as at 15 November 2022?

[69] The starting point is the Guardianship of Infants Act 1964, which is the equivalent of our Care of Children Act.[63] For convenience I shall refer to the Guardianship of Infants Act as "GIA", a copy of which Mr Morrisey annexed to his affidavit.[64]

[70] In the GIA "infant" is defined as *"a person under 21 years of age"* and "father" includes *"a male adopter under an adoption order but does not include the natural father of an illegitimate infant"*.[65]

[71] Section 6(4) goes on to say that "*the mother of an illegitimate infant shall be guardian of the infant"* and s 6A, as inserted by s 12 of the Status of Children Act 1987, provides that *"where the father and mother have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant"*.

[72] Section 10(2)(a) then states that a guardian *"shall, as against every person not being, jointly with him, a guardian of the person, be entitled to custody of the infant"*.

[73] Accordingly, the Irish statute does not recognise the father of an illegitimate infant (ie: an unmarried father) but the natural father has the ability to bring an application to the court. Section 11(2)(a) of the GIA further provides that the court may by an order under s 11 *"give such directions as it thinks proper regarding the custody of the infant and the rights of access to the infant of his father or mother"*.

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[63] As per s 104(1)(b)(ii) and (3)(b) of the Care of Children Act [Mr Barclay]'s Irish solicitor, Mr Morrissey, provided an affidavit concerning the relevant law of the Contracting State of the child's habitual residence.

[64] BOD, page 6.

[65] Section 2.

[74] Section 11(4) of the GIA states *"in the case of an illegitimate infant the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the natural father of the infant and for this purpose references in this section to the father or parent of an infant shall be construed as including him"*.

[75] As mentioned earlier, neither parent ever filed an application for a custody or access order under the GIA, and [Mr Barclay] was not appointed a guardian of [Felix] until 9 March 2023, nearly four months after [Ms Carran] had removed [Felix] from Ireland.

[76] Hence [Ms Carran] pleading in her notice of response that *"the applicant did not have guardianship rights or rights to custody when [Felix] left Ireland"*[66] and, on the face of it, she is correct. Pursuant to the provisions of the GIA [Ms Carran] was [Felix]'s sole guardian and was entitled to his custody.

[77] This begs the question or next issue as to the applicability or validity of "inchoate" or more informal rights of custody as have been recognised in New Zealand.

[78] Ms Park helpfully referred me to a decision of the Ireland Supreme Court on this very issue, *J.McB v L E*[67]. In that case Mr McB, who was Irish, and Ms E, who was English, met in England and subsequently lived together in England, Australia, Northern Ireland and Ireland, but never married.

[79] They had three children and came to live in Ireland in 2008 when the children were 7½, 6 and 1 respectively. They separated for a while in or about early 2009 but reconciled in April 2009. They had decided to get married and their wedding was scheduled for 10 October 2009 but whilst Mr McB was away on a 10 day training course in July 2009 Ms E took the children and went to a women's refuge. Mr McB had continuing contact with the children and there is mention in the judgment that despite accusations against Mr McB, which he denied, Ms E left him a letter in which

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[66] BOD, page 97.
[67] *J.McB v L E* [2010] IESC 48.

she said *"I would never deprive the kids of you…I am not taking the kids away from you…you are a good dad"*.

[80] On 25 July 2009, so only two weeks later, Ms E took the children to England without informing Mr McB beforehand and she did not return. Ten days before that, on 15 July, Mr McB had instructed his solicitors to prepare an application under the GIA for an order appointing him to be a guardian of the children, but the application had not been served and the jurisdiction of the District Court had not, therefore, been invoked at the date of the removal of the children from Ireland.

[81] Mr McB then applied to the English Court for an order for the return of the children to Ireland pursuant to the legislation of the UK giving effect to the Hague Convention. The English Court, in turn, requested that Mr McB obtain from the High Court of Ireland a decision or determination that the removal of the children from Ireland was wrongful within the meaning of article 3.

[82] The High Court held that Mr McB had not enjoyed any rights of custody in respect of the children at the time of their removal from Ireland. Mr McB then appealed to the Supreme Court.

[83] It was argued that the rights of custody protected by the Hague Convention include those of an unmarried father where he is living with and by agreement exercising day-to-day care of the children. Mr McB said he was in the process of asserting his right to apply to be appointed a guardian for the children when they were removed, and it was understandable that he had not previously done so. It was submitted that the Court should, in an appropriate case, be prepared to recognise "inchoate rights" of a natural father who had not obtained recognition of his position in the form of a court order, at least where he was carrying out duties and enjoying privileges of a custodial character.[68]

[68] At [22].

