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**IN THE FAMILY COURT
AT AUCKLAND**

**FAM 2015-044-663
[2016] NZFC 2814**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN NEOFIT MIKOVA
 Applicant

AND TATIANA TOVA
 Respondent

Hearing: 7 April 2016

Appearances: I Blackford and H Holmes for the Applicant
 G Cameron for the Respondent

Judgment: 11 April 2016

RESERVED JUDGMENT OF JUDGE L de JONG

Introduction

[1] This case is about Andrew. He turns 6 in [age details deleted].

[2] Last Thursday I presided over a half day “submissions only” hearing to address the father’s Hague Convention application seeking Andrew’s return to [name of country deleted]. The mother opposes the application.

[3] Andrew is a NZ citizen. There is a dispute about what Andrew’s habitual residence is, or whether he has a habitual residence. The mother’s position is that [name of country deleted] was not Andrew’s habitual residence and, even if it was, he will be at grave risk if he is ordered to return to [name of country deleted]. Either way, the mother says Andrew should not be returned to [name of country deleted].

[4] This judgment was reserved until now.

Interlocutory application to file evidence out of time

[5] A preliminary issue arose from the mother’s interlocutory application for leave to file an affidavit dated 19 February 2016 out of time. This application was adjourned until last Thursday to allow the father to investigate new matters raised by the mother about statements allegedly made by an employee of the [name of country deleted] central authority.

[6] The father filed an affidavit dated 1 April 2016 with a translated statement from the central authority employee in question.

[7] Counsel for each party are very experienced Hague Convention lawyers. They both took an appropriately robust approach to the mother’s interlocutory application and consented to both parents’ affidavits being received by the Court on the basis the contents of the other are not accepted but that it is necessary the Court has this evidence. Each counsel made submissions about the relevance of this evidence.

What is the brief background?

[8] The parents are both originally from [name of country deleted]. They met in NZ and after a few months began living together. As a result of this relationship their only child was born on [date deleted] 2010. They were married on [date deleted]. Both parents have NZ citizenship.

[9] The parents discussed¹ leaving NZ and living in London. For this reason the mother and Andrew left NZ in February 2011. It was agreed they would spend time with family in [name of country deleted] while they waited for the father to settle matters in NZ.

[10] By May 2011 the father had sold up their NZ business interests and had joined his family in [name of country deleted]. They relocated to London in August 2011, bought a home and the father started a business there. However, during a family trip to [name of country deleted] in Easter 2012 it was decided the family would remain in [name of country deleted] and live there. There is a dispute between the parents about whether this was a joint decision or whether it was forced on the mother by the father.

[11] However, what the parties agree is that the family then lived in [name of country deleted] and they each developed businesses in [name of country deleted]. The mother contends the father was violent and abused alcohol and drugs. In September 2012 the mother and Andrew left the family home to live with maternal family in [name of country deleted].

[12] In May 2013 the parties' London home was sold and a year later the mother purchased two apartments in [name of country deleted]. One for her and Andrew to live in, and the other as a rental property.

[13] When a divorce order was issued by consent in February 2015 it provided, among other things, for Andrew to have regular weekend contact with his father.

¹ The mother says she only agreed to move after much pressure from the father but with the knowledge they would return if things didn't work out.

[14] On 1 June 2015 the mother unilaterally relocated Andrew to NZ without reference to the father.

What is the Hague Convention about?

[15] The Hague Convention on the Civil Aspects of International Child Abduction is what its title suggests. It is an international treaty dealing with international child abduction. It was originally introduced out of concern about the number of children abducted between countries in a family context, and the judicial inconsistency in the way cases involving abducted children were being decided.

[16] The Convention was adopted by New Zealand statute in 1991 and is incorporated in our COCA.

[17] The preamble to the Convention , and Article 1, set out the principles and objects of the Convention, which include;

- (a) The interests of children is of paramount importance;
- (b) Children must be protected from the harmful effects of abduction;
- (c) Children must be promptly returned to the originating country;
- (d) The law relating to the “rights of custody and access” in the originating country must be respected in all other Convention countries.

[18] These principles and objects have been universally applied on the basis that:

- (a) The Court in the originating country is the most appropriate forum for determining the relative merits of “custody” and “access” disputes;
- (b) Once the grounds for an application for return have been made out the child must be returned to the originating country unless one of the s106 defences is made out.

