

DEAN BLAIR

BARRISTER
LLB

24 April 2017

Ministry of Justice
Tauranga Family Court
McLean House
26 McLean Street
DX HX 11034
Tauranga 3143

Attention: Leah Wills

RE: Schmidt v Hopfengartner FAM 2017 079 000015

I **enclose** my reporting memorandum.

Yours faithfully



Dean Blair
Barrister

Copy to: M Roots by email only

A Ashmore by email only

IN THE FAMILY COURT
AT TAURANGA

FAM 2017-079-000008

IN THE MATTER OF the Care of Children Act 2004 and
the ratification thereby of the Hague
Convention on the Civil Aspects of
International Child Abduction 1980

BETWEEN AXEL SCHMIDT
Applicant

AND LISA HOPFENGARTNER
Respondent

REPORTING MEMORANDUM OF LAWYER FOR CHILD

Dated 24 April 2017

Dean Blair
Lawyer for Child
4 Willow Street
Tauranga

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MAY IT PLEASE THE COURT:

1.0 INTRODUCTION

- 1.1 This memorandum is filed on behalf of the child in these proceedings, **CLARA LARISSA SCHMIDT** born 3 July 2007 ("Clara").
- 1.2 The writer was appointed as lawyer for Clara pursuant to the directions of His Honour Judge Coyle dated 10 March 2017 to:
 - (i) Consider the issues for the child arising from the specific s.106 defences as pleaded in the notice of defence;
 - (ii) given the grave risk defence pleaded and the possibility alluded to of a child objection defence to address the following:
 - (a) Does the child object to her return;
 - (b) If she does object, the basis for her objection;
 - (c) Comment on any factors which may assist the Court in weighing up the issues of Clara's age and maturity.
 - (iii) Identify any factors (if any) impacting upon Clara's views;
 - (iv) Report on any views Clara may have about matters affecting her in the context of the Hague Convention proceedings;
 - (v) Identify any matters from Clara's perspective (if any) relevant to the exercise of the Court's discretion should a defence be made out;
 - (vi) From Clara's perspective are there any other defences which should have been pleaded;

- (vii) Represent the views of Clara at the hearing.

2.0 SUMMARY OF PROCEEDINGS

- 2.1 Until 2014 Clara and both parents were in Germany. Clara was born and raised in Germany. There were access and enforcement related proceedings in Germany (re. father's access) in the years following separation between Clara's parents, separation occurring in or about 2009. Without attempting to cover all of those previous proceedings, of particular relevance is that in 2014 Mr Schmidt then made application for sole custody of Clara. Ms Hopfengartner did not appear at the hearing, but was represented. On 17 December 2014 a judgment was given by the District Court-Family Court of Furth in favour of Mr Schmidt, providing him with sole custody of Clara. The judgment records that Clara could not be heard in person by the Court as her whereabouts was unknown. On the evidence of Ms Hopfengartner filed in these present proceedings, she and Clara (and Ms Hopfengartner's husband Simon Hopfengartner and their own daughter) left Germany for the final time in November 2014 and arrived in New Zealand in January 2015.
- 2.2 On 23 December 2014 Ms Hopfengartner appealed the decision and a decision of the Nuernberg Higher Regional Court dated 31 May 2016 upheld the decision, confirming sole custody to Mr Schmidt.
- 2.3 On 14 February 2017 Mr Schmidt (via counsel instructed by the Central Authority, Mr Roots) made without notice application for order preventing Clara's removal from New Zealand pursuant to s.77 Care of Children Act 2004 ("COCA"). That order was granted on 14 February 2017 by His Honour Judge Twaddle, in the Family Court at Thames. The order

requires any tickets or travel documents, including passports, for Clara to be surrendered to the Registrar of the Family Court forthwith.