[84] The Supreme Court, which was a full bench of five Justices, found that Mr McB did not have rights of custody in respect of the children at the time of their removal from Ireland and said as follows:[69]

> The Irish courts interpret the rights of parents and of their children whether within a family based on marriage or in relationships outside marriage in accordance with Irish law, both statute and common law, and the Constitution, which accords a special position to the family and, in particular, to the family based on marriage. Under section 2 of the European Convention on Human Rights Act, 2003, the courts are obliged to interpret and apply any statutory provision or rule of law, in so far as is possible, subject to the rules of law relating to such interpretation and application, in a manner compatible with the State's obligations under the provisions of the European Convention on Human Rights. Section 4(1)(a) of that Act requires the courts to take judicial notice, inter alia, of the judgments of the European Court of Human Rights.

[85] The Court referred to s 6A of the GIA which I quoted earlier, which refers to the right of an unmarried father to seek an order appointing him as a guardian of the infant. It then said:

> [31] Thus, the natural father has the right expressly conferred by statute to apply to be appointed as guardian of his child and an independent right to apply for orders granting him custody or access. The court hearing any such application is obliged by law to treat the welfare of the child as the first and paramount consideration.
>
> [32] A court when considering an application of a natural father to be appointed as guardian will have regard to all the circumstances of the relationship which exists between the father and the child. It is well known that there is a potentially enormous variation in such relationships ranging from the position of the father of a child conceived as the result of casual or commercial intercourse or even rape, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured from the commencement of his or her life by the father with the mother in an environment bearing almost all of the characteristics of a family founded on marriage, when the rights would be very extensive indeed.
>
> [33] Thus, the courts recognise the blood link between a natural father and his child as an important element which establishes a biological relationship, but which does not, without more, confer any rights on the natural father … The relationship must be judged by a court in the light of all the circumstances of the case but always subject to the overriding consideration of the best interests of the child. The law grants to the natural father a right to apply to the court; the court must consider the extent of his rights as well as those of the mother and of the child. Recognising the existence of the biological relationship between the father and the child, the law grants to the court the power

[69] At [28].

> to regulate and control the scope and ambit of that relationship in an application for guardianship or custody on the part of the natural father. Thus, a natural father has no rights of custody in Irish law in the absence of a court order granting them. For the sake of completeness, it should be said that it follows that a natural father has no right to determine the place of residence of his child save as may be granted to him pursuant to a court order.

[86] The Court also noted:

> [35] The Irish courts, in the interpretation and application of the Hague Convention, have, as the law stands, declined to recognise as amounting to rights of custody under the Hague Convention, the "inchoate rights" of those who are carrying out duties and enjoying privileges of a custodial or parental character though not yet formally recognised or granted by law.
>
> [37] It is the view of the Supreme Court that nothing in the jurisprudence of the European Court of Human Rights suggests that the provisions of Irish law with regard to the rights of custody of a natural father in respect of his child are incompatible with the Convention … The Supreme Court is of the view, in the light of the infinite variation of extra-marital relationships and consequent relationships with children, that the requirement for a court order to give legal force to the right of custody of a natural father is necessary and appropriate and not disproportionate to the objective of protection of the best interests of the child.
>
> [38] Accordingly, the Supreme Court remains satisfied that the appellant did not have rights of custody in respect of his children for the purpose of article 5 of the Hague Convention on 25th July 2009.

[87] Nonetheless, the Irish Supreme Court decided to stay the proceedings and referred a question to the European Court of Justice for a ruling. The particular question posed for the European Court of Justice was whether a member state was precluded from:[70]

> …requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having "custody rights" which render the removal of that child from its country of habitual residence wrongful.

[88] In response, the European Court of Justice noted that:[71]

> The referring court states that, under Irish law, the natural father does not have rights of custody in respect of his child, unless those rights are conferred on

[70] At [44].
[71] Judgment of the Court (Third Chamber) 5 October 2010 In Case C-400/10 PPU at [48].

> him by an agreement entered into by the parents or by a court judgment, whereas such rights of custody automatically belong to the mother, and no attribution of them to her is necessary.

