**NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.**

**IN THE FAMILY COURT**
**AT TAURANGA**

**FAM-2017-079-000015**
**[2017] NZFC 69293**

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| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004 |
| BETWEEN | AXEL SCHMIDT<br>Applicant |
| AND | LISA HOPFENGARTNER<br>Respondent |

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| Hearing: | 18 August 2017 |
| Appearances: | L Kearnes and Ms Barnes for the Applicant<br>A Ashmore for the Respondent<br>D Blair as Lawyer for the Child |
| Judgment: | 1 September 1017 |

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**RESERVED JUDGMENT OF JUDGE S J COYLE**
**[In relation to application of return of child under the Hague Convention; s106 (1)(a), (c)(i) & (ii), and (d) Care of Children Act 2004]**

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[1] Mr and Ms Hopfengartner live in Whenuakite in the Coromandel Peninsula. Living with them is Ms Hopfengartner's daughter, Clara Lorisa Schmidt, born 3 July 2007, and their daughter Lotte. Although Mr and Ms Hopfengartner are German nationals, they love New Zealand and love living in the Coromandel. For them they have an idyllic life, and it had been their intention to remain living there for the foreseeable future with Clara and Lotte.

[2] Ms Hopfengartner has, however, unlawfully removed Clara from Germany, and once Clara's father, Mr Schmidt, found out where Mr and Ms Hopfengartner were living, he commenced proceedings under sub-part 4 of the Care of Children Act 2004. That sub-part implements into New Zealand domestic law the Hague Convention on the Civil Aspects of International Child Abduction.[1] Mr Schmidt has therefore applied pursuant to s 105 of the Act for the return of Clara to Germany. Mr Ashmore, for Ms Hopfengartner, accepts that jurisdiction is established in terms of s 105(1) of the Act. As a consequence, pursuant to s 105(2), this Court must make an order that Clara be returned promptly to Germany. The Supreme Court in *Secretary for Justice v HJ* referred to the Courts "duty to order return in terms of s 105."[2]

[3] Section 105 however is subject to s 106 which sets out the grounds for refusal of an order for the return of a child, codifying what have become known as the "defences" under the Hague Convention. Ms Hopfengartner relies on the following defences:

(a) That the application is made more than one year after the removal of Clara, and that Clara is now settled in a new environment;[3]

(b) That there is a grave risk that Clara's return would expose Clara to physical and psychological harm, or would otherwise place Clara in an intolerable situation;[4]

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1 COCA, s 94.
2 *Secretary for Justice v HJ* [2006] NZSC 97 at [48].
3 COCA s 106(1)(a).
4 COCA s 106(1)(c.)

(c) That Clara objects to being returned, and that she has attained an age and a degree of maturity of which it is appropriate to weight to Clara's views.[5]

[4] If Ms Hopfengartner is able to establish any of those defences, the Court then has a discretion whether to make an order for the prompt return of Clara or not.

[5] Thus the issues I have to determine in this hearing are as follows:

**Twelve months and settled**

**(a)** Is Clara now settled in her new environment?[6]

**(b)** Is there any relevance of the Deportation Liability Notices issued by Immigration New Zealand and served on Mr and Ms Hopfengartner to the issue of whether Clara is settled or not?

**(c)** Should it be established that Clara is settled, how should the Court exercise its discretion in relation to return?

**Child objection**

(a) Does Clara object to being returned?

(b) If so, has Clara attained an age and maturity requiring the giving of weight to her views?

(c) What weight should be given to her views?

(d) How should the Court exercise discretion?

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5 COCA s 106(1)(d).

6 It is accepted by Ms Hopfengartner that the application was made more than one year after the removal of Clara from Germany.

**Grave Risk/Psychological Harm**

(a) Is there a grave risk that the return of Clara to Germany would expose Clara to psychological harm?

(b) Is there a grave risk that the return of Clara to Germany would otherwise place Clara in an intolerable situation?

(c) If either of those grounds are established, how should the Court exercise its discretion in relation to return?

**Is Clara settled in her new environment?**

[6] Clara, Lotte, and Mr and Mrs Hopfengartner left Germany on 11 November 2014. When they left Mr Schmidt had no idea that they had left Germany or that they intended to leave permanently.

[7] On 17 December 2014 the District Court at Fürth made an order placing Clara in the custody of Clara.[7] A translation of the decision of the Fürth District Court set out at pp 22 to 30 of the Bundle of Documents. At the start of the judgment the Fürth Court sets out that custody is awarded to Mr Schmidt, and then sets out its reasons for making the decision. The Court concluded:

> The transfer of parental custody to the father is in the best interests of the child. The ingrained resentment the mother of the child holds against the father of the child, by now significantly impairs the mother's ability to raise her daughter. … With her actions, the mother wilfully and significantly disregards the interests of her daughter.[8]

[8] At the time that decision was issued Mr and Ms Hopfengartner had left Germany with Clara. Notwithstanding that she had left Germany, Ms Hopfengartner was clearly aware of that decision as, on 21 January 2015, she filed an appeal against

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7 The German Courts refer to custody and access as supposed to the New Zealand concepts of day-to-day care and contact.