- 2.4 On 23 February 2017 Mr Schmidt made application for an order for Clara's return to Germany pursuant to s.105 COCA.
- 2.5 Directions were made by His Honour Judge Coyle on 1 March 2017 as to timetabling and transferring the proceedings to the Tauranga Family Court.
- 2.6 On 10 March 2017 Ms Hopfengartner, through her instructed counsel, filed a notice of defence referring to grounds for defence being:
 - s.106(1)(a) – Application being made more than one year after removal of the child and the child now settled in her new environment.
 - s.106(1)(c) grave risk that that return would expose the child to physical or psychological harm or place her in an intolerable situation.
- 2.7 A Judicial Conference occurred on 10 March 2017 at which time further timetabling was directed and lawyer for child appointed with the brief set out earlier in this memorandum.
- 2.8 Ms Hopfengartner has filed her affidavits in support of her defence on 6 April 2017, being an affidavit by herself, her husband Mr Hopfengartner, and a German lawyer Michael Loewe sworn 4 April 2017 summarising the proceedings in Germany between the parties. Ms Hopfengartner has also filed an affidavit by Kevin Clark sworn 3 April 2017 who is a Whenuakite (Coromandel) local expressing support for this family and their place in the community. An amended notice of defence was filed, raising the additional and signalled defence of child objection (s.106(1)(d)).

- 2.9 On 20 April 2017, the applicant filed and served a further affidavit (by counsel for the applicant's secretary) annexing various further documents for the purposes of these proceedings.
- 2.10 The advice of the Tauranga Registry is that Ms Hopfengartner has not surrendered Clara's passport in accordance with the without notice order made.

3.0 SITUATION

- 3.1 The parties are both German and Clara was born during their relationship which I understand to have occurred in the city of Monchengladbach in 2007.
- 3.2 The parties separated in or about 2009, although have different accounts of post-separation developments. Ms Hopfengartner's advice is that separation occurred in 2009 following an alleged assault against her by Mr Schmidt in June 2009 and that the separation continued from that point. Mr Schmidt's position is that between 2009 and July 2010 the parties tried to renew their relationship. As I understand the background, Clara and her mother moved to Rothenburg (Germany), and then to Furth (Germany) in or about 2011.
- 3.3 In the period post-separation Mr Schmidt filed applications with respect to his access to Clara, expressing difficulties in achieving his access, which he says was regular but limited. Each party holds very different perspectives about what was happening post-separation.
- 3.4 In early 2014 Clara went overseas with her mother and Mr Hopfengartner, then returning to Germany and going to Grafenberg.

- 3.5 I have set out above Mr Schmidt's 2014 application filed for custody of Clara and the decision of 17 December 2014 in his favour. As already detailed, Ms Hopfengartner's appeal (she was in New Zealand by that point) was unsuccessful.
- 3.6 There have been related orders made through the German Court system with respect to penalty, warrant for arrest or for the detention of Ms Hopfengartner. An Arrest Warrant is attached to the latest affidavit filed by the applicant as exhibit "A" and is dated 25 May 2016. The impact of that document appears to be to direct pre-trial detention of Ms Hopfengartner with respect to being "strongly suspected" of misappropriation of bonds or finances held by Clara between 2012 and 2014.
- 3.7 Once in New Zealand in 2015, Ms Hopfengartner obtained a passport for Clara from the German Embassy in Wellington, New Zealand, on 4 March 2015. Exhibit "H" of the affidavit filed by Camielle Poata sworn 20 April 2017 is a notice issued by the German Embassy, Wellington dated 13 February 2017 that the passport issued has become void based upon Ms Hopfengartner having presented a decision of 13 February 2012 (providing her with custody) when applying for the passport, but the Embassy subsequently learning about the decisions of 17 December 2014 and 31 May 2016 in favour of Mr Schmidt.
- 3.8 Clara has been in New Zealand since January 2015 according to Ms Hopfengartner, based in the Coromandel district (ie. that district of Coroglen/Hahei/Hot Water Beach or thereabouts) since March 2015.
- 3.9 I am making enquiries as to Clara's immigration/residency status and hope to report that to the Court in due course. Ms Hopfengartner might also chose to take the opportunity to set this out for the information of the Court.