[89] The Court commented[72] that the European Court of Human Rights had already considered a case with comparable facts and ruled that national legislation granting, by operation of law, parental responsibility for such a child solely to the child's mother is not contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms, provided that it permits the child's father, not vested with parental responsibility, to ask the national court with jurisdiction to vary the award of that responsibility.

[90] The Court further noted that the European Court of Human Rights had previously ruled that national legislation which does not allow the natural father any possibility of obtaining rights of custody in respect of his child in the absence of the mother's agreement, constitutes unjustified discrimination against the father.[73] The Court of Justice said this finding:[74]

> …is not invalidated by the fact that, if steps are not taken by such a father in good time to obtain rights of custody, he finds himself unable, if the child is removed to another Member State by its mother, to obtain the return of that child to the Member State where the child previously had its habitual residence. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement…and of her right to determine the child's place of residence, and that does not deprive the natural father of the possibility of exercising his right to submit an application to obtain rights of custody thereafter in respect of that child or rights of access to that child.

[91] Accordingly, the European Court of Justice agreed with the Irish Supreme Court. A Member State is not precluded from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful.[75]

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[72] At [54].
[73] At [56].
[74] At [58].
[75] At [64].

[92] Again, the fact is that [Mr Barclay] did not have a court order from Ireland granting him rights of custody or access. Consequently, and as harsh a result as it is for [Mr Barclay] in circumstances where he had been having regular access with [Felix] from the date of the parties' separation in April 2016 and right up until [Felix]'s removal from Ireland in November 2022, he did not have "rights of custody" in terms of Irish law.

[93] It is apparent that the law and also the Constitution in Ireland accords special status and/or protection to relationships founded on marriage. In her written submissions Ms Park referred me to article 41 of the Constitution of Ireland which is about the family. It states:

> 1(i) The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> (ii) The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

[94] Further in article 41 the Constitution states:

> 3(i) The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

[95] Ms Park advised in her written submissions that in March 2024 voters in the Republic of Ireland overwhelmingly voted against a proposed amendment to the Constitution. Research has confirmed that the referendum proposed to expand the constitutional definition of Family to include "other durable relationships" outside of marriage and 67.7 per cent voted "no".

Decision

[96] Given that this is the clear position in Irish law and the Irish Supreme Court and the Irish public in the form of the recent (2024) referendum have expressly considered but rejected relaxing that law, it is not for me in the Christchurch Family Court in New Zealand to tell Ireland that they have got that wrong.

[97] The Hague Convention itself and the Care of Children Act in respect of applying the Hague Convention,[76] expressly refers to rights of custody under the law of the Contracting State in question. That is Ireland in this case, and I am satisfied that in Irish law [Mr Barclay] did not have rights of custody as at November 2022 when [Ms Carran] removed [Felix] from Ireland to New Zealand.

[98] [Mr Barclay]'s application therefore fails at that first hurdle, given that the jurisdictional requirements for an order for return in s 105(1) of the Care of Children Act have not been met.

[99] Accordingly, [Mr Barclay]'s application is dismissed.

[100] Given the finding above it is not necessary to determine the further defences raised by [Ms Carran]. For the sake of completeness, I will give brief reasons only, for what I would have decided, given that I met with [Felix], heard the evidence of the s 133 report writer, and heard counsel's fulsome submissions.

Child objection defence

[101] I am satisfied that [Felix] is objecting to returning to Ireland. He was clear with Mr Wren, particularly in their second meeting for the purpose of Mr Wren's updated report for the hearing,[77] he was clear with Ms Abrahamson[78] and he was clear with me.

[102] At our meeting, which I relayed to the parties and counsel at the beginning of the hearing, [Felix] told me "*I don't want to go back to Ireland".* Later in our conversation, when I asked him what would happen if he has to go back to Ireland, he said *"I'm going to scream at my dad and I'm going to lock myself in my room and never see him again".*

[76] Section 97.
[77] Report of 2 April 2024 at [4].
[78] Section 133 report at [56] and [61].

[103] In my view I am obliged by the Hague Convention itself,[79] by UNCROC[80] and by s 6(2)(b) of the Care of Children Act to give some weight to [Felix]'s views. I cannot simply ignore what he says. The real question and issue is what weight should be given to his views, in light of his age and maturity?

[104] The answer is that I cannot give much weight to [Felix]'s views. He is only [9], and although he turns 10 [soon], I found him to be a young 9-year-old. He was not able to sit still in his chair and kept swivelling around in 360 degree circles. He quickly lost interest in our discussion, although I am conscious and acknowledge that he had been waiting outside for almost an hour while I talked to [Elliot], and he was likely bored.

