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IN THE FAMILY COURT
AT HUTT VALLEY

FAM-2016-096-000072
[2016] NZFC 2972

IN THE MATTER OF	the Care of Children Act 2004 and the ratification thereby of the Hague Convention on the Civil Aspects of International Child Abduction 1980
BETWEEN	RANDY ALBERT Applicant
AND	UMA ALBERT Respondent

Hearing:	4 April 2016
Appearances:	KE Pearce for the Applicant LK McWilliam for the Respondent
Judgment:	4 April 2016

ORAL JUDGMENT OF JUDGE J JOHNSTON

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[1] This is an application pursuant to s 105 by the Central Authority for the return of a child to the United Kingdom. Counsel have agreed that all the matters in s 105(1)(a) to (d) are satisfied. The only issue for me to determine was whether the ground for refusal set out in s 106(1)(b)(ii) could be established, that is, that Mr Albert father of the child, consented to or later acquiesced in the removal.

[2] Counsel agreed on the applicable law and that was set out in paragraph 16 of the legal submissions of Counsel for the Central Authority. Counsel cited the case of *Central Authority v Collins*, 2012 NZFC 2694 and paragraph 61 in which Judge Callinicos paraphrased an English decision as follows:

> (1) That any consent must be proved on the balance of probabilities by the person relying on the defence.
>
> (2) The evidence required to establish consent must be clear and cogent and must be real, positive, and unequivocal.
>
> (3) If a Court is left in a state of uncertainty then the defence will fail.
>
> (4) The Court may be satisfied that consent has been given even though it is not in writing and there may be cases where consent can be inferred from conduct.

[3] That largely reflects the House of Lords decision in *re H (Minors) (Abduction and Acquiescence)* [1998] AC 72. Lord Browne-Wilkinson summarised the position as follows:

> (1) For the purposes of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends on his actual state of mind. As Neill LJ said in [*Re S (Minors)* which is 1994 1, FLR, 819 and 838]: "the Court is primarily concerned not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".
>
> (2) The subjective intention of the wronged parent is the question of fact for the trial Judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
>
> (3) The trial Judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of weight to be attached to the evidence and is not a question of law.
>
> (4) There was only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the

> other parent to believe that the wronged parent clearly is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.

[4] After referring to *re H*, Beaumont & McEleavy in The Hague Convention on International Child Abduction on page 128:

> Henceforth the criteria must be whether the dispossessed custodian subjectively intended to and did give unconditional consent to the removal or retention. However, in line with the exception which exists in relation to acquiescence, that will not exclude certain limited cases where, in the present of very strong evidence, consent may be inferred objectively from conduct alone.

[5] As can be seen, there is an emphasis on the subjective intention of the wronged parent.

[6] As for whether or not the Court should exercise its discretion if it found that consent had been given in *H v H* [1996] 2 FLR 570 at 574-575 Waite LJ suggested the following factors relevant to the exercise of such a discretion, namely:

> (a) the comparative suitability of the forum in the competing jurisdictions to determine a child's future in the substantive proceedings,
>
> (b) the likely outcome (in whichever forum they be heard) of the substantive proceedings,
>
> (c) the consequences of the acquiescence, with particular reference to the extent to which a child may have become settled in the requested State,
>
> (d) the situation which would await the absconding parent and the child if compelled to return to the requesting jurisdiction,
>
> (e) the anticipated emotional effect upon the child of an immediate return order (a factor which needs to be treated as significant but not paramount),
>
> (f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.

[7] This hearing was by way of submissions only. I am grateful to both counsel who have filed comprehensive submissions prior to the hearing. Although Mrs Uma Albert was present no oral evidence was heard. The evidence for me to consider was

that contained in the affidavits of Randy Albert (Mr Albert) and his mother Lucille Albert, Uma Albert (Mrs Albert) and that of her parents and her brother.

[8] The burden of proving consent or acquiescence was on Uma Albert and for that reason Ms McWilliam made her submissions first.

[9] There was no dispute about background matters. The parties met in the United Kingdom, in London in 2011. They were married there on 29 June 2013. Sandra was born there on [date deleted] 2014. Uma Albert now has indefinite leave to remain in the United Kingdom, and Randy Albert has a spouse visa which enables him to reside and work in New Zealand.