- 3.10 On 27 October 2016 the German Embassy, Wellington wrote to counsel for Mr Schmidt (in Germany) confirming the issue of a passport for Clara by the German Embassy, Wellington Schmidt on 4 March 2015. What is unclear in the evidence is when Mr Schmidt established information or concerns that Clara was in New Zealand (it appears his lawyer had written in September and October 2016 requesting information of the German Embassy, Wellington).
- 3.11 I do not yet have the exact date Clara commenced attending Coroglen School, Coromandel. I have established from the school that her last day of attendance there was 20 December 2016, but she remained on the roll until 13 February 2017, at which point she was enrolled at Whenuakite School, Coromandel. Term 1 at Whenuakite School commenced on 1 February 2017, meaning Clara was some 1½ weeks late starting term.
- 3.12 Clara resides just outside of Hahei township, Coromandel with her mother, step-father, Simon Hopfengartner, and half-sister Charlotte ("Lottie") who is 5 years old.
- 3.13 Clara has not had contact with her father for a significant period of time.

4.0 ATTENDANCES

- 4.1 I have perused the documents filed and sent to me by the Court, as well as the incoming documents being Ms Hopfengartner's affidavits and the further papers filed by the applicant (attached to affidavit of Ms Poata).
- 4.2 I have corresponded with, or spoken to, the Principals of Coroglen School and Whenuakite School. At the time of filing this report I await further information from Coroglen School as

to the exact date of Clara's enrolment at the school in 2015, her attendance records and school reports.

4.3 I have arranged through counsel and then with Ms Hopfengartner directly for the purposes of organising my first meeting with Clara which occurred on Tuesday, 18 April 2017 at Thames. I have received email correspondence from Mr Schmidt and responded.

4.4 I attended with Clara on 18 April 2017 at Thames. I arranged for this to occur at the office of a Thames legal colleague who provided a private interview space for me to meet with Clara. This provided neutrality of venue and it was geographically convenient to both Ms Hopfengartner and Clara and myself. I attended very briefly with Ms Hopfengartner (to ascertain only what Clara knew about the proceedings prior to my meeting with her) and then with Clara. I spent approximately 45 minutes with Clara whilst her mother went into the adjoining town centre of Thames at my request. This provided Clara and I with an excellent opportunity to speak privately and without any risk that she perceived her mother was somewhere close by, perhaps within hearing range.

4.5 I have researched commentary and case law on the grounds of opposition, which as set out below, will be relevant to Clara.

4.6 I have written to New Zealand Immigration requesting advice as to Clara's present status. I await a response.

5.0 CLARA'S INSTRUCTIONS AND ANY S.106 DEFENCES

5.1 The issues for Clara with respect to the defences, and as are pleaded by her mother should, in my submission, focus upon s.106(1)(a) (in New Zealand for more than one year following removal and Clara is now settled in her environment) and s.106(1)(d) (child objection to return).

- 5.2 The child objection defence would require an assessment by the Court of Clara's age and degree of maturity in the giving of weight to those views "in addition to taking them into account in accordance with s.6(2)(b)".
- 5.3 If a ground for refusal for return is made out, the Court retains the discretion pursuant to s.106(1) as to whether to grant or refuse to make an order for return.
- 5.4 I am setting out Clara's instructions immediately below, and will then return to the grounds for refusal of order for return in s.106, as far as those are relevant.
- 5.5 Clara's instructions:
- (a) During my interview with Clara, Clara advised she is 9 years old, almost 10. Clara advised she is now at Whenuakite School, finishing at Coroglen School last year. Clara explained the school change as resulting from a move of house within the area, her sister Lottie now being at school and the convenience in terms of bus transport to Whenuakite School as contributing towards the decision. Clara made it clear that she helped with the decision about whether to move schools and she is very happy at the new school.
 - (b) I was aware that Clara had a delayed start for Term 1 at Whenuakite School this year and I asked her about this. Clara explained this was by reason of having been at a music festival in the South Island which she and family had wanted to go to.
 - (c) Clara described having good friends in her district of the Coromandel. She explained having "more than 10" and said she sees her friends often, inside and outside of

school. The school change has not caused a dislocation or loss of friendships.

