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

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IN THE FAMILY COURT
AT QUEENSTOWN

I TE KŌTI WHĀNAU
KI TĀHUNA

FAM-2023-059-000034
[2023] NZFC 12247

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SANCHEZ] Applicant
AND	[McDONALD] Respondent

Hearing:	28 September 2023 (In Christchurch)
Appearances:	I Blackford for the Applicant J Guest for the Respondent S van Bohemen as Lawyer for the Children
Judgment:	9 November 2023

RESERVED JUDGMENT OF JUDGE D P DRAVITZKI

Background

[1] On 11 November 2021, Mr [McDonald] brought his children, [Andrew] and [Sophia], to New Zealand. He did so under a Spanish Court order which provided the children were to live in New Zealand until the end of the 2022

school year. The children were then to be returned to Spain where they had been living since 2016.

[2] On 5 December 2022, Mr [McDonald] told the children's mother, Ms [Sanchez], he and the children would not be returning to Spain despite the terms of the Spanish Court's order.

[3] Ms [Sanchez] applies to this court for an order that the children are returned to Spain under subpart 4 of the Care of Children Act 2004 which enacts into New Zealand law the provisions of the Hague Convention on the Civil Aspects of Child Abduction ("the Hague Convention").

[4] Mr [McDonald] opposes an order for [Andrew] and [Sophia]'s return. He says:

(a) The children were not "habitually resident" in Spain at the time they were retained in New Zealand. Therefore, one of the necessary prerequisites for an order for return is not present.[1]

(b) If he is wrong in that, he says three of the specific exceptions that enable the Court not to make an order for return are established. Those are:

(i) The children object to being returned to Spain and have attained an age and degree of maturity at which it is appropriate to give weight to their views.[2]

(ii) Ms [Sanchez] acquiesced to the children not returning to Spain and she is bound by that acquiescence.[3]

(iii) The children's return to Spain would cause a grave risk to them of:

(1) being exposed to psychological harm; or

[1] Care of Children Act s 105.
[2] Section 106(1)(d).
[3] Section 106(1)(b)(ii).

(2) otherwise being placed in an intolerable situation.[4]

(c) If any of the specific exceptions are established, then a discretion arises to order the children's return or not. Mr [McDonald] says I should exercise that discretion not to order return. He says the children's welfare and best interests support them remaining in New Zealand and outweigh any other factors in favour of return to Spain.

Chronology

[5] I am grateful to counsel for preparing a joint chronology. From that I refer to the following facts which I consider most relevant.

[6] The parties met in France in 2007. They were both living in the United Kingdom (UK) at the time. They returned to the UK to live together before moving to Auckland, New Zealand in early 2009.

[7] They were married in Spain on [date deleted] April 2009. They lived in Auckland from 2009 until August 2016 except for 2011 when they spent a year living in Brisbane, Australia.

[8] [Andrew] was born in Auckland on [date deleted] November 2010 (he will turn 13 this month). [Sophia] was born in Auckland on [date deleted] December 2012 (she will turn 11 next month).

[9] In September 2016, Ms [Sanchez], [Andrew] and [Sophia] moved to [location A, Spain]. Mr [McDonald] followed shortly afterwards. However, the parties separated very soon after Mr [McDonald] arrived in [location A].

[10] I understand on 15 December 2016, the parties signed an agreement recording:

[4] Care of Children Act s 106(1)(c).

(a) Catalan law would govern their divorce in relation to parental responsibility and child maintenance matters and they would submit to the jurisdiction of the Spanish Court;

(b) The children's care would be shared on a week-about basis for most of the year with longer periods in the summer and Christmas and Easter holidays.

(c) From January 2020, the parties would move to New Zealand with the children for one year. In January 2021, the children would return to Spain to permanently establish their residence there.

[11] The parties' agreement was approved by the Spanish Court and formalised into a court order on 22 February 2017.

[12] The children's care was shared equally in Spain, in terms of their agreement and resulting court order, from November 2016 to November 2021 – a period of five years. Extended holiday periods were spent in New Zealand in 2017, 2018 (approximately a month each) and in 2020 (six weeks).

[13] In 2019, Ms [Sanchez] applied to the Spanish Court to remove the requirement the parties live in New Zealand for a year in 2020/2021. Her application was granted on 16 December 2019.

[14] In March 2020, Mr [McDonald] appealed that decision. On 8 February 2021, the Provincial Court of [location A] overturned the 2019 decision and reinstated a requirement the children live in New Zealand for one year. This appeal decision ("the appeal decision") established the basis on which the children travelled to New Zealand. They were to travel to New Zealand with Mr [McDonald] "for the period of one year approximately, from November 1, 2021 to completion of the school year that begins in January 2022 in New Zealand".[5]

[5] Bundle of Documents (BOD) pages 106-107.

[15] If Ms [Sanchez] travelled to New Zealand, Mr [McDonald] was to pay her financial support. If she did not, a visiting regimen between her and the children was to be established and she was required to pay Mr [McDonald] financial support. The appeal decision also provided that after the return of the children to [location A] in late 2022, the provisions of the 22 February 2017 order are to apply. [6]

[16] On 11 November 2021, the children and Mr [McDonald] travelled to New Zealand. The children were enrolled at [school 1] and have been actively engaged in school, family, community and sporting activities in the [location B], New Zealand] area since then, throughout 2022 and until the present time. This is a period now of almost two years.

[17] In February 2022, Ms [Sanchez] moved to Sydney and obtained employment there. She visited the children in New Zealand in June 2022 and September 2022.

[18] In November 2022, Ms [Sanchez] initiated family mediation in Australia but cancelled that on 7 December 2022.

[19] On 5 December 2022, Mr [McDonald] advised Ms [Sanchez] that he and the children would not be returning to Spain.

[20] On 19 December 2022, Ms [Sanchez] visited the children in [location B] for one week.

[21] On 20 December 2022, Mr [McDonald] alleges that Ms [Sanchez] suggested he and the children move to Australia. He says this was repeated in an email sent by her to him on 24 January 2023. This is the basis for Mr [McDonald]'s claim Ms [Sanchez] acquiesced to the children not being returned to Spain.

[22] On 17 March 2023, "an enforcement order" was issued in the Provincial Court of [location A] enforcing the appeal decision requiring the children's return to Spain.

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[6] BOD pages 23 and 108.

[23] Mr [McDonald] also sought an order from the [location A] Court that the children not be required to return to Spain. On 10 July 2023, that application was dismissed.

[24] On 13 April 2023, Ms [Sanchez] made an application to the Spanish Central Authority seeking orders for return of the children under the Hague Convention. The application seeking return was filed in the Family Court at Queenstown on 25 July 2023. The hearing was conducted on 28 September 2023 in Christchurch (to achieve the earliest available hearing date.)

The law

[25] These proceedings are founded on ss 105 and 106 of the Care of Children Act 2004. Relevantly, s 105 provides:

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

[26] The only requirement of s 105 which is controversial is s 105(1)(d) whether the children were "habitually resident" in Spain (being the other "Contracting State") at the date they were retained in New Zealand.

[27] It is well established that the onus is on Ms [Sanchez], as the applicant, to establish the grounds in s 105(1). The standard of proof is the balance of probabilities.

[28] If the s 105 elements are proved, the Court must order the children's return to Spain unless one of the positive exceptions in s 106 of the Act is established.

[29] Relevantly, s 106 says:

> **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—
>
> …
>
> (b) that the person by whom or on whose behalf the application is made—
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> …
>
> (ii) consented to, or later acquiesced in, the removal; or
>
> (c) that there is a grave risk that the child's return—
>
> (i) would expose the child to physical or psychological harm; or
>
> (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
>
> …

[30] The onus is on Mr [McDonald] to establish the s 106 exceptions. The standard of proof is again the balance of probabilities.

[31] The hearing was conducted on the basis of the parties' affidavit evidence and written and oral submissions of counsel. The parties were not cross-examined. That is the usual approach in Hague Convention proceedings. The approach to considering the evidence in those circumstances is discussed in *Basingstoke v Groot.*[7]

> [39] In our view, deciding on conflicts of evidence is done in the usual way, taking into account such factors as any independent extraneous evidence, consistency of the evidence (both internally and with other evidence) and the inherent probabilities ... Courts will thus no doubt be inclined to attach more weight to the contemporaneous words and actions of the parents (and any independent evidence) than to their bare assertions in evidence as to the position – see *Re H (minors) (abduction: acquiescence)* [1998] AC 72 at p 90- per Lord Brown-Wilkinson.

[32] There is more detailed discussion of the legal principles when considering each of the issues throughout this decision.

The issues

[33] The issues I am required to consider are, therefore, the following:[8]

Habitual residence

(a) What date were the children retained in New Zealand?

(b) Were the children habitually resident in Spain at the date of their retention in New Zealand?

Acquiescence

(c) Did Ms [Sanchez] acquiesce to the children remaining in New Zealand?

Children's Objection

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[7] *Basingstoke v Groot* [2007] NZFLR 363.

[8] Submissions of Counsel for the Applicant dated 22 September 2023 at paragraph 12 largely sets out these issues. I have reframed or added to those where I consider that necessary or helpful.

(d) Do [Andrew] and/or [Sophia] object to returning to Spain?

(e) Have [Andrew] and/or [Sophia] reached an age and degree of maturity at which it is appropriate to give weight to his/her views?

(f) What weight should be given to his/her views?

Grave Risk

(g) Would the return of the children place either of them at grave risk of exposure to psychological harm?

(h) Would the return of the children place either of them at grave risk of otherwise being placed in an intolerable situation?

Exercise of the Discretion

(i) If any of the exceptions to return are established, how should the residual discretion be exercised?

[34] I will address each of the issues.

What is the date of the children's retention?

[35] The date on which the children's habitual residence must be determined is the date of their allegedly unlawful retention in New Zealand. That is the date at which their lawful purpose to be in New Zealand ends. That date is not 11 November 2021 when they came to New Zealand under the authority of the Spanish appeal decision.