[10] Mr Albert's position is set out in summary form in his affidavit of 29 January. In mid 2015 the parties had difficulties in their marriage and attended counselling. Uma Albert said a number of times that she wanted to go back to New Zealand but nothing was discussed in any detail and no agreement was reached. They remained living in England. He thought that they would be able to get over their differences.

[11] In September 2015 they discussed Mrs Albert wanting to spend time with her family in New Zealand and have some time away on her own with Sandra on holiday. They agreed that she and Sandra would fly ahead and he would join them a few weeks later. They would have Christmas together in New Zealand and then return to England to work on their relationship. When he discovered in September that Mrs Albert had booked one-way tickets, he asked her about that. According to him she evaded answering. When he discussed that with Mrs Albert's brother, Clint Coleman, he assured Mr Albert there was nothing sinister in having one-way tickets and they could buy their return tickets when they were in New Zealand and knew when they were returning.

[12] Mr Albert then stated that the three of them had come to New Zealand in February 2015 and then in May 2015 Mrs Albert and Sandra came to New Zealand when Mrs Albert's father had a health scare. There was no difficulty with their returning and he thought that on this occasion it would be no different.

[13] When he accompanied Mrs Albert and Sandra to the airport and also Clint Coleman, who had flown out from New Zealand to accompany Mrs Albert, Mrs Albert gave him a paper to sign. That is annexed to the affidavit as JD11, and stated: "I, Randy Albert, give my permission for my child, Sandra Albert, born [date deleted] 2014 … to travel with my wife, Uma Albert." It was signed by both parties. There is no indication on that agreement that Mr Albert consented to Sandra remaining in New Zealand.

[14] Mr Albert himself flew to New Zealand on the 20 December 2015 and was here until 8 January 2016. Towards the end of his stay in New Zealand Mrs Albert asked whether or not he would agree to Sandra growing up and going to school in New Zealand. He did not agree. He asked Mrs Albert to sign her consent for him to travel with Sandra back to England but Mrs Albert refused. He returned to England without Sandra and immediately obtained legal advice and filed his application with the United Kingdom authorities, the International Child Abduction and Contact Unit, on 13 January 2016.

[15] Mrs Albert filed a detailed affidavit on 26 of February setting out her position. She stated that there had been discussions between the parties about living in New Zealand at some time in the future. They had agreed after Sandra was born that she would stay at home with Sandra. Mr Albert's work choices and his legal and financial and emotional support became issues between them. He was taking low paid contract work. He spent long periods of time campaigning on different issues and that was resulting in a lack of financial support.

[16] When the parties travelled to New Zealand in February 2015, Mrs Albert saw how much easier it would be if they were to live in New Zealand and have the support of Mrs Albert's family. She tried to discuss with Mr Albert when they might move to New Zealand permanently but no agreement was reached. She and Sandra came out in May 2015 because of her father's health scare for two weeks.

[17] Because of their marriage difficulties, the parties attended counselling from the 20 June to 15 August 2015. On 9 July Mrs Albert sent Mr Albert an email setting out her difficulties with life in London as she experienced them. A copy of

that email was annexed as exhibit A to her affidavit. That email also suggested a compromise which was for her and Sandra to move to New Zealand in September, for her to find part-time work or a short contract and a flat, and her parents would look after Sandra while she worked.

[18] At the end of the email she wrote:

> This is a temporary separation that I'm proposing, an opportunity for both of us do what we need to at this difficult time so that we don't get to the point in our relationship where we both really resent each other for not fulfilling our very different needs or offering the support we individually need at this time. We would be in regular Skype contact with you and your extended family.

[19] Mrs Albert stated that she and Sandra would come to New Zealand looking to live here on a permanent basis and that Mr Albert would join them two months later, and if their relationship had improved and if she felt she could cope and that he could support her emotionally and financially she would consider rejoining Mr Albert in London with Sandra and they would then agree to a timeframe for moving to New Zealand as a family. She said she made it clear that if their relationship did not improve then Sandra and she would remain living in New Zealand. According to her she and Mr Albert discussed that proposal at length and she believed he agreed to it. She bought tickets in September for Sandra and her to travel to New Zealand. The travel was then moved to November with Mr Albert visiting over Christmas. She said that she made him aware that she had purchased one-way tickets and that she had asked him about transferring the ownership of the car to him.

[20] The response from Mr Albert was set out in an email from him dated 14 September 2015 and that was annexed as exhibit B. There were some passages in that email which Mrs Albert relied on. In the first paragraph the use of the word "move".

