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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 1365

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: 11 June 2018

REASONS JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 11 June 2018 at 3pm pursuant to r 11.5 of the High Court Rules.

11/6/18
Registrar/Deputy Registrar

STEPHEN HEWLETT
Deputy Registrar
High Court of New Zealand

Introduction

[1] On 18 May 2018, as I anticipated some further delay in delivering my reserved decision I issued a results judgment dismissing this appeal.[1] I now set out my reasons.

[2] This is an appeal from the judgment of Judge Coyle dated 1 September 2017 in which he declined an application, brought pursuant to s 105 of the Care of Children Act 2004 (the Act), for an order that Anna[2] be returned to Germany.[3]

[3] Anna is now almost 11 years old. The appellant is Anna's father. He and Anna's mother (the respondent) were never married, and Anna was born after they had separated as a couple. In 2014, seven-year-old Anna was living with her mother, step-father, and her younger sister in Fürth, Germany. The respondent had sole parental custody of Anna, and pursuant to court orders the appellant was entitled to access. The appellant, however, complained that the respondent had repeatedly failed to comply with the access orders and was actively preventing him from seeing Anna, to her detriment and contrary to her best interests. He made an application to the District Court at Fürth for custody.

[4] On 17 December 2014, the Fürth District Court made an order awarding the appellant parental custody of Anna. By then, however, the respondent and her husband had already surreptitiously departed Germany, taking Anna and her younger sister with them. The appellant had no knowledge of their departure or their whereabouts. In early 2015 the respondent, her husband and the two children arrived in New Zealand, and apart from a five-week period spent in Australia during April – May 2015, they have remained living here in New Zealand ever since.

[5] Despite undertaking extensive enquiries over the following two years, the appellant was unable to discover the respondent and Anna's whereabouts until his lawyer received correspondence dated 27 October 2016 from the German Embassy in Wellington advising that the Embassy had issued a passport for Anna on 4 March 2015. The appellant then informed the German Central Authority which on 6 December 2016

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1 *Simpson v Hamilton* [2018] NZHC 1098.
2 The names of the parties have been anonymised.
3 *Simpson v Hamilton* [2017] NZFC 69293.

made a formal request to the New Zealand Central Authority for Anna's return to Germany, citing the sole custody order in favour of the appellant made by the Fürth District Court on 17 December 2014.

Background

[6] It is relevant to set out the background in more detail, including the conduct of the parties and the history of their dispute over issues relating to Anna prior to the respondent's departure from Germany with her in November 2014.

Early relationship and access disputes

[7] While there is a dispute between the parties as to the nature and duration of their relationship, it appears that although not co-habiting they commenced and maintained a relationship between 2003 and late 2006. Anna was born in July 2007, and thereafter the appellant had contact visits with her each week. The respondent says that they separated in 2006, and that in 2009 she relocated to another town situated in Bavaria. The appellant, however, says that he and the respondent maintained their relationship until 2009 when they separated.

[8] In April 2010 the respondent commenced a relationship with Mr Hamilton, and in May the following year, the respondent and Anna relocated to Fürth and commenced residing with him there. In August 2011 the respondent gave birth to her second daughter, Mr Hamilton being the child's father. In March 2013 the respondent and Mr Hamilton were married.

[9] In July 2010 the appellant and respondent agreed upon terms of a consent order dealing with access arrangements which was filed and confirmed by a court in Germany. It appears from documents exhibited and attached to the appellant's affidavit that significant issues arose between the parties over access. In February 2011 the respondent emailed the appellant and advised him that she did not intend to have any further direct communication with him, and that all further communication over access arrangements would need to be undertaken through the appellant's lawyer. In April 2011 another consent order was made regarding access, and in May 2011 the respondent and Anna moved to reside in Fürth. Access arrangements continued to

cause disputes between them, and the appellant says that in 2011 instead of access on 75 days that year, he was only able to see Anna on 25 days. And in 2012-2013, the appellant says he had access on three days rather than the 60 days that had been agreed. In 2014 the appellant says that he had no access or contact with Anna at all.

The September 2013 car incident

[10] On 20 September 2013 an incident occurred in the course of an access changeover date when the appellant decided to collect Anna from her school. The respondent did not agree that Anna should be collected from her school, and had suggested that the collection take place at a nearby café. The appellant says that the respondent endeavoured to prevent him collecting Anna, by taking her from the school via a side entrance and into a car driven by the respondent's husband. The appellant says that when he tried to stop the respondent and her husband driving away, he was run over and injured. Although both the respondent's husband and the appellant made complaints to the police over the incident, it was only the respondent's husband who was prosecuted and convicted for an offence of causing the appellant injury by driving at him. The appellant says that the respondent's husband was convicted and on 1 December 2014 ordered by the Nürnberg Regional Court to pay him compensation, and that an appeal by the respondent's husband was subsequently dismissed.

2014: Access orders and disputes

[11] The incident on 20 September 2013 was also addressed by the Nürnberg Higher Regional Court in its decision dated 28 March 2014, in which it defined the terms on which the appellant was to have access to Anna. The Court said:

> By now, daughter [Anna] was no longer willing to have contact, due to the incident on 20.09.2013. .....
>
> The convincing expert report suggests there is no indication to support the concerns of the [respondent] that he influenced the child against her and that this would impede her parenting. According to the expert report, the child's tendency to retreat and the psychosomatic features displayed by her (nightmares, bedwetting) cited by mother as a reason against contact in Moenchengladbach and confirmed by the psychotherapist, Waltraud Pavel, on 26.07.2013, are not necessarily to be ascribed to the contact [with the father], but to the adjustments demanded from the child as a whole – also within the mother's household.

> According to the convincing statements of the experienced expert, there was no indication at all for an endangering of the child's wellbeing through contact with the father, accordingly there was no reason to appoint a contact supervisor (Section 1684, Subsection 4 Paragraph 3 German Civil Code).
>
> The ordered contact supervision was, indeed, not considered expedient by the expert Dr Schwabe-Hoellein in her expert report dated 31.03.2013. The assessment of the expert at the time has, in the opinion of the Senate, been rendered obsolete by now, by the further developments. The number of contacts cancelled by the [respondent] has increased. There is no longer a basis for the assumption that the parents would be able to organise the contact with goodwill amongst themselves.
>
> The incident on 20.09.2013 shows that the parents are no longer able to conduct a danger-free handover of the child, like that previously went ahead at the café Cool Bits. Just because of the conflict on 20.09.2013 alone, which took place in the presence of the child, the arrangement of contact supervision has become necessary, with it being irrelevant in this individual case, who contributed to what extent to [the appellant] being hit and struck by the car of the [respondent's] husband in front of the school building. Therefore, the taking into account of the criminal file against the husband of the [respondent] for failing to stop after an accident is not deemed necessary.
>
> ...
>
> To prevent the father picking up the child at school, the mother left the school together with her child through a side exit and together with the child got into the vehicle driven by her husband. The [appellant] was hit and struck by the car as it started moving.
>
> The daughter [Anna] also witnessed the incident. In a hearing of the child conducted by the Senate, [she] mentioned of her own accord that her father, caused by the incident on 20.09.2013, has continuously been causing her fear and that she for that reason did not currently want contact with him. The Senate assumes that this is not the independent and sustained will of the child. The fact is rather that [Anna], with this, adopts the will of her mother. This, however, changes nothing in regard to the Senate's overall assessment that the parents, due to the ongoing conflict, will not be able to carry our contact visits without involvement of a contact supervisor in until further notice.

[12] In early 2014 the appellant and respondent agreed that the respondent could take Anna overseas to Costa Rica for a period of six months departing in February and returning to Germany in August-September. The appellant says that contrary to what he was told by the respondent regarding this trip, in fact the respondent and her husband, accompanied by Anna and her younger sister, went first to Brazil and returned briefly to Germany before proceeding on to Scotland.

[13] In its decision of 28 March 2014, the Nürnberg Higher Regional Court made an order detailing the dates, terms and hours during which access was to take place.

However, because of an agreement reached between the appellant and the respondent allowing the respondent to take Anna with her and her husband to Costa Rica for six months from February 2014, the first access dates stipulated in the court order were for Saturday 20 September and Sunday 21 September 2014. The Order also stipulated two dates in October 2014.

[14] Further provisions of the access order detailed the involvement of a contact supervisor and access during the school holidays, Christmas holidays 2014/2015, and Easter holidays 2015, as well as other holidays in 2015 and the following years. The Court order also made provision for the appellant to have contact via Skype during the time that Anna was to be away in Costa Rica.

[15] On 27 June 2014, the appellant acting through his legal representative filed a complaint against the respondent alleging abduction of Anna. He complained that despite the access order made by the Nürnberg Higher Regional Court on 28 March 2014, the respondent had failed to inform him of the address where she and Anna were staying in Costa Rica.

[16] In September 2014 the respondent and her husband, together with Anna and her younger sister, returned to Germany. Anna returned to her school in Fürth. On 24 September 2014, the respondent was interviewed by the Fürth Police in relation to the appellant's complaint alleging that she had abducted Anna. On 29 September 2014 when appearing before the Nürnberg District Court, the respondent provided a false residential address which the Fürth Public Prosecutors subsequently alleged she had done in order to conceal and withhold information regarding Anna's whereabouts from the appellant.

[17] On 22 October 2014, Anna was spoken to by Ms Doris Zimmerman, a contact supervisor who later provided a report for the court on access dated 4 December 2014. The contact supervisor's interview with Anna took place only a matter of several weeks before the respondent departed Germany with Anna. In her report Ms Zimmerman said:

> In a conversation with [Anna], who approaches the Undersigned Contact Supervisor open and cheerfully, she states that she is aware of why she is here

today, and what the task of the Undersigned Contact Supervisor is. When asked, [Anna] says she last saw her father a year ago. [Anna] indicates that she would like to see her father again. *"I would like to show him how well I can swim."* The father would only know that she had passed her beginners swimming exam [Seepferdchen]. Further, she would like to *"Watch films, because he has such beautiful films with really great ballerinas, Swan Lake, I really like that movie; I would like to watch that again. ... I would like to do so many things, but I don't dare. Daddy hit our car and he showed on his mobile phone that he is calling the police."* Following, [Anna] describes the incident in front of her school. She explains: *"... Daddy rolled on his side and pretended he was hurt."* After being asked, whether she had seen that herself, [Anna] declares: *"I did see it and we knew that he [the father] did it on purpose and lied as well."* *"I would like to do everything with him again, but I don't dare to."*

[Anna] then explains to the Undersigned Contact Supervisor, she can imagine meeting with her father again, if he "doesn't do any nonsense" and doesn't go to court anymore. If he managed to do that for one year, then she wanted to see him again. Queried, whether she has told this idea to her mother at all, [Anna] declares: *I thought of that myself.* ...