[105] When we talked about his family in Ireland he referred to his granddad's "*stinky farts",* which reinforced [Felix]'s age and stage and he referred to [Mr Barclay] being his "*fake dad"* if he doesn't go to Ireland and said *"[Braden] will be my real dad"*, [Braden] being his stepfather. I am not being critical of [Felix] making these comments. I understand what he is saying, but this level of thinking demonstrates his level of maturity.

[106] It is also obvious, and understandable, that [Felix] has been influenced by [Ms Carran] and the position she has taken, and no doubt by [Elliot]'s position as well. When Mr Wren first met with [Felix] in November 2023 [Felix] did not have a clear objection to returning to Ireland. Although he recognised and acknowledged while saying it that it might be a silly idea, he suggested staying with his mum (in New Zealand) during the week and staying with his dad (in Ireland) for the weekends. [Felix], at that stage, was not aware that his mother was not going to go back to Ireland, even if he was ordered to return, and inevitably [Felix] has been influenced by that position and prospect.

[107] The complete lack of contact with [Mr Barclay] since February 2023 is another contributing and influencing factor.

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[79] Article 13.
[80] Article 12.

[108] In all the circumstances I can only give minimal weight to [Felix]'s objection, which is therefore insufficient to uphold the objection. That defence would fail.

Grave risk of intolerable situation

[109] I am well aware that the grave risk defence is a very high threshold and difficult to make out,[81] but for a combination of reasons I would have exercised my discretion to uphold this defence.

[110] I acknowledge that [Felix] has lived the first eight years of his life in Ireland, and that he has his father there with whom he had lived in a form of shared care ever since the parties separated. [Felix] also has several other paternal and maternal family members in the local area that he would be returning to, and which is an area, a school and a life that is familiar to him.

[111] I also acknowledge Ms Abrahamson's oral evidence that there would not be any long-term psychological damage to [Felix], and that it could facilitate some resilience, if he were separated from his mother due to her remaining in New Zealand.[82] Nonetheless, I cannot accept Ms Abrahamson's evidence in that regard.

[112] There are, in my view and assessment, a number of factors that in combination give rise to a grave risk of an intolerable situation for [Felix] if he was returned to Ireland. On their own, none of these factors would give rise to a grave risk, but I consider the cumulative impact of these factors reaches that threshold, as the High Court found could be the case in *Parish v McDonald:*[83]

(a) The assessment of a grave risk for [Felix] must take into account that he does not want to return to Ireland.

(b) Over time [Felix]'s views have become, and are becoming, even more entrenched. They will very likely become more entrenched again when he learns that [Elliot] is not returning to Ireland.

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[81] *H J v Secretary for Justice* (CA) (2006) 26 FRNZ 168 at [33].
[82] NOE, page 41, line 11, to page 42, line 3.
[83] *Parish v McDonald* [2022] NZHC 3022 at [75].

(c) [Felix] is currently angry with his father, and even although [Mr Barclay] has not done anything wrong. As I noted earlier, [Felix]'s most recent phone calls with his father have not gone well and have been upsetting for [Felix], and he told me that he would lock himself in his room and not see dad at all if he were forced to return. It is clear that [Felix] will blame [Mr Barclay] if he has to return to Ireland, and although that may be completely unjustified objectively, that is [Felix]'s subjective perspective and reality.

(d) Given my decision not to make an order for return for [Elliot], he will remain in New Zealand and that places [Ms Carran] in a very difficult position in that she would have one boy in New Zealand and one in Ireland. Even although [Ms Carran] has already said she would not go back to Ireland anyway, she (presumably) cannot go back if [Elliot] is to remain in New Zealand and when he still has the best part of four more years at high school.

(e) [Ms Carran] has been [Felix]'s primary carer since birth and is, therefore, his most important and secure attachment. In my view, [Felix] returning to Ireland knowing that he might only have physical contact with his mother once a year, is not something that he will be able to cope with. I realise that this is precisely the scenario that [Mr Barclay] has been put in since November 2022, but it appears that [Felix] has coped with that enforced separation from his father, even although it is far from ideal. The separation from his mother would surely have a psychological impact on [Felix] and, in my assessment, a significant impact. Having spent an hour with [Elliot] and been impressed by his maturity, I was immediately struck when I then met [Felix] by how young and small he is. I cannot imagine him coping with being separated from his mother.