What are the issues?

[19] The father must satisfy this Court on the balance of probabilities that each of the four requirements set out in s 105 are made out before an order to return Andrew to [name of country deleted] can be issued - *Hall v Hibbs* [1995] NZFLR 762 at 764; *H v H* (1995) FRNZ 498 at 50; *Basingstoke v Groot* [2007] NZFLR 363 (2006) 26 FRNZ 707

[20] The mother accepts three of the four requirements in s 105 have been made out. This concession is entirely appropriate in the circumstances of this particular case and means the father is left to satisfy this Court under s105(1)(d) that Andrew was “habitually resident”² in [name of country deleted] immediately before he was taken to New Zealand by his mother in May last year. This burden of proof remains on the father at all times and, in this sense, the mother does not have to prove anything.

[21] Therefore, the first issue this Court must decide is whether Andrew’s habitual residence was [name of country deleted] immediately before he was taken to NZ by his mother. If it was not, the applicant’s case must fail. If it was, then a second issue arises because what the mother says is that, even if [name of country deleted] was Andrew’s habitual residence immediately before his alleged abduction, she opposes Andrew’s return by relying on the s 106(1)(c) “grave risk” defence. She says there is a grave risk Andrew’s return to [name of country deleted] will expose him to physical or psychological harm, or otherwise place him in an intolerable situation.

[22] In the case of the grave risk defence the onus is on the mother to satisfy this Court on the balance of probabilities that the grave risk defence has been made out to decline ordering Andrew’s return – *Basingstoke v Groot* [2007] NZFLR 363; *HJ v Secretary for Justice* [2007] NZFLR 195.

ISSUE 1: WHAT IS ANDREW’S HABITUAL RESIDENCE?

[23] Although s 95 refers to the concept of habitual residence, this phrase is not defined in any statute or in the Convention itself.

² In terms of s 105(1)(d)

[24] In *Punter v Secretary for Justice* [2007] 1 NZLR 40 the Court of Appeal confirmed that the principles relating to habitual residence were correctly stated in its previous decision of *SK v KP* [2005] 3 NZLR 590. These principles, and an analysis of the applicant's burden of proof, were addressed by the Court of Appeal in *Basingstoke v Groot* [2007] NZFLR 363.

[25] In summary, what can be distilled from these cases is as follows

- (a) The meaning of "habitual residence" is different to "ordinary residence" and "domicile."
- (b) Habitual residence involves a broad factual inquiry which should take into account all relevant factors, including "settled purpose", "the actual and intended length of the stay", "the purpose of the stay, the strength of ties" to the relevant countries, "the degree of assimilation" into the country "(including living and schooling arrangements), and cultural, social and economic integration."
- (c) Settled purpose or intention is "important but not necessarily decisive" and should not override the underlying reality of the connection between the child and relevant countries nor "obscure the broad factual nature of the inquiry."
- (d) The parents' purpose or intention should be assessed on the basis of their subjective intention and the "objective manifestations of the intent". The Court's focus will usually be on the parental intentions as to the quality and length of stay in the new country "rather than to their intentions as to the abandonment of the previous habitual residence."
- (e) A child can not have a settled purpose that is different from the parents, and one parent cannot terminate a habitual residence in breach of the other parent's rights.

- (f) Habitual residence in one country can be lost before a new habitual residence has been acquired in another country.
- (g) The length of the proposed stay in a new country can be relevant to the issue of a whether there is a settled purpose. “Any settled purpose does not have to be to live in a place indefinitely but can be for a limited period as long as there is intended to be a sufficient degree of continuity for it to be properly treated as settled.”
- (h) A stay in a new country for a limited time or temporary purpose may not necessarily qualify as habitual residence
- (i) Although a child cannot have more than one country of habitual residence, it is possible for a child’s habitual residence to change periodically.
- (j) Deciding conflicts of evidence in Hague cases should be “done in the usual way, taking into account such factors as any independent extraneous evidence, consistency of the evidence (both internally and with other evidence) and the inherent probabilities.”

What does the father say?