In regards to the question of a possible initially supervised contact [Anna] declares: *"I don't dare to anyway, not even, if it is with someone else. I have to feel good again first."* Asked if this would work, she is not sure. *"It may not forever. I don't know."*

While the Undersigned Contact Supervisor and the mother are having a conversation, [Anna] occupies herself in the front room. ... [The mother] elaborates on the difficulties with the contact from her point of view. *"[Anna] does not want to meet her father voluntarily"*. She fought against the skype contacts with her father and soiled herself. [The mother] declares that she is slowly getting sick of hearing the accusation that she was preventing the contact. This was not the case. "I did everything". The father was still totally fixated on her and wanted the child at any cost. She also feared that the father on his part could kidnap [Anna]. [Anna] was manipulated massively by the father. She also feared emotional abuse through the father. To certain experiences, such as the trip to Paris, [Anna] reacted with massive behavioural abnormalities ... Since the car accident, [Anna] had been clearly afraid. She herself, perceived her personal situation as more and more stressful. [The father] was spying on her social data and attempted to get information from her neighbours and family, and sometimes did so in a manner that was threatening to those people ...

In phone conversations, [the father] reports how he keeps searching for [Anna] and what efforts were necessary not to lose contact with [Anna] and to find out her whereabouts. *"We assume that the mother will continue to disappear."* .... He said he was available for any contact appointment and could observe these unreservedly, even at short notice.

On the basis, that supervised contact handovers have been ordered by the court for a period of more than two years, which the Undersigned Contact Supervisor is not able to provide to this extent, it has been proposed that the contact supervision be transferred to a colleague, and this was also discussed with the authorities involved. The parents were informed of this as well as the conversation with [Anna].

[18] Ms Zimmerman also recorded that an appointment made with the respondent for Anna to meet with a new contact supervisor on 7 November 2014 was cancelled by the respondent on the basis that Anna was unwell. Ms Zimmerman further noted that on 13 November she was informed by the respondent and her lawyers that the planned contact with the appellant arranged for the following weekend would not go ahead because of the legal proceedings involving criminal charges initiated by the appellant (being the charges against the respondent's husband arising from the 20 September 2013 incident), and because Anna's fear after the car accident "would currently not allow for contact to occur."

Respondent sells government bonds and transfers funds from Anna's bank account

[19] The appellant alleges that over a period commencing 12 October 2012, the respondent progressively sold government bonds which were held for Anna and arranged for the proceeds to be transferred into her own personal bank account. It is further alleged that on the day of the respondent's departure from Germany on 11 November 2014, she sold further government bonds from Anna's account and arranged for the proceeds in the sum of EUR 1,062.43 to be transferred into her own account. Then on 8 December 2014, following her departure from Germany, she transferred by way of an online transfer funds held in Anna's bank account with Commerzbank AG to her own account with that bank, and also transferred the sum of EUR 85,500 from her own account to an account at the Bendigo Bank in Australia. On 25 May 2016, the District Court at Fürth issued a warrant for the respondent's arrest in connection with an alleged breach of trust.

The Fürth District Court hearing on 26 November 2014 and appeal

[20] By the date of the hearing of the appellant's application for sole custody, the respondent had already surreptitiously departed from Germany on 11 November 2014 accompanied by her husband and her two daughters, and consequently she did not attend the Fürth District Court on 26 November 2014 for the hearing of the appellant's application for transfer to himself of sole custody of Anna. In an earlier written pleading filed on her behalf and dated 2 October 2014, the respondent's counsel had opposed the application for transfer of sole custody to the appellant. At the hearing the respondent's counsel advised the Court that he did not know where the respondent

lived, and the court proceeded on the basis that Anna's whereabouts were unknown. Anna herself was represented at the hearing by counsel acting as a litigation guardian. The litigation guardian supported the appellant's application for transfer of sole custody of Anna to him.

[21] After the hearing, and prior to the Court delivering its judgment on 17 December 2014, the respondent sent a letter to the Court dated 6 December and also submitted an undated written statement on 12 December.

[22] The Fürth District Court in its judgment of 17 December 2014 records that although numerous access arrangements had been made by way of Court orders between 2010 and March 2014, the respondent never fully adhered to any of these. The Court noted that during 2011, access had taken place on 25 days instead of 72 days, and in 2012 only three days instead of 60 days, and in 2013 and 2014 the Court said the appellant had no access at all. As regards compliance with the order for access made by the Nürnberg Higher Regional Court on 28 March 2014, the Court observed that none of the set contact sessions via Skype ever eventuated. The Court further noted that no contact session had taken place since the respondent had returned with Anna to Germany, and said that Ms Zimmerman, the contact supervisor appointed by the Nürnberg Regional Court, had outlined in a written statement that all the attempts to establish contact sessions were unsuccessful due to the respondent's refusal.

[23] In explaining the reasons for its decision to award and transfer parental custody of Anna to the appellant, the Court said:

> Joint parental custody is ruled out.
>
> The [respondent] has for many years harboured a deep-seated resentment towards the claimant. She is trying to hide from him and is practically on the run. That a joint parental custody is not possible under these circumstances and requires no further explanation.
>
> 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. It has now developed into the driving force behind the actions taken by the mother. With her actions, the mother wilfully and significantly disregards the interests of her daughter. From numerous statements the child made at access proceedings, from the psychological assessment created on that occasion by expert Dr. Marianne Schwabe-Höllein, from statements made

by the Youth Welfare Office and the Guardian *ad litem*, it is not only known to the court, but also to the mother of the child, that her daughter desperately yearns for contact with her father. This has not changed to this day. Even after her having spent several months at an unknown location and even in light of the incident that happened on 20.09.2013, where [Anna] became eye-witness to a dramatic encounter between her father and her mother's husband, who was operating a passenger vehicle at the time, and on which the child only has the perspective of her mother for explanation, [Anna] told the contact supervisor that she would like to do "everything with her father again." That [Anna], in light of her mother's hugely rejectionist attitude, which would not have gone unnoticed by her and her mother's prerogative of interpretation of the events on 20.09.2103, also entrusted in the contact supervisor that she did not have the courage, does not seem surprising and is not to be interpreted as a limitation of the clear wish of the child to see her father.

The [respondent], however, has been ignoring this, her daughter's dearest wish, all-out and consistently for years. For this, she is prepared to accept further significant disadvantages for her daughter. She, time and again, changes their place of residence, practically being on the run from the claimant, and keeps in hiding. After [Anna] started her primary schooling in September 2013, she had to leave the school again only a few months later. In the autumn of 2016 she briefly attended the school again, only to stop attending without an excuse being given. Since that time, there has been uncertainty, if and where the child has been attending school. The mother's game of hide and seek is certainly not suited to allow for or let alone encourage relatively solid social relationships for the child outside of the family.

Although the Court does not fail to appreciate that the child [Anna] has been living with her mother since birth and loves her for sure, it has to be concluded that a transfer into the care of the father is in the best interest of the child.

Other than the mother, who clearly puts living out her grudge towards the father of the child before the interests of her child, the father has already agreed to allow generous contact with the mother of the child.

He is living in well-ordered circumstances and there is no doubt that he is able to give the child the opportunity to have a 'normal life', without one parent's behaviour being fuelled by hatred of the other parent and with contact to both parents.

As already illustrated above, the child loves her father and wishes to see him again.

The transfer of the parental custody to the father of the child does not seem undue either.

The Nürnberg Higher Regional Court, with a decision dated 28.03.2014, tried to resolve the stagnant situation, especially the longstanding denial of access through the [respondent], by ordering a Right of Access decree. In those proceedings, the appointment of a contact supervisor was expressly seen as the less severe means than the removal of the right to determine the place of residence.

But the [respondent] not only ignored the order of contact sessions via skype [sic] and after that in person mediated through the contact supervisor, but also

> unambiguously told the contact supervisor that she also is not willing to allow contact sessions in the foreseeable future. Moreover, the [respondent] has gone into hiding since the adoption of said decision. It cannot be ascertained, whether the child regularly attends school.

[24] It is clear that soon after the Court had delivered its decision on 17 December 2014 the respondent was informed of the outcome, and on 21 January 2015 she filed an appeal against the sole custody order made in favour of the appellant. Although she appealed against the custody order, the respondent did not disclose that she had already departed from Germany. At around the same time, on 23 January 2015, the respondent and her husband arrived in New Zealand with Anna and her sister. They had flown to Christchurch from Melbourne. Upon arrival the respondent and Anna were granted three-month visitor's visas. They remained in New Zealand for three months before travelling to Australia where they spent some five weeks before returning to New Zealand on 27 May 2015.

[25] In March 2015 the respondent and Anna spent time on the Coromandel Peninsula, to which they returned following their arrival back from Australia on 27 May. Upon arrival they were again granted three-month visitor visas which were subsequently extended to expire in November 2015.

Subsequent orders and the appellant's attempts to locate Anna

[26] On 20 March 2015, the Fürth District Court issued a penalty order to the respondent and directed that it be served upon her lawyer in Germany as her authorised recipient. The penalty order set out details of a charge made by the Public Prosecutors regarding the respondent's persistent refusal to reveal the whereabouts of her daughter to the appellant notwithstanding the access rights set out in the orders of the Nürnberg Higher Regional Court dated 28 March 2014. The penalty order noted that on 27 June 2014 the appellant had filed a criminal complaint against the respondent for parental abduction of a minor, and imposed a financial penalty of EUR 3,600.

[27] On 15 June 2015, Anna was enrolled at a local school ("School 1"). It appears that she had not been enrolled at or attended any school since departing Germany in November the previous year. On 27 November the respondent applied for and was granted an Essential Skills work visa that allowed her to work as a customer relations

and human resources manager for a health food business. The respondent's husband was granted a concurrent open work visa, and the two children were granted student and visitor visas.

[28] In February 2016 the respondent and her family shifted residence and moved to a rental property at another location in the Coromandel. Anna was then enrolled in another local school ("School 2").

[29] On 1 March 2016, the Nürnberg-Fürth Public Prosecutors investigating the respondent in relation to her alleged abduction of a minor issued a search alert for Anna. As I have already noted, in May 2016 the German Court issued a warrant for the arrest of the respondent in relation to alleged misappropriation of Anna's funds.

[30] On 30 May 2016 the respondent's appeal from the decision of the Fürth District Court was dismissed.

[31] In August 2016 the appellant's attempts at locating Anna were publicised in the German media, and on German television. Apparently as a result of the media publicity, the appellant was contacted and was informed that his daughter might be in New Zealand.

[32] On 18 October 2016 the Fürth District Court on an application by the appellant made an order declaring that the respondent was obligated to release Anna into the appellant's care, and further ordered that the use of force to effect execution of the release order may be ordered if required. The Court said:

> The claim for release is justified. The mother of the child is obligated to release the child ...
>
> Since the mother, for the purpose of withholding the child from the father, has been on the run with the child for years, the putting in place of regulatory instruments does not promise success. For that matter, an immediate execution of the decision is pivotal ...
>
> The principle of proportionality is ensured. The behaviour of the mother of the child to date, clearly shows that without the use of direct force a release of the child will not take place.

Request for Anna's return

[33] On 26 October 2016 the appellant's lawyer wrote to the German Embassy in Wellington seeking any information held regarding Anna, and on 27 October the Embassy replied advising that it had issued a passport to Anna on 4 March 2015. The appellant notified the German Central Authority of Anna's whereabouts in New Zealand and on 13 January 2017, a formal request by the German Central Authority (dated 6 December 2016) requesting Anna's return to Germany was forwarded to the New Zealand Central Authority.