(f) [Felix] returning to Ireland will also, very likely, be a permanent separation from his older and only brother, [Elliot]. The sibling relationship, which is a lifelong relationship for [Felix], can potentially

be severed permanently and irretrievably if they are to live on opposite sides of the world, and their relationship (and ongoing relationship) is important and vital given that they have always lived together. [Felix] will inevitably look up to [Elliot]. The two brothers have always lived together and notwithstanding their different ages and stages, I cannot contemplate separating them.

(g) There is evidence that [Felix] has previously suffered from anxiety. [Ms Carran] deposed to [Felix] being anxious and unsettled after he came home from longer access with Ms [Barclay] in Ireland, at which time [Felix] was not wanting to go to access, before the length of the visits was then reduced in 2021. [Ms Carran] said *"it got so bad to the point that he was putting his finger in his bum and eating his poop for months"*.[84] Ms Abrahamson acknowledged that there is a risk [Felix]'s behaviour might regress if he is forced to return to Ireland.[85]

(h) Ms Abrahamson noted in her report that [Felix]'s temperament is not always described as easy and his parents agreed he has strong emotions.[86] The parties advised Ms Abrahamson that [Felix] sometimes has difficulty managing his emotions.[87]

[113] How [Felix] would cope with all of these things is unknown, but is a massive risk, and in my assessment there is a grave risk that [Felix] would be placed in an intolerable situation if he were returned to Ireland.

[114] Given that finding that a grave risk of an intolerable situation has been made out, I could not responsibly exercise the residual discretion to order return in those circumstances.[88]

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[84] BOD, page 104 at [45].
[85] NOE, page 16, line 10.
[86] Section 133 report at page 38.
[87] At page 40.
[88] *LRR v COL* at [96].

Next steps?

[115] At the conclusion of the hearing and in the event I was to decline an order for return, Mr Wren invited me to give an indication to the parties (and [Felix]) as to what the next steps might be.

[116] [Mr Barclay] will clearly need some time to absorb this decision and to take advice as to his rights and options.

[117] As I have also said to [Elliot]'s father, [Mr Maguire], I invite and encourage [Mr Barclay], or [Ms Carran], to apply to the Christchurch Family Court for a parenting order, to formalise care and contact arrangements for [Felix]. [Ms Carran] will inevitably oppose an application to relocate [Felix] to Ireland, 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 [Felix].

[118] [Felix] is not objecting to contact with [Mr Barclay] but is objecting to living in Ireland. He needs to have contact with [Mr Barclay] and his wider paternal family, and with his wider maternal family for that matter. Those relationships must now be repaired, maintained and strengthened.

[119] [Mr Barclay] will want to put together his own proposal as to the contact that he seeks, and which is feasible and affordable. I am not aware of his financial position, or the position of his wider family, as to what ability they have to assist with funding travel costs. Thought will need to be given as to when and how [Felix] can fly back and forth between New Zealand and Ireland, as to how often and for how long he can stay. He will presumably need an adult to fly with him and [Elliot]'s travel will inevitably be another relevant factor.

[120] There is also, in my view, a considerable moral and financial onus on [Ms Carran] to assist with the funding of travel costs and to do more than what she has already proposed. It is not going to be good enough for [Ms Carran] to say that she cannot afford to pay for air tickets, as she had initially indicated in her first affidavit.[89]

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[89] BOD, page 107 at [71].

She has been able to put $40,000 into her new house with [Mr Archer], she has stressed that she has an excellent full-time job that pays well, and she has the support of her husband who also works full-time. [Ms Carran] is very fortunate that I have not made orders for return, but the Court of Appeal has been clear that it is not the Court's role to judge the morality of the abductor's actions.[90]

[121] At the very minimum there should be weekly video calls for [Mr Barclay] and his family, and those calls should begin as soon as possible, allowing some time for [Mr Barclay] to come to terms with this decision.

[122] I do not consider that [Mr Barclay] will 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 by AVL, but any disputed issues may be able to be determined by submissions-only.

[123] I would be minded to case manage and prioritise any further proceedings under the Care of Children Act and, naturally, Mr Wren would be appointed to represent [Felix].

[124] In the interim I ask Mr Wren to meet with [Felix] immediately to explain this decision to him in appropriate terms and detail.

Costs

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

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

[90] *LRR v COL* at [91].