[26] In simple terms the father’s position is that both parents, and Andrew, were living in [name of country deleted] for three years before the mother secretly left with Andrew to live in NZ in May/June 2015. It is submitted on behalf of the father that the facts show the parents had a shared intention for Andrew to live in [name of country deleted] with a sufficient degree of continuity to be properly described as settled.³

[27] The facts relied on by the father to establish that Andrew’s habitual residence was [name of country deleted] immediately before he was removed from that country include; the family moved to [name of country deleted] in response to the mother’s dissatisfaction with the father working long hours, her wish to be involved

³ Counsel relies on *LK v Director General, Dept of Community Services* [2005] HCA 9.

in the business and preferably in [name of country deleted]; that Andrew spent most of his life in [name of country deleted] and the most “significant, memorable and meaningful years of his life”; [name of country deleted] was the only home Andrew has any memory or knowledge of; Andrew was continuously enrolled in kindergarten and with health authorities in [name of country deleted]; divorce orders were made by consent in February 2015; the parents abandoned NZ as their habitual residence when they sold up and left in 2011 without any plan to return; if the parents were in England long enough for Andrew to acquire a new habitual residence, they abandoned England as their habitual residence by selling up and cutting all ties to that country; each parent developed businesses in [name of country deleted]; the mother purchased a home in [name of country deleted] and has a rental property there; the mother’s parents live in [name of country deleted]; the mother’s own evidence shows that her departure from [name of country deleted] was planned, sudden, secret and without reference to the father.

What does the mother say?

[28] The mother disputes [name of country deleted] is Andrew’s habitual residence. The mother always understood she could return to NZ at anytime if she was unhappy. She says she did not intend or consent to remain in [name of country deleted], and was “trapped” in that country by the father.

[29] The mother says by way of background that she didn’t have the courage to leave her relationship with the father right from the time they were living together in NZ. However, after much pressure, the father proposed they go to London for a year ‘to see how it goes. He told me if things doing (sic) work out or if I wasn’t happy, I would come back to New Zealand.’⁴

[30] On this basis the mother agreed to leave NZ, with Andrew, in advance of the father. It was decided the mother would go ahead to [name of country deleted] to spend time with Andrew’s maternal grandparents while the father was left to sort out things in NZ and sell their businesses.

⁴ Paragraphs 31 & 32 of mother’s affidavit dated 15 December 2015.

[31] In anticipation of their departure the father prepared a “power of attorney” authorising the mother to travel with Andrew to a range of countries. This was done as a precaution in case the father’s written consent was required.

[32] The mother says the move to London went well. However, what happened next is not straight forward. The parties planned a two week Easter trip to [name of country deleted] in April 2012. While the mother visited family with Andrew during this Easter trip, the father worked. When it was time for them to go back to London, the father announced they would stay in [name of country deleted] instead of returning. When challenged by the mother about this, she says the father yelled at her. She says “this day was the beginning of hell for Andrew and I.”⁵

[33] The mother says the father organised to rent out their London property and within a week their London belongings arrived. The parties argued about the father’s decision but the father was unmoved. In response, the mother put in place arrangements to ensure she received a half share of the London sale.

[34] The mother says the father’s behaviour deteriorated after this. He spent less time with them and would return home drunk, “often under the influence of illegal drugs.”⁶ She says he became more violent and hit her.

[35] The mother alleges the father bought a gun and threatened her with it. On one occasion she says he held the gun to her head and raped her. She called the Police. She is unclear about how it happened but believes the father paid the Police off. He then “hit me really hard multiple times and said if I call the Police one more time or ever tell anyone about what is happening at home he would kill me. This all happened in front of Andrew. He was crying the whole time and running around the room.”⁷

[36] The mother says, after this, she never talked about her abuse. The physical abuse got worse and her health deteriorated. With the help of her own parents the mother left the father with Andrew in September 2015.⁸

⁵ *Supra*, at paragraph 37.

⁶ *Supra*, at paragraph 40.

⁷ *Supra* at paragraph 40.

⁸ Although the mother’s evidence at paragraph 47 of her affidavit is that the parties separated in

[37] The mother says the father continued to abuse her by yelling and screaming, usually at night when he was drunk or under the influence of drugs. She says she found the father's "power of attorney" that he had signed on 18 February 2011 and used it to move to NZ with Andrew after selling her [name of country deleted] apartments. They flew to NZ on 31 May 2015 and by June the mother had applied for a protection order.