[36] Ms Blackford says the date of retention is 5 December 2022 when Mr [McDonald] unambiguously said he and the children would not be returning at the end of the 2022 New Zealand school year. She says that is a clear anticipatory breach of the requirement to return the children in accordance with the Spanish order.

[37] Mr Guest and Mr van Bohemen, the children's lawyer, dispute that. Relying on *P v Secretary for Justice (*referred to as *Punter one)*, they said it was not possible for retention to occur until the lawful period for the children to be in New Zealand had expired.[9] The end of the 2022 New Zealand school year was on or about 16 December 2022. Mr Guest and Mr van Bohemen say that is the date of retention.

[38] That date is only 11 days after 5 December. In my view, little turns on the difference in dates. I adopt 16 December 2022 as the date of retention.

Were the children habitually resident in Spain on 16 December 2022?

[39] Habitual residence is not defined in the Act or in the Hague Convention. Counsel all agree the same cases provide a line of authority exploring the concept. Particularly important are the Court of Appeal decisions in *SK v KP*, *P v the Secretary for Justice* (*as the New Zealand Central Authority*) (referred to as the *Punter* series of decisions and particularly *Punter two*) and *Basingstoke v Groot*.[10] More recently the High Court (Dobson J) has discussed the concept in detail in *Langdon v Wyler*.[11]

[40] Habitual residence is a broad-based, factual enquiry. It is important to consider all of the factors about a child's situation and circumstances. It is not the same as the legal concept of domicile.

[41] Mr Guest and Mr van Bohemen in particular both urge me to recognise the shift in jurisprudence over time. The focus must be more child centred. It should focus closely on that child's (or children's) sense of their world and their "home". It should be less concerned with the parents' intentions or purpose and how they came to be living in a particular place.

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[9] *P v Secretary for Justice* [2004] 2 NZLR 28 (referred to as *Punter one*).
[10] *SK v KP* [2005] 3 NZLR 590, (2005) 24 FRNZ 518, [2005] NZFLR 1064; *P v Secretary for Justice* [2007] 1 NZLR 40 (referred to as *Punter two*); and *Basingstoke v Groot* [2007] NZFLR 363.
[11] *Langdon v Wyler* [2017] NZHC 2535.

[42] I agree with the general proposition that a child-centred focus to the enquiry is important. The higher courts have made that clear through the series of cases above and others.

[43] In an earlier decision, I attempted to summarise my understanding of the developing jurisprudence of habitual residence with reference to a number of the prominent cases.[12] I do not repeat that discussion here. It is sufficient that counsel agree the important principles are as stated in *Punter two*:[13]

> [88] In *SK v KP*, the inquiry into habitual residence was held, at para 80, to be a broad factual inquiry. Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a State (both in the past and currently), the degree of assimilation into the State, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK v KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive. It should not in itself override what McGrath J called the underlying reality of the connection between the child and their particular State:
>
> > There is also support for the proposition that the Court should be slow to infer a change in habitual residence in the absence of shared parental attempt to bring it about this reflecting the weight attached to parental intention under the convention: *Zenel v Haddow* 1993 SLT 975, at p 979. The decision of the Court on habitual residence must, however, in the end always reflect the underlying reality of the connection between the child and the particular state. Obviously there will be circumstances in which having been considered the facts indicate to the Court that all the circumstances of the case rather indicate this underlying reality (footnotes omitted).

[44] In *Langdon v Wyler* these principles were recently examined by the High Court.[14] After discussing important New Zealand cases as well as recent decisions from other Hague Convention jurisdictions, Dobson J said:[15]

> [13] These recent appellate decisions from the United Kingdom relegate a consideration of settled purpose as reflected in the evidence from parents to a similar degree as is recognised by the New Zealand Court of Appeal. Prior to Punter No 2, in *SK v KP,* Glazebrook J recognised the need to so relegate this consideration. In that appeal her Honour observed:

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[12] *[Armstrong] v [McCoy]* [2022] NZFC 8611 paras [21]–[33].
[13] *P v Secretary for Justice* (*Punter two*) n 10 para [88].
[14] *Langdon v Wyler* above n 11.
[15] At paras [13]–[14].

> A softening of the parental purpose test has been recognised as necessary … Concentration on parental purpose should not be allowed to obscure the broad factual nature of the inquiry … Settled purpose, albeit important, is only one factor to be taken into account.
>
> [14] In summary the assessment of whether a particular country is a child's habitual residence is a factual inquiry, necessarily tailored to the particular circumstances of the individual case. Parental purpose may be a factor, but it is not determinative. The focus is on the actual situation of the child, and his or her connection with and integration in the relevant country. (Footnotes omitted).

[45] Applying a "broad-based factual assessment" centred on the child's experience, Mr Guest submits that by 16 December 2022, both children had lost habitual residence in Spain and are instead habitually resident in New Zealand.

[46] In written submissions, he noted both parents are New Zealand citizens and so are the children. Both children were born in New Zealand. They have extensive prior experience living in New Zealand as their home before coming here on their present stay.[16] That prior experience includes each of them living in New Zealand as their primary home from birth until August 2016. In [Andrew]'s case, that is over five-and-a-half years. In [Sophia]'s case, that is three-and-a-half years. The children also had lengthy visits to New Zealand in 2017, 2018 and 2020. Those prior connections and experiences mean it was easy for the children to obtain habitual residence in New Zealand during their longer stay from November 2021.

[47] The children have been fully enmeshed and immersed in life in New Zealand. Their experiences here since November 2021 go well beyond a "holiday".[17] There has been a full integration in terms of their schooling and in New Zealand activities socially and culturally. This has occurred in a single area ([location B]). I understand Mr [McDonald] and the wider paternal family live in the area and are closely connected to it.

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[16] Respondent's submissions 22 September 2023, paragraph 16(b)–(c).
[17] At paragraph 16(e).

[48] The children have not been outside New Zealand since November 2021. The children have not visited their mother in Spain or in Australia. Her limited contact visits have all occurred in New Zealand.

[49] Mr Guest says all of these factors point towards the children's habitual residence being New Zealand in December 2022.

[50] Of course, it is not necessary for me to find that. The enquiry for me is whether the children were habitually resident in Spain at that date. It is possible for children to have no habitual residence. However, it is not possible for children to be habitually resident in two places at the same time. If I am satisfied the children were habitually resident in New Zealand by December 2022, that would necessarily involve a finding they had lost habitual residence in Spain.

[51] As well as factors increasing the children's connection with New Zealand, Mr Guest highlighted factors which he says decrease and reduce their connection with Spain. Ms [Sanchez] was no longer living there. She left Spain in late 2021 before Mr [McDonald] and the children and, I understand, spent some time elsewhere in Europe. In early 2022, she relocated to Sydney, Australia. She says that is not and was never intended to be a permanent relocation. Sydney is the place nearest to the children where she could obtain employment in her specialised career ([details deleted]). She has secured a job at [details deleted]. Ms [Sanchez] says her home remains Spain and she has temporarily relocated to Sydney to facilitate contact with the children while they were in New Zealand.[18]

[52] Mr Guest submits Ms [Sanchez]'s absence from Spain lessens the children's connection to the place. They have seen their mother living in Sydney since they have been in New Zealand. Their physical contact with her has occurred only in New Zealand. Their remote contact over social media has occurred with her based in Australia. They perceive her now as more connected with Australia than Spain.

[53] Mr Guest puts it this way:[19]

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[18] That move to Australia has not proved particularly successful in facilitating her contact as will be discussed later in the decision.

[19] Respondent's submissions n 16, paragraph 16(f).

> During this time in New Zealand, contact has taken place between the children and their mother, with the children fully understanding and accepting that their mother is living in Australia and not Spain. She has not "kept the home fires burning". Mr van Bohemen reports that [Andrew] would be happy if his mother remained in Australia, as the second choice to her living in New Zealand.

[54] Mr Guest also submits when the children came to New Zealand their connection with Spain "was not strong and therefore should be relatively easy to displace".[20] That is for "at least" two reasons.

[55] Firstly, the children had spent lengthy parts of their lives away from Spain and not living there. In [Andrew]'s case, he has lived less than half his life in Spain. In [Sophia]'s case, approximately half. Most of the time they had not been in Spain, they had been living in New Zealand.

[56] Secondly, the children also have a weak connection to Spain because "at no time have the children lived with their parents together in Spain". That is, their time in Spain has always been as part of a separated family.[21]

[57] Mr Guest summarised his submissions as follows:[22]

> 16. (i) When seen from the point of view of the children, living in Spain with shared care arrangements between their parents must seem a distant and quite different prospect from their lives over the last 22 months. There is nothing in their reported interviews with their counsel that suggests that they see it as home, and in contrast their comments reinforced that they see New Zealand, but particularly [location B], as their home.
>
> 17. Counsel submits that the assessment of these circumstances should be:
>
> - The habitual residence in Spain at the time of the departure was easier to lose than in other circumstances: the children has not lived there for all their lives, they had previously had habitual residence in New Zealand and possibly in Australia, and never lived in Spain with their parents together as a family.
>
> - New Zealand was the obvious country for them to acquire habitual residence in quickly, because they had previously had habitual residence in New Zealand.

[20] At paragraph 16(d).
[21] Respondent's submissions n 16, paragraph 16(d).
[22] At paragraph 17.

- They did re-acquire habitual residence in New Zealand because of time here, settled life through stable address and schooling, integration into New Zealand activities.

- The connection with Spain has become tenuous and artificial through the absence of their mother from Spain, and contact with her being in New Zealand physically and electronically from Australia.

[58] Mr van Bohemen supports a finding the children are habitually resident in New Zealand. He largely refers to factors which emphasise the degree of the children's involvement and enmeshment in life in New Zealand:

(a) The children's very positive performance at school as evidenced by their school reports.[23]

(b) That the children have been involved in a wide range of activities such as [a marathon], organised sports and mountain biking.[24]

(c) Evidence of the children's close connection to family and involvement in family activities.[25]

(d) The way the children spoke to Mr van Bohemen about their contrasting ties with their schools, family and friends in New Zealand and in Spain:

(i) each of them prefers their New Zealand school to memories of their Spanish school.[26]

(ii) [Sophia] occasionally messages and talks to her aunt and grandmother in Spain but has not talked to her friends in Spain "for months". That is contrasted with her family and social ties in New Zealand. She lives with her grandmother and "loves" the neighbourhood and the people in it.[27]

[23] Lawyer for Child submissions dated 26 September 2023 paragraph 32(f), (g) and (h).
[24] At paragraph 32(i).
[25] At paragraph 32 (j).
[26] At paragraph 32(d).
[27] At paragraph 32(c) and BOD pages 254–255.