8 Bundle of Documents p 27.

the custody order. The appellate judgment of the Nüremberg Higher Regional Court (before three Judges of that Court) is set out in its translated version at pp 207 to 211 of the Bundle. The Appellate Court upheld the decision of the Fürth District Court.

[9] After leaving Germany, the evidence of Ms Hopfengartner was that they initially stayed in Australia with friends. However on 23 January 2015 Mr and Ms Hopfengartner arrived in New Zealand on a visitor's visa and travelled around New Zealand for two months, ending up in the Coromandel where they remained between March and April 2015. They then returned to Australia on 21 April 2015 for a five week holiday in Melbourne, but at the end of that trip returned to the Coromandel where they have remained ever since. On 15 June 2015 Clara was enrolled at Coroglen School. At that time the evidence of Ms Hopfengartner was that they were living at a house on the Tairua/Whitianga highway. However in February 2016 they moved to a new house in Hahei, where they remained living until recently. I accept the evidence of Ms Hopfengartner that they had to leave the Hahei property as their landlord required the property to be sold. In mid February 2017 Clara started at the Whenuakite School where she remains.

[10] During this period Mr Schmidt had no idea where his daughter was. It appears on the evidence that through a coincidence, in part helped by an extensive media and internet campaign in Germany, he was alerted to the possibility that Clara may be in New Zealand, and eventually he ascertained her whereabouts. In December 2016 Mr Schmidt filed a request for the return of Clara with the Central Authority in Germany. Subsequently applications were made by the New Zealand Central Authority on behalf of Mr Schmidt on 14 February. The New Zealand Family Court made orders for the immediate surrender of Clara's travel documents and an order preventing Clara being removed from New Zealand.

[11] The formal application for return under s 105 of the Act was filed on 23 February 2017. Clara has therefore been in New Zealand from late January 2015 and in the Coroglen/Hahei/Whenuakite area since June 2015. The issue that arises is whether she is now settled in that environment or not. Ms Kearns for Mr Schmidt submits that she is not settled and that the evidence is inadequate to enable the Court to make such a finding. Mr Ashmore for Ms Hopfengartner submits that Clara is

clearly settled in that environment, a submission supported by Mr Blair as Clara's counsel.

[12] What is meant by the word "settled" has been determined by the New Zealand Supreme Court in *Secretary for Justice v HJ.*[9] The Court held:

> Whether a child is now settled in its new environment involves a consideration of physical, emotional and social issues. Not only must a child be physically and emotionally "settled" in the new environment, he or she must also be socially integrated.[10]

[13] When considering whether a child being settled it is the date of hearing which is relevant.[11]

[14] In *Re N (Minors)(Abduction)* Bracewell J held: [12]

> The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving, attachment. That can only be relevant insofar as it impinges on the new surroundings.

[15] I adopt that reasoning as it is consistent not only with the New Zealand approach, but also the approach of the Family Court of Australia.[13]

[16] Ms Kearns submits Clara is not settled. She submits that the evidence shows that following her removal from Germany, Clara has been entirely unsettled. In support she refers to Mr and Mrs Hopfengartner initially residing in Australia, then arriving in Christchurch, travelling from Christchurch to the Coromandel, returning to Melbourne for six weeks, before returning to the Coromandel. She further submits that the three changes of residence and two changes of school since February 2016 are relevant. Thus Ms Kearns submits there is no evidence that Clara is settled at school, that Mr and Mrs Hopfengartner are in stable employment, and no evidence of extra-curricular activities.

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9 *Secretary of Justice v HJ* above n 2.
10 *Secretary for Justice,* above n 2, at [55].
11 *Secretary for Justice v HJ,* above n 2, at [57].
12 *Re N (Minors)(Abduction)* (1991) 1 FLR 413.
13 See for instances *State Central Authority v Ayob* (1997) 21 Fam LR 567; *Graziano v Daniels* (1991) 14 Fam LR 697.

[17] In her cross-examination of Ms Hopfengartner, Ms Kearns asserted that Clara had missed six days in 2016 of school; this, Ms Kearns submits, was "a reasonably significant number of days."[14] I do not accept that six days missed over the total school year are a significant number of days missed. Nor do I accept that the three changes of residence within the same geographical area from June 2015 to May 2017 are significant either; such is the lot of tenants that their tenure is uncertain. From May 2015 until February 2016 (9 months) the Hopfengartner's lived in a property at Coroglen on the Tairua/Whitianga road. Then from February 2016 to May 2017 (15 months) they lived in Hahei. They had to move in May 2017 to Whenuakite because the tenancy agreement in relation to the Hahei property was terminated by the landlord.[15] That evidence is more consistent with stability rather than instability, and I determine that it is evidence of Clara being settled in that locale of the Coromandel region.