- (d) Clara described enjoying guitar, singing and reading. She spoke about having music lessons each Saturday and she made a reference to learning to sail at Flaxmill Bay nearby, maybe doing choir and piano and possibly hip hop or ballet.
- (e) She enjoys drawing and craft. Clara explained that she reads in both the German and the English languages and told me about a new book she is reading by author she named as Jacqueline Wilson. She referred to another book she is reading, The Never Ending Story. This is a German language version she is reading. Clara regards that the best language for her to read in is English. Clara describes enjoying school work, saying she is good at maths and she spoke about reading every night. Clara described being at Year 5 age but doing some Year 6 work. "I love maths".
- (f) Clara speaks eloquently, expresses herself well and I believe, is a confident communicator. She does not have any obvious accent - if I had not known about Clara being German and having lived there until 2014, it would have been difficult for me to detect she is a German child.
- (g) Clara explained some understanding about the proceedings and why she is seeing a lawyer. She is aware that her father (whom she refers to as "Papa") has requested the Courts for Clara to be returned to Germany because this is the country she is from. She explained her understanding that if she returns to Germany this will mean she goes into the custody of her father. I explained to Clara a bit about how such cases

operate and she knows that the decision about whether she will return to Germany is not her's to make, but that through her lawyer her point of view and the situation for her will be shared with the Judge. Clara realises there is a chance she will be returned to Germany through these processes, although as set out below, she is very opposed to this happening. Clara instructs becoming "really sad" when she heard about the case in New Zealand and she is now "very worried", "very very confused", "a lot", by her father's request to take her from her family in New Zealand and to have her returned to Germany.

- (h) Clara described her background in Germany when she had visits with her father which she used to enjoy. Clara described that this changed when there was an incident she says she observed involving a vehicle (car) at her school and an argument or dispute about her collection involving her father. This will be the incident referred to by the parties in the pleadings, in 2013. Clara's perspective is that her father was in the wrong with this incident and her exposure to this conflict caused her distress and (Clara says) changed how she felt about seeing her father. Clara instructs she got scared by what happened and found it very upsetting.
- (i) Clara's instructions are that she wants very much to stay with "my family" and not be taken from them. Clara's mother is very important to her and Clara described a very close relationship with her mum. "She is my Mum, she's my teddy bear, she's who I cuddle." Clara described her sister Lottie and stated a very close relationship with Lottie. Clara describes sleeping in a bunk bed with Lottie and that when Clara went on school camp recently, Lottie really missed her whilst she was

away. Clara confirmed having missed Lottie herself, during the camp. Clara ranked that Lottie is really important to her and gave her an 8/10 which on the scale we used was a high level of importance. The only reason Lottie didn't get a 9 or a 10 was because sometimes she can be annoying.

- (j) Clara described her relationship with Simon Hopfengartner as being "really good" and that basically he is her dad. She acknowledged she has a father ("Papa") in Germany and that she still loves him but that in Clara's head, Simon has become a dad in her life in New Zealand.
- (k) Clara expressed during our discussion her opposition to being made to return to Germany. She acknowledges some positives in Germany such as the food and that she has family there. For Clara, there is a negative aspect to Germany which is this is where she regards she was exposed to the conflict in her childhood. The main example she referred to was the incident with the car. She has a negative association of Germany with respect to this and with the "stuff to do with Dad".
- (l) Clara opposes a return to Germany. She absolutely wishes to stay in New Zealand and is very sad about the prospect of being removed from her family in New Zealand. Her "family" is a reference to Mum, Simon and Lottie. She voiced her objection/opposition to being returned to Germany as a return being "horrible, horrible, horrible".
- (m) Clara voiced her position by saying, "If he really wants me back, why destroy my life? He'd be taking me from Mum, my family, my friends, my relationships". Clara

later added that by requiring her return to Germany would be to “pull me out of my home”.