[34] On 14 February 2017 the Family Court at Waihi made an order directing that Anna was not to be removed from New Zealand until further order of the court, and requiring all passports and travel documents in her name or relating to her to be surrendered forthwith. On 22 February 2017, counsel for the New Zealand Central Authority filed an application in the Family Court at Thames on behalf of the appellant seeking an order for Anna's return to Germany.

[35] On 22 May 2017, Immigration New Zealand issued a deportation liability notice to the respondent on the grounds that she had concealed relevant information in a visa application. The notice stated that on 19 August 2015, when lodging an application for a visitor visa, the respondent had produced a document from a German Higher Regional Court (dated 13 February 2012) which stated that she had sole custody of Anna. She provided the same document in support of Anna's application for a student visa on 24 November 2015. On 30 May 2017, deportation liability notices were issued in respect of Anna and her sister, on the grounds that as their mother had been made liable for deportation, the reason for their visas ceased to exist meaning that they too were liable for deportation. On 14 June 2017 a deportation liability notice was also issued to the respondent's husband.

The Family Court hearing and decision

[36] Judge Coyle sitting in the Family Court at Tauranga heard the application under s 105 of the Care of Children Act on 18 August 2017 and reserved his decision. His judgment was delivered on 1 September 2017, and as I have noted, the Judge declined to make an order for Anna's return to Germany. The reasons for Judge Coyle's

decision will be discussed more fully later in this judgment. In essence, however, he considered that Anna had been in New Zealand for more than 12 months and was now settled here, and she objected to be returned. Based on these grounds, he exercised his discretion to refuse to order her return.

28 September 2017: the appellant uplifts Anna from her school

[37] Following the Family Court decision, on 28 September 2017, the appellant went to School 2 which Anna attended, and without having made any arrangements to do so he uplifted Anna and drove her to Auckland. The appellant was assisted by two members of the organisation known as Child Recovery Australia who accompanied him and Anna during the drive to Auckland. While it is clear from Anna's comments to her counsel, Mr Blair, that she was unsettled and traumatised by these events and the appellant's actions, it is relevant to note that at the time of this occurrence, the German custody order was the only custody order in place, and furthermore that the German Court had made an order in which it had said that the respondent had shown by her conduct that without the use of direct force she would not release Anna.

[38] The respondent immediately made a without notice application for an interim parenting order which was granted by the Family Court. The police then located Anna and returned her to the respondent.

30 October 2017: Immigration and Protection Tribunal decision

[39] The respondent and her husband appealed against their liability for deportation which arose when they were served deportation liability notices in 2017, and the Immigration and Protection Tribunal (IPT) delivered its decision on the appeal on 30 October 2017.[4]

[40] The IPT found that the respondent, her husband, Anna and her sister had established exceptional circumstances of a humanitarian nature which would make it unjust or unduly harsh for them to be deported from New Zealand. The IPT further found that it would not be contrary to the public interest for them to remain in New

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4 *Re AE (Germany)* [2017] NZIPT 503385.

Zealand on a temporary basis, and ordered that the respondent and her husband be granted open work visas and the two girls granted student visas, for a period of six months. In reaching its decision the IPT said:

> [58] The German courts have been highly critical of the [respondent's] past actions in thwarting contact between the daughter and her father and regard her as a parent who has put her own interests before her daughter. In contrast, following the father taking the daughter from her school in September 2017, Judge Coyle, in granting an interim parenting order in the [respondent's] favour and ordering that the father have no contact with the daughter until further order of the Court, noted that the father "has shown he has no respect for the rule of law in New Zealand and no insight into what is best for [the daughter]".
>
> ...
>
> [75] Currently, returning to Germany risks the daughter being separated from her family and placed in the custody of her father with whom she has had no contact for an extended period. Weighing the emotional trauma that will result for the daughter against the [respondent's] concealment of relevant information, the Tribunal finds that it would be unjust and unduly harsh for the daughter and her mother, stepfather and sister to be deported from New Zealand at this time.

The appellant's submissions on appeal

[41] Ms Soljan for the appellant says that the Judge erred by not making an order for Anna's return to Germany, and the appellant now seeks such an order on appeal. She submits that by narrowly focussing his attention on Anna's immediate situation and circumstances in New Zealand, the Judge failed to take into account or give sufficient weight to the wider circumstances of Anna's predicament. She says that by adopting that narrow focus the Judge either disregarded or failed to give sufficient weight to key aspects of Anna's situation relating to her immigration status, background, the German court's competence and the respondent's ability to ameliorate welfare concerns for her daughter.

[42] Ms Soljan says that the respondent has been shown to have acted with complete contempt for the German court and the custody order made in favour of the appellant. She submits that by her action of bringing her daughter all the way to the other side of the world from Germany, the respondent has isolated Anna from her past life and disregarded her rights and needs. Ms Soljan further says that the respondent has

ignored the appellant's attempts to arrange contact with Anna since he located her in New Zealand, resulting in the appellant commencing proceedings in the Family Court.

[43] Ms Soljan explains that the Family Court's findings which are challenged in the appeal are: the determination that Anna is settled in New Zealand; the weight to be given to Anna's views; the Judge's failure, when exercising the discretion to make an order for Anna's return, to take into account relevant considerations regarding her welfare; and the Judge's failure to give sufficient weight to the need to deter and prevent future abductions. The appellant notes that there is no challenge by the respondent as to whether the jurisdictional pre-requisites for the making of an order for return contained in s 105(1) of the Act have been established, and that this was accepted by the respondent at the hearing before the Family Court. Ms Soljan also points out that the respondent does not contend on appeal that Anna's return to Germany would lead to a grave risk that she would be exposed to physical or psychological harm or otherwise place her in an intolerable situation.[5]

[44] Ms Soljan submits that the two objectives of the Hague Convention[6] as set out in Article 1 are first, to secure the prompt return of children wrongfully removed to or retained in a contracting state; and secondly, to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states. She further submits that the purpose of the Convention provisions now contained in s 105 of the Act is to ensure that the courts of the country of the child's habitual residence, rather than the courts of the country to which the child has been wrongfully removed, resolve disputes as to custody and access. She says that the Convention is designed to be a summary measure and it contains no explicit reference to the interests of the child. Ms Soljan accepts, however, that the Convention is fundamentally a child protection mechanism to protect both individual children and children collectively.

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5 Section 106(1)(c).

6 Convention on the Civil Aspects of International Child Abduction 1343 UNTS 98 (opened for signature 25 October 1980, entered into force 1 December 1983), implemented in New Zealand law by Subpart 4 of Part 2 of the Care of Children Act 2004.

"Settled" defence

[45] Ms Soljan submits that the Family Court Judge erred in concluding that the "settled defence" had been established and by failing to take the immigration issue and Anna's New Zealand immigration status as at the date of hearing into account. She says that Anna and the respondent's immigration status and right to be and remain in New Zealand are temporary and uncertain, which was a highly relevant factor that ought to have been taken into account.

[46] Ms Soljan also argues that the Family Court Judge excluded or failed to give weight to relevant evidence regarding:

(a) the risk of the respondent attempting to flee from New Zealand and the relevance of that risk to the issue of whether Anna was settled in New Zealand;

(b) the German court's observation that the respondent was "on the run" with Anna;

(c) the respondent's misappropriation of Anna's money, on which the Judge refused to allow cross-examination of the respondent despite the issue being relevant to the financial stability of the respondent's household;

(d) Anna's attendance record at school in New Zealand and her non-attendance over the period following her arrival in New Zealand; and

(e) the respondent's history of transience.

Child objection defence

[47] In relation to the child objection defence, Ms Soljan submits that the Family Court Judge erred in his assessment of the weight to be given to Anna's views regarding her return to Germany in the custody of her father. She says that the Judge failed to take into account that Anna's views are due to her natural concerns about

being separated from her mother and her younger sister, and that Anna appeared to be unaware that her mother would be able to return to Germany with her. Ms Soljan also submits that the Judge failed to take into account the history of Anna's relationship with her father in Germany, and the finding of the German court that Anna had enjoyed her visits with her father and had expressed a wish to see him. Counsel submits that while the Judge did reference this past relationship, he had no basis for his finding that it had diminished over time. She says the court-appointed psychologist had never seen Anna in the company of her father, and was therefore in no position to assess their current attachment. Finally in this context, Ms Soljan says that the Judge made no reference to Anna being only 10 years old, and submits that having regard to her relatively young age and the full circumstances, only modest weight should have been given to her views.

[48] Ms Soljan further says that the Judge's finding that Anna had not been influenced in her views regarding her return to Germany was contrary to the evidence. She says that Anna is living in an environment in which her mother exhibits "ingrained resentment" towards the appellant, and consequently that must be an influence and affect Anna's ability to express her own free will. She says that Anna has been deliberately isolated and is totally dependent upon her mother, and the respondent has ignored Anna's wishes to see her father. Furthermore, she says the Judge placed undue focus and weight on the traumatic effect on Anna of the incident involving the motor car in September 2013. Ms Soljan submits that having regard to Anna's relatively young age, and the present situation in which she has been isolated from any contact with her father by the respondent, only modest weight should have been given to her views.

Exercise of residual discretion

[49] In relation to the Family Court Judge's exercise of the discretion as to whether to order Anna's return to Germany, Ms Soljan submits that he failed to take a number of relevant considerations into account. These will be addressed in more detail later. Ms Soljan submits that had the Family Court Judge given appropriate consideration to those additional factors, the balance would weigh in favour of an order for Anna's

return, and an order for her return would send a clear message that taking the law into one's own hands, as the respondent has done, will not succeed.

The respondent's submissions

[50] Mr Ashmore for the respondent submits that Judge Coyle was correct in his decision to decline to make an order for Anna to be returned to Germany. Mr Ashmore further submits that the Judge correctly determined that return to Germany would be too cataclysmic for Anna, and that her welfare and best interests outweigh the Hague Convention policy considerations that would otherwise require her to be returned.

[51] Mr Ashmore notes that during the hearing in the Family Court, Judge Coyle had permitted cross-examination of the respondent and the court-appointed psychologist, and so had the benefit of seeing and hearing those witnesses when assessing the weight to be attached to their evidence.

The background facts

[52] Mr Ashmore says that the respondent disputes the appellant's account of their relationship and the history of their dispute over access to Anna prior to her departure from Germany with Anna in November 2014. He refers to the respondent's affidavit[7] filed in the Family Court in which she set out the history of her relationship with the appellant, who is 14 years older than her and whom she met when she was an intern at a business where he was a senior manager. In her affidavit the respondent states that she and the appellant had already separated but were continuing to maintain what she describes as a dysfunctional relationship at the time that Anna was conceived.

