EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

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IN THE FAMILY COURT
AT HASTINGS

FAM-2016-020-000119
[2016] NZFC 7068

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004 AND THE IMPLEMENTATION THEREBY OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980
BETWEEN	DOUGLAS PERUGIA OF GERMANY Applicant
AND	IMOGEN TOBIN OF NEW ZEALAND Respondent

Hearing: 16 August 2016

Appearances: Mr M Casey for the Central Authority
Mr G Mansfield for the Respondent
Ms A McLeod Lawyer for Child

Judgment: 8 September 2016

RESERVED JUDGMENT OF JUDGE A B LENDRUM

Introduction

[1] This judgment determines an application heard on 16 August 2016 and bought by Douglas Perugia (the "father") to have his daughter Alise Perugia-Tobin

born [date deleted] 2007 ("Alise") returned to his care in Germany. The application was opposed by Alise's mother Imogen Tobin (the "mother") who wishes Alise to stay with her in [New Zealand location deleted].

[2] Mr Casey is counsel for the Central Authority and thereby the father. Mr Mansfield represents the mother. Ms McLeod is the lawyer for Alise.

[3] At the conclusion of the hearing on 16 August 2016 I explained to all counsel, and the mother, that while s 107 of the Care of Children Act 2004 (the "Act") requires applications to be dealt with speedily my current position was that I would need some time to deliver my decision.

[4] At that point Mr Casey submitted that if my decision was that the Central Authority were successful in their application for Alise to be returned to her father in Germany then an early decision would be most helpful. The primary reason for this was his advice that the new school year, and term, for Alise in [name of city deleted] would begin on 1 September 2016. It was his submission that her early return to be available for the commencement of the school year would be in her interests.

[5] Further to that submission Mr Casey requested that I give consideration to delivering my decision on the basis that I advised the orders I would make and then deliver my reasons for that decision at a later date. Both counsel for the mother and lawyer for the child confirmed that that approach was acceptable to them.

[6] I record that the evidence was complete at that time as I had read and heard the evidence and then received oral submissions from all counsel.

[7] It is not disputed that Alise and her mother arrived in New Zealand on 13 December 2015 for a Christmas holiday with mother's family. It is also not disputed that they were due to return to Germany on 4 January 2016. They did not return then and have remained in [New Zealand location deleted] since that date.

[8] On 6 May 2016 the father's application was filed in this Family Court pursuant to the provisions of sub-part 4 of part 2 of the Act. The purpose of that sub-part is to implement into New Zealand law the provisions of the Hague Convention ("the Convention") which appears as Schedule 1 to the Act.

Issue

[9] The issue in this case was limited because counsel for the mother conceded that the four grounds the father had to establish pursuant to s 105 had been met.[1] Accordingly the case proceeded solely upon the basis of the mother's defence as pleaded in her amended notice of defence of 24 May 2016 and being pursuant to:

(a) Section 106(1)(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; and

(b) Section 106(1)(d) - the child's objection to being returned and the weight to be given those views pursuant to s 6 (2)(b) of the Act.

Background

[10] The father is a [ethnicity deleted] national. The mother is a New Zealand national.

[11] The father and mother met in London in 2000 when they were working together. In 2001 they commenced a de facto relationship.

[12] The parties were married in [overseas location deleted] on 5 September 2003.

[13] In 2004 the father and mother travelled to [New Zealand location deleted], New Zealand where they lived for a period of one and half to two years. They then returned to live in [overseas location deleted] in 2006.

[1] NOE p 33 line 16-21 & p 35 lines 20–22 and 27–28 & p 36 lines 10–13.

[14] In early 2007 the mother became pregnant with Alise. She returned to [New Zealand location deleted] during the course of her pregnancy. The father travelled to [New Zealand location deleted] to be present at Alise's birth.

[15] Alise was born in [New Zealand location deleted] on [date deleted] 2007. The father returned to [overseas location deleted] shortly after her birth with the mother and Alise returning to [overseas location deleted] a few months thereafter. From early 2008 to 2010 the parties lived together in [overseas location deleted] as a family unit.

[16] Alise holds a New Zealand passport together with a [ethnicity deleted] passport. She also possesses an identification card enabling her to travel freely around the European Union.

[17] In January 2012 the parties separated. The evidence does not disclose how Alise's care was shared between her parents during the period January 2012 to January 2013. However it is common ground that Alise's paternal grandmother Katheryn Borgogni played a significant role in her care, both prior to, and following, the separation between her parents. During this time Alise also had considerable contact with members of her father's family extended as well as contact with her mother.