[18] Nor do I accept it is significant that at the end of 2016 Clara changed from Coroglen School to Whenuakite School. That has only been one change of school in just over two years she has been living in the Coroglen/Whenuakite area. The reasons advanced for shifting school are set out in the notes of evidence.[16] Those reasons are entirely appropriate and child focused.

[19] Ms Hopfengartner has employment in Auckland in human resources, which requires her at times to work in Auckland and at other times to work remotely, from her home. Mr Hopfengartner is trained as an osteopath, but his qualifications are not recognised in New Zealand, and thus he carries out the functions of an osteopath but under the title of a cranial sacral specialist or a body alignment specialist. In relation to Ms Hopfengartner's employment she has taken what she terms as a sabbatical; I apprehend it to be more leave without pay while these proceedings remain unresolved[17].

[20] The evidence of Ms Hopfengartner is that Clara is having singing and guitar lessons, that she is involved with a kapa haka group through school, and that she is

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14 Notes of Evidence p 7, line 7.
15 Notes of Evidence p 32, line 25 to p 33, line 9.
16 Notes of Evidence p 9, line 14 to p 10, line 2.
17 Notes of Evidence, p 24.

intending on enrolling in dance. Ms Hopfengartner gave evidence about the number of friends Clara has and the fact that her friendships and social circles has increased since they now live so close to the Whenuakite School.[18] I accept her evidence in this regard, and it was not seriously challenged in cross-examination.

[21] The family also all attend a gospel choir although they have no particular religious affiliation. Further it is quite clear to me when I read the affidavit of the principal of Coroglen School, as well as the s 133 report, that Clara is very happy and settled in school in New Zealand. Indeed Ms Lightfoot in her report records the principal of Whenuakite School stating:

> [Clara's] totally happy to be a kiwi girl, she loves the outdoors, enjoys the environment, she loved planting trees at Hotwater Beach. She plays netball, ripper rugby, and soccer at school, and she was going to open mike night. She is just amazingly well-adjusted, she is neat, I wish we had more Claras.[19]

[22] To Mr Blair and Ms Lightfoot, Clara expressed a clear view that her life is in New Zealand and that she sees herself as a "kiwi kid". In Ms Lightfoot's evidence it is that sense of a kiwi outdoors life that is important to Clara, and particularly the ability to be involved with animals.

[23] I find that Clara is physically and emotionally settled in her new environment in the Coroglen/Hahei/Whenuakite region, and that she has achieved a high level of social integration given the factors I have referred to above. I reject Ms Kearns' submission that she is not settled as the evidence, not only that from Ms Hopfengartner, but the other evidence that I have referred to, shows a clear and consistent pattern of Clara being clearly settled both factually and legally.

**What is the relevance (if any) of the immigration issue?**

[24] Subsequent to the filing of these proceedings Mr and Mrs Hopfengartner have been served with a Deportation Liability Notice issued by Immigration New Zealand. They have filed an appeal with the Immigration and Protection Tribunal

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18 Notes of Evidence p 25, lines 1 - 14
19 Bundle of documents p 362

although there appears to be no indication as to when their appeal is likely to be heard.

[25] Mr and Ms Hopfengartner have been in New Zealand under different visas. Ms Hopfengartner has been here under the skilled migrant visa, with Mr Hopfengartner here under a general work visa. Mr Schmidt has filed an affidavit from Mr McBride, a specialist immigration barrister. Mr Ashmore indicated that it is accepted that Mr McBride is an expert in terms of s 25 of the Evidence Act 2006, and certainly his evidence has been substantially helpful to me.

[26] Mr McBride sets out at [14.6] of his affidavit his understanding that the DNL's have been served on Mr and Ms Hopfengartner on the basis that they incorrectly disclosed Ms Hopfengartner's legal status concerning custody of Clara in Germany. It appears that when arriving in New Zealand in January 2015, Clara's passport was shortly to expire. To remain in New Zealand she needed a passport which was current, and the allegation is that Ms Hopfengartner applied to the German Embassy in Wellington for a passport for Clara asserting that she had legal custody of Clara. She by this time knew that the Fürth District Court had placed Clara in the custody of Mr Schmidt. The allegation therefore is that she deliberately misrepresented the factual and legal situation in relation to Clara's custody to the German Embassy. The Embassy have now revoked Clara's passport on the basis that it had been misled by Ms Hopfengartner.

[27] Mr McBride was available for cross-examination. It is clear from Mr McBride's evidence that the IPT, in deciding whether to grant the appeal or not, must consider s 207 of the Immigration Act 2009. This section requires the tribunal to be satisfied that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for [Ms Hopfengartner] to be deported from New Zealand, and it would not in all the circumstances be contrary to the public interests to allow Ms Hopfengartner to remain in New Zealand. Mr McBride at [18] of his affidavit gave his opinion that "based on that information I would say that the chances of the respondents or her husband's deportation appeal succeeding resulting in resident visas are minimal."