[38] The mother's evidence is that [name of country deleted] is "overwhelmed by Syrian refugees some of which have been uncovered as ISIS fighters as well as having Al Qaeda connections. There is an overwhelming sense of fear among the population with a lot of people making the decision to leave the country. The law enforcement resources have already been stretched by the overwhelming amount of crime happening currently in [name of country deleted], which is further complicated by the amount of corruption in their ranks."⁹ The mother says [name of country deleted] is a poor country and is [details of corruption deleted]¹⁰ She says crime has "increased dramatically."

[39] By way of example, the mother explains she was the victim of crime in [name of country deleted]. Her car was stolen and "I was awoken multiple times by men unknown to me banging on my door. The mother says her wallet was taken and the Police declined to take action.

[40] It is in the context of this background and history that the mother says she did not intend to live in [name of country deleted]. The situation was forced on her without any way out and under threat of violence.¹¹

What is this Court's decision about Andrew's habitual residence?

[41] For the purpose of s 105(1)(d) this Court is only required to determine what, if any, was Andrew's habitual residence immediately before his mother took him to NZ at the end of May 2015. This Court finds it was [name of country deleted].

January 2015 it is accepted by counsel that this is an error and that the parties actually separated in September 2015.

⁹ Mothers' affidavit dated 15 December 2015 at paragraph 58.

¹⁰ *Supra*, at paragraph 60.

¹¹ Family members and friends have also filed affidavits about the father's alleged violence.

[42] By way of background, Andrew's habitual residence was NZ when he was born. When he was about [age details deleted] Andrew left NZ with his mother while his father was initially left to settle the family's affairs.¹²

[43] Having regard to the legal principles identified in paragraph [25] of this judgment, Andrew's habitual residence was no longer NZ by the time the family moved to London in May 2011. Whether or not the father had told the mother they could return to NZ if things didn't work out in London, the independent extraneous evidence suggests it is likely Andrew's habitual residence changed to England around the end of 2011 or beginning of 2012. By that time his parents had a well settled intention to remain in London. They had purchased a home, they started a business there, they had left NZ behind, and London was close enough for them to visit family in [name of country deleted]. At worst, Andrew did not have a habitual residence between August 2011 and April 2012.

[44] Given the summary nature of this jurisdiction, it is difficult for this Court to determine what exactly happened in April 2012 which led to the parties to remain in [name of country deleted] on a visit to that country. The father says this was what the mother wanted but the mother says it was not.¹³ Whatever the circumstances of their move to [name of country deleted] this Court finds that by at least February 2015 Andrew's habitual residence was more likely than not to be [name of country deleted].

[45] The reality of the situation is that by February 2015 the actions of both parents showed they had chosen to live and work in [name of country deleted], they had sold their London home and divided the proceeds between them, each parent had started their own businesses in [name of country deleted], the mother had purchased an apartment in [name of country deleted] for her and Andrew to live in, the mother had purchased another apartment in [name of country deleted] for investment purposes, Andrew regularly attended kindergarten in [name of country deleted], Andrew had a close relationship with extended maternal family members, and the parents used the [name of country deleted] Family Court system to make a divorce

¹² The mother says she didn't want to live in London but did on the understanding she could return if things didn't work out.

¹³ This Court notes with some interest that the despite what the mother says happened in April 2012 she did not get any legal advice about what she could do about the situation she was faced with.

order by consent. The consent order provided for Andrew to be in his mother's day to day care and contact with his father each weekend. The order also dealt with financial support.

[46] It is also noted by this Court that the mother left [name of country deleted] on three separate occasions. While the mother did not take Andrew. Although Andrew was taken by his mother to NZ at the end of May 2015 armed with a "power of attorney,"¹⁴ the mother was aware the father did not consent to Andrew living in NZ and the secrecy surrounding her departure reflected this. By then the family had been living in [name of country deleted] for three years.

[47] In this Court's view, together the above factors demonstrate on the balance of probabilities that immediately before Andrew was removed from [name of country deleted] on 31 May 2015 the parents had a shared intention for Andrew to live in [name of country deleted] with a sufficient degree of continuity to be properly described as settled.

ISSUE 2: IS THERE A GRAVE RISK IF ANDREW RETURNS TO [NAME OF COUNTRY DELETED]?