- (n) Clara instructs that if she has to go back to Germany it would mean she would never see her sister or anyone here (in New Zealand), until she is old enough to get back to New Zealand. Clara anticipates that her mother will not be able to return to Germany with her if Clara is required to go, although she is not fully clear about this.
- (o) Clara described her closeness with New Zealand and her enjoyment living here. She said, “I’m a Kiwi now”. When describing an outcome whereby she would be removed from New Zealand (against her will) she said, “He’d be taking from me the magical power New Zealand has for me”. Clara spoke about her fondness for New Zealand, including describing it as “little, cute and friendly” and she does not think Germany is like that.

5.6 I submit Clara’s instructions and situation therefore avail her of the s.106(1)(a) and (d) grounds for refusal of order for return.

5.7 I respectfully submit it is unlikely that Clara could rely on the “grave risk” ground in s.106(1)(c). Clara’s instructions do not, in my submission, match an argument that if returned to Germany (inevitably to her father’s care), that this would expose her to the type of physical or psychological harm anticipated by that subsection, or to an intolerable situation. This is not to understate the possible emotional/psychological impact which I submit might occur to Clara if removed from her family in New Zealand and placed against her will with her father in Germany (despite the German Courts having directed this). I submit the s.106(1)(a) and (d) grounds for opposition would more accurately reflect Clara’s position and the reasons why the Court should consider not ordering return, and when

the Court turns to the discretion, the personal impact upon Clara of a forced return in weighing up her best interests, vs any policy grounds.

6.0 S.106(1)(a) GROUND

- 6.1 The majority judgment of the Supreme Court in *Secretary for Justice v HJ* [2007] 2 NZLR 289 stated at paragraph 55 of the judgment that whether a child is now settled in her new environment, is 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*".
- 6.2 The Court noted at paragraph 56 of the judgment that the scope and depth of the enquiry will usually be significantly greater in a case involving s.106(1)(a) (and probably other exceptions) than the fairly summary process envisaged if no exception can responsibly be asserted.
- 6.3 Prior to any hearing, I intend to have a second meeting with Clara to further discuss this aspect.
- 6.4 Any aspect in this case about whether Clara was subject to concealment or deceit when arriving in New Zealand (particularly I believe when starting to 'settle' in Coromandel in March 2015) has a bearing within the exercise of the discretion (if a ground for opposition is made out) but also, "*obviously the circumstances of the concealment or deceit may be relevant in a purely factual way to the settlement issue, but we do not consider the need to deter concealment or deceit should otherwise influence the settlement assessment. The policy objective is better achieved by means of the exercise of the discretion rather than indirectly via the settlement assessment.*" (Paragraph 69 of *Secretary for Justice v HJ*.)

- 6.5 On the face of Clara's instructions to me to this point, she has had a good opportunity to settle into this district of the Coromandel region, into extracurricular activities, schooling and friendships. As stated by her, New Zealand has a "magical hold" over her.
- 6.6 The attendance information for Coroglen School and that school's advice as to when she started there will, in my submission, have a bearing upon this 'settlement' assessment. I do not know whether she started at the school soon after her arrival in the Coromandel, or whether she was "concealed" for a period. If so, this could have affected her ability to begin to settle and integrate. I do not yet know what her attendance records were for Coroglen, because if those were poor or spasmodic that might count against whether she was settling, integrating and enjoying her school community.
- 6.7 If the Court determines Clara is settled in her new environment in New Zealand (having been there for two years) the majority judgment in *Secretary for Justice v HJ* (paragraph 21) places context around the reasoning and approach then taken. It may be expected that the "harmful effects" of wrongful removal, which the Preamble records as a principle concern of the Convention, will often have dissipated with the readjustment implicit in "settlement" and that further upheaval will itself be harmful. Against these policies, any presumption of return of "settled" children is unwarranted.
- 6.8 On the information available, it is unclear what Ms Hopfengartner's status is in New Zealand. Is she assured of being able to stay in New Zealand or is her residency (if she has it) now at question? I submit Ms Hopfengartner needs to provide more information around this in the context of the Court considering how real any assessment of Clara being

settled in New Zealand is - if her mother's immigration or residency status is in doubt.