[28] However as he acknowledged there were a number of important documents that he had not seen. He also appeared to be under the misapprehension that there were current proceedings before the New Zealand Family Court in relation to Clara's day-to-day care. What became apparent during his cross-examination was that Mr McBride thought that a possible outcome would be either:

(a) That the appeal be dismissed, but that the IPT order that Mr and Mrs Hopfengartner be granted a temporary visa, which is valid for a period not exceeding 12 months; or alternatively

(b) T heir appeal is allowed and that they are granted a temporary visa for a period not exceeding 12 months. The effect of the temporary visa is that they would then remain in New Zealand lawfully, and during the 12 month period could apply for another form of visa including a residence visa.

[29] In Ms Kearns' submission the uncertainty as to Mr and Ms Hopfengartner's immigration status goes squarely to the issue of Clara being settled or not in New Zealand. Her submission is the very real chance that they will be deported, and thus cannot be said that Clara is settled in New Zealand.

[30] I determine that I cannot place any weight on the immigration issue as it concerns future possibilities rather than actual reality or certainties. While I accept Mr McBride's evidence that it is more likely than not that their appeal will fail, and at best they might be granted a temporary visa, that probability does not equate to a certainty or inevitability. Additionally should they be granted a temporary visa, as suggested by Mr McBride, then it may be that they obtain a residence visa during the intervening 12 month period. It is wrong for this Court to prejudge decisions yet to be made by the IPT, itself a judicial entity, nor any subsequent decisions yet to be made by INZ. I have to make my decision on the basis of the known evidence before me at this point in time. If Clara subsequently leaves New Zealand because a decision is made by the IPT to deport her parents, then that will come to pass. But it should not properly influence my decision as to whether Clara is settled in New Zealand or not.

[31] The only relevance would have been if the appeal had been rejected prior to the hearing before me and Mr and Ms Hopfengartner were about to be definitely deported; Clara then could not be said to be settled in her new environment. I note that subsequent to the conclusion of the hearing Ms Kearns filed a memorandum with the Court seeking a direction that Ms Hopfengartner produce further evidence. It was not clear to me the basis upon which Ms Kearns sought this direction. For as Mr Ashmore sets out in his submissions in response, the review she referred to was not the outcome of the IPT appeal, and thus there was no new evidence that I needed to consider before issuing this judgment. I have placed no weight on the issues raised by Ms Kearns in her 30 August 2017 memorandum.

**How should the subsequent discretion be exercised in relation to Clara?**

[32] Ms Hopfengartner has established the defence of Clara being settled in a new environment. Having done so there remains a discretion vested in the Court as to whether to order a return or not. The Supreme Court in *Secretary of Justice v HJ* stated in relation to the discretion:

> It is not appropriate to speak in terms of a presumption of return in a discretionary situation. This is because the exercise of the discretion must recognise, and set to balance, both the welfare and best interests of the child and the general purpose of the Convention.[20]

[33] The approach to be adopted by Courts in New Zealand is set out more fully by the Supreme Court at [85] to [87] inclusive. It is clear there is a balancing between the welfare and best interests of Clara, and the general purposes of the convention. Issues such as concealment are relevant in relation to the exercise of discretion, but the Court is still required to find that that factor outweighs the interests of a child when deciding to make an order for return. The legislative basis for this is contained in s 4(4)(a) of COCA. Pursuant to s 4(2) this is an individualised assessment of Clara and her particular circumstances but must also take into account the relevant principles in s 5. An assessment of those principles must be undertaken however in light of the fact that this is a summary process, and the Court is not making a determination as to what is the ultimate outcome that will meet the best interests and welfare of Clara.

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20 *Secretary of Justice v HJ, above n 2,* at [68].

[34] For example, s 5(a) is centred in Clara being protected from all forms of violence; that there is violence is disputed on the facts. There is a dispute for instance as to whether Ms Hopfengartner drove over Mr Schmidt's foot at a 2013 access changeover, or whether it was Mr Schmidt who was the aggressor, deliberately moving in front of the vehicle. I am unable to resolve that factual dispute. Additionally whilst there is in the bundle of documents a decision of a German Court deciding that it was Mr Hopfengartner who was violent and not Mr Schmidt, it is unclear to me whether that was a civil or criminal finding. In any event, I must assume that both the Fürth Court and the Appellate Court have determined that Mr Schmidt presents no safety risks to Clara in awarding him Clara's custody.

[35] The principles in s 5(b) to (c) are entirely aspirational on the facts of this case. For as the Appellate Court in Germany found there has been an ongoing lack of willingness by Mrs Hopfengartner to engage Mr Schmidt as a meaningful parent in Clara's life, and certainly her actions in removing Clara from Germany and hiding from him where they were living so as to exclude him from Clara's life mean that he has had no ability to be involved in her life.

[36] Sections 5(d) and (e) are important in the facts of this case. That is Clara should have continuity in her care, development and upbringing, as well as a relationship with both of her parents. However her ability to have a relationship with her parents is currently impossible because of the decisions of Ms Hopfengartner. Additionally should the Court order return Ms Hopfengartner has made it clear that she will not return with Clara and will remain in New Zealand with Mr Hopfengartner and Lotte. Section 5(f) relating to Clara's identity is important and the evidence in relation to her sense of identity has already been referred to above.