(iii) [Andrew] contrasted his freedom and independence in New Zealand and the ability to bike to visit friends with the constraints on his friendships in Spain.[28]

Determination of habitual residence

[59] I reject Mr Guest's submission that the children did not have strong ties to Spain which made it easier for them to lose habitual residence there. When they came to New Zealand in November 2021, they had lived in Spain for the whole of the previous five years in a shared week-about care arrangement between their parents. For [Andrew], that was from ages approximately six to 11. For [Sophia], that was from ages approximately four to nine. Five years is a huge part of any child's life, particularly at such important, formative and conscious ages.

[60] When [Sophia] moved to live in Spain in 2016, she was three years and nine months old. She came back to New Zealand in late 2021 at not quite age nine. By then, Spain is likely to have been the only place [Sophia] could clearly remember living permanently (as opposed to visiting on holiday).

[61] [Andrew] was approximately six years old when he left New Zealand for Spain in 2016. As such, when he came back in 2021 (aged almost 11), he probably had some memories of previously living in New Zealand. But even for him, his memories of life in Spain would have been much more prominent than any lingering memories of New Zealand.

[62] I do not accept or really understand the submission that the children had a weak habitual residence in Spain when they came to New Zealand. The five years prior to their return to New Zealand is a significant length of time for children of that age and, for [Sophia], probably covers much of her remembered consciousness.

[63] While in Spain, the children lived in a shared-care arrangement between their parents. This is the reality for many children and makes up the life and circumstances which they know. This does not reduce or lessen a child's connection

[28] At paragraph 32(e).

with their homeplace and environment, nor does it undermine their habitual residence there.

[64] The children were clearly habitually resident in Spain when they left and came to New Zealand in November 2021 as much as any child who has lived the previous five years in a settled arrangement prior to departure.

[65] The period in New Zealand was never intended to be permanent (even on Mr [McDonald]'s evidence). Therefore, habitual residence in Spain was not immediately lost on departure to New Zealand in 2021.

[66] The enquiry therefore must be whether their habitual residence in Spain was gradually lost during the children's time in New Zealand so that by December 2022, they were no longer habitually resident there.

[67] I accept, all other things being equal, [Andrew] and [Sophia] could have obtained habitual residence in New Zealand without difficulty. Of course, they knew their paternal family members who live here. [Andrew] probably had conscious memories of previously living in New Zealand even if [Sophia] did not. Both had spent lengthy holiday periods in New Zealand and were familiar with the environment here. The children are New Zealand citizens and speak fluent English. Their father is a native New Zealander. All of those factors would have readily eased their transition to living in New Zealand and building connections here.

[68] However, even now, there are still indications that the children see themselves as closely connected to both Spain and New Zealand. They refer to themselves as "Spiwis" (that is, Spanish Kiwis). They also speak Spanish fluently and some Catalan. They support the sporting teams of both countries (the Spanish women's soccer team at the recent World Cup and the All Blacks in the current rugby World Cup).[29]

[69] The difficulty I have with the argument of Mr Guest and Mr van Bohemen is that it takes no account of the circumstances in which the children came to New Zealand. It is important to record those circumstances.

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[29] BOD page 254, paragraphs 12(e)–(f).

[70] [Andrew] and [Sophia] came to New Zealand over their mother's opposition. They came as the result of contested Spanish court proceedings. That court determined they could travel to New Zealand on very specific terms – from November 2021 until the end of the 2022 New Zealand school year. At the end of that period, the children were to be returned to Spain.

[71] The relevance of that background is not that the Spanish order somehow binds the New Zealand court or impacts on its jurisdiction in any way. The relevance is that the order forms part of the wider factual matrix and circumstances under which the children were able to come to New Zealand. Those factual circumstances are that it was to be a strictly temporary time-limited, impermanent move. Permission was obtained over their mother's opposition. She says she was worried if Mr [McDonald] came to New Zealand, he would refuse to return the children. Unsurprisingly, she feels vindicated in her fears.

[72] There is no suggestion that when the children came to New Zealand, Ms [Sanchez]'s position was unclear, undecided or in any way supportive of the children living permanently in New Zealand. She was required to comply with them coming for a year because that was the Court's order.

[73] If Mr [McDonald] is taken at his word in the case he advanced in the Spanish appeal hearing, it was also a temporary, time-limited move on his part. The children would spend just over a year in New Zealand and then return to Spain.

[74] It is important to note the children must have known the move was temporary and time limited.

[75] It is likely the children knew their parents were arguing in court about whether they would be allowed to come to New Zealand.[30] Once the Court's appeal decision was issued, the children must have known travel to New Zealand was for a finite period and they would not remain here permanently. If Mr [McDonald] did not tell

[30] There is no direct evidence about it but it seems very likely the children would have known about the dispute (given [Andrew] was 10 and [Sophia] eight when the appeal decision was issued in February 2021).

them that, then undoubtedly Ms [Sanchez] would have and emphasised they would return to Spain after a year.

[76] Once in New Zealand, at the ages of 11 ([Andrew]) and nine ([Sophia]), the children would have understood concepts of time, that they were to return to Spain and that their return would be at the end of the next school year. They would have understood the move was not intended to be indefinite or forever. They would have understood return was not at some undefined point in the future. There were clear time parameters imposed around the trip that the children would have been aware of.

[77] It is not correct to categorise the children's time in New Zealand as a "holiday". It was intended as something more than that. But it was also never intended to be permanent or even undefined. It was time limited and specific with a very clearly defined end point (the end of the 2022 New Zealand school year).

[78] [Andrew] and [Sophia] would have known that when they came to New Zealand. That would, or at least should, have remained their understanding while they were living here. Of course, Mr [McDonald] and Ms [Sanchez] were crystal clear about the arrangements imposed by the Court and would or should have continued to make that clear to the children. If Mr [McDonald] did not, Ms [Sanchez] would have.

[79] In those circumstances, it must be harder for [Andrew] and [Sophia] to establish habitual residence in New Zealand. If habitual residence is to be considered closely related to a child's sense of their "home" place and their level of involvement, enmeshment and engagement in that place, then it must be relevant that their stay is temporary and will end on a clearly defined date and that they know that.

[80] If habitual residence is the equivalent of becoming established within a place and "putting down roots", then the knowledge that a stay is temporary and will end on a set date is the opposite of that. Habitual residence is not just about whether a child is settled and happy in a place. The circumstances and basis on which they came to that place must still remain relevant.

[81] There are some similarities in these children's situation to the child who spends a year overseas on an educational exchange programme. An exchange student lives for a year in another country. They experience schooling, develop friendships, are often involved in cultural and sporting activities and develop a relationship with their host family but they also know their stay is for a specified, time-limited purpose. There is no suggestion their "habitual residence" changes during their year overseas.

[82] I accept that here, [Andrew] and [Sophia] had the additional aspect of involvement with Mr [McDonald]'s family while in New Zealand but it was always on a temporary basis. The purpose and circumstances surrounding the children's period in New Zealand must remain relevant.

[83] In my view, Mr [McDonald] and Mr van Bohemen's argument that the children are now habitually resident in New Zealand ignores the circumstances and background under which they came here. I accept the authorities emphasise the enquiry is to be a child-centred one. However, none of those authorities say the circumstances and basis of the children's stay should be completely ignored.

[84] Referring to para [88] of *Punter two*, in his submissions Mr van Bohemen distils the factors to a list as follows:[31]

> (a) The settled purpose [of the parents];
>
> (b) The actual length of stay by the children in the state;
>
> (c) The intended length of stay in the state;
>
> (d) The purpose of the stay;
>
> (e) The strength of the children's ties to the respective states;
>
> (f) The degree of the children's assimilation into the state;
>
> (g) The children's Living and schooling arrangements; and
>
> (h) The children's cultural, social and economic integration.

[85] Mr [McDonald]'s approach, supported by Mr van Bohemen, seems to me to consider only the factors about the children's degree of involvement and integration

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[31] Para [43] above; Lawyer for Child submissions n 23, paragraph 8.

in New Zealand (points (f), (g), and (h) above). It ignores the basis on which [Andrew] and [Sophia] came to New Zealand (points (a) to (d) above). In my view, that is not a correct application of the authorities.

[86] The settled purpose of the parents was for the children to spend a year in New Zealand. That was Ms [Sanchez]'s position imposed on her by the Spanish court. It was also Mr [McDonald]'s intention, if his evidence to that court is to be believed.

[87] I acknowledge the children's living and schooling arrangements are settled and positive and they have high levels of cultural, social and economic integration. However, when considering that level of integration or the degree of "assimilation", the basis and background of why they are here must remain relevant.

[88] That is not to say that [Andrew] and [Sophia] are not happy and settled in New Zealand. The evidence suggests they are.

[89] I am also not suggesting the children were constantly aware they would be leaving New Zealand and every interaction they had with others occurred with that in the forefront of their minds. Of course, they would have gone about their day-to-day lives meeting and interacting with others as children do. That is, dealing with what was in front of them and not constantly conscious they would be leaving at the end of the school year. At the same time, the fact they would be leaving and returning to Spain and they knew and understood that must be relevant in considering their ability to establish the longer-term, deeper connections with New Zealand that, in my view, are associated with the concept of habitual residence.

[90] I asked Mr Guest about the importance of the fact the children came to New Zealand under a court order and on a strictly time-limited basis. He accepted that was part of the factual context for consideration but he submitted to me the situation had changed in the time the children have been in New Zealand.

[91] In particular, he said the children had settled here more successfully than Mr [McDonald] had expected or hoped.