Introduction

[48] As this Court has determined [name of country deleted] is Andrew's habitual residence, this Court must now order his return in accordance with s 105(2) unless satisfied a s 106 defence has been made out.

[49] The mother's opposition to Andrew's return is based on the s 106(1)(c) "grave risk" defence. She says there is a grave risk Andrew's return to [name of country deleted] would expose him to physical or psychological harm, or otherwise place him in an intolerable situation.

[50] The onus is on the mother to satisfy this Court on the balance of probabilities that the grave risk defence has been made out and that the Court's discretion should

¹⁴ The power of attorney was signed in NZ in the context of the mother travelling ahead with Andrew in anticipation of their move to London.

be exercised to refuse his return – *Basingstoke v Groot* [2007] NZFLR 363; *HJ v Secretary for Justice* [2007] NZFLR 195..

What are the relevant grave risk legal principles?

[51] There are a cluster of principles which can be distilled from New Zealand and international case law relevant to our interpretation of the Convention including:

- (a) The harm must be substantial, severe or significant – *Damiano v Damiano* [1993] NZFLR 549; *A v A* (1996) 14 FRNZ 348
- (b) The grave risk must be substantial – see *Clarke v Carson* (1995) 13 FRNZ 662; [1995] NZFLR 956; *Damiano*.
- (c) The grave risk must be associated with the “returning” of the child to the originating country rather than associated with the “returning” of the child into the arms of the other parent – *S v S* [19099] NZFLR 513; *Armstrong v Evans* (2000) 19 FRNZ 609; [2000] NZFLR 984; *KS v LS* [2003] [2003] 3 NZLR 837; (2003) 22 FRNZ 716 as approved by the Court of Appeal in *HJ v Secretary for Justice* [2006] NZFLR 1005 in preference to *El Sayed v Secretary for Justice* [2003] 1 NZLR 349
- (d) Unless otherwise demonstrated, our Court can, on the face of matters, have confidence Family Courts in other Hague Convention countries have the “ability and inclination” to protect children, particularly if their legal system is based on “best interests” – see *Re E (a Minor) (Abduction)* [1989] 1 FLR 135; *Murray v Director Family Services* [1993] FLR 92--416; *S v S* [1999] NZFLR 513; *Hollins v Crozier* [2000] NZFLR 775; *KMH v Chief Executive of the Department of Courts* [2001] NZFLR 825
- (e) The ability of the originating country to provide protection is likely to be a “highly relevant consideration.”

- (f) Hague Convention defences (and grave risk defence in particular) are by their very nature difficult to make out – *S v S* [1999] NZFLR 513; *KS v LS*; *HJ v Secretary for Justice* [2006] NZFLR 1017
- (g) An abducting parent cannot rely on this defence by creating a situation of potential harm, such as refusing to return to the originating country with the children – *C v C* [1090] 2 All ER 465; *Clark v Carson* (1995) 13 FRNZ 662.
- (h) While this defence is not to be used as a device to litigate best interests, this does not mean the assessment of risk is made without reference to the children’s interests and circumstances – *KMH v Chief Executive of the Department of Courts* [2001] NZFLR 825.
- (i) If the grave risk defence is made out the Court must exercise its residual discretion to determine whether or not the children should be returned to their originating country in accordance with the principles identified in the obiter comments of the Supreme Court in *Secretary for Justice v HJ* [2007] 2 NZLR 289; [2007] NZ SC 93; [2007] NZFLR 195. See also *Smith v Adam* [2007] NZFLR 447 (CA).

What does the mother say?

[52] The mother says the parties met in NZ in March 2006 and early in the relationship she found the father’s “behaviour strange. He was often rude, acted abnormally and sometimes out of control.”¹⁵ She said their relationship was abusive. The father would get drunk and yell. He pushed her when angry.

[53] Despite the apparent seriousness of this abuse and his drinking in the first three months of their relationship, the mother says they began living together in June 2006. Since then the mother says the father has continued to drink excessively, has been “extremely rude and arrogant to some of my friends”¹⁶ and has slapped her face. She says he called her “stupid” and “dumb” and swore at me a lot.”¹⁷

¹⁵ Paragraph 11 of mother’s 15 December 2015 affidavit.

¹⁶ *Supra*, paragraph 19.

¹⁷ *Supra*, paragraph 28.