[37] The other evidence in relation to Clara's best interests and welfare is that set out by Ms Lightfoot. The central thrust of Ms Lightfoot's report and her evidence in cross-examination is that return to Germany for Clara would be cataclysmic. She bases that evidence on the following:

(a) Clara's account of the motor vehicle incident referred to above. Ms Lightfoot was quite clear that Clara was experiencing post-traumatic stress because of her perception of events in which she had witnessed. She said in response to a question from me "I mean Clara's account of experiences from the view of a six year old and talks about the things that she directly experienced. She didn't talk about the things that Ms Hopfengartner listed as the most scary parts of the situation. Clara had her own series of experiences.[21]

(b) "Clara had an account that is very consistent with a six year olds recount of trauma. She predominantly talked about sensations and sensory perceptions. She couldn't think at the time. There was no logicality or analysis of the events at the time she was experiencing it. She could say how she felt but not what she thought at the time and when she recounted her experience to me, which would be what three years later, five years later, she, she demonstrated the same range of feelings that she described having at the time. She regressed in her – in the logicality of her, of her account and overall her, her, her account was very consistent of actual trauma."[22]

[38] Secondly she gave evidence about the effects of returning to Germany in terms of Clara's psychological state. She described it has Clara leaving everything behind, and being akin to a death. Thirdly, Clara felt she would be leaving her primary attachment figure. Ms Lightfoot was challenged around that evidence at length. I accept her evidence that whilst it is clear from the psychological report provided to the German Courts that Clara was attached to her father, Clara has subsequently had a significant period in which she has had no contact with her father at all. Thus whilst she may have had a strong attachment with her father at that point in time, through the effluxion of time that attachment has lessened and the attachment with her mother in particular has increased.

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21 Notes of Evidence p 95, lines 25 – 27.
22 Notes of Evidence p 96, lines 15 – 25.

[39] I acknowledge Ms Kearns criticisms around the failure of Ms Lightfoot to discuss matters with Mr Schmidt. However whilst Ms Kearns highlights the number of phone calls between Ms Lightfoot and Ms Hopfengartner ( in contrast with none to Mr Schmidt), I accept Ms Lightfoot's evidence that those phone calls were not information sharing or gathering but rather were simply to clarify appointment times and processes. There was email communication from Ms Lightfoot to Mr Schmidt inviting him to meet with her which Mr Schmidt replied that his counsel would contact Ms Lightfoot to make the arrangements. It is regrettable Ms Lightfoot did not follow that up in the absence of any further response from Mr Schmidt or his counsel. The criticisms however do not detract from the substance of Ms Lightfoot's report, and those matters in which she specifically addressed the brief. Ms Lightfoot's evidence is "that severing of that primary attachment will be distressing to Clara, or cause her trauma and she will be incredibly dislocated."[23] Ms Lightfoot concluded that returning Clara would place her in an intolerable situation.[24] I accept and rely on her evidence in that regard.

[40] The effect of returning Clara to Germany would be to separate her from her step-father and sister, Lotte (aged 6). The evidence of Mr and Mrs Hopfengartner, and of Ms Lightfoot, all point to a strong and supportive relationship between Clara and Lotte. Return therefore removes Clara from her mother, step-father, and sister, and returns her to her father whom she has not seen since 2013, and to a father she associates with trauma in her life.

[41] When looking at Clara and her particular circumstances it is my clear finding that it would be contrary to her welfare and best interests to require her to return to Germany for the reasons I have set out. The Supreme Court however has said that what is in the best interests of a particular child "cannot be the only or indeed the dominant factor in the exercise of a s 106 discretion."[25] The Supreme Court referred to the *W v W (child abduction)* decision[26] where the Court discussed the operation of the Convention so as to achieve stability for the majority of children and noted that that might have to be achieved "at the price of tears in some individual cases."

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23 Notes of Evidence p 97, lines 28 – 30.
24 Notes of Evidence p 104, line 31.
25 *Secretary of Justice v HJ*, above, n 2, at [50].
26 *W v W* [1993] 2 FLR 211 at 220.

[42] In the context of the policy and convention issues, the issue of concealment is relevant. The Supreme Court in *Secretary of Justice v HJ* has expressed a clear view that policy implications arising out of concealment should be dealt with "as a facet of the exercise of the discretion."[27] In this case Ms Hopfengartner left Germany with Mr Hopfengartner, Clara and Lotte without advising Mr Schmidt and in the face of orders which provided for him to have ongoing access to Clara. In the knowledge that Fürth German Court had awarded custody to Mr Schmidt she came to New Zealand, and at no stage did she inform Mr Schmidt where Clara was. She made no effort to contact Mr Schmidt in the intervening period, and it was left for him to find out where Clara was living. She changed school once Mr Schmidt became aware that Clara was in Coroglen School without telling Mr Schmidt. The fact that she had shifted from Hahei to Whenuakite only became apparent during Mr Blair's cross-examination. In relation to concealment the Supreme Court *Secretary for Justice v HJ* stated: [28]

> The mother wrongly removed the children from Australia. She failed to advise the father that she had taken them to New Zealand and where she was living. Beyond that failure, which hardly amounts to a form of concealment, the mother did little, if anything, which can reasonably be regarded as concealment.