[53] Mr Ashmore further says that rather than the legal proceedings in Germany being a series of interventions by the courts, as claimed by the appellant, a more accurate account of those proceedings is set out in the affidavit of Mr Michael Loewe who was the respondent's lawyer in Germany and who represented her in the various proceedings before the Fürth District Court, the Nürnberg-Fürth Regional Court, and the Nürnberg Higher Regional Court.[8] In his affidavit Mr Loewe lists a total of 40

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7 Affidavit sworn 31 March 2017.
8 Affidavit sworn 4 April 2017.

applications or proceedings commenced in the courts in Germany relating to access or custody of Anna between 2010 and 2014, and says that of the 34 proceedings initiated by the appellant, the applications were granted on six occasions. The appellant's applications related to access agreements, including some applications that the court impose fines for non-compliance with access arrangements, although it appears that no fines were imposed. Mr Loewe states that the respondent reported in those proceedings that after each of her contact sessions with her father, Anna had displayed psychological and behavioural problems leading to the respondent arranging for her to have psychological treatment for an extended period. As a response to these problems, the respondent requested that the number of contact sessions be reduced or suspended, or that a neutral supervisor be present during contact sessions. The court proceedings in Germany between 2010 and late 2013 predominantly related to access or enforcement of access. In late 2013, the appellant made an application for an order that the right to determine Anna's place of residence be transferred to him, and in August 2014 he applied for sole custody of Anna, resulting in the decision made by the Fürth District Court on 17 December 2014.

[54] In relation to the car incident in September 2013, Mr Ashmore says that rather than the appellant being run over by the respondent's husband, the accurate account of what occurred is contained in the judgment of the Nürnberg Higher Regional Court of 31 May 2016 in which the court said:

> On 20 September 2013, the [appellant], in an attempt to enforce his right of access to his daughter [Anna], near the primary school ... in Fuerth, had to avoid the moving car driven by the husband of the [respondent], and hurt himself in the process.

[55] Mr Ashmore says that despite the appellant's claim that the respondent's husband was convicted of a criminal offence regarding that incident, that is denied and disputed by the respondent and her husband. He says that while it is correct that the respondent was effectively hiding from the appellant during the time immediately prior to her departure from Germany, she maintains that she had justifiable reasons for doing so due to the relentless harassment she had been subjected to by the appellant and which had been ongoing since 2009. Mr Ashmore submits that the appellant has recommenced similar conduct since learning of the respondent's whereabouts in New Zealand.

[56] In relation to the sole custody decision made by the Fürth District Court in December 2014 and the appellate court decision in May 2015, Mr Ashmore submits that in each case the respondent was not present, and that there was no consideration of the child's views nor any psychological assessment undertaken by a court-appointed psychologist. He says that since 2012, the first child psychologist that Anna has engaged with was Dr Lightfoot whom she saw in 2017 in relation to the present proceedings. He submits that the contemporary expert assessment of Dr Lightfoot is to be given more weight than the report prepared for the courts in Germany which were prepared without the benefit of any direct engagement with Anna.

"Settled" defence

[57] Mr Ashmore supports Judge Coyle's finding that Anna is now settled in New Zealand and that the settled defence has been established. He submits that the Judge was correct in his assessment and treatment of the issue of Anna's uncertain immigration status as at the date of the Family Court hearing, and appropriately gave the matter of her immigration status no weight as deportation was not inevitable. Counsel refers to the IPT decision of 30 October 2017 in which the IPT allowed the appeal on humanitarian grounds, cancelled the deportation liability notices, and granted work visas for the respondent and her husband and student visas for Anna and her sister. Mr Ashmore says this decision, which was issued after the Family Court judgment, has now removed the risk of an imminent deportation and will enable further visa applications and residency applications to be made.

Child objection defence

[58] Mr Ashmore notes that the appellant accepts that Anna does object to being returned to Germany and that she is of an age where her view should be given weight. He responds to the submission that Anna's views are the result of the respondent's influence, and says that Dr Lightfoot's opinion that Anna's views are her own provides a well-founded basis for the Judge's finding that the child objection defence is established. He notes that the reasons Anna has given for not wanting to be returned to Germany are: she does not want to be parted from her mother; she would lose her life in New Zealand, including the rest of her family, her friends and her lifestyle; and that she does not want to see her father yet. Mr Ashmore says that the change in Anna's

current attitude to her father from that recorded in the January 2013 report of Dr Schwabe-Hoellein prepared for the court in Germany is explicable by the damaging effects of the September 2013 motor vehicle incident, which resulted in her attitude to her father changing and her confidence in him diminishing.

Exercise of residual discretion

[59] Mr Ashmore submits that having regard to Anna's now settled situation in New Zealand and to her objections to being returned, Judge Coyle then proceeded appropriately to exercise the discretion by weighing the competing factors of the Hague Convention policy, which would require return to Germany, against his assessment of Anna's welfare and best interests being met by allowing her to remain in New Zealand and not being subjected to the upheaval and disruption of being returned to Germany in the sole custody of the appellant.

[60] Mr Ashmore submits that the Judge clearly took all the relevant considerations into account in the course of exercising his discretion, and having done so, the decision he made to decline to make an order for Anna's return to Germany was made in accordance with the relevant law and legal principles and was one he was entitled to make. Accordingly, says Mr Ashmore, the appeal should be dismissed.

Submissions of counsel for the child

[61] Counsel for the child, Mr Blair, also supports the District Court judgment and submits that Judge Coyle was correct in his findings that the settled defence and objection defence were made out and by exercising his discretion and declining the application seeking Anna's return to Germany. He submits that both the settled defence and the objection defence are well founded. He submits that the Hague Convention policies, reflected in the provisions of the Act relating to return of children illegally removed from a jurisdiction, should in this instance yield to Anna's interests and welfare, because her interests overwhelmingly outweigh the need for recognition and application of the policy considerations.

[62] In his submissions, Mr Blair recounts in detail the contents of his interviews with Anna both prior to and following the Family Court hearing in August 2017. Mr

Blair described the manner in which Anna explained why she wishes to continue to live with her mother and family in New Zealand, and why she is anxious and fearful at the prospect of being sent back to Germany to live with her father. Mr Blair authentically explained her wishes and provided an account of her description of her now established life in New Zealand in which she explained why she is very keen to remain and not be required to return to Germany and to live with her father.

[63] As regards the settled defence, Mr Blair submits that any harmful effects to Anna caused by the events of her departure and removal from Germany in November 2014 have now been dissipated by the passage of time. He says that from June 2015 when the respondent and her husband arrived on the Coromandel Peninsula, Anna has been living in a stable and progressively settled situation in terms of her home life and schooling. The changes of residence and schools that have taken place were not such as to be of any significance, and Anna has quickly adapted to her new and current school where she is excelling at her school work and is engaged with and totally accepted as a valued member of her school community. He says that Anna now regards herself as a Kiwi, and she is socially integrated in her New Zealand life and situation residing with her mother and family in the Coromandel.

[64] Mr Blair further submits that Anna, now nearly 11 years old, has expressed a very strong objection to being required to return to Germany, and he says that having regard to the reasons she provided and the manner in which she explained herself to him during her interviews with him, her views on the issue should be given significant weight. Mr Blair says that although Anna had expressed her objection strongly prior to the Family Court hearing, the events of 28 September 2017 when she was removed from her school by the appellant and taken to Auckland have in Anna's mind served to reinforce and strengthen the reasons for her objection. He submits that being required to return to Germany would cause Anna significant distress and involve a major and disruptive upheaval from her now settled emotional state and living circumstances.

[65] Mr Blair submits that the Judge correctly exercised the discretion as to whether to make an order for Anna's return to Germany, and in doing so took into account all the relevant considerations. He submits that notwithstanding the circumstances of her

removal from Germany and the actions of the respondent in concealing her whereabouts from the appellant, a forced return to Germany would have a serious impact on Anna and cannot be justified by upholding the Convention's policy of returning children illegally removed from a jurisdiction. Such a result would be a substantial disservice to Anna.

[66] In conclusion counsel submits that the exercise of the discretion by the Family Court Judge should not be overturned on appeal.

Sections 105 and 106 of the Care of Children Act

[67] The relevant provisions of the Care of Children Act for present purposes are ss 105 and 106. Section 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—
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> (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.
>
> (3) A court hearing an application made under subsection (1) in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a court of that State, or a decision of a competent authority of that State, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State, and may adjourn the proceedings for that purpose.

(4) A court may dismiss an application made to it under subsection (1) in respect of a child or adjourn the proceedings if the court—

(a) is not satisfied that the child is in New Zealand; or

(b) is satisfied that the child has been taken out of New Zealand to another country.

[68] As the Supreme Court noted in *Secretary for Justice (New Zealand Central Authority) v HJ*, s 105 reflects the Hague Convention's general objective of achieving the prompt return of children to their country of habitual residence following wrongful removal.[9] The Court must order prompt return of the child if the Court is satisfied that the grounds in s 105(1) are made out, unless one of the s 106 grounds for refusing to do so is established. Section 106 provides:

106 Grounds for refusal of order for return of child

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

(a) 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

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9 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [43].

(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.

(2) In determining whether subsection (1)(e) applies in respect of an application made under section 105(1) in respect of a child, the court may consider, among other things,—

(a) whether the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to refugees or protected persons:

(b) whether the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

(3) On hearing an application made under section 105(1) in respect of a child, a court must not refuse to make an order under section 105(2) in respect of the child just because there is in force or enforceable in New Zealand an order about the role of providing day-to-day care for that child, but the court may have regard to the reasons for the making of that order.

[69] The policy of the Hague Convention, reflected in s 106, is therefore not that wrongfully removed children must be returned in all circumstances. As the Supreme Court observed in *HJ*, the exceptions are there to permit the welfare and best interests of individual children to be taken into account in specified circumstances.[10] However, even if one or more of the s 106 grounds are made out, the Court retains a residual discretion as to whether or not it makes an order for return of the child. This is reflected in the use of the words "*may* refuse to make an order" in s 106(1).[11]

[70] It is therefore a two-step approach: first, there is an issue of fact as to whether one of the s 106(1) grounds is made out, and secondly an exercise of discretion as to whether to order return.[12]

Approach on appeal

[71] On appeal, the Court will treat the issue of fact, namely whether one of the s 106(1) grounds is made out, as a general appeal governed by the principles in *Austin,*

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10 At [65], endorsing *Director-General of the Department of Families, Youth and Community Care v Moore* (1999) 24 Fam LR 475.

11 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [41] and [61].

12 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [71].

Nichols & Co Inc v Stichting Lodestar.[13] This means that the appellate Court is free to re-evaluate the question on its merits and come to its own decision. However, in the present case I bear in mind the advantage that Judge Coyle had in terms of hearing and seeing the witnesses give evidence before him.[14]

[72] When it comes to the second stage of the analysis, namely the exercise of the residual discretion, the principles in *May v May* apply on appeal.[15] The appellate court will therefore not interfere with the lower court's exercise of the discretion unless the appellant can show that the Judge acted on a wrong principle; failed to take into account some relevant matter; took account of some irrelevant matter; or was plainly wrong.

Relevant s 106 grounds in the present case

[73] In the present case Judge Coyle in the Family Court considered that two of the s 106 grounds were established, namely that more than 12 months had passed and Anna was settled in New Zealand (s 106(1)(a)); and that Anna objected to being returned to Germany (s 106(1)(d)). He exercised his discretion to refuse to order return.

[74] I address these two grounds in turn, noting that each has its own features and observations made in the context of one ground cannot be applied automatically or uncritically to another.[16]

The "settled" defence

Relevant law

[75] Section 106(1)(a) provides that it is a ground for refusing to order return that the application was made more than one year after the removal of the child, and the child is now settled in his or her new environment.