[18] In January 2013 the father relocated to Germany for work purposes. In June 2013 the mother and Alise visited him in [name of city deleted] where he was living and working in the [occupation details deleted] trade.

[19] In August 2013 the mother moved to [overseas location 2 deleted] with a new partner. Alise remained in the day to day care of her grandmother.

[20] In November 2013 following her earlier visit to [name of city deleted] the mother relocated to Germany to obtain employment. The father facilitated the mother's trip. Alise continued to live with her paternal grandmother.

[21] It is the father's evidence that upon her arrival in Germany the mother lived with him and it was, at least initially, their intention to reconcile. The mother does not dispute the father's evidence that the parties lived together in [name of city deleted] during the period November 2013 to June 2014. The mother does dispute that there was an intention to reconcile. Nevertheless they lived together for this eight month period.

[22] The mother also alleges that she and the father jointly falsified documents to enable the mother to remain living in Germany. The father denies this claim.

[23] Alise moved to Germany in June 2014 to live with her parents. Accordingly she had lived with her paternal grandmother from at least August 2013 to June 2014.

[24] Alise was enrolled in school in Germany in September 2014 at the end of the summer holidays. By that time her mother and father were living apart. The father states that the mother was taking care of Alise during week days and he would do so on the weekends.

[25] By this time the mother had re-partnered with a Peter Hofman and by November the father had re-partnered with Matilda Agostini.

[26] By mid January 2015 Alise's care, by an agreement made between them, was shared equally between her parents on a week and week about basis.

[27] In the summer holidays 2015 Alise returned to [overseas location deleted] and spent that holiday in the care of her paternal grandmother.

[28] In September 2015 Alise commenced her second year schooling in[name of city deleted].

[29] In December 2015, and with the agreement of her father, Alise and her mother travelled to New Zealand for the Christmas holidays. They arrived on 13 December 2015.

[30] Lawyer for child advises that the mother made enquiries regarding Alise attending the [name of school deleted] in [New Zealand location deleted] prior to Christmas 2015. This allegation is not disputed by the mother.

[31] On 4 January 2016 the mother advised the father that she could not take the return flight to Germany due to illness.

[32] On 21 January 2016 the mother made a without notice application for day to day care orders pursuant to the Act. Those proceedings were filed in the Hastings Family Court.

[33] On 6 May 2016 the father made his application pursuant to the Hague Convention for the return of Alise to Germany.

[34] On 13 May 2016 the mother filed her defence to the father's application and on 24 May she filed an amended notice of defence.

The Law

[35] The Convention is implemented in New Zealand law through s 94 of the Act. The objects of the Convention, which are set out in Article 1, are:

> (a) to secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[36] Germany and New Zealand are Contracting States.

[37] In New Zealand the objectives and purpose of the Convention were considered by The Supreme Court in *Secretary for Justice v HJ*.[2] That judgment confirmed both the principles set out in Article 1 of the Convention and the essence

[2] *Secretary for Justice v HJ* [2007] 2 NZLR 289.

of the Convention which is that care and contact arrangements for a child unilaterally removed from a country shall be determined by the country of the child's habitual residence as opposed to the country to which the child was wrongfully moved or where they are retained. Therefore the Hague Convention's central issue for this Court is to determine not the child's best interests but the appropriate forum for determining the child's best interests as to custody and access.[3]

[38] Section 105 sets out as follows:

> **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—
>
> (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—

[3] *S v S* [1999] 3 NZLR 625.

(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.

[39] As I set out above the respondent, and responsibly so, accepted that the four jurisdictional conditions which the applicant required to prove pursuant to s 105 have been met in this case. That was an appropriate concession in this case where the evidence clearly establishes that:

(a) Alise is in New Zealand;

(b) Alise was removed from Germany where her father had rights of custody as set out in s 97 of the Act;

(c) at the time of Alise's removal from Germany and retention in New Zealand those rights of custody were being exercised by her father; and

(d) Alise was habitually resident in Germany immediately before her removal.

[40] As a consequence of the applicant establishing that his case meets all the grounds required in s 105 the Court may, pursuant to s 105(2) refuse to make an order for return only if the mother is able to establish any of the grounds set out in s 106 of the Act. These are often referred to as the "Hague Defences". The onus here is upon the mother to establish any one of those grounds. The standard of proof remains, as in all family matters, on the balance of probabilities.

[41] Articles 12 and 13 of the Convention record the circumstances in which the Court may refuse to make an order for return. In New Zealand those