[43] In this case I find there has been concealment by omission. There is a clear difference in facts between the *Secretary of Justice v HJ* and this case. In that case the mother simply took the children to Australia and did not tell the father where she was living. In this case Ms Hopfengartner has taken them in the face of the Court order changing Clara's care, against the background in which the Appellate Court upheld the lower Court's determination that the mother had actively thwarted the child's relationship with the father, and in this case the mother has actively concealed the change of school and change of residence from the father. Concealment is a significant issue of this case which impacts upon the exercise of discretion.

[44] Section 94(1) specifically implements into New Zealand law the Hague Convention. The objects of the convention are set out in Article 1 namely:

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27 *Secretary of Justice v H, above n 2,* at [69].
28 *Secretary of Justice v HJ*, above n 2, at [111].

(a) To secure the prompt return of children who are wrongfully removed or retained in any contracting state; and

(b) To ensure that rights of custody and of access under the law of one contracting state are respected in other contracting states.

[45] Thus, in this case the following relevant policy considerations that I need to consider:

(a) Respecting and implementing the decision of the German Court to grant custody of Clara to Mr Schmidt by ordering the return of Clara to Germany to give effect to that order, and so as to enable the ongoing decisions about Clara's welfare and best interests to be assessed by the German Family Courts.

(b) The fact that with Mrs Hopfengartner has deliberately attempted to thwart the order of the German Court, and Mr Schmidt's ongoing involvement in the Clara's life; and

(c) The desirability of ensuring that those who deliberately set out to thwart orders in one jurisdiction are not seen to be able, through the passage of time and their own efforts, to establish and seek to rely upon a new life for a child in another country.

[46] Those policy considerations are significant in this case but on the particular facts of this case it is my determination that the welfare and best interests of Clara outweigh these policy considerations and I therefore exercise my discretion and decline to make an order for the return of Clara to Germany as sought under this ground. That is I have reached the view that to require Clara to return to Germany would be too cataclysmic for her. It would require her to be in the primary care of her father whom she has not physically seen since 2013. It would require her to leave behind her mother, her stepfather and her sister. It would require her to leave behind the life that she has in New Zealand and move to a life in Germany, the present realities of which are unknown to Clara. I agree with Ms Lightfoot's evidence that for Clara that would be an intolerable situation (in a psychological sense).

**Does Clara object to returning to Germany?**

[47] Whether Clara objects or not is a factual determination. Consideration of a child's objection under s 106(1)(d) involves four issues:

(a) Does Clara object to a return?

(b) If so, has Clara obtained an age and degree of maturity at which it is appropriate to give weight to her views?

(c) If so, what weight should be given to Clara's views? and

(d) How should a residuary/statutory discretion be exercised?

[48] This approach was set out in *W v N [child abduction].*[29] An objection is more than a mere preference for a mere wish; an objection carries with it a "notion of clarity in force in a way that it is expressed"[30]

[49] Ms Lightfoot expressed an opinion that Clara clearly objected to being returned to Germany and was cross-examined by Ms Kearns and Mr Blair in relation to that opinion. Ms Lightfoot described Clara's objection to returning as, "there is resistance to being placed in the care of her father." But went on to say "as part of her overall reaction to being returned to Germany but overall I have to say that her choices are not anti-Germany, but pro New Zealand and everything that is here for her and in fact if you subtract everything that she would be leaving behind she is leaving behind herself, reality, her orientation on life and her day-to-day living. … So in that sense it is all about leaving everything that she knows here in New Zealand and gains nothing that she has in Germany."[31]

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29 *W v N [child abduction]* [2006] NZFLR 793 at [46] the High Court's approach and analysis was upheld on appeal with the Court of Appeals judgment cited as *White v Northumberland* (2006) NZFLR 1105

30 *Bayer v Bayer* [2012] NZFC 2878 at [63]; *White v Northumberland* (2006) NZFLR 1105 at [57].

31 Notes of Evidence p 102, line 19 to p 103, line 2.

[50] A summary of the basis of Clara's objections as communicated to Ms Lightfoot are set out in her report at [7.1] where Ms Lightfoot stated: [32]

> Clara's objections to return relate to the following:
>
> 1. She would be taken away from her mother who is very important to her;
> 2. She would be taken away from her family in New Zealand;
> 3. She would be taken away from her friends and other relationships;
> 4. She would be taken away from her home;
> 5. She is "kiwi", enjoys living in New Zealand, and prefers to live in this country in comparison to Germany; and
> 6. She would be returned to an overall context of her father's care in a country, in which she associates with adult conflict and being unhappy.