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13 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. See *KN v CN* [2016] NZHC 2049 at [29]–[30], which confirms this approach in the context of s 106.

14 See *B v F [De facto relationship]* [2010] NZFLR 67 at [8].

15 *May v May* (1982) 1 FLR 165 at 170; see *KN v CN* [2016] NZHC 2049 at [29]–[30].

16 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [39].

[76] When determining as a matter of fact whether the child is "settled", the Court will consider physical, emotional and social factors. As the Court noted in *HJ*:[17]

> Not only must a child be physically and emotionally "settled" in the new environment, he or she must also be socially integrated.

[77] The Court added that the age of the child will be relevant to all aspects of the settlement question.[18] The date at which settlement is considered is the date the Court hears the application rather than the date on which the application was filed.[19]

[78] Ms Soljan submits that "settled" involves a physical and environmental component, referring to the English case *Re N (Minors) (Abduction)*.[20] There, the Court held that "settled" meant more than mere adjustment to surroundings. It continued:[21]

> ... the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability.

[79] Environment could encompass place, home, school, people, friends, activities and opportunities.[22] In *Re N*, the Judge also held that the present position should import stability when looking at the future, and be permanent insofar as anything in life can be said to be permanent.[23] Bracewell J then noted that every case turned on its own unique facts, and in that case the children were not settled in their new environment. They were aged four and almost three, and had been brought to England by their mother. They had been moved about often in their short lives, and one of the children had only had one term at their new school. It was too early to say that they were settled.

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17 At [55] (footnote omitted).
18 At [55], footnote 48.
19 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [57].
20 *Re N (Minors) (Abduction)* [1991] 1 FLR 413 (Fam).
21 At 417–418.
22 At 418.
23 At 418.

[80] Ms Soljan also refers to *Graziano v Daniels*, a decision of the Australian Family Court.[24] In that case the mother had moved the four children, aged between three and eight years old, to Tasmania from the United States of America. The Judge affirmed the comments of the English Court in *Re N (Minors) (Abduction)* and held that the test must be "more exacting than that the child is happy, secure and adjusted to his surrounding circumstances".[25] The children's relationship with their mother was not properly regarded as part of being "settled" in the new environment. The evidence was that the two younger children had not formed bonds beyond their mother or grandmother, although the position of the two older children was more complex as they had adapted well at school and made friends. However, the Judge relied on the evidence of a clinical psychologist which indicated that there was still a "question mark as to the stability of their adjustment".[26] He held that the children had not reached the degree of physical and emotional integration within the new environment as to be able to be described as "settled".

[81] Anna's immigration status arose as an issue in the Family Court in the context of considering whether she was "settled" in New Zealand, and the appellant now argues that Judge Coyle gave insufficient consideration to this factor. The respondent in turn refers to *Lozano v Alvarez*, a decision of the United States Court of Appeal (2nd circuit).[27] In that case the appellant asserted that where the child was residing in the new country illegally, a "settled" finding was barred as a matter of law. The Court of Appeal disagreed, holding that the child's immigration status was simply one factor of many for the Court to consider. It noted that:[28]

> ... "settled" should be viewed to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment ... In making this determination, "a court may consider any factor relevant to a child's connection to his living arrangement." ...
>
> Factors that courts consider should generally include:
>
> (1) the age of the child; (2) the stability of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child attends church [or participates in other community or extracurricular school activities] regularly; (5) the respondent's employment

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24 *Graziano v Daniels* (1991) 14 Fam LR 697 (Fam).
25 At 704.
26 At 705.
27 *Lozano v Alvarez* 697 F 3d 41 (2d Cir 2012).
28 At [17] and [18].

and financial stability; (6) whether the child has friends and relatives in the new area; and (7) the immigration status of the child and the respondent.

[82] The Court further held that a child's immigration status should only be relevant to the settled analysis to the extent that there is an imminent threat of removal from the country.[29]

[83] If the Court determines that the child is settled in the new country, it must then consider the discretion to order or refuse to order return. The Supreme Court in *HJ* made the following comments regarding the exercise of the discretion in relation to the "settled" defence:

> [85] Drawing all these threads together, we consider the way in which the New Zealand Courts should approach the s 106(1)(a) discretion can be stated in the following way. The discretion requires the Judge to compare and weigh two considerations. One concerns the welfare and 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.
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> [86] 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. Matters relevant to the assessment include the circumstances in which the child is now settled; the circumstances in which the child came to be wrongfully removed or retained; and the degree to which the child would be harmed by return. Other factors capable of being relevant will be the compass and likely outcome of the dispute between the parties, and the nature of any evidence directed to another ground of refusal, whether or not that ground is made out. In short, everything logically capable of bearing on whether it is in the best interests of the child to be returned should be considered.
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> [87] If the Judge 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 that the s 106(1)(a) discretion be exercised in favour of 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.
>
> [88] It follows that the approach taken in the Family Court and upheld in the High Court was not a correct exercise of the discretion. The Family Court Judge was wrong to place a heavy onus on the mother and to give the weight he did to what he saw as her concealment of the children and the consequent need to preserve the "integrity" of the Convention ...

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29 At footnote 18.

[84] It is therefore a matter of weighing up and striking the right balance between the best interests of the child and the deterrent policy of the Hague Convention.[30] Generally speaking, the abducting parent should not be allowed to gain an advantage from concealment or deceit.[31] As Fisher J recognised in *S v S*, the Convention has a broader normative role in this regard:[32]

> There is the future of other children to consider. Their interests will be promoted by demonstrating to potential abductors that there is no future in interstate abductions. A firm attitude to the return of children, in other words, discourages those parents who might otherwise be tempted to contemplate unilateral removal.

[85] Nevertheless, as the Court observed in *HJ*, in the context of the "settled" defence the best interests of the child assume additional importance[33] and any competing factors, such as the broader normative role of the Convention, must "clearly outweigh the interests of the child" if return is to be ordered.[34]

Analysis

(i) The s 133 psychologist's report by Ms Sue Lightfoot

[86] Prior to the hearing in the Family Court, the Court requested the preparation of a psychologist's report pursuant to s 133(5) of the Act to address particular issues relating to Anna which were relevant to the proceeding. The principal questions posed involved an examination of Anna's objection to being returned to Germany; consideration of the basis for her objection, namely whether it was reality-based or affected by undue influence; and whether Anna was sufficiently mature to understand and appreciate the implication of her objection. The report was prepared by Sue Lightfoot, a registered clinical psychologist in private practice. Ms Lightfoot has extensive experience which includes employment as a Senior Psychologist by the Department of Child Youth and Family Services at Tauranga, and has worked for the Department for over 30 years, initially in social work positions and thereafter as a

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30 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [50].

31 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at [69].

32 *S v S* [1999] 3 NZLR 513 (HC) at 519.

33 See [53] and [81] per the majority, and [137] per McGrath J.

34 At [87].

psychologist working in the area of forensic evaluation of adults, children and family functioning. Ms Lightfoot has extensive clinical experience working with abused, neglected, and traumatised children and their families, and in the specialist forensic assessment of both children and adults.

[87] In preparing her report, Ms Lightfoot met with and observed Anna at home in the presence of the respondent and Anna's younger sister; interviewed Anna; and consulted with both the appellant and the respondent. She also spoke to counsel for the child, Mr Blair; Anna's step-father; the principals of both School 1 and School 2 which Anna has attended; and to a family friend of the respondent and her husband. In addition to those interviews and conversations, Ms Lightfoot reviewed a large number of affidavits and other materials provided to her by the parties, including translations of the German court decisions, and reports prepared for the court in Germany. Her report is detailed and thorough.

[88] In the section of her report titled 'General Adjustment and Behaviour', Ms Lightfoot summarises her opinion regarding Anna's settlement and adjustment to living in New Zealand:

> During interview with Lawyer for Child Mr Blair, [Anna] stated she considered particularly the Coromandel area of NZ to be her home, she has lots of friends in the area, knows lots of people in the community, her school is there, she has weekly singing and guitar lessons, she thinks it is a nice area to live in, and she loves the beaches. In interview with myself, [Anna] told me similar, stating she is definite that she wants to stay in NZ – "*my life is here*"
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> ... During this assessment, no concerns were expressed about [Anna's] behaviour or general adjustment, by any source. All those interviewed about [Anna], were consistently positive about her general functioning and adjustment. During my observations and interviews, all evidence suggested similarly, that [Anna] is well settled in her current situation, is happy, is making very good developmental and educational progress, and has in all ways successfully adapted to life in NZ.

[89] Anna has been in New Zealand and residing with her mother, step-father and younger sister on the Coromandel Peninsula since March 2015. On 15 June 2015 she was enrolled at School 1 where she remained until commencing at School 2 in February 2017 because that school is closer to where the family are now residing, and because her younger sister was also starting at the school. It is clear from the comments of the principal of School 1 and from Anna's school reports that Anna

quickly settled and was accepted into the school community following her enrolment. The principal of School 1 wrote in 2017:

> [Anna] enjoys school, is a very capable and enthusiastic learner and the family always went to great length to ensure she attended and completed school and home learning tasks. She very quickly learnt to read in English when she first arrived, having a good spoken English and the ability to read in German. She also worked well in Mathematics, Music and Art particularly. [Anna] was a confident and co-operative student. She was always quick to ask questions or seek clarification if she did not understand instructions or vocabulary. She interacted well with her peers in the classroom and playground.

[90] Anna's class teacher at [School 2] wrote in March 2018:

> As a new student to [School 2] in February 2017, [Anna] made a positive and settled start. She made friends easily and quickly. [Anna] is an outgoing confident girl. She relates well to her peers and adults at school.
>
> [Anna] is a motivated and conscientious student. She achieves above the expected level for her year level in literacy subjects and well above in mathematics. [Anna] enjoys the challenge of extension, often surpassing the level of expectation asked of her. She has positive support from home for her school learning. Homework is always done to a very high standard.
>
> [Anna] is normally happy at school, however a change in [Anna's] demeanour and attitude has been noticeable recently. Although she has had moments of anxiety and has expressed that she feels worried about her family situation, [Anna] is usually self-assured and confident.

[91] Ms Lightfoot also refers to comments made by the principal of [School 2]:

> Mr [M], Principal of [School 2], indicated [Anna] is currently achieving at a level above age-expected standards in reading and maths, and at age-expected standards in writing – "*she really enjoys learning – anything, and she enjoys success. She loves the arts, she's creative, and she likes singing. She's one of those neat all-round girls*" …
>
> Mr [M] described [Anna] as a well-adjusted girl from his observations of her over the first term – "*she settled in immediately. She seems to know all our NZ idiosyncrasies, but she has some of her own European flavour which comes out on occasion. And we only have two Maori children at the school but we have Te Reo every day in class, and she clicks into it, she's open to it, sings the waiata. She's totally happy to be a Kiwi girl, she loves the outdoors, enjoys the environment, she loved planting trees at Hot Water Beach. She plays netball, ripper rugby, and soccer at school, and she was going to Open Mic Night. She's just amazingly well-adjusted, she's neat, I wish we had more [Annas]*".