[92] I have difficulty with that submission. [Andrew] and [Sophia] have settled in New Zealand exactly how Mr [McDonald] hoped they would. They appear to be positive, well-adjusted children. Despite their parents' conflict, they did well in Spain and have done well in New Zealand. In [location B], they were living in a positive environment with family who were familiar to them and supportive. Of course, Mr [McDonald] hoped the children would thrive in New Zealand and they have (with the obvious exception that they miss their mother who is much less of a presence in their lives than previously).

[93] Mr [McDonald] says he is surprised the children no longer want to return to Spain and that is a change in circumstances that should be considered. However, their reluctance to return is unsurprising given how much they have enjoyed it in New Zealand and some of their less positive memories of COVID effected life and schooling in Spain.[32] I do not accept it was unexpected or unforeseen when [Andrew] and [Sophia] came to New Zealand in November 2021 that they would do well here and that they may be reluctant to return to Spain when the time came in December 2022.

[94] Mr Guest said the other unexpected change is Ms [Sanchez]'s now living in Sydney lessening the children's connection to Spain. I also do not accept the submission that is an unexpected change in circumstances. The appeal decision under which they travelled specifically contemplates Ms [Sanchez] living in New Zealand while the children are living here. It requires Mr [McDonald] to pay her financial support if she does so. Ms [Sanchez] has made it clear her move to Sydney is temporary and only to be closer to the children. There is no basis to reject that evidence as untrue. I do not see how Ms [Sanchez]'s temporary living arrangement significantly changes the children's connection with Spain. They continue to see themselves as products of and connected to both countries.

[95] I accept entirely I am not "bound" by the Spanish court orders. Mr van Bohemen criticises the Spanish court for essentially determining the children's habitual residence as Spain for all time. He reminds me that habitual residence is

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[32] I discuss those factors in more detail under the "children's objections to return" section of this decision para's [101] – [130] below.

always a decision to be determined on the basis of the facts at the time they need to be considered. I accept that.

[96] I am satisfied the children were habitually resident in Spain when they travelled to New Zealand in November 2021.

[97] I accept they are settled and engaged in New Zealand and that is important in considering the issue of habitual residence as at December 2022. However, the purpose of their time in New Zealand and particularly that it was time-limited and impermanent also remains important. That is particularly relevant for children of [Andrew] and [Sophia]'s age who are aware of the temporary nature of their stay. In my view, the fact the children must have known they were always to return to Spain at the end of 2022 makes it more difficult for them to obtain habitual residence here. That applies when looking at the issue from a "child-centred" viewpoint. It is hard to see how [Andrew] and [Sophia] could ever have viewed New Zealand as their "home" or the place they "lived" or were "settled" on a long-term basis when they always knew they were to return to Spain at the end of the school year.

[98] I am satisfied that in December 2022, the children retained substantive links to Spain and continued to see Spain as at least an equal "home" to New Zealand. I am satisfied, when considering all of the circumstances, the children remain habitually resident in Spain.

[99] The requirements of s 105 of the Act are, accordingly, established by Ms [Sanchez].

Children's objections to return

[100] Having determined the requirements of s 105 are made out, I must now consider whether any of the grounds under s 106, raised by Mr [McDonald], are established. Section 106(1)(d) provides that the Court may refuse to make an order for return if:[33]

[33] Care of Children Act s 106(1)(d).

> … the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with s 6(2)(b), also to give weight to the child's views.

[101] The onus is on Mr [McDonald] to prove this exception applies. The standard of proof is the balance of probabilities.

[102] The leading decision remains the Court of Appeal's *Whyte v Northumberland*.[34] This records a four-step process for considering the exception:

(a) Does the child object to return?

(b) Has the child obtained the age and degree of maturity at which it is appropriate to give weight to the child's views?

(c) What weight should be given to the child's views?

(d) How should the residuary discretion be exercised?

[103] *Re J (Abduction: Child's Objection to Return)* says that each case will depend on its facts.[35] However, when considering the issue of the weight to give to a child's objection, "ascertainment of the strength and validity of the views" is required. The following may be relevant (although not exhaustive) considerations:

(a) The reasons for the objection;

(b) Whether the reasons are valid and well founded; "to what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?"

(c) The strength of the views;

(d) The age and maturity of the child;

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[34] *Whyte v Northumberland* [2006] NZFLR 1105.
[35] *Re J (Abduction: Child's Objection to Return)* [2004] 2 NZFLR 61 quoting *re T (Abduction: Child's objection to return)* [2000] 2 FLR 204.

(e) Relevant surrounding circumstances;

(f) "To what extent are the child's views shaped or … coloured by undue influence or pressure, directly or indirectly exerted by the abducting parent?"

[104] The children's views were obtained by Mr van Bohemen. He met with them twice. First on 25 August 2023 for 45 minutes, then on 28 August for 10 to 15 minutes. What the children said about their respective schools is recorded in his report of 1 September 2023.[36]

> c) … school in Spain during and post-Covid required long periods of distance learning and then, when they returned to school, they had to have social distancing in the class room and wear masks and they had not liked that;
>
> d) That school in New Zealand on arrival was very different (ie no social distancing, no masks) and that they liked that …

[105] Mr van Bohemen records the following in full in relation to his discussion with [Sophia] on 25 August.[37]

> [Sophia]
>
> 14. It appeared to me from my 1:1 meeting with her that [Sophia] was very keen not to be disloyal to either of her parents. When I asked her what she would do if she was the boss, she said that she did not want to "be the boss" or to decide where she and [Andrew] should live.
>
> 15. My notes of her views were:
>
> a) She "loves" living where she is. Her reasons included:
>
> i. She, [Andrew] and Mr [McDonald] live in a neighbourhood where there are lots of neighbours, dogs, horses and animals.
>
> ii. She knows all the people in the neighbourhood;
>
> iii. She can bike to visit the neighbours and also into [location B];

[36] BOD pages 251-259 (with specific points from page 254.)
[37] At pages 254-256.

iv. [location B] school is big, friendly, there is lots of grass and it is not "locked up" (in contrast to her school in [location A]);

v. She has lots of activities (she told me about soccer and cross country in particular);

b) For the most part she has enjoyed her mother's 3 visits to see them in [location B] but they can be "stressful" because she (Ms [Sanchez]) talks to her about going to live with her in Spain;

c) Sometimes [Sophia] does not like her calls with her mother. Her reasons were that sometimes Ms [Sanchez] cries and gets "hyped-up" and that makes [Sophia] feel unhappy.

d) Her views about her family / friends / neighbourhood / school in Spain included:

i. That she occasionally messages and talks to her aunt and grandmother in Spain;

ii. That she hadn't talked to her friends in Spain for "months"

iii. That there were "high gates" around the school;

iv. The neighbourhood did not feel safe (in contrast to how she felt about the neighbourhood in [location B]);

e) That she could not understand why Mum does not want to come to New Zealand (to live)

f) That if the Court decided she and [Andrew] were to stay in New Zealand she would be happy because she likes it here; there is "more nature"; she has friends; she lives with grandma and there are animals. But she said she would also be sad if that meant that her mother went back to Spain. [Sophia] said she would "feel both emotions".

g) That if the Court decided she and [Andrew] were to return to Spain she would feel happy to be with her Mum, but sad if Dad didn't come back and upset if she had to live in apartment, without animals.

16. Before I conducted my meeting with [Sophia] we reviewed my notes and she agreed to me passing her views to the parties/ the Court.

[106] In relation to his discussion with [Andrew] on 25 August, Mr van Bohemen recorded in full the following:[38]

[38] BOD pages 256–257.

[Andrew]

17. [Andrew] was more forthcoming with his preference to live in [location B], not [location A]. My notes of his reasons for that are:

    a) It is "freer" here. If he wants to visit friends he can go and do that on his bike – something he said he could not do in the middle of [location A]

    b) He has friends here: he talked about [three of his friends];

    c) School in New Zealand is more relaxed than in Spain;

    d) He is excited about the prospect of attending [High School] next year. He has visited the school and likes it, he is interested in learning Tech, drawing and Japanese there;

18. I asked [Andrew] if felt like the "new kid" or if he had "fitted in" to life in New Zealand. He assured me he did not feel like the new kid and that he fitted in.

19. My notes of when [Andrew] talked about his parents included:

    a) That Mum's visits to New Zealand had been too short;

    b) He did not know what his mother would do if he and [Sophia] lived in New Zealand;

    c) He knows that his father does not want to go back to Spain where he does not have a house or family.

20. My notes of when I asked [Andrew] what he would do if he were "the boss" were

    a) He would decide that he and [Sophia] would live in New Zealand;

    b) It would be "perfect" if Mum came to live in New Zealand;

    c) It would be "nice" if Mum stayed in Australia and continued to visit and he and [Sophia] were able to visit her there.

21. At the end of the meeting I reviewed my notes with [Andrew] and he agreed to me reporting his views to his parents and the Court.

[107] Mr van Bohemen's meeting with the children on 28 August 2023 was shorter and was undertaken for three main purposes:[39]

(a) To see if there was anything else the children wanted to say they had omitted in their first meeting three days earlier.

[39] BOD page 257.

(b) To clarify whether they understood they would be returning to the same home they had previously lived if they were ordered to return to Spain.

(c) To enquire whether they wished to meet with me.[40]

[108] Nothing material arose from the discussion on 28 August relevant to the consideration of whether they objected to being returned to Spain.

[109] The sum total of the information available to me about the children's views is that received from Mr van Bohemen, all of which I have included above. I am required to interpret those statements and determine whether they constitute objections to return.

[110] Mr Guest and Mr van Bohemen both say the children's views qualify as objections. Ms Blackford says they are merely statements of preference which lack the strength and certainty required to be considered as objections under the exception.

[111] Mr van Bohemen summarised his analysis of the children's position in his written submissions: "In my meetings with the children, they expressed an objection to returning to Spain, but did so in muted terms."[41] In his oral submissions, he said the "muted" nature of the children's objections might be because the children were anxious not to choose sides between their parents or offend either knowing what each wanted. He encouraged me not to "read down" the children's opposition to return just because it was stated in less than strong and emphatic terms.