[51] It is clear from Ms Lightfoot's report that central to Clara's concerns around seeing her father is the car incident that occurred on 20 September 2013. Mr Blair has in his memoranda and reports to the Court set out quite clearly that Clara has expressed to him an objection to returning to Germany. It is my finding that Clara has consistently expressed an objection to return to Germany. For her a return to Germany is inexplicably intertwined with loss of her relationship with her mother, and her moving to the care of her father in relation to whom she has traumatic memory. What did or did not happen outside Clara's school in September 2013 is irrelevant. What is relevant is that Clara has a strong recollection of that event and for her it is traumatic and associated with her father. It is my finding that Clara has a strong objection to returning to Germany.

**Has Clara obtained the age and degree of maturity at which it is appropriate to give weight to her views?**

[52] I have a clear view that she has. Ms Lightfoot evidence that I relay upon is contained in [7.18] to [7.25] of her report where she concludes: [33]

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32 Bundle of documents p 363.
33 Bundle of documents p 368 to 371.

> In my assessment Clara has an advanced developmental ability for her age, and would be more mature than many children her age in most areas. I consider that she has made a decision that has been understandably, both emotionally logically based, and aimed at meeting her current needs.
>
> While Clara is perhaps yet too young to apply a high order analytical, multi-factorial assessment of her situation, her decision has been completely logical and appropriate for her. It is also likely to be the same decision most older children or adults would make in her situation.[34]

[53] Additionally when cross examined by Mr Blair she expanded upon that opinion and set out several reasons why she believed Clara was mature for her age.[35]That aspect of Ms Lightfoot's evidence was not seriously challenged in cross-examination. When questioned by Mr Blair, Ms Lightfoot stated:

> Over all of the kind of categories of maturity that you want to use, with a child of her age, she shows herself at an above level, if you like, of functioning.[36]

[54] Clara is at the date of hearing aged 10 years and one month. A number of decisions have been attached in the bundle of documents in which the views of children of different ages have been given weight by the Court. That Clara's views are listened to is supported in terms of Article 12(1) of the United Nations Convention on the Rights of the Child.

[55] It is my finding Clara has obtained an age and degree of maturity which it is appropriate to give her views weight. The evidence establishes that notwithstanding her chronological age, she has a maturity level in advance of her chronological years.

**What weight should be given to Clara's views?**

[56] In my view significant weight should be given to her views for the reasons articulated by Ms Lightfoot. There is a degree of logicality to her views and she has a clearly reasoned and well thought out basis for her views. There is no evidence that they have been influenced by Mrs Hopfengartner. While Ms Kearns sought to discredit, through her cross examination of Ms Lightfoot, Clara's views as being influenced by the presence and overtures of Mrs Hopfengartner, I accept the

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34 Bundle of documents p 371.
35 Notes of Evidence, p 105, lines 5-30.
36 Notes of evidence p 105, line 24 and 28.

evidence of Ms Lightfoot that there was no indicators that Clara's views were anything other than her own.[37] I find that the defence of child objection is established on the evidence before me for the above reasons.

**How should the residual statutory discretion be exercised?**

[57] In my view the analysis undertaken in [32] – [46] above is equally applicable to the exercise of the discretion in terms of this defence, and for the same reasons, the welfare and best interests of this particular child in her circumstances outweigh the policy considerations.

**Result**

[58] I am satisfied that Ms Hopfengartner has made out the child objection defence and I decline to make an order for return under s 106(1)(d).

**Is there a grave risk that Clara's return would either expose Clara to physical or psychological harm or otherwise place Clara in an intolerable situation?**

[59] Given that I have found two of the defences made out I do not consider it necessary to resolve the defence of grave risk/intolerable harm. But for the sake of completeness, I record that I would not have found the defence of grave of risk established.

[60] The defence of grave risk requires a Court to be satisfied that there is a grave risk that Clara's return would expose her to physical or psychological harm or otherwise place Clara in an intolerable situation. The two concepts; physical or psychological harm, and intolerable situation, are disjunctive and need to be considered separately. This is a difficult defence to establish.[38] The High Court has held that it must be a risk of more than just distress and harm as a result of moving countries.[39]

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37 See for instance Notes of Evidence, p 82, lines 23-31

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

39 *Clark v Carson* [1996] 1 NZLR 349 (HC) at [353]; approved in *Coates v Bowden* (2007) 26 FRNZ 210 (HC)

[61] I adopt the summation of the legal position of his Honour Judge Twaddle in *Mok v Cornelisson*[40] where his Honour stated:

> The burden of establishing that one or both of the exceptions apply rests on Ms Cornelisson. A standard of proof is on the balance of probabilities. The risk referred to in [s 13(1)(c)] must be serious, substantial and weighty: *Damiano v Damiano* [1993] NZFLR 548. Subject to some exceptions, it is generally assumed that the law of the originating country can provide adequate protection for a child; *Damiano, S v S.* "Physical or psychological harm" and "intolerable situation" are separate and disjunctive exceptions; the Court must be satisfied that there is a grave risk of either "physical or psychological harm" or an "intolerable situation." The kind of harm envisaged is "substantial", "severe" and "weighty"; *Re A (a minor) (abduction)* [1988] 1 FLR 365, and must be more significant than the harm a child might experience from being removed and then returned to the originating country: *C v C (minors: abduction: rights of custody abroad)* [1989] 2 All ER 465 (CA). The abducting parent cannot rely solely on a harmful situation being created by that parent, for example the mother refusing to return to the originating country with a child: *C v C* (above); *Clarke v Carson* [1996] 1 NZLR 349; (1995) 13 FRNZ 662; [1995] NZFLR 926. "Intolerable" in the context of s 13(i)(c)(ii) has been held to mean "simply and demonstrably not able to be countenanced": *Damiano*. In *H v H* 12/4/95, Grieg J, HC Wellington AP359/94, Greig J described intolerable to mean:
>
> > "that something cannot be tolerated. It is not just disruption or trauma, inconvenience or anger. It is something which must be of some lasting serious nature which cannot be tolerated."

[62] Mr Ashmore relies upon a decision of Judge Boshier in *Secretary of Justice v Penny;*[41] that is a decision of the Family Court and whilst persuasive is not binding. However Mr Ashmore himself in his submissions at [51] notes that the grave risk defence is often difficult to establish and at [53] he states:

> Notwithstanding all of the above the defence must not be interpreted in such a way as to render it meaningless. There will be situations where it could be established.

[63] I agree. Mr Ashmore acknowledges that Courts treat with some cynicism the position advanced by Ms Hopfengartner that she will not return to Germany with Clara if an order for return is made. However Mr Ashmore submits that "the sheer remarkableness of the proceedings in Germany and its obvious affect on them gives considerable credence to her position."[42] However that submission ignores the

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40 *Mok v Cornelisson* [2000] 19 FRNZ 598 at 601.
41 *Secretary of Justice v Penny* (1995) 13 FRNZ 264 (FC).
42 At [58] of his submissions.

reality that this is a situation entirely of Ms Hopfengartner's creation as a consequence of her refusal to acknowledge, and her avoidance of, the decision of the German Courts that Clara is to be in the care of Mr Schmidt.

[64] Whilst I accept Ms Lightfoot's evidence that a return would create an intolerable situation for Clara, given that her evidence was expert psychological evidence her comments can only be interpreted as being psychologically intolerable for Clara and not opinion as to the legal position. Indeed if Ms Lightfoot had expressed such an opinion it would be her expressing an opinion as to the ultimate outcome and such opinion would be entirely improper. I prefer to deal with the issue of separation of Clara from her mother and Lotte, as I have done above, under the exercise of discretion as they are factors which impact on Clara's best interests and welfare. I also note the comments of the Court of Appeal in *HJ v Secretary for Justice* where the Court of Appeal noted: [43]

> The s 106(1)(c) defence is not easy to invoke successfully. This is in part a function of the hurdle provided by the expression "grave risk" and in part because of judicial expectations that, in the normal course of events, the legal systems of other countries will protect children from harm. In this context we think that references by Judge von Dadelszen to "heavy onus" ... should simply be construed as a statement of the obvious – that the defence in question was, by its nature, difficult to make out.

[65] As Wylie J recorded in *ST v MW*[44] those observations by the Court of Appeal, notwithstanding the subsequent appeal of *HJ* to the Supreme Court, were not addressed on appeal and thus the law in New Zealand in this regard is that summarised by the Court of Appeal as set out above.[45]

[66] Thus I would not have been satisfied that the evidence establishes that the s 106(1)(c) defences would have been made out, and thus I would have, if required, dismissed that defence.

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[43] *HJ v Secretary for Justice*, above n 38 at [33].
[44] *ST v MW* HC Auckland CIV-2008-404-004916, 7 October 2008
[45] Above at [88]

**Conclusion**

[67] For the reasons set out above I decline to make an order for Clara's return under s 106 of the Act on the grounds that the s 106(a) and (d) defences have been established. Further for the reasons I have set out above my decision, in relation to the exercise of the discretion, is that notwithstanding the strong policy considerations, Clara's welfare and best interests favour not making an order for Clara to be returned to Germany. The application for an order for return is therefore dismissed.

[68] There is in force as a consequence of the original application filed on behalf of the Central Authority an order preventing Clara being removed from New Zealand. At this stage I do not intend to discharge that order, and note in any event there is no application before me to formally discharge it. However in light of the findings of the Fürth Family Court upheld on appeal, there is a real risk for Clara that if I were to discharge that order, then Mr and Ms Hopfengartner may attempt to flee the jurisdiction of this Court in order to prevent Mr Schmidt progressing proceedings under the Care of Children Act relating to day-to-day care and contact in relation to Clara. Mr Schmidt is now entitled to file such proceedings in this Court.

[69] Nor do I intend to revoke the order requiring Clara's passport to be held by the Court without hearing further from counsel, and I will issue a subsequent minute in relation to that issue within the next week.

S J Coyle
Family Court Judge