> I fully acknowledge the need that you have to move back to NZ, or at least have some time to reflect on our situation whilst in NZ without me. I had not understood that you had booked one-way tickets to NZ until last Thursday. When you asked me if I would like you to put the car into my name as part of that conversation, it suggests to me a real finality to how you view your time here in the United Kingdom. There is a very real possibility of Sandra growing up in a single parent family situation, how that may work, needs us to talk and be honest about this. We need to talk through this in

> detail. With less than two months to go till you are both supposed to go, there is a certain amount of urgency that we have clarity on this. What I felt was agreed from the counselling, was that you should go to NZ ahead of me with Sandra, and that I would come and join you. Then we would return to the United Kingdom and in light of that experience be in a better place to agree the next steps, our future and Sandra's future. You may recall things differently, which is part of the reason I felt it important to write this to you. It is really sad that we find ourselves in this situation, and it gives me no pleasure in having to take a hard look at the different scenarios which face us. Thinking of Sandra, neither of us wants her, I think, to grow up estranged from either of us. The 'compromises' you refer to in your email above, in terms of what you feel you have had to give to me are surely part of accepting me for who I am. The 'compromise' you propose I would suggest is more an ultimatum which irrespective of my views you appear steadfast in following through with. I hope that we will be able to resolve our situation in a way that Sandra can still grow up with the hopes and aspirations that we both share for her.

[21] Mrs Albert's evidence was that the parties continued to discuss matters verbally after that for some weeks and her understanding of the discussions was that there was agreement.

[22] Mrs Albert quoted Mr Albert as saying, "I would never stop you from doing anything," and acted as though he was accepting of and resigned to what was happening. She said she told him that if they did not reach any agreement when he came to New Zealand to visit at Christmas they would need to sell their house so that she could get her equity out of it. Neither of them at any time referred to her travel as a "holiday". She referred to it as a "move". Mr Albert referred to it as a "trial separation". Mrs Albert said that she remained hopeful that they would come to a compromise which meant that Sandra would live in a supportive environment with both parents' involvement. Her hope was that Mr Albert would agree to move to New Zealand after May 2016.

[23] She said that there were a number of reasons why Mr Albert should have realised that her move to New Zealand was permanent. First were her discussions and his agreement over September and October 2015, her one-way ticket, the transfer of her car to Petra Albert, and the cancellation of her car insurance and registration, the moving of funds of £9000 to a New Zealand bank account, her giving away Sandra's clothes which Sandra had outgrown, and selling equipment associated with care of Sandra. She did not arrange to move other items as she thought Mr Albert would come to New Zealand at a later date and do the necessary

shipment. Mrs Albert said she saw her lawyer in the United Kingdom and made a will for her English assets. She had only a prepaid phone and that just stopped when she ran out of credit. Her friends in the United Kingdom knew that she was returning permanently and she received a number of farewell gifts and cards some of which she detailed. There were some farewell celebrations but Mrs Albert did not want to have leaving drinks as she thought that was insensitive to Mr Albert.

[24] Mrs Albert also attached a text message from Petra Albert to indicate that Petra Albert and others were aware that Mrs Albert's move to New Zealand was permanent.

[25] Mrs Albert also refers to the open-ended consent for Sandra to travel which I have already referred to. She also said that when she made her customs declaration she indicated she would be travelling to New Zealand on a permanent basis.

[26] When Mrs Albert arrived in New Zealand she enrolled Sandra at a local GP and registered her with Plunket and started swimming lessons for her. She said there was little communication from the time she left for New Zealand until Mr Albert arrived on 23 December. Mr Albert, when she emailed him about that responded that he was giving her some time without being in touch with her so that she would be free to make up her mind and to think things over.

[27] When Mr Albert was in New Zealand, the parties attended Family Dispute Resolution and came to some agreements about communicating about Sandra. They did not resolve their relationship issues. Mrs Albert acknowledged that Mr Albert asked her about Sandra returning to the United Kingdom with him but she said she wanted Sandra to stay in New Zealand as they had agreed. Further Mr Albert did not say how Sandra would be cared for in the United Kingdom so she did not consider that it was a serious suggestion. She was surprised when Mr Albert, on his return, initiated these proceedings.