[112] Mr Guest emphasised that even on the face of what the children said, they must be regarded as wanting to stay in New Zealand and not return to Spain. He said that constitutes an objection to return requiring me to consider the exception.

[113] Ms Blackford acknowledged the children would prefer to stay in New Zealand. However, she noted the relatively mild nature of their comments and the fact they do not hold overwhelmingly negative views of Spain. She also said the children's

[40] They were ambivalent about meeting with me and I determined not to meet with them for reasons set out in my minute of 18 September 2023.
[41] Submissions of Lawyer for the Children n 23, page 13, paragraph 55.

experiences in each country are inevitably affected by the fact they left Spain at the height of the Covid pandemic with significant school and social restrictions. They came to New Zealand which, at the time, was not subject to the same level of restriction and social isolation. Ms Blackford says while I might accept the children prefer to stay in New Zealand, that preference is not so strongly held or clear that it can properly be regarded as an "objection" to return.

[114] I do not overlook the possibility that one of the children's stated views might constitute an objection to return while the others may not. As Mr van Bohemen noted, [Andrew]'s "preference" to remain in New Zealand is more strongly stated than [Sophia]'s.[42]

Case law in relation to what constitutes an objection

[115] Whether or not a child objects to return is a matter of fact. Arguably "objects" is a stronger term than disagree. In *Secretary for Justice v Penney* [1995] "object" was seen as meaning "to express a strong, clear preference".[43] In contrast, Judge Inglis in *Ryding v Turvey* said that "objects" means no more than the child has expressed a wish not to return.[44] In *Bayer v Bayer* Judge Boshier stated:[45]

> The concept of "objection" carries with it a notion of clarity and force in the way it is expressed. A mere wish may fall short. I imagine that is why the drafters of the Convention deliberately chose the word "object".

[116] A qualifying objection, in its simplest terms, is a clearly held desire not to return. But it must be clear. On that basis, I am satisfied that [Andrew] *certainly* and [Sophia] *probably* do object to returning. Considering their answers in total, it appears to me the children clearly do not wish to return to Spain.

[117] If the same question is stated in a different way: "Do the children want to remain living in New Zealand?" I think the answer is "yes".

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[42] BOD, page 256, paragraph 17.
[43] *Secretary for Justice v Penney* [1995] NZFLR 827.
[44] *Ryding v Turvey* [1998] NZFLR 313.
[45] *Bayer v Bayer* [2012] NZFC 2878, [2012] NZFLR 567 at [63].

[118] The children's objections to return are not stated as strongly as is seen in some cases. Notwithstanding that, they are happy and settled in New Zealand and I accept they wish to remain living here. That logically qualifies as an objection to being returned to live in Spain.

[119] The second consideration is whether [Andrew] and [Sophia] have obtained an age and degree of maturity at which it is appropriate to give weight to their views.

[120] Mr van Bohemen asked the parents their views about the children. Mr [McDonald] described both children as "calm" and "mature".[46]

> Ms [Sanchez] described each of the children as "very capable athletes". She described [Sophia] as "motivated" and "artistic". She described [Andrew] as "sporty, but also quite intellectual" and told me about his interest in reading, history and Japanese. Ms [Sanchez] told me she thought "the children would not want to take sides because they never do that".[47]

[121] [Andrew] and [Sophia] are capable, well-adjusted children who appear to be of at least average social maturity as similar-aged peers. [Andrew] is almost 13 and [Sophia] is almost 11. At that age, I consider they have reached an age and maturity where serious consideration needs to be given to their stated views.

[122] That is confirmed when undertaking the third part of the analysis which requires me to determine what weight should be given to the children's views. The *re J* factors which I have referred to above are helpful in considering [Andrew] and [Sophia]'s objections.[48] Frankly, their objection to return to Spain and their corresponding desire to remain in New Zealand is entirely understandable and rational. They are able to clearly articulate what they like better about New Zealand than Spain. The children are happy and settled in New Zealand. They are in the care of their father. They are supported by paternal family, particularly their grandmother. They are doing well at school. They report having positive peer relationships. They live in what many would consider an idyllic rural/urban lifestyle in a genuinely beautiful place.

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[46] BOD page 253, paragraph 8.
[47] BOD page 253, paragraph 9.
[48] *Re J (Abduction: Child's Objection to Return)* n 35.

[123] They also undoubtedly miss their mother from their lives. However, their response to that is to suggest she come to live with them. If the children's views should be "read down" at all for a lack of maturity, it may be on the basis that they do not appreciate Ms [Sanchez] does not see that as realistic for herself.

[124] It is inevitable the children's views are coloured by their most recent experience of living in Spain. That particularly includes the COVID lockdowns and restrictions which they did not experience to the same extent in New Zealand.

[125] It is also important to record there is no evidence the children were very unhappy or did not do well in Spain when they lived there. Even now, they do not see return to Spain as a dire or disastrous proposition.

[126] Overall, the children's views show a clear desire to remain living in New Zealand (ideally with their mother present if possible). Those views are wholly understandable and rationally based given their recent experiences of both countries, particularly over the COVID "snapshot" period of time.

[127] Considering the *Whyte v Northumberland* test, I record I am satisfied:[49]

(a) the children object to return;

(b) they have obtained an age and degree of maturity at which it is appropriate to give weight to those views; and

(c) I consider there is a rational and understandable basis to their views – significant weight should be given to them.

[128] I defer the final step of the *Whyte v Northumberland* test (that is, how I should exercise the residual discretion whether or not to order return) until the end of this decision.[50]

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[49] *Whyte v Northumberland* n 34.
[50] As above.

[129] Before turning to that, I will consider whether any of the other s 106 exceptions are established by Mr [McDonald].

Did Ms [Sanchez] acquiesce to [Andrew] and [Sophia] not being returned to Spain?

[130] Section 106(1)(b)(ii) says the Court may refuse to make an order for return if the person seeking return has "consented to or later acquiesced in the removal". The relevant test is formulated in the English decision of *re K (Abduction: Consent)*.[51] That establishes:[52]

(a) The evidence in support of acquiescence must be clear and cogent and must be real, positive, and unequivocal.

(b) If the Court is left in any state of uncertainty, the exception fails.

(c) The Court may be satisfied that acquiescence has been given although it is not in writing.

(d) There may be cases where consent can be inferred from conduct.

[131] In New Zealand *Secretary for Justice v Penney* confirms evidence of acquiescence must be clear and compelling.[53]

[132] The principles were recently considered by the High Court in *Olliver v Richardson* relying on *JHL v Secretary for Justice.*[54] Acquiescence depends on the state of mind of the parent that acquiesced. The burden of proof is on the person relying on the defence (in this case Mr [McDonald]).

[133] The standard of proof is the balance of probabilities.

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[51] *Re K (Abduction: Consent)* [1997] 2 FLR 212.
[52] At page 217 paragraph H – page 218, paragraph A.
[53] *Secretary for Justice v Penney* n 43.
[54] *Olliver v Richardson* [2018] NZHC 2696 at paragraphs [74]-[78]; *JHL v Secretary for Justice* [2008] NZFLR 54.

[134] Acquiescence occurs after a child has been unlawfully taken or retained. Unlike consent, once given, acquiescence cannot be withdrawn. A parent is held to their agreement and is unable to subsequently retract that and insist on return to the original country.

[135] A well-known summary of the principles is in Secretary for *Justice v M* Judge Robinson quoting from Waite J in *W v W (Child Abduction: Acquiescence)*:[55]

> … Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general rights of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. **It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.** (Emphasis added).

[136] Mr [McDonald] relies on a combination of evidence, both direct and circumstantial, to say Ms [Sanchez] acquiesced in the children not being returned to Spain.

Mr [McDonald]'s indirect evidence

[137] Firstly, Mr [McDonald] says Ms [Sanchez] initiated mediation in Australia. He says it can be inferred the purpose of that was to discuss options other than the children being returned to Spain.

[138] Secondly, he says there was "delay" in Ms [Sanchez] pursuing Hague Convention proceedings. Mr [McDonald] made it clear the children would not be returned to Spain on 5 December 2022. Her application was not lodged with the Spanish central authority until 13 April 2023. Proceedings were not filed in New Zealand until 25 July 2023.

[139] In and of themselves, these facts provide little assistance.

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[55] *Secretary for Justice v M* [1996] NZFLR 128; *W v W* [1993] 2 FLR 211 at 217.

Australian mediation

[140] The only information provided about the Australian mediation referral is:[56]

(a) a generic letter from Family Dispute Resolution service in Australia received on 24 November 2022; and

(b) an email from the service on 7 December 2022 advising family dispute resolution was no longer proceeding.

[141] Neither of those specifically says what the mediation was about or why it was sought. Ms [Sanchez] says she instigated it to discuss her contact with the children either in New Zealand or Australia because she was having difficulty making arrangements with Mr [McDonald].

[142] There is a reference to the parties undertaking mediation in an email sent on 24 January that Mr [McDonald] relies on but by then Ms [Sanchez] had already cancelled this mediation referral.

[143] On the facts there is not enough evidence about why mediation was requested to suggest it is relevant to the issue of acquiescence.

Delay in commencing proceedings

[144] There is also no context provided to the alleged "delay" in commencing proceedings. Resourcing issues often mean there is a lengthy period between a person approaching the central authority in a country requesting return and when the formal application is lodged there. There can then be further delays before the application is transmitted to the requested country (in this case New Zealand) and filed in court here. I am not satisfied there is any proved intentional "delay" on Ms [Sanchez]'s part. There is also no evidence that any delay that might exist is indicative of her acquiescing to the children not being returned to Spain.

[56] BOD pages 227-229 and 231.

Mr [McDonald]'s direct evidence

[145] The first direct piece of evidence is an alleged conversation between the parties when Ms [Sanchez] visited New Zealand in December 2022. Mr [McDonald] says:[57]

> After I advised [Ms Sanchez] that I believed it was in the best interests of the children to remain in [location B], [Ms Sanchez] decided to travel to New Zealand for a week from the 19th of December. Whilst in [location B] I met her and the children by chance outside Countdown supermarket. She suggested that I could take a job to live in Australia as she would "never" live in [location B] and Australia is an English speaking country with very good job opportunities.