[92] The respondent gave evidence and was cross-examined at the hearing in the Family Court. Judge Coyle noted that he accepted her evidence about the number of

friends [Anna] has and the fact that her friendships and social circle have increased since the family moved to live close to [School 2].[35] While the respondent's credibility and reliability must be considered in light of her conduct in removing Anna from Germany and her subsequent conduct in the course of obtaining a German passport for Anna, and concealing her whereabouts from the appellant and German authorities, her evidence regarding Anna's social integration was corroborated by other independent evidence, and was justifiably regarded by the Judge to be reliable.

(ii) The issue of Anna's immigration status

[93] In reaching his decision Judge Coyle decided that he should not place any weight on the immigration status of Anna and the other members of her family, because of the uncertainties surrounding the matter. The Judge observed that he had to make his decision on the basis of the known evidence before him, and that Anna's uncertain immigration status should not influence his determination of whether she is settled in New Zealand or not.[36]

[94] While the Judge did not regard Anna's immigration status to be "known evidence", in my view Anna's unresolved and uncertain immigration status, as a result of the outstanding deportation liability notices, was itself a known fact which should not be put entirely to one side. Rather, it was a relevant consideration to be taken account of in assessing whether Anna was settled in New Zealand at the date of the Family Court hearing. However, having regard to the appeal that had been lodged with the IPT against the deportation liability notice, deportation was neither certain nor imminent. There was the possibility of an outcome such as has subsequently been determined by the IPT, namely cancellation of the deportation liability notices, and that outcome has enabled Anna and the other members of her family to apply for and obtain temporary work and student visas.

[95] While her immigration status was uncertain, and as a consequence her continued residence in New Zealand was not certain or secure, I consider that Anna's immigration status was not a factor that was required to be given any significant and

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35 At [20].
36 At [30].

determinative weight in the context of the assessment of whether Anna was settled. I agree with Judge Coyle that to do so would necessarily involve the Court in an exercise of prejudging or predicting the yet-to-be-made decisions of the IPT and Immigration New Zealand. Accordingly, in my view the Judge was correct in treating Anna's immigration status as effectively neutral and not warranting any weight as regards his determination of the question of whether she was settled.

(iii) Is the "settled" defence established?

[96] The appellant's application for Anna's return was made over two years after she was removed from Germany. During the period from November 2014 to October 2016, the appellant had no knowledge of Anna's whereabouts and despite his efforts he had been unable to find her. The appellant cannot of course be criticised for the fact that the application for Anna's return was not brought earlier than it was, as he was powerless to do otherwise, but the passage of time that occurred in this case has caused the s 106(1)(a) defence to become available.

[97] From all the evidence it is clear that Anna is now very well settled in the broadest sense. She is fully integrated into both the school community and the wider community. The self-confidence she exhibits and the success that she has achieved in her school work and extracurricular activities are a clear indication that she has developed a real and authentic sense of belonging and attachment to her social situation and environment. She has wholeheartedly embraced life within the Coromandel community. I consider that she is not merely happy or adjusted to her new environment, but that she has formed significant emotional connections beyond her immediate family which demonstrate security, stability, and permanence. The present case can therefore be contrasted with *Re N (Minors) (Abduction)* and *Graziano v Daniels*, referred to by the appellant.

[98] I am satisfied that the respondent has established that Anna is now settled here in New Zealand, physically and emotionally in terms of her life and living environment in the Coromandel, and that she is also fully integrated into both the school community and the wider community. Although Ms Soljan points out that there was a period of instability and transience when the respondent initially arrived in New

Zealand with Anna, during which the family travelled briefly to Australia and Anna did not attend school, I am satisfied that this has now passed and Anna leads a stable and settled life. Accordingly, I agree with the conclusion reached by Judge Coyle regarding the establishment of the settled defence in s 106(1)(a).

(iv) The Judge's exercise of the s 106(1)(a) discretion

[99] Having found Anna to be settled, Judge Coyle then addressed the issue of the discretion to refuse to order Anna's return to Germany.

[100] In exercising that residual discretion, the Judge applied the approach explained by the Supreme Court in *HJ* at [85] to [87], recognising that it required a balancing of the welfare and best interests of the child against the policies and general purposes of the Convention.[37] The Judge noted that issues such as concealment of the child are to be considered in the context of the discretion, but the court would have to find that factor outweighed the child's welfare interests before it would be appropriate to make an order for return.

[101] In considering Anna's welfare and best interests, Judge Coyle appropriately addressed s 4 and each of the principles set out in s 5 of the Act. The Judge considered there to be no basis for any concern relating to violence. He noted that responsibility for the appellant's injury during the September 2013 driving incident was disputed, and that he was unable to resolve the factual dispute. The Judge further noted that as the Fürth District Court had subsequently awarded the appellant sole custody of Anna, it was clear that it considered that the appellant presents no risk to Anna's safety.

[102] The Judge also considered the principles contained in s 5(d), regarding a child's continuity of care, and s 5(e), regarding the preservation and strengthening of the child's relationship with both her parents. He noted that it was impossible for Anna to have a relationship with both parents because of the respondent's actions and because of her intention of remaining in New Zealand with her husband and youngest daughter, in the event that Anna is required to return to Germany. The Judge also referred to the

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37 At [32]–[33].

importance of preserving Anna's sense of identity (s 5(f)) and noted she now considered herself to be a "Kiwi".

[103] In relation to Anna's welfare and best interests, the Judge also referred to Ms Lightfoot's report and her evidence as to the likely cataclysmic effect on Anna of being returned to Germany. The Judge noted that Ms Lightfoot based her opinion on the effect upon Anna of the September 2013 motor vehicle incident, which Anna had described to her in a manner indicative of and consistent with traumatic recall, and the effect of returning to Germany on Anna's psychological state. Ms Lightfoot considered that leaving behind all of her family and life in New Zealand would for Anna be akin to a death. In her report Ms Lightfoot said that Anna had told her that should she be returned to Germany, she would lose her relationship with her mother who was the most important person to her, and that she would lose her life in New Zealand including the other members of her family, and that she did not want to see her father yet.

[104] The Judge noted that while it appeared that Anna may previously have had a strong attachment to her father, it was significant that she had not had any contact with him for a significant period, and the Judge found that through the passage of that time her attachment to her father had lessened and her attachment to her mother had strengthened. The Judge then referred to Ms Lightfoot's evidence that separating Anna from her mother and thereby severing her primary attachment would cause her trauma and distress and place her in an intolerable situation. The Judge also noted that returning her to Germany would be to separate her from her younger sister with whom she is very close, and her step-father. The Judge concluded:[38]

> Return therefore removes [Anna] 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.
>
> When looking at [Anna] 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.

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38 At [40]–[41].

[105] The Judge then referred to the observations of the Supreme Court in *HJ* that the child's best interests cannot be the only or even the dominant consideration in the exercise of the s 106 discretion.

[106] The Judge then addressed the issue of the respondent's removal and concealment of Anna as being relevant to the exercise of the discretion to order her return to Germany. He considered the policies of the Convention, and noted that the respondent had brought Anna to New Zealand in the knowledge that the Fürth District Court had awarded sole custody of Anna to the appellant, and had thereafter maintained her concealment of her, leaving it to the appellant to eventually locate her. The Judge considered that concealment was a significant factor bearing upon the exercise of the discretion, and identified the following Convention policy considerations as being relevant to his consideration:[39]

(a) respecting and implementing the decision of the German Court to award sole custody of Anna to the appellant, and thereby enabling any further decisions regarding Anna's welfare and best interests to be considered and determined by the German courts;

(b) recognising that the respondent had deliberately attempted to thwart the order of the German court and prevent the appellant from having ongoing involvement in Anna's life; and

(c) by ensuring that those who deliberately set out to thwart court orders made in one jurisdiction are not seen to be able, by means of their efforts and the passage of time, to establish and then seek to rely on a new life for a child in another country in order to avoid an order for return.

[107] Having considered those policy factors which he considered to be significant in the context of the present case, Judge Coyle found that they were outweighed by Anna's welfare and best interests, and he exercised the discretion by declining to make an order for her return to Germany. The Judge explained that he had concluded that

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39 At [45].

her return to Germany would require Anna to be placed in the primary care of her father whom she had not physically seen since 2013, and be separated from her mother, sister, and stepfather. She would also be required to leave the life she presently has in New Zealand and move to a life in Germany which is unknown. The Judge agreed with the evidence of Ms Lightfoot that returning Anna to Germany would place her in an intolerable situation, and he considered that it would be "too cataclysmic for her".[40]

(v) Has the appellant shown that the Judge erred in the manner in which he exercised the s 106 discretion?

[108] As I have already noted in relation to the exercise of the residual discretion, the principles in *May v May* apply on appeal. The appellate court will therefore not interfere with the lower court's exercise of discretion unless the appellant can show that the Judge acted on a wrong principle; failed to take into account some relevant matter; took account of some irrelevant matter; or was plainly wrong.

[109] Ms Soljan submits that the Judge erred in the exercise of the discretion by failing to take into account the following considerations:

(a) that Anna and the respondent are unlikely to be granted residence visas and are unlikely to be able to remain in New Zealand on a long-term basis, having regard to their current immigration status;

(b) that the assessment of the likely impact on Anna of her return to Germany was founded on her returning without her mother and younger sister, when there was no sufficient basis for accepting the respondent's self-serving position that she herself would not return to Germany if Anna's return was ordered by the court;

(c) that Anna's views were based on an incorrect assumption that an order for her return to Germany would mean that she would never see her mother and younger sister again, when the appellant had said he would

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[40] At [46].

pay for Anna to visit her mother in New Zealand should she remain here;

(d) that the appellant had made it clear that he would support shared care of Anna in Germany, if the respondent did herself also return;

(e) that Anna's extended family located in Germany, including her grandparents, would support and assist her to cope with the disruptive effects caused by her abduction and subsequent return; and

(f) that the court in Germany has been seized of Anna's case since 2010 and had already determined that the appellant had the necessary skills and ability to care for her, awarding sole custody to him despite there being a period of separation during which she had not had any contact with him;

(g) that an order for Anna's return would be consistent with her right to know and be cared for by her parents and to preserve her identity, including her nationality; and

(h) that Anna's views, while relevant, should be given only modest weight.

[110] I consider that the matters raised by Ms Soljan were all before the Judge on the evidence presented to the Family Court, and while he did not specifically refer to each of these matters in the context of explaining his reasons for exercising the discretion to refuse to make an order for Anna's return, I do not consider that he erred by not having done so.

[111] Ms Soljan also submits that the Court must send a strong and unequivocal message that the actions of the type taken by the respondent are not acceptable and will not bear fruit. In the present case the respondent's conduct was certainly an egregious flouting of the German court orders. She departed Germany in November 2014 and brought Anna to New Zealand in order to deprive the appellant of future access and in contravention of the German court orders for access, and continued to

conceal Anna in New Zealand when she knew that the court in Germany had awarded the appellant sole custody of her. The respondent's reprehensible actions are the very kind of conduct that the Hague Convention provisions and policies are directed to prevent, and which the courts of all jurisdictions rightly condemn as contrary to the rule of law. Courts in applying the policies of the Convention will be extremely cautious when considering the contentions of a party who, having flouted a court order, nevertheless seeks to take advantage of their unlawful conduct when resisting the return of a child to the jurisdiction in which the orders were made. Here the respondent seeks to rely on the settled defence, notwithstanding that the extended time during which Anna became settled was due to the respondent's own actions and concealment of her daughter in breach of the German court orders. It is important to keep in mind that throughout that extended period, the appellant has been prevented from having any contact whatsoever with his daughter, while the respondent has had exclusive contact and the opportunity to influence Anna to adopt her attitudes towards the appellant, rather than Anna forming her own views independently.