[28] In her oral submissions, Ms McWilliam made the point that for the travel in February and May 2015, return tickets were purchased. On this occasion no return ticket was bought. I had already indicated that in my view, it was quite a different

situation to come for a few months in contrast with two or three weeks as to whether or not a return ticket would be purchased. That evidence is certainly not clear and unequivocal as to the intentions at that time, in particular the intentions of Mr Albert. He knew that one-way tickets had been purchased and he had already raised his concern in his email on 14 September.

[29] Ms McWilliam also made the submission that while Mr Albert was in New Zealand he did not arrange for return tickets for Mrs Albert and Sandra prior to leaving again. Given the uncertainty in the situation I find that that did not amount to consent for Sandra to remain in New Zealand permanently.

[30] Ms McWilliam went through the affidavit evidence of Mrs Albert which I referred to above. There was a later affidavit which I have just been made aware of from Mr Albert's mother Lucille Albert. Ms McWilliam's submission was that the views or the intentions of Uma Albert were not clear in her correspondence with Lucille Albert because of her not wishing to upset Lucille Albert, who is Mrs Uma Albert's mother-in-law, but Lucille Albert also had a husband who was sick in hospital. Uma Albert had written: "While we are away we will keep in touch." That would indicate there was not an intention to remain away permanently.

[31] As for the discretion whether or not to order a return, Ms McWilliam submitted that I should take into account that the parties had serious marriage problems, that Mrs Uma Albert requires the support of her family, that Mr Albert had consented to the travel initially, that Ms Albert would have no accommodation to return to in London, she had no family, only friends, that she has not worked since Sandra's birth and she is unclear whether she is eligible for any United Kingdom benefits. She would struggle to find other accommodation as Mr Albert is in the home. She would also struggle to find a return fare. She has initiated weekly emails to Mr Albert about Sandra and arranged fortnightly Skype calls.

[32] Ms Pearce submitted that some matters raised today were not in the affidavit evidence. They included whether there were arrangements made for return tickets for the family while Mr Albert was in New Zealand. She also did not have the opportunity to obtain instructions from Mr Albert as to whether or not he was aware

of the transfer of the ownership of the car. Mrs Albert's assertion that her application for United Kingdom residence was to facilitate ease of travel rather than residing in the United Kingdom was not in her affidavit evidence.

[33] Mr Albert's position as set out in his affidavit evidence largely reflected his position set out in his email of 14 September. He thought that after a short break for Mrs Albert he would join her, and then they would return to the United Kingdom to resolve their future.

[34] That was consistent with his initiating proceedings immediately on his return. He certainly could not be said to have been inactive or dilatory in pursuing his remedy. Ms Pearce also submitted I should put more weight on contemporary evidence and in particular the email exchanges between the parties, and between Mrs Uma Albert and Lucille Albert.

[35] Ms Pearce submitted that Mrs Albert was not clear in her email of 9 July as to what her intentions were. She referred to a short contract when she referred to her employment. The email of 9 July would have been written while the parties were still in counselling, counselling being from 20 June to 15 August.

[36] Mr Albert's email of 14 September was when counselling had been completed. I agree with Ms Pearce's submission that that email certainly could not be construed as a clear and unequivocal consent to Sandra being relocated to New Zealand.

[37] As far as emails from others were concerned, while Petra Albert referred to evidence of other emails, which might have supported Uma Albert's position, no such emails were exhibited.

[38] As for the email to Lucille Albert and being sensitive to Mrs Lucille Albert's situation at time, Ms Pearce submitted that if Mr Albert had consented to Sandra being relocated to New Zealand there would have been no need to be concerned about being sensitive to Mrs Lucille Albert as there would have been a decision which her son had agreed to.

[39] Similarly where Mrs Uma Albert said in her affidavit evidence that there were no leaving drinks as that would be insensitive to Mr Albert, I would have thought that if Mr Albert had given his clear and unequivocal consent to Mrs Albert and Sandra leaving it would not have been a sensitive matter and farewells could have been celebrated together.

[40] Ms Pearce also submitted that it was Mr Albert's frame of mind or subjective intention that the Court should be concerned with. If Mr Albert was not aware of certain matters being done by Uma Albert, they could not have influenced his subjective views. Such matters included the transfer of funds, the disposal of the car, the making of the will, text messages between Mrs Uma Albert and other family members or friends to which Mr Albert was not a party, Mrs Albert's customs declaration, what Mrs Albert might have told her parents or her brother, and what they believed. Ms Pearce submitted that Mrs Albert's parents had not spoken to Mr Albert. I noted Mrs Kristy Coleman, in paragraph 9 said, "From everything we heard from Uma, from Randy, meaning Mr Albert, and from Clint, there was no question that Randy had agreed to Uma and Sandra moving to New Zealand to live." She did not say what it was she had heard from Mr Albert that gave her that view. A bare assertion is insufficient, when weighed against evidence of Mr Albert's own understanding.