[146] Later in his affidavit he confirms the conversation "about us all living in Australia" occurred on 20 December 2022.[58] Ms [Sanchez] denies the conversation in general terms: "I did not tell the respondent we could all go and live in Australia."[59]

[147] The second and he says most important direct piece of evidence Mr [McDonald] relies on is an email sent to him by Ms [Sanchez] on 24 January 2023. The full email is attached as Appendix A to this decision.[60]

[148] More specifically, Mr [McDonald] relies on the passage of the e-mail which says:[61]

> Let me remind you if Spain is such a big issue for you (you never integrated nor did you learn your children's language). Australia has a career progression for you and the opportunity to be with their mother, it is also an English speaking country.

[149] Mr [McDonald] says that is incontrovertible, clear and definite evidence that Ms [Sanchez] was not pursuing the children's return to Spain. Rather, she wanted Mr [McDonald] to consider the children (and him) moving to Australia.

[150] Ms Blackford, for Ms [Sanchez], raises two issues. Firstly, she says the passage I have repeated is not clear and unequivocal, particularly when it is read within

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[57] BOD pages 220-221, paragraph 20.
[58] BOD page 222, paragraph 31.
[59] BOD page 265, paragraph 29.
[60] BOD page 226.
[61] As above.

the context of the whole message and other messages sent by Ms [Sanchez] about this time.

[151] She also says even if Ms [Sanchez] is agreeing in the quoted passage to the children living in Australia and not returning to Spain, this does not constitute acquiescence under the Act. It is not agreement to the children remaining in New Zealand. Mr Guest, for Mr [McDonald], says any agreement to the children not being returned to Spain is satisfactory for the Act's purposes. He says whether the agreement is to them remaining in New Zealand or for the family to move to Australia is irrelevant. If Ms [Sanchez] is not insisting on the children being returned to Spain, that is sufficient to establish the exception. Neither counsel referred me to authority on this specific point.

[152] Mr Guest says other communications (particularly e-mails) in which Ms [Sanchez] insisted the children be returned to Spain are largely irrelevant. Any emails before the date of the alleged acquiescence predate it and Ms [Sanchez] can change her mind and subsequently acquiesce. Communications after the acquiescence are ineffective as they are "too late". Acquiescence once given, cannot be revoked or "walked back" by Ms [Sanchez].

[153] Like the circumstantial evidence, I consider the direct evidence relied on by Mr [McDonald] falls a long way short of establishing acquiescence. That is bearing in mind the onus is on him to establish the exception and that the evidence must be clear and unequivocal.

[154] Firstly, in relation to the alleged discussion outside Countdown on 20 December, the evidence is simply the parties' assertions which differ greatly. Mr [McDonald] says the conversation occurred, while Ms [Sanchez] denies it. I acknowledge I have not had the benefit of observing the parties give evidence or be cross-examined. However, I am not satisfied what Mr [McDonald] alleges is likely to have occurred in the way he says.

[155] He acknowledges the conversation occurred during a chance meeting outside a supermarket. It is unlikely, in that setting, Ms [Sanchez] would have

engaged in a rational, considered discussion about a matter as important as where she and the children would live long term. I accept it is possible there may have been some comments made but the impromptu and unconsidered nature of the meeting makes it highly unlikely either parent was intending to make binding commitments for themselves and the children without much more consideration and discussion.

[156] The position in relation to the email on 24 January is, in my view, similarly unsatisfactory. When read in its entirety, the email of 24 January 2023 presents a difficult picture.

[157] The passage highlighted by Mr Guest may indicate some willingness by Ms [Sanchez] to consider options other than the children's immediate return to Spain, specifically the children living in Australia. However, even then the situation is not clear.

[158] The email is titled "Re: Cooperation between parents for [Andrew] and [Sophia] safe return to Spain".[62] Ms [Sanchez] is clearly angry at Mr [McDonald]'s refusal to return the children to Spain. She alleges he has been dishonest and the retention is part of his "manipulative masterplan" to bring them to New Zealand and not return them. She reminds Mr [McDonald] he is in breach of the Hague Convention. She says:[63]

> Moving forward, I am forced and willing to mediate under the Australian mediation (since you failed to reply to my lawyer on numerous occasions) until their safe return to live with their mother as soon as you allow them to leave NZ.

[159] After the passage which Mr [McDonald] relies on, Ms [Sanchez] says:[64]

> If you return the children to Spain I will happily leave Australia and the job. My children are the most important in my life.

[160] She makes it clear she will not live in New Zealand and believes there are no suitable job opportunities for her in [location B]. She continues:[65]

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[62] BOD page 226.
[63] As above.
[64] As above.
[65] BOD page 226.

> I hope you have the decency to start and engage in mediation immediately (you have their details as I tried to engage in this in the past since I knew you were not willing to return to Spain). The children would like to travel to see me and live with me, talk to them! Think of them for a change, you have already separated them for a year. How long do you want to put them through this?!

[161] I don't understand exactly what the email of 24 January 2023 is proposing when it is read in its entirety, if in fact it is proposing anything definite. Ms [Sanchez] is angry and frustrated with Mr [McDonald]. English is not her first language. What is clear is that she would be happy for the children to be returned to Spain- as she had understood was meant to happen. She believes Mr [McDonald] is in breach of the Spanish court's orders and the Hague Convention. She may be willing to consider the children remaining in Australia. When she refers to mediating in Australia "until their safe return to live with their mother", it is not clear to me whether she means that return is to be in Spain or in Australia.[66] There is no suggestion whatsoever that she consents to them remaining in New Zealand.

[162] I do not accept the submission from Mr Guest that other emails sent at or around the same time as this one are irrelevant. When there is a lack of clarity or certainty in the specific communication being examined, then contemporaneous communications sent around the same time might be helpful to clarify what someone actually means in the specific evidence under consideration.

[163] Relevantly Ms [Sanchez] sent emails soon after 24 January 2023 which made it very clear she expected the children to be returned to Spain.

[164] For example, on 8 February 2023 she sent an email which said:[67]

> I want to have the kids back in Spain immediately. I don't agree to them staying there to NZ or having to travel there.
>
> When are you bringing them back?

[165] On 13 February, she said:[68]

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[66] As above.
[67] BOD page 186.
[68] BOD page 186.

> You have no right to deprive our children of a mother. I want my children back, think about their emotional wellbeing before you kidnap them.
>
> I don't give you my authorisation to keep them in NZ from February onwards …
>
> They need to be returned to Spain immediately otherwise you are going against Spanish law.
>
> Please let me know when you are returning them asap.

[166] I accept these statements would be ineffective to revoke acquiescence if it already had been clearly and unequivocally given in the email of 24 January. But, in my view, it had not.

[167] I also consider the parties' contemporaneous behaviour. There is no evidence of Mr [McDonald] immediately responding to Ms [Sanchez]'s email of 24 January to record she now agrees to the children living in Australia nor of him taking steps to reconvene mediation (as her e-mail might be read to suggest). It is likely he would have made some response if he saw her email as a significant change in her position.

[168] Mr Guest acknowledges Mr [McDonald] relies heavily on the email of 24 January to support this part of his argument. That email is not nearly as clear or unequivocal as I am asked to accept.

[169] On its face, it leaves me in real doubt as to exactly what Ms [Sanchez] meant. It is also made in the context of repeated demands for the immediate return of the children to Spain before and shortly after the 24 January email.

[170] Ms Blackford says this about the e-mail:[69]

> … At most it can be seen as a throwaway and intemperate comment regarding Australia. It does not set out any cogent proposal regarding relocation to a third country, and on no occasion gives any indication that the mother agrees to the children remaining in New Zealand.

[171] I agree that is an accurate summary.

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[69] Submissions of Counsel for the Applicant dated 22 September 2023, page 23, paragraph 97.

[172] Mr [McDonald]'s evidence is:[70]

> I say that [Ms Sanchez] equivocated and acquiesced about the children staying longer in New Zealand [than] was originally envisaged, and considered the possibility of us both living in Australia indefinitely rather than returning to Spain.

[173] Other than the use of the word "acquiesced", this might also be an accurate summary (although Ms [Sanchez] would probably not accept that). However, "equivocated" and "considered the possibility" is not a clear, unqualified statement the children did not need to return to Spain. It is not acquiescence.

[174] I put to one side the issue of whether acquiescence needs to be to the children remaining in the requested country (New Zealand), as Ms Blackford says, or whether it is sufficient if the requesting parent has agreed for the children not to be returned to their original country (Spain) as Mr Guest says. I do not need to determine that.

[175] I reject the exception that Ms [Sanchez] has acquiesced to the children's non return because the evidence of it is simply insufficient. It is neither clear nor unequivocal. Repeated reading of the email of 24 January leaves me uncertain exactly what Ms [Sanchez] meant. That is the opposite of a clear and unequivocal statement that she agreed to the children not being returned to Spain.

[176] At most, Ms [Sanchez] may have considered that is a possibility. However, I do not accept it was ever clearly communicated to Mr [McDonald] in a way that means Mr [McDonald] could rely on it or that Ms [Sanchez] should be prevented from insisting the children are returned.

[177] Mr van Bohemen does not pursue this exception on behalf of his child clients. He says [Andrew] and [Sophia] do not believe their mother agrees to them remaining in New Zealand.

[178] I am not satisfied Mr [McDonald] has established Ms [Sanchez] has acquiesced in the children's non return. As such, Mr [McDonald]'s application under s 106(1)(b)(ii) fails.

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[70] BOD page 222, paragraph 33.

Grave risk

[179] Mr [McDonald] says ordering [Andrew] and [Sophia]'s return to Spain creates a grave risk of the children suffering psychological harm or otherwise places them in an intolerable situation.[71]

[180] The leading decision on grave risk is that of the Court of Appeal in *LRR v COL*.[72] The decision identifies eight factors concerning the grave risk/intolerable situation exception.[73] I consider the following most relevant in this case:

(a) First, there is no need for any gloss on the language of the provision. It is narrowly framed. The terms "grave risk" and "intolerable situation" set a high threshold.