[112] In the present case, the respondent's deliberate and egregious breach of the orders of the German court means that significant weight is to be attached to upholding and respecting the German court orders and condemning the respondent's actions. Having flouted and frustrated the German courts' orders, the respondent seeks to take advantage of the extended period of time during which she has managed to conceal Anna's whereabouts from the appellant by opposing Anna's return on the grounds that she is now settled. However well-intentioned her actions may have been, the respondent's conduct does her no credit and cannot be justified because of what she regarded as the constant harassment of her by the appellant. Her actions cannot be condoned, and I consider that those matters and the relevant Convention policies weigh significantly in favour of making an order for Anna's return to Germany.

[113] On the other side of this balancing exercise in the present case are the welfare and best interests of Anna. The assessment of her welfare and best interests is to be made as at the date of hearing, and for that reason I consider that the expert report prepared by Dr Marianne Schwabe-Hoellein in January 2013, which is relied on by the appellant as representing an informed view of Anna's attitude to her father and as demonstrating her wish to be able to spend time with him, has long since been

superseded by subsequent events. The Schwabe-Hoellein report describes Anna's excited and positive interactions with her father which clearly indicated that she looked forward to meetings with him and enjoyed their time together. Dr Schwabe-Hoellein stated that over the course of the three meetings that she had observed between Anna and her father, she observed that Anna had a secure bond with him and was reassured by her father's presence. That report was prepared when Anna was five and a half years old, prior to the motor vehicle incident in September that year.

[114] The appellant also relies on the expert psychological report prepared for the Nürnberg Higher Regional Court by Dr Gottfried Spangler dated 4 February 2016. This appears to be an extensive report which covers a wide range of issues relating to Anna, her developmental stages, her psychological state, her bond with her parents and her wishes as a child as well as many other topics including some relating to the appellant and respondent, although only certain parts of the report have been produced in evidence. The report was necessarily prepared without the benefit of either interviews or observations of Anna and the respondent, and Dr Spangler recognised that Anna's emotional ties could have changed over the time since she was seen in Germany. He said:[41]

> According to the information from the preliminary report, [Anna] had a secure bond with both parents, so that, from this point of view these are good conditions for her staying with both parents. With her current life situation, especially with her contact with her father being suppressed, we can expect in [Anna] restrictions to her emotional wellbeing or an increased likelihood of emotional stress. For this reason, it is especially important that she has emotionally available attachment figures. There is no current information available on the quality of [Anna's] emotional ties, so we cannot exclude that in the meantime adverse changes in the quality of her emotional ties with both her parents may have occurred. On the basis of the prior substantially positive experience, we deem a consolidation, once the current restrictions have been eliminated, possible indeed.

[115] However, Ms Lightfoot's report contains the most contemporary assessment of Anna and although it is primarily focussed on the issue of Anna's attitude to returning to Germany, in considering the authenticity of Anna's objection Ms Lightfoot necessarily examined and observed matters that are also relevant to Anna's welfare and best interests and as to whether she is settled in New Zealand. As I have already

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41 At 71.

noted, Ms Lightfoot's firm opinion is that Anna is now psychologically and socially integrated in New Zealand and considers New Zealand to be her home. To order Anna's return would be to impose severe and enduring consequences. In the course of her oral evidence in the Family Court, Ms Lightfoot described the traumatic grief that separation from her mother and forced return to Germany would cause as "incredibly dislocating". Ms Lightfoot said:[42]

> Counsel: Is the situation for [Anna], if she's removed from New Zealand and returned to Germany and assuming her mother doesn't go which is what her evidence is, is this a situation akin to how a child needs to deal with the death of a parent and the grief associated with that?
>
> Ms Lightfoot: Sure. That, I mean, that is I think I call it traumatic grief at one point at the end of the report and certainly this a relatively new formulation that is in the appendix of DSM 5, whether one calls it persistent complex bereavement disorder or whether one calls it traumatic separation. It's the same when a child leaves everything that they know and are familiar with and they love and they go to the unknown and the uncertain and the different. It's akin to a trauma as well.
>
> ...
>
> Counsel: And at 8.7 on page 374, you say at the end of that paragraph, "[In] my opinion the effects of disrupting [Anna's] secure attachment will be very considerable and extend over time. The first likely effects will be when [Anna] is told this is going to occur. She will experience a period of significant grief and depression, as she adjusts to the loss of her primary attachment figure."
>
> Ms Lightfoot: Correct. That's at the very least. Whether it persists and becomes something more complex will be dependent upon what services are provided to her and whether she is mentally and emotionally able to adjust. Whether she chooses to do that.

[116] In her report Ms Lightfoot said:

> 8.8 Following on from grief, [Anna] may display anger and behavioural reactions such as oppositionality and lack of compliance, and general dysregulation in behaviour as she protests the decision. It is possible [Anna] will display anger, lack of trust, and avoidance of closeness and intimacy in relationships, on the long-term. This is likely to be especially the case after [Anna] appreciates the reality that her mother and family will not return to Germany. There is also the real possibility [Anna's] developmental progress will be compromised on the short-term, as this transition is likely to preoccupy [Anna] and distract her from education, leisure activities, and enjoyment of life generally ...

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42 Notes of evidence page 100 lines 16 - 26

[117] In paragraph [8.10] of her report, entitled "Loss of Emerging Sense of Self", Ms Lightfoot said:

> [Anna] has recently begun to develop a well-stated sense of self that identifies with NZ and the lifestyle here. This is a very positive beginning to the turmoil of adolescence with all its usual insecurities and anxieties. A return to Germany will require [Anna] to redevelop her sense of self. This is likely to be problematic for her given that she does not now identify as being German, and does not want to live there.

[118] Ms Lightfoot summarised her opinion regarding the effects on Anna of an ordered return to Germany as being:

> **Trauma:** Increased symptoms of post traumatic stress, anxiety, fear about her safety, and hyper-vigilance, in the company of her father.
>
> **Anger and Conflict with Father**: (potentially) causing serious emotional and psychological disturbance.
>
> **Loss of Primary Attachment**: This is one of the most severe and destabilising stressors a child can experience, and is often referred to as "traumatic grief". Serious negative psychological impacts will be apparent definitely on the short-term, but also possibly on the very long-term. [The respondent] believes [the appellant] will completely prevent her having a relationship with [Anna].
>
> **Loss of Sibling Relationship**: Loss of lifelong factor for positive adjustment and resilience.
>
> **Loss of Sense of Self**: This will occur at a particularly challenging stage of development, when insecurities about self are common.
>
> **Cumulative Risk**: It needs to be noted that psychosocial and environmental risk factors produce cumulative negative effects for children, and attachment loss/abandonment and trauma are two of the most serious risk factors in a child's life ... Overall it is likely a required return to Germany without her mother, will have a profound negative psychological impact for [Anna].

[119] I am satisfied that the clearly predictable consequences of ordering Anna's return to Germany would be serious emotional and psychological disturbance, significant destabilisation, traumatic grief, and depression. She is likely to have compromised developmental progress, and be distracted from her education, leisure activities, and enjoyment of life. The possible longer-term effects include avoidance of closeness and intimacy in relationships. Anna's return to Germany, without her mother and sister, to a life with her father is likely to have what Ms Lightfoot describes as a profoundly negative psychological impact upon her. Judge Coyle described the

effects as being "too cataclysmic for her." I agree. I summarise the likely effects identified by Ms Lightfoot as being devastating, and enduringly damaging.

[120] The Supreme Court said in *HJ*:[43]

> [50] Hence, what is in the best interests of the particular child in terms of s 4(1) cannot be the only or indeed the dominant factor in the exercise of the s 106 discretion. To take that view would be to "limit" the discretion contrary to s 4(7). In particular, the best interests of the particular child must be capable of being outweighed by the interests of other children in Hague Convention terms, if to decline return would send the wrong message to potential abductors. As we will develop below, striking the right balance between the best interests of the child or children on the one hand, and the deterrent policy of the Convention on the other, lies at the heart of the exercise of the s 106(1)(a) discretion. Waite J put the point well in *W v W (Child Abduction)* when he said that it was implicit in the general operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases.

[121] Here the predictable effects of an order for return are much more than tears and mere physical and emotional upheaval. Here the effects of an order for return will be harmful and damaging, with potential lifelong consequences. In my view, an order for Anna's return would be contrary to the purpose of the Act which is to promote children's welfare and best interests and to facilitate their development.[44]

[122] Relevantly, the preamble to the Hague Convention states:

> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
>
> Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access ...

[123] While the express purpose of the Convention is to protect children from the harmful effects of their wrongful removal, the one-year period provided for in s 106(1)(a) is a recognition that the effects of removal may dissipate over time during which an increasing state of stability and settlement may develop. Where a child is found to be settled and is likely to suffer harmful effects as the result of an order for return, the refusal of an application for an order for return would not be inconsistent

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43 Citing *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 (Fam) at 220.

44 Section 3(1)(a) of the Care of Children Act 2004.

with the fundamental purpose of the Convention in protecting children from the harmful effects of relocation.

[124] When dealing with a situation where a settled defence has been established under s 106(1)(a) and weighing up the objectives of the Act and of the Convention in securing the prompt return of children wrongfully removed to a contracting state, in my view it would be simply wrong for the welfare and best interests of the child or children to be effectively sacrificed or relegated, and that they be subjected to severe trauma with potentially life-long adverse and destabilising effects, in order to uphold the deterrent policy of the Convention. To make an order having that effect would be contrary to the very purpose of the Care of Children Act. Each and every child is entitled to the full protection of the law as provided for in s 3 and 4 of the Act, and where, as in the present case, it is clear that a child will be seriously if not severely harmed by an order for return, even a strong case for upholding the Convention such as also exists in the present case must yield to the welfare and best interests of the child.

[125] I see no error on the part of Judge Coyle in the manner in which he exercised the discretion conferred by s 106(1)(a) to refuse to order Anna's return to Germany. The appellant has failed to show that the Judge acted on a wrong principle, failed to take any relevant considerations into account, took irrelevant considerations into account, or that he was plainly wrong.

The child objection defence

Relevant law

[126] Section 106(1)(d) provides that it is also a ground for refusing to order return where 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 s 6(2)(b), also to give weight to the child's views.