[41] As for other matters set out in Uma Albert's affidavit, particularly the matters in paragraph 21 I cannot find on the evidence that their discussions over September and October 2015 established a clear agreement on Mr Albert's part for Sandra to remain in New Zealand. The one way ticket and Mrs Albert stressing that she did not intend to return unless they made agreements over Christmas in New Zealand supported Mr Albert's contention that he was facing threats rather than coming to any agreement. The transfer of the car would not be unequivocal evidence of consent to a long-term return to New Zealand for Sandra. The movement of funds could not have affected Mr Albert's views if he was not aware of that occurring. The giving away of Sandra's clothing and selling some items were also not clear and unequivocal evidence of a permanent or indefinite return to New Zealand. That could have happened at any time and for other reasons. As for Ms Albert seeing a lawyer and making a will for her United Kingdom assets, I find it surprising that if

Mrs Albert was seeing a solicitor she would not ask what the position would be for her to take the parties' child to live out of the United Kingdom. Making a will in the United Kingdom would more likely indicate an intention to return given a person can have only one will.

[42] As for the consent to travel which was exhibit A to Mr Albert's affidavit of 29 January, I find that if the parties had intended the consent to be for Sandra to relocate to New Zealand that is what it would have stated. It would have been a simple matter to express that in any agreement. Mrs Albert said that there was room for Mr Albert if he had wished to put in conditions. Looking at the exhibit, I find that given the need to sign the agreement there would be very little room for conditions. While it is not necessary for consent to be in writing, many Judges have stated that if there were such consent, it should be recorded in writing. This particular signed form falls far short of any consent for Sandra to remain in New Zealand.

[43] As for the evidence of other family members, the evidence was largely hearsay and were assertions without supporting evidence of how particular views or conclusions were reached.

[44] In any event it is not the views of family members or friends as to what the position might have been but it is Mr Albert's views that I need to consider, including his subjective views, together with any actions or inactions on his part.

[45] I have concluded that on the balance of probabilities it has not been established that Mr Albert consented to Sandra remaining in New Zealand. At best some of the evidence was ambivalent. It was certainly not clear, cogent, real, positive and unequivocal. I also find that there was nothing in Mr Albert's subsequent conduct to indicate any acquiescence.

[46] As for discretion, I accept that Mrs Albert has more support in New Zealand. It is where her family and friends are. There will be some financial consequences of her coming here and now having to return. Other factors to consider are the comparative suitability of the Courts here and the Courts in the United Kingdom in

determining outcomes for children. It was not disputed that the United Kingdom courts were equally suitable.

[47] As for the likely outcome of the substantive proceedings, Mr Albert said that he would be seeking shared care. I do not have sufficient evidence to consider properly what the likely outcome will be and the issue of care was not part of this hearing.

[48] As for whether Sandra has become settled here, she has been in New Zealand since November 2015. She has seen her father in December and early January. A settled position has not arisen. Mr Albert made his application as soon as he could on his return to the United Kingdom. In cases where a settled situation is claimed the times have been much longer than in this case and in some cases it has been years.

[49] As for the financial situation for Mrs Albert if she and Sandra were to return, Mrs Albert's own evidence was that she had savings. There was no evidence that the £9000 she transferred to New Zealand has been used up.

[50] As for the anticipated emotional effect on Sandra of an immediate return, in my view that indicates that a return should be sooner rather than later. That is because of Sandra's age. She will be two on [date deleted] 2016. If there were further delay in her return, her ability to form an attachment with Mr Albert would be seriously impaired. Seeing him on Skype once a fortnight would not enable Sandra to form a secure attachment with her father. It would be different if she were older and could retain a better memory of her environment and persons in it.

[51] As for the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return were to be refused this is a situation where the return is consistent with and expected by the provisions of the Hague Convention.

[52] There will be an order for Sandra's return to the United Kingdom.

[53] Travel arrangements need to be made so there will not be an immediate discharge of the order preventing removal.

[54] The matter is adjourned for case management review, 18 April, to enable counsel to advise what the position is at that time and to seek further orders or directions from me or some other Judge.

J Johnston
Family Court Judge