(b) Second, the Court must be satisfied the return of the child would expose him or her to a grave risk. This language requires something more than a substantial risk. It is a risk that deserves to be taken very seriously. The assessment turns on both the likelihood of the risk eventuating and the seriousness of the harm if it does.

(c) Third, a situation is intolerable if it is a situation which this particular child in these circumstances could not be expected to tolerate.

(d) Fourth, the inquiry contemplated is future looking. The Court is required to make a prediction, based on the evidence, about what may happen if the child or children are returned. What is required is for the Court to be satisfied there is a risk which warrants the qualitative description of "grave". Any protective measures that will reduce a risk that might otherwise exist on return are relevant to that assessment.

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[71] Care of Children Act s 106(1)(c)(ii).
[72] *LRR v COL* [2020] NZCA 209.
[73] At [86] to [96].

[181] Mr [McDonald] says the grave risk of the children suffering psychological harm comes from a combination of factors:

(a) He says he is unable to return to Spain and could not and would not do so even if the children were ordered to return.

(b) His employment there was as an immigration consultant to people wanting to settle in New Zealand. He says COVID ended that business. He has no viable employment opportunities.

(c) Not being a Spanish citizen, he has limited access to government financial support. In his evidence, Mr [McDonald] provided links to Spanish government websites to support his claim he is not eligible for government financial support if he returned.

[182] Other than those Spanish government website links, I am required to rely on his evidence that return to Spain is impracticable for him to the point of impossibility.

[183] I accept it would be difficult for Mr [McDonald] to return to Spain and re-establish himself there. I do note, however, that Mr [McDonald] criticises Ms [Sanchez] for refusing to consider moving to New Zealand. He says she could "make it work" living here. She may well say the same thing about him in Spain.

[184] I do have some difficulty with Mr [McDonald]'s evidence about this. He lived in Spain for five years prior to coming to New Zealand in November 2021. When he left Spain, his assurance to the Spanish court was that the children would return at the end of 2022. Presumably he said he would too. COVID was already well established by that time.

[185] I accept border closures at the time would have caused real difficulties for his emigration-based employment.

[186] However, those border restrictions have now eased. New Zealand is currently experiencing high levels of immigration. Presumably that includes from Spain and other parts of Europe. It may be, in those circumstances, there are opportunities in

Spain for someone with Mr [McDonald]'s skills that would enable him to live there and earn an income- as he has previously.

[187] However, I accept, for the purposes of considering the exception, Mr [McDonald]'s evidence that he cannot return to Spain with the children if they were ordered back. In that case, that would be a significant change in the children's care arrangements. Mr [McDonald] has been the children's primary caregiver since November 2021. Ms [Sanchez] has had very limited face-to-face contact with the children since then. Just after this hearing, she was to undertake her fourth visit to New Zealand to spend time with the children during the school holidays. Her face-to-face contact has been limited to four such holiday periods over a timespan now of almost two years. The most frequent contact she has with the children is remote contact by AVL and social media (although she alleges difficulties with that also).

[188] Prior to coming to New Zealand, Mr [McDonald] equally shared the children's care for five years in Spain.[74] Even utilising technology for remote communication and some visits to Spain, his role in the children's lives will be greatly reduced. The physical travel for visits would be difficult and expensive. The time-zone difference between New Zealand and Spain could complicate even remote communication by video link or telephone. I readily accept that would be a significant change for the children.

[189] Mr Guest submits the fact that the children do not wish to return to Spain also contributes to the risk of harm. They are at an age and stage where going against their views could cause real conflict and potential resistance, particularly from [Andrew].

[190] The neighbourhood where Ms [Sanchez] owns her home is criticised by Mr [McDonald] as run down and somewhat poor. He notes [Sophia] told Mr van Bohemen she does not feel "safe" there.

[191] In oral argument, Mr Guest was clear he was not elevating environmental factors associated with that neighbourhood to a level of physical (or psychological)

[74] Before that, the parties were living together. I am not aware of the exact arrangements for the children's care but of course both parents would have been involved in that.

risk to the children that could be considered grave by itself. The submission is that it is an environment in which the children feel insecure and uncomfortable. It is one more factor that will add to the children's sense of dislocation and unhappiness if returned to Spain.

[192] Overall, Mr Guest submits these factors combine to create a grave risk for the children if ordered to return to Spain.

[193] Given the above catalogue of very significant changes for the children, I am readily prepared to accept there may be some risk to their "happiness", level of settlement and their general wellbeing on their return to Spain, especially initially. They will be without their father who has been their primary caregiver. They will move into the care of their mother. They do not wish to return and their opposition might be stronger than it appears on its face. They are settled and happy in New Zealand and have some memories of life in Spain they are not enthusiastic about.

[194] There is no expert psychological evidence about the potential impact on the children of a return to Spain. I rejected a submission by Mr van Bohemen (not necessarily supported by Mr Guest) to commission a s 133 psychological report. I did so as I did not consider it essential for the disposition of the proceedings and because of the delay that would have been required.

[195] Mr Guest invites me to accept, as a matter of common sense, there are potential psychological implications for the children if ordered to return. I do accept that. I agree it is a matter of common sense that with such major changes in the children's lives, return will be a challenging and unsettling time for them.

[196] *LRR v COL* has developed the law on the grave risk exception.[75] It emphasises that the Court needs to consider the defence carefully and not dismiss it too readily. In particular, the Court may be required to closely examine whether assurances that protective factors to be put in place in the country of return will actually be effective in mitigating the risk whatever that is. At times, the evidence may need to be tested.

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[75] *LRR v COL* n 72.

[197] However, *LRR v COL* also re-emphasised that grave risk remains a high threshold.[76] A grave risk is exactly that.

[198] I do not accept that this exception is established by Mr [McDonald]. That is because of the stringency of the test which must be met.

[199] I am not satisfied that the children will be exposed to a grave risk of psychological harm or that the situation will be intolerable to them if ordered to return to Spain.

[200] The children do not have overtly strong negative views of Spain. They retain strong connections there and a fondness for the country. They speak Spanish. They are familiar with the schooling system. Understandably, they were not enthusiastic about the social restrictions and distance learning enforced by COVID. However, those restrictions no longer apply. The children did well in Spain. As far as I am aware, they were settled there, just as they have been happy and settled in New Zealand.

[201] It was also submitted the children's relationship with their mother has become strained and difficult. [Sophia] refers to Ms [Sanchez] crying and getting "hyped up" during phone calls.[77]

[202] The children are no doubt aware of their parents' conflict with each other. That is a difficult dynamic for any child to navigate while trying not to offend either parent.

[203] I accept Ms [Sanchez] may, at times, have exposed the children to her distress about the situation. Of course, she should try not to. However, that distress is understandable. It is unrealistic to expect that [Andrew] and [Sophia] would have no idea of their mother's views. It is inevitable they would know she is unhappy about them remaining in New Zealand to some extent.

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[76] *LRR v COL* n 72.
[77] BOD page 255, paragraph 15(c).

[204] However, I do not accept there is evidence of any fundamental concerns about the children's relationship with their mother. Prior to coming to New Zealand, Ms [Sanchez] shared the care of the children on an equal basis. There is no evidence she was anything other than a capable mother. Certainly, there is no suggestion that return to her care specifically gives rise to grave risk concerns.

[205] The children clearly miss their mother. They want her to be a bigger part of their lives. Ideally, from their point of view, that would be in New Zealand.

[206] Mr van Bohemen realistically did not pursue the grave risk exception on behalf of his clients. He said there was nothing in what the children said to him that indicated they saw a grave risk of psychological harm or an intolerable situation if they were returned to Spain. I acknowledge the assessment is an objective one and not just based on the children's views. However, the fact the children did not indicate to Mr van Bohemen overt distress at the possibility of return is relevant in considering this exception.

[207] I am not satisfied that Mr [McDonald] has established the "grave risk" exception in either s106(1)(c)(i) or (ii).

Weighing the discretion

[208] I have found Mr [McDonald] has established that the children object to being returned to Spain in accordance with s 106(1)(d). I am satisfied their objections are rational and reasonable and readily understandable. The children's views are the result of their positive experiences in New Zealand probably combined with the unusual COVID-affected environment in Spain immediately prior to their departure.

[209] Because the exception has been established, a discretion arises for me whether or not to make an order for return.[78]

[78] Care of Children Act s 106(1).

[210] The leading authority in New Zealand on the exercise of the discretion is the majority decision in *Secretary for Justice v HJ*.[79] The Court is required to weigh potentially but not necessarily competing considerations. On the one hand, the welfare and best interests of the children. On the other, the purpose of the convention which is to deter unlawful removals or retentions of children.

[211] The weight to be given to the competing considerations will vary according to which exception has been established. For example, in *LRR v COL,* the Court of Appeal was clear that if the grave risk exception is established, it is almost impossible to conceive circumstances where return would be ordered.[80] If other exceptions are established, the discretion may require careful consideration.[81]

[212] Section 4 of the Act makes the welfare and best interests of children in their particular circumstances the first and paramount consideration in proceedings under the Act. Section 4(4)(a) also says the section "does not limit" that part of the Act which deals with Hague Convention applications. However, that does not mean that welfare and best interest considerations are irrelevant to Hague Convention proceedings. *LRR v COL* said they should be at the "forefront" of the Court's considerations.[82]

[213] Firstly, Hague Convention provisions are welfare and best interest based. Generally, the welfare and best interests of a child will be promoted by returning children to their country of habitual residence and for the Court in that jurisdiction to determine their longer-term care arrangements.

[214] Secondly, the Care of Children Act allows a court not to make an order for return even though the necessary requirements of s 105 are satisfied if one of the s 106 exceptions is established. That must be on the basis that, in certain

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[79] *Secretary for Justice v HJ* [2006] NZSC 97; [2006] 2 NZLR 289.
[80] *LRR v COL* n 72 at [96].
[81] *Secretary for Justice v HJ* (n 79) was a case involving the exception that the children had been in New Zealand for more than a year before the application was made and were settled. In that situation, close consideration of the discretion was needed.
[82] *LRR v COL* n 72, at [83].

circumstances, return is not in the welfare and best interests of that particular child. Mander J in the recent High Court decision of *Anderson v Lewis* said:[83]

> [144] 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. (References omitted).