[54] The mother's friend¹⁸ has filed an affidavit. She says she saw and heard the parties arguing about 8 years ago when the father squeezed the mother's face causing her to cry.

[55] The mother filed a lot of evidence about the father's violence and drug/alcohol abuse, including evidence from extended family members. Some of the allegations are very serious. She also filed a lot of evidence about crime and corruption in [name of country deleted]. The evidence regarding all these allegations is briefly summarised in paragraphs [28] to [40] in this judgment.

[56] In general terms it is submitted on behalf of the mother that, while [name of country deleted] has a legal system and is part of the European community, the degree of corruption and lawlessness in [name of country deleted] means there is a grave risk Andrew's return would expose him to physical or psychological harm, or otherwise place him in an intolerable situation.

[57] A variety of reports, and media articles, are attached to the mother's affidavit to show the place [name of country deleted] has in the European Union is in jeopardy, and so is [name of country deleted]'s ability to dispense justice fairly and in a timely fashion.

What does the father say?

[58] The father denies he had problems with alcohol or was violent to the mother. He denies using drugs or that the Police were called to their house.

[59] The father's version of key events is quite different from the mother's. He cannot understand why the mother chose to live with him, or marry him, if she believed he was so "strange" and violent.

[60] The father says important decisions in the relationship were made jointly, including the decision to have a child, to live in London and to eventually live in [name of country deleted]. He recalls the mother signed an agreement in April 2012

¹⁸ Jessica Anderson filed an affidavit dated 14 December 2015.

for the first property they rented in [name of country deleted] but he has not produced a copy of the agreement.

[61] The father says he had a loving and caring relationship with his son and had him every weekend. He says there is no risk of any kind to Andrew if he is returned to [name of country deleted].

[62] It is submitted on behalf of the father that this case involves a “blatant and calculated abduction ... in direct contravention of the father’s rights of custody”¹⁹ and that the [name of country deleted] Courts are “more than able to address any welfare issues and allegations of risk.”²⁰ Counsel for the father submits there is no expert evidence of the alleged risk of harm and seriousness of harm as deemed necessary by the High Court in *Adams v Wigfield* (1993) 11 FRNZ 279, and the mother’s defence must therefore fail.

What is this Court’s decision about grave risk?

[63] The allegations made by the mother about the father’s violence and drug/alcohol abuse are hotly contested. The most serious of those allegations involve the mother being raped by the father at gun point. However, the tenor of the evidence produced on behalf of the mother is that the violence, in all its different forms, was constant and/or oppressive to the extent the mother saw no way out, especially in light of the level of corruption and lawlessness in [name of country deleted].

[64] There is a need to deal with the mother’s evidence with some caution in light of the fact, for example, there are some inconsistencies in her evidence. The most significant relate to the mother’s allegations regarding physical violence. When the mother arrived in NZ last year she applied for a protection order. In her 18 June 2015 affidavit²¹ she provided a detailed account of the allegations but states the violence was “verbal and psychological,”²² not physical or sexual. It is possible the mother felt it was not necessary to address the allegations of physical abuse but she filed her

¹⁹ Counsel for the applicant’s submissions at paragraph 80.

²⁰ *Supra*, paragraph 69.

²¹ See exhibit B attached to mother’s 15 December 2015 affidavit.

²² See paragraph 7 of mother’s 18 June 2015 affidavit.

application for a protection order when she was safely in NZ, far away from the father, and specifically confined her allegations to psychological abuse. The mother does not explain why there is such a serious and irreconcilable difference in her evidence, especially in light of the evidence her mother has also filed.

[65] It is evident from the last European Commission report²³ [date of report deleted] (“EC report”) that [name of country deleted] has been monitored and received ongoing support to address issues [details of report deleted] [name of country deleted] opinion polls highlighting that [details of corruption deleted].²⁴ The EC report acknowledges some work has been done to address judicial reform but more work is needed. [Details of report deleted].²⁵

[66] The EC report also identifies that some preventative measures have been taken to address the issue of corruption but more work is required and that the [details of report deleted]²⁶ is a high risk area. Organised crime is also identified as a problem in the EC report and recognises this is being targeted but requires further work and attention.²⁷

[67] The political instability in [name of country deleted] is likely to be a significant reason why reform and advances in all identified areas has been slow.²⁸

[68] The mother alleged an employee she approached at the [name of country deleted] central authority agreed with her that it was not safe for Andrew to remain in [name of country deleted], for the reasons identified in the EC report, and supported her move to NZ.