7.0 CHILD OBJECTION - S.106(1)(d)

- 7.1 As described in the summary of Clara's instructions above, she is opposed to being made to return to Germany. I submit, in Convention language, she "objects". She is very resistant to any suggestion that she should be made to return to Germany (and therefore effectively to her father's care).
- 7.2 Whether Clara's objection is an objection to return to *Germany* or more an objection to being removed from her mother's care and placed into her father's care needs to be considered. In the context, however, of wishing to stay in New Zealand (where she is settled), being removed from her family, sent against her will to Germany (which she associates with prior conflict) and into a care arrangement which she rejects, Clara very much objects.
- 7.3 Clara objects to Germany in the sense that it is her country of origin in which she says she experienced adult conflict during her childhood and resultant unhappiness. She says she became scared from exposure to that conflict, with reference to the car incident as she perceives or recalls it. I submit this is legitimate ground for objection to *Germany* – it is a home country Clara instructs she has unhappy memories about.
- 7.4 The legal commentary to s.106(1)(d) places into question whether lawyer for child should make comment about the child's age and degree of maturity in the context of that ground for opposition. What will be apparent from my report will be Clara's excellent conversational skills, her ability to express and to report about her situation and concerns. In my experience, a much older child (or teenager) could have failed

to express themselves or engage in the discussion as well as Clara did - who is not yet 10.

- 7.5 As lawyer for Clara, I request that her objection and views are given weight and importance.
- 7.6 I submit that the Court needs to decide at the next Judicial Conference on 1 May 2017 whether to direct an urgent psychological report (s.133 Care of Children Act 2004) so as to assess Clara's objection, age and degree of maturity as anticipated by s.106(1)(d). If a report were directed, this could also assess, from Clara's perspective, her degree of settlement in New Zealand and her attachment or psychological integration into her new environment. The Court has obligations to hear these proceedings as quickly as possible and a psychological report could delay matters (although I do not know when any likely hearing date will be). Section 133(6) would require consideration as to whether a psychological report would be essential, including the ground as to whether a report would cause delay. If there were a psychological report, the psychological impact upon Clara of removal from her mother, step-father and sister in New Zealand could also be considered, perhaps best categorised as an issue and consideration for the exercise of the discretion.

8.0 ANY FACTORS IMPACTING UPON CLARA'S VIEWS

- 8.1 It is impossible for me to assess any direct or indirect impact upon Clara's views by her mother's perspective about the history to this matter and about Mr Schmidt.
- 8.2 Clara has expressed a view about her access with her father, based upon a reported incident Clara says she observed (the incident with the vehicle in 2013). Clara says she has made a direct observation as opposed to relying upon a parental

description of it. The incident distressed her and she referred to it as one important feature in terms of her present views about things.

8.3 I believe Clara is very happy in New Zealand and that this therefore impacts upon her views.

8.4 Clara has a sibling with whom she instructs she is very close. I submit this has a significant impact upon Clara's stated objection to a return to Germany (thus leaving her sibling) and helps to explain why Coromandel, New Zealand is now home for Clara (with her sister).

8.5 The outcome Clara seeks is to stay with her mother and "family". This is undoubtedly a factor shaping Clara's views and situation.

9.0 DISCRETION IF A GROUND TO OPPOSE RETURN IS MADE OUT

9.1 The majority judgment in *Secretary for Justice v HJ* confirmed at paragraph 68 that it is not appropriate to speak in terms of a presumption of return in a discretionary situation.

9.2 With regard to the discretion being exercised pursuant to s.106(1)(a), the majority judgment at paragraph 85 requests the Judge to "*compare and weigh up two considerations. One concerns the best interests of the child or children involved in the case. The other concerns the significance of the general purpose of the Convention in the circumstances of the case. These two considerations will not necessarily be in conflict*".

9.3 At paragraph 86 of the judgment,

"When undertaking this exercise the Judge should consider whether return would or would not be in the best interests of a child who has necessarily already been found to be settled

in its new environment. That very settlement implies that an order for return may well not be in the child's best interests."

9.4 The Court identifies matters relevant to the assessment including:

- Circumstances in which the child is now settled.
- The circumstances in which the child came to be wrongfully removed or retained.
- The degree to which the child would be harmed by return.
- The compass and likely outcome of the dispute between the parties.
- In short, *"everything logically capable of bearing on whether it is in the best interests of the child to be returned and should be considered"* (paragraph 86).

9.5 At paragraph 87 of the judgment, if the Court considers that return is not in the best interests of the child, the issue becomes whether some feature of the case, such as concealment by the party responsible for the wrongful removal, nevertheless requires return *"so as to avoid the perverse incentive inherent in refusing to order return. Unless the Court finds that such competing factors as may exist clearly outweigh the interests of the child, return should not be ordered."* (Paragraph 87).

9.6 It is difficult to comment further upon the exercise of the discretion unless and until one of the grounds for non-return are made out. The Court will need to make determinations as to whether Clara is settled, or whether she objects to return to Germany and having regard to her age and maturity this should be taken into account.

9.7 Only psychological information would give the Court an accurate description of the degree of psychological harm to

which Clara would be exposed if returned to Germany against her will (a component in the discretionary exercise).

9.8 As stated in *Secretary for Justice v HJ*, even if the Court were to resolve that it is in Clara's best interests to stay in New Zealand (a step in the exercise of the discretion) the Court would then need to weigh into the ultimate decision the application of any policy ground so as eliminate any perverse incentive arising from the case, in ordering return. In short, at that stage of the process, the Court would need to strike the right balance between the best interests of Clara and the deterrent policy of the Convention on the other. The comments of Waite J in *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 at 220 are relevant, where he said that the objective of "*stability for the mass of children may have to be achieved at the price of tears in some individual cases*".

9.9 Clara's instructions are effectively that it would best for her to be able to remain in New Zealand with her mother, step-father and sister (family) and to continue to enjoy the benefits of New Zealand now perceived by Clara. She regards herself as a "Kiwi", on the information available so far is integrated and I believe would experience considerable loss in the event of removal from her family. In her words, her life would be destroyed and she is confused as to why her Papa would seek to do this.

9.10 I await information from the school and Immigration as to Clara's status prior to consolidating this position further.

10.0 ANY OTHER DEFENCES WHICH SHOULD HAVE BEEN PLEADED

10.1 I submit it is realistic that Ms Hopfengartner has not pleaded s.106(1)(b)(i). Even though Clara was not physically living

with her father at the time of her removal from Germany in November 2014, it is obvious he has displayed longstanding efforts and intentions to exercise access and then would have gone on to care for Clara as the custodial parent as a result of the December 2014 decision.

10.2 There could be no suggestion that there is a defence of consent or acquiescence.

10.3 I submit s.106(1)(e) could not apply, i.e. human rights, fundamental freedoms.

11.0 OTHER

11.1 I submit the Court needs to give urgent consideration to whether a s.133 psychological report covers the threshold created by s.133(6), as to it being essential. A feature will be delay in the responsibility of the Court to dispose of these proceedings as quickly as possible. I submit the report would have relevance with respect to the child settlement issue, the child objection issue (including age and maturity and weight of views) and Clara's psychological best interests if the point is reached at which the Court will exercise a discretion. This would include the aspect as to any psychological harm or effect caused to Clara if the Court were to conclude in the event of a ground for opposition being made out, that return should occur.

11.2 May it please the Court.

DATED 24 April 2017

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DA Blair

Lawyer for Child