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**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE**

**CIV-2017-470-141
[2018] NZHC 1098**

BETWEEN	SIMPSON Appellant
AND	HAMILTON Respondent

Hearing:	5 March 2018
Appearances:	L F Soljan for Appellant A E Ashmore for Respondent D A Blair for Child
Judgment:	18 May 2018

RESULTS JUDGMENT OF PAUL DAVISON J

*This judgment was delivered by me on 18 May 2018 at 11 am
pursuant to r 11.5 of the High Court Rules.*



Registrar/Deputy Registrar

STEPHEN HEWLETT
Deputy Registrar
High Court of New Zealand

Introduction

[1] This is a results judgment issued in relation to the appellant's appeal from the reserved judgment of Judge Coyle dated 1 September 2017 in which he declined to make an order for Anna's return to Germany under s 106 of the Care of Children Act 2004 (the Act). At the conclusion of the hearing of this appeal on 5 March 2018 I reserved my decision. As I anticipate some further delay before I deliver my judgment setting out my reasons in full, I am issuing this results judgment now, with a judgment setting out the reasons for my decision to follow.¹

[2] In his judgment Judge Coyle found the defences contained in s 106(a) and (d) to have been established by the respondent and, exercising the Court's discretion, declined the application brought under s 105.

[3] The appellant has brought an application pursuant to s 105 of the Act for the return of Anna to Germany following her unlawful removal by the respondent on or shortly after 11 November 2014. At the time prior to Anna's removal from Germany the respondent had sole parental custody of her, although the appellant and respondent were at the time engaged in legal proceedings over arrangements for the appellant to have contact with his daughter and had also made an application for transfer of custody of Anna to him.

[4] In a reserved decision issued by the District Court in Furth, Germany on 17 December 2014, the Court ordered the transfer of parental custody to the appellant. The respondent did not attend the District Court hearing but made submissions by counsel to the Court in response to the appellant's application for a custody order in his favour. At the time of the District Court hearing, Anna's whereabouts were unknown.

[5] On 17 December 2014, the District Court at Furth delivered its judgment and made an order transferring custody of Anna to the appellant. However without informing the appellant of her intentions, the respondent had already departed from Germany on or around 11 November 2014, taking Anna with her.

¹ The names of the parties have been anonymised.

[6] Despite the appellant's endeavours to ascertain where the respondent had taken Anna, he was unsuccessful and he had no knowledge of their whereabouts until early November 2016 when his lawyer in Germany received a letter from the German Embassy in Wellington advising that the Embassy had issued an identification document for Anna on 4 March 2015.

[7] Soon thereafter and following steps taken by the appellant, on 6 December 2016 the German Central Authority citing the sole custody order made by the Furth District Court on 17 December 2014, made a formal request to the New Zealand Central Authority for Anna's return to Germany.

[8] Section 105(2) of the Act provides that the Court must make an order that the child in respect of whom an application is made be returned promptly to the person or country specified in the order where an application is made and the Court is satisfied that the grounds of the application are made out. The mandatory provisions of s 105 are subject to s 106. Section 106(1) provides:

If an application under section 105(1) is made to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under section [105(2)] for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court—

- (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or
- (b) that the person by whom or on whose behalf the application is made—
 - (i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or
 - (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
- (e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

[9] In his judgment, Judge Coyle found that Anna's mother, the respondent, had satisfied the Court that the defences contained in s 106(a) and (d) had been established, and notwithstanding the strong policy considerations arising from the provisions of the Hague Convention² which were to be taken into account, nevertheless in the exercise of the Court's discretion, he found that Anna's welfare and best interests considered together with the policy and provisions of the Hague Convention would be best met, by the Court declining to make an order under s 105(2) for her return to Germany. Accordingly Judge Coyle dismissed the appellant's application for an order for Anna's return.

[10] For the reasons to be set out in full in my reserved judgment, I find that:

- (a) The application under s 105 (1) was made more than 1 year after the removal of Anna from Germany, and that she is now settled in her new environment in New Zealand.
- (b) That Anna objects to being returned to Germany and having regard to her age and degree of maturity it is necessary to give appropriate weight to her views.
- (c) In exercising the court's discretion in accordance with the approach described by the Supreme Court in *HJ v Secretary of Justice*³ by striking the balance between the best interests of the child, and the deterrent policy of the Hague Convention, I consider that

² The Convention on the Civil Aspects of International Child Abduction.

³ *Secretary for Justice v HJ* [2006] NZSC 97, [2007] 2 NZLR 289.

notwithstanding the respondent's actions of removing Anna from Germany illegally and thereafter actively concealing her whereabouts from the appellant for a period of two years, and also having appropriate regard to Anna's welfare and best interests, the discretion in this instance is properly exercised by the Court declining the application for an order directing that Anna be returned to Germany.

[11] Accordingly I make an order dismissing the appeal and I uphold the decision of the Family Court declining to make an order for Anna's return to Germany.

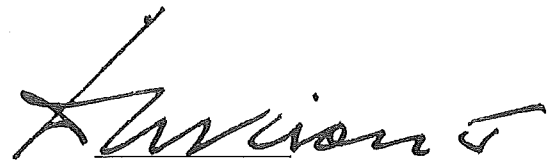
[12] The Court is mindful of the importance of the determination of this issue to the parties and particularly mindful of the interests of Anna and her welfare during this period when her future is and has been uncertain by reason of the current proceedings.

[13] As I have already explained, I shall set out my detailed reasons for dismissing the appeal in a reasons judgment to follow.

Decision

[14] The appeal is dismissed.

[15] The question of costs is deferred until after I have delivered my reasons judgment.

A handwritten signature in black ink, appearing to read 'Paul Davison J', with a stylized flourish at the end.

Paul Davison J