[69] The employee in question has a law degree. She filed a statement.²⁹ She denies making any statements alleged by the mother about the [name of country deleted] government and judicial authorities, and says she has no personal or

²³ Exhibit H attached to the mother’s affidavit dated 15 December 2015.

²⁴ *Supra*, page 2.

²⁵ The mother attached an interesting [details deleted] thesis to her 15 December 2015 affidavit suggesting that the biggest challenge faced by [name of country deleted] is to reform the judicial/legal system to combat corruption.

²⁶ *Ibid*, note 23, pp 8 to 12.

²⁷ *Supra*.

²⁸ *Supra*, p9.

²⁹ Attached to an affidavit filed on behalf of the father dated 1 April 2015.

professional experience to support the mother's allegations. The employee notes the mother has in fact used the [name of country deleted] Court herself without difficulty when an order was made regarding Andrew and maintenance. The employee advises there are child protection and other agencies available to the mother but understands she did not utilise their services or seek their support.

[70] Even if some of the more serious allegations are ultimately found to be true, and fall within the category of substantial, severe or significant harm contemplated by the Convention,³⁰ this Court is not satisfied there is a grave or substantial risk Andrew's return to [name of country deleted] will expose him to physical or psychological harm, or otherwise place him in an intolerable situation, for reasons that can be summarised as follows:

- (a) Much of the evidence regarding the mother's allegations is disputed and needs to be tested in a way that allows the father to participate. It would be inappropriate for this Court to assess the evidence without the benefit of all available witnesses, especially in light of the differences in the mother's evidence highlighted in this judgment. All the relevant witnesses are in [name of country deleted].
- (b) While no violence is acceptable, the degree and nature of the evidence does not reach the grave or substantial risk threshold in light of the principles identified in paragraph [51] of this judgment.
- (c) While [name of country deleted]³¹ and NZ have different cultures they both have a legal system based on a welfare and best interests model, and protective agencies/measures are available in that country if necessary.
- (d) While the mother has apparently been the victim of crime in [name of country deleted], crime is a worldwide problem. It is accepted by this Court that organised crime is a particular issue in [name of country deleted] but the latest EC report suggests slow progress is being made

³⁰ Identified in paragraphs [15] to [18] & [51] of this judgment.

³¹ [Name of country deleted] as a member of the European Union is a signatory to Brussels II and a member of the International Court of Human Rights.

to address this and other identified issues. The mother alleges the father is likely to have bribed corrupt police when they attended her home on one occasion but there is no evidence to suggest she contacted the Police, let alone bribed the authorities.

- (e) The mother allowed the father to have weekend contact each week before she left [name of country deleted] with Andrew and had consented to an order in those terms. There is no evidence the mother utilised the protective arm of the Courts or applied to relocate Andrew.
- (f) Counsel for the mother acknowledges the High Court recently upheld an order for the return of a child to [name of country deleted] in *ASM v DPM* [2016] NZHC 137.

[71] Having determined that a s 106 grave risk defence has not been made out on the balance of probabilities, this Court is required to make an order for Andrew's prompt return pursuant to s 105(2). Travel arrangements will need to be made for Andrew's return. It is preferable Andrew is returned in the company of his mother because she is his primary care giver.

[72] This Court will make an order for Andrew's return but adjourn the proceedings so a judicial conference, by telephone if necessary, can be arranged for the purpose of giving effect to today's order and to discharge or suspend a temporary order dated 13 November 2015 that currently prevents Andrew leaving New Zealand.

ORDERS & DIRECTIONS

[73] The following orders and directions are made

- (a) Leave is granted to the parties to file affidavits out of time on behalf of the mother dated 19 February 2016 and on behalf of the father dated 1 April 2016.

- (b) An order is made that Andrew is to be returned promptly to [name of country deleted].
- (c) The proceeding is adjourned to a date to be fixed, by telephone conference if necessary, in about three weeks or so for the purpose of implementing or giving effect to the order for return.
- (d) Leave is granted to publish this case as *Mikova v Tova* and the child may be referred to as *Andrew* born [date deleted] 2010.

L de Jong
Family Court Judge

Dated at Auckland at 3pm 11 April 2016