[215] Mr Guest accepts the exercise of the discretion involves consideration of both the principles relating to a child's welfare and best interests and the principles underlying the convention. He submits the welfare and best interests of the children strongly favour them remaining in New Zealand while issues in relation to their long-term care are resolved. The children are settled and happy here. That should not be disturbed.

[216] I accept the children's return to Spain will be a major change for them and would be challenging. I do accept the children remaining in New Zealand is less disruptive to their current lives. However, I have also found there is no evidence return would be deeply traumatising or give rise to a grave risk of psychological harm.

[217] There is also an aspect of the children's lives in New Zealand which is concerning to me.

[218] Since the children have been in New Zealand, Ms [Sanchez] has had no meaningful role in the children's day-to-day care and has only had very limited physical contact with them. She has only had contact with the children in New Zealand four times.

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[83] *Anderson v Lewis* [2023] NZHC 390 at [142]–[144].

[219] Mr [McDonald] has refused to let the children leave New Zealand to visit their mother in Australia. The reason for that restriction is not clear to me. Whatever the reason, the result is contact between the children and their mother has only been available in New Zealand and therefore limited to when she can travel here. Even the limited contact that has happened in New Zealand has, at times, been unsatisfactory. Each parent blames the other for those difficulties but the short position is there have been real difficulties arranging face-to-face contact.

[220] Remote contact by AVL has occurred frequently. However, in the emails exchanged between the parties and entered into evidence, there are references to Ms [Sanchez] having difficulties in speaking to the children when she expected to, even with that contact[84].

[221] I observe the children's living circumstances in New Zealand, while generally positive, have been marked by the glaring absence of their mother from their lives, at least physically. It is a fact that has coincided with the period Mr [McDonald] has had primary care and control over the children's movements and contact with their mother. There have been real difficulties agreeing and implementing an appropriate contact relationship with their mother. Even taking into account the distance between New Zealand and Australia, the negotiations for both physical and remote contact seem (from the sworn evidence and the exhibited e-mails) to be characterised by high conflict between the adults and difficulty making satisfactory arrangements, particularly for physical contact.

[222] The situation in New Zealand can be contrasted with the children's lives in Spain. Their care was shared. Obviously both parents had significant and substantial care and contact over that five-year period. There is no evidence before me that there were major difficulties with shared care.

[223] It is not possible to know if there would be the same difficulties with contact if the children were primarily in Ms [Sanchez]'s care in Spain and Mr [McDonald] was at a distance as is the case now. I understand that so far it is untried for the children

[84] BOD page 275-278 for example

to live mainly with their mother and have contact with their father. Certainly, I did not receive any evidence about that having occurred in the past.

[224] Welfare and best interest considerations generally promote children having a relationship with both parents in a substantial and meaningful way. That seems to have occurred far more in Spain than since they have been in New Zealand.

[225] I recognise the situation will not revert to shared care in Spain if Mr [McDonald] does not return. What could result is an effective reversal of the current situation in that the children live in the care of their mother in Spain with a very limited relationship with their father. However, I understand the order for shared care remains in place in Spain and Ms [Sanchez] is willing to give effect to it if Mr [McDonald] relocated there.

[226] I am concerned that during the time the children have been in New Zealand their relationship with their mother has been very limited.

[227] I do have concerns about the welfare and best interests of the children remaining in New Zealand (even if that is only while substantive decisions are made about their care). That would probably mean their mother is largely physically absent from their lives and even remote contact is at times problematic. That is what has occurred since they have been here.

[228] It is not possible to say whether the same difficulties would be experienced if the children were living with their mother in Spain and their father was in New Zealand. Obviously, the distance itself causes substantial challenges with frequent physical contact.

[229] I also consider convention principles are important in weighing the discretion in this case. It is often said Hague Convention proceedings are about forum. At its core, the convention is an international agreement that recognises it is not generally in children's interests to be removed from their usual home (or prevented from returning to it) by one parent seeking to unilaterally relocate them.

Signatories agree to prevent unilateral relocation by generally requiring children to be returned to their usual home. It is in their usual home country that issues about substantive care and contact are to be resolved.

[230] In November 2021 [Andrew] and [Sophia] had been living in Spain for five years. They came to New Zealand on a time-limited, specific basis. They did so because Mr [McDonald] said he would return the children to Spain after a year. The Spanish court was presumably reassured by the existence of the convention and the knowledge that if Mr [McDonald] refused to return the children, the authorities here could order it.

[231] It is difficult to imagine the Spanish court allowing the children to come to New Zealand over Ms [Sanchez]'s opposition unless it was confident the children would be returned at the end of the time-limited period. It had Mr [McDonald]'s assurances. However, if he reneged on those, it had an underlying international convention to ensure return. One of the most fundamental objectives of the Hague Convention is to establish an international order under which there would be certainty about return.

[232] It is difficult to identify a clearer case than this one where a foreign court makes an order for children to travel to another country (New Zealand) with a clear expectation they will be returned to their usual home (Spain) at a specific given time.

[233] This case can be readily distinguished from others where the parties had informal agreements or understandings about living in another country for a period. Often that period is not clearly defined, the parties agreed purposes are less certain and there is not the formality of a court order recording and mandating the situation.

[234] The present case can also be distinguished from cases such as *Anderson v Lewis* where there are existing court orders in a foreign jurisdiction but those orders have not been closely followed by the parties.[85] In *Anderson v Lewis*, the 2018 US Court order provided the child would live in the US but travel to New Zealand during the northern hemisphere "summer" school holidays and every

[85] *Anderson v Lewis* n 83.

second Christmas. Despite those terms, the child had remained in his father's care in New Zealand for six months from January 2019, then for over a year from December 2019 to December 2020 prior to the final trip to New Zealand from July 2021 when the alleged retention occurred. The parties disagreed about the reasons for those extended stays in New Zealand but there had not been close adherence to the terms of that order.

[235] That is quite different from the circumstances under which [Andrew] and [Sophia] travelled to New Zealand. That was a very specific time-limited order granted over opposition and, I understand, after argument. I am not satisfied there is any evidence Ms [Sanchez] has ever agreed to any extension of the children's time in New Zealand beyond December 2022 at all. The order must have been made, at least partly, because the Spanish court was confident legal structures were in place to ensure the children's return.

[236] Put another way, if an order for return is not made in these circumstances, it is difficult to see how a court in any jurisdiction (including a New Zealand court) can have confidence that children will be returned at the end of a permitted period overseas (particularly a longer period) if the travelling parent changes their mind and refuses to return the children.

[237] When boiled down to its fundamental proposition, Mr [McDonald]'s argument in the "children object to return" exception is that the court should exercise its discretion and refuse to order the children's return because they have enjoyed their time in New Zealand, are settled here and now don't want to return to Spain. That is despite return to Spain being the agreed, and ordered, outcome from the outset.

[238] That argument cannot be correct. If it was, it would mean that courts (I repeat, including New Zealand courts) could not have confidence about allowing children outside their jurisdiction for extended periods for fear they will not be returned.

[239] It does not require significant imagination to predict courts could become reluctant to agree to children spending extended periods overseas if they were concerned the children would not be returned. That is particularly if the travel was to

spend extended time with family members. Courts' permission to travel may become harder to obtain over opposition from parents (like Ms [Sanchez]) who are worried that once out of the jurisdiction, the children will be retained there and not returned. Children could end up required to remain in their "home" country without extended periods outside that country.

[240] Usually, the country the parent wants to take children to will be that parent's country of origin. It is likely the parent's extended family still lives there. That probably includes the children's grandparents. All of that is the case here.

[241] If longer periods overseas became "too risky" for courts to sanction because of the risk of non-return, children could be denied the opportunity to spend extended time in the country of origin of one of their parents. They are thereby denied the opportunity to learn about that parent's culture and background in the place the parent comes from (which, of course, is culture and background the children share).

[242] Children would also be denied the opportunity to forge deep relationships (deeper than can be achieved on brief holidays) with family members who could and should be important to them including their grandparents. This is particularly the case if health, economic or other reasons prevent grandparents travelling to the children's home country for extended periods.

[243] That cannot be a desirable outcome.

[244] In the specific facts of this case, I consider general convention principles which favour return have significant importance.

[245] More broadly, respect for the decisions of a foreign country favour return. While those decision are not binding on me, in a more general sense, I do consider them relevant. If New Zealand courts expect and rely on foreign courts to respect and at least take into account New Zealand courts' decisions (including in Hague Convention matters), then New Zealand courts should show similar respect.

[246] These considerations favour an order for return.

[247] Weighing and considering all these matters, I am satisfied it is appropriate and correct to make an order for [Andrew] and [Sophia]'s return to Spain, even though the children object to return.

[248] An order for return is to issue.

Summary of findings and outcome

[249] I have found [Andrew] and [Sophia] remain habitually resident in Spain. The requirements of s 105 of the Care of Children Act are fulfilled and I must make an order for return, unless one of the exceptions under s 106 of the Act is established.

[250] I am not satisfied that Ms [Sanchez] has consented to or acquiesced to the children not being returned to Spain. That exception is not established.

[251] I am not satisfied there is a grave risk of the children suffering psychological harm or otherwise being placed in an intolerable situation if they return to Spain. That exception is not established.

[252] I am satisfied the children object to return to Spain and have obtained an age and degree of maturity at which it is appropriate to not only take into account their views but to give weight to them. I am satisfied that exception is established.

[253] Notwithstanding that, I exercise my discretion to order return for the reasons given.

[254] Therefore, an order is to issue that [Andrew] and [Sophia] are to be returned promptly to Spain pursuant to s 105(2) of the Care of Children Act 2004.

[255] These proceedings are to be allocated a case management review date in two weeks to consider implementation of this order and for any further steps required in these proceedings. The parties are to file memoranda for that case management

conference with the directions they are seeking. Those memoranda may be referred to me for judicial direction if that is required.

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Judge DP Dravitzki
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 09/11/2023 (Released at 4.30pm)