[127] In *White v Northumberland*, the Court of Appeal considered two diverging approaches to the child objection defence that were evident in the case law.[45] The first, described as the "shades of grey" approach, gave varying degrees of weight to the child's views depending on the child's age and maturity.[46] The second, described as the "in or out" approach, held that if a child is not of an age and degree of maturity which makes it appropriate to take his or her views into account, the child must be returned despite his or her objections.[47]

[128] The Court of Appeal in *White v Northumberland* noted that the "shades of grey" approach had prevailed in England,[48] and also considered that the New Zealand legislature had endorsed this approach by using the words "give weight to" in s 106(1)(d). The child objection defence is accordingly not a matter of determining as an absolute question whether the child is of an age and degree of maturity such that it would be appropriate to take his or her views into account. Rather, the following four-step approach is taken:[49]

(a) Does the child object to return? If so;

(b) Has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views? If so;

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

(d) How should the residual statutory discretion be exercised?

[129] Where the Court considers that the child's views have been unduly influenced by some other person, such as the abducting parent, or that the objection to return is due to a wish to remain with the abducting parent, it may be that little or no weight is given to the child's objection.[50]

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45 *White v Northumberland* [2006] NZFLR 1105 (CA).

46 Adopted by Balcombe LJ in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 (CA).

47 Adopted by Millett LJ in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 (CA).

48 Referring to *Zaffino v Zaffino (Abduction: Children's Views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410.

49 *White v Northumberland* [2006] NZFLR 1105 (CA) at [44] and [47].

50 *Re J (Abduction: Child's Objections to Return)* [2004] EWCA Civ 428, [2004] 2 FLR 64 at [60]–[61].

[130] In exercising the residual discretion, the Court's primary task is to consider the child's objection (having decided how much weight is appropriate to give to it) when set against the fundamental policy of the Hague Convention,[51] namely that children are to be returned to their place of habitual residence so that the courts of that contracting state can make the determination about the children's best interests.[52]

[131] In *White v Northumberland*, the child was ten years of age. His mother had brought him to New Zealand from England. The child expressed a clear objection to returning to live in England, and a clear preference for his living and schooling circumstances in Christchurch. The psychologist's report, however, noted that the child did not yet have any clear sense of his own identity and was not mature enough to make these decisions for himself. Rather, he still saw himself and his mother very much as a "unit". The Family Court Judge concluded that the child's views should be given only "modest weight",[53] and ordered the child's return. On appeal, her decision and approach were upheld by both the High Court and Court of Appeal.[54]

[132] Ms Soljan refers to *Department of Communities (Child Safety Services) v Garning*, a decision of the Australian Family Court.[55] In that case, the mother took her four daughters, aged 14, 12, nine and eight years old at the time of hearing, from Italy to Australia. All four girls expressed a wish to remain in Australia with their mother. The family consultant who interviewed the girls said that each of them reported being happy in Australia; they enjoyed their school and were making friends. However, each also identified missing aspects of their lives in Italy, including school, friends and family members. The opinion of the family consultant was that the basis for the girls' objections to returning to Italy was predominantly related to their perception that their father had historically perpetrated violence against their mother. They said they would accept returning to Italy if their mother accompanied them and

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51 *White v Northumberland* [2006] NZFLR 1105 (CA) at [25], citing *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 (CA) per Balcombe LJ at 730.

52 See *S v S* [1999] 3 NZLR 528 (CA) at [9], cited in *W v N [Child abduction]* [2006] NZFLR 793 (HC) at [43] per Chisholm J.

53 *N v W* FC Christchurch FAM-2005-009-3881, 13 March 2006 at [42].

54 See *W v N [Child abduction]* [2006] NZFLR 793 (HC); *White v Northumberland* [2006] NZFLR 1105 (CA).

55 *Department of Communities (Child Safety Services) v Garning* [2011] FamCA 485; upheld on appeal: *Garning v Director-General, Department of Communities (Child Safety Services)* [2012] FamCAFC 35.

they did not have to live with their father. Forrest J concluded that the girls' objection to being returned to Italy did not show "a strength of feeling beyond the mere expression of a preference or of ordinary wishes",[56] which is a requirement under the Australian legislation. He therefore did not take account of their views and ordered the return of the children.

[133] The Australian legislation contains a further requirement of the child objection defence that is not found in s 106 of the Act. Regulation 16(3)(c) of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) provides that a Court may refuse to order return if a person opposing return establishes each of the following:

(a) the child objects to being returned;

(b) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes; and

(c) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.

[134] Given the differing test in the Australian context, in particular element (b) which is not part of the New Zealand test, I consider the decision in *Department of Communities (Child Safety Services) v Garning* to be of only limited relevance to this present case.

Analysis

[135] In considering Anna's objection to being returned to Germany, Judge Coyle applied the four-step approach endorsed by the Court of Appeal in *White v Northumberland.*[57]

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56 *Department of Communities (Child Safety Services) v Garning* [2011] FamCA 485 at [116] and [118].

57 At [44] and [47].

(i) Does Anna object to being returned?

[136] The Judge found that Anna had clearly expressed her objection to being returned to Germany.

[137] In his reports to the Family Court,[58] Mr Blair referred to Anna's clearly expressed objections to being returned to Germany. In his report of April 2017 Mr Blair said:

> [Anna's] instructions are that she wants very much to stay with "my family" and not be taken from them …
>
> [Anna] 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 [Anna], 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".
>
> [Anna] 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 [her stepfather and younger sister]. She voiced her objection/opposition to being returned to Germany as a return being "horrible, horrible, horrible".
>
> [Anna] 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. [Anna] later added that by requiring her return to Germany would be to "pull me out of my home".

[138] The Judge noted that Ms Lightfoot had in her report referred to Anna's statement to Mr Blair that she was very opposed to returning to Germany, as she would be taken away from her mother who is very important to her; she would be taken away from her family in New Zealand; she would be taken away from her friends and other relationships; she would be taken away from her home; and because she is a "Kiwi" now and wishes to remain here. Anna further explained to Mr Blair that returning to Germany would mean she would be placed into her father's custody and care in a country she associates with unhappiness and adult conflict. Mr Blair also noted that Anna had expressed reluctance to have any contact with her father. In her report, Ms Lightfoot referred to the reasons Anna had given Mr Blair and said that during her

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58 Dated 24 April 2017 and 9 June 2017.

own interview with Anna, she had clearly expressed her objection to returning to Germany. During cross-examination by Mr Blair in the Family Court, Ms Lightfoot said:

> Counsel: Did you establish from her any actual opposition to going back to Germany? You mentioned the cities and the streets. Were there grounds that she articulated which were human grounds?
>
> Ms Lightfoot: There was a resistance to being placed in the care of her father.
>
> Counsel: Okay.
>
> Ms Lightfoot: She says I'm not ready for that.
>
> Counsel. ... Was Germany and I've indicated this in one of my reports and I want to check it with you. Was Germany the country which she associates with that problem in 2013?
>
> Ms Lightfoot: It's part of her overall reaction to being returned to Germany but overall I have to say that her choices are not anti-Germany, they're pro-New Zealand and everything that is here for her and in fact if you subtract everything that she'd be leaving behind, she's leaving behind herself, her reality, her orientation on life and her day-to-day living. She will have nothing left to orient herself to apart from a man she hasn't seen for five years and once thought fondly of but since that had a traumatic experience at the hands of or at the hands of him and her stepfather. So in that sense it's all about leaving everything that she knows here in New Zealand and going to nothing that she has in Germany.

[139] On the basis of the evidence and particularly the assessment made by Ms Lightfoot, I agree with Judge Coyle's finding that the evidence clearly establishes that Anna has a strong objection to returning to Germany. Indeed, Mr Blair submits that Anna's resistance to having any involvement with her father has strengthened considerably since the Family Court hearing due to the incident on 28 September 2017, when her father uplifted her from her school without warning in the presence of two strangers and removed her to Auckland where she remained until the police intervened. I accept that the events of 28 September 2017 inevitably reinforced Anna's sense of trepidation and anxiety about her father.

(ii) Has Anna attained an age and degree of maturity at which it is appropriate to give weight to her views?

[140] Judge Coyle then addressed the question of whether Anna had obtained the age and degree of maturity at which it is appropriate to give weight to her views, and found that she has. I also agree with that finding. In her report Ms Lightfoot was specifically

requested to consider the issue of Anna's maturity and ability to understand the implication of her objection to return to Germany. She summarised her conclusions regarding Anna's maturity by noting that she had demonstrated a good level of organised and rational thought, had already begun making important life decisions such as which school she wished to attend, and has a very good overall developmental ability. She said:

> In my assessment [Anna] does have an advanced developmental ability for her age, and would be more mature than many children her age in most areas. I consider she has made a decision that has been understandably, both emotionally and logically based, and aimed at meeting her primary needs. While [Anna] is perhaps yet too young to apply a high order analytical, multifactorial 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 and adults would make in her situation.

(iii) What weight should be given to Anna's views?

[141] Ms Soljan submits that by reason of Anna's age and the effects of her mother's influence upon her, only modest weight should be given to her views. In my view, however, it is clear from the contents of Mr Blair's reports and Ms Lightfoot's report and evidence that Anna has explained her reasons for her objection, and that they are sensible, logical, and appropriate for a child of her age and situation. She has clearly demonstrated a level of maturity above that of others her age, and an ability to explain the reasons for her views which are well founded and show no indication of being coached or influenced by her mother to adopt a view that is not sensibly her own. I consider that Anna's views regarding her life in New Zealand and her objection to being required to return to Germany are appropriately to be given considerable weight.

(iv) How should the residual statutory discretion be exercised?

[142] Having found Anna's objection to have satisfied the requirements of s 106(1)(d), I accordingly come to the fourth and final step, namely whether the Judge erred in the manner he exercised the discretion to refuse to order Anna's return.

[143] The Judge exercised the discretion to refuse to make an order for Anna's return to Germany for the same reasons as he exercised the discretion in relation to the settled defence under s 106(1)(a). I find that the Judge did not fail to take any relevant

considerations into account. The decision he reached to refuse to order Anna's return was open to him to make having regard to the evidence, and was certainly not plainly wrong.

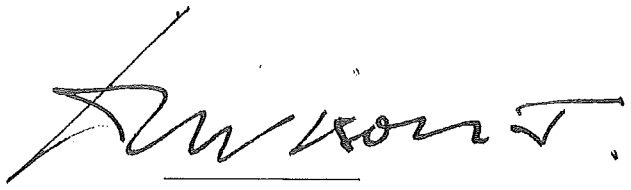
[144] The evidence relating to the likely effects on Anna of returning to Germany, is also relevant to the exercise of discretion in the context of s 106(1)(d). The establishment of each of these two defences provides support for the other in terms of the exercise of the discretion to refuse to order Anna's return to Germany.

Conclusion

[145] The fact that Anna is now settled in New Zealand, coupled with her clearly expressed and well-reasoned objection to being returned to Germany, provide a compelling basis and secure foundation for the decision of the Family Court to refuse to order her return to Germany. The decision does not of course prevent the appellant from pursuing the proceedings he has commenced in New Zealand regarding contact with Anna.

[146] Nor is this decision to be taken as condoning the respondent's actions, which as I have said amounted to an egregious breach of her legal obligations. Rather, in this case Anna's welfare and best interests – as evident from the fact she is so well settled in her present life in New Zealand and has so firmly expressed her objection to returning to Germany – outweigh the policy provisions of the Convention, making it appropriate for the application for return to be refused.

[147] For these reasons, by my result judgment of 18 May 2018 I dismissed the appeal.



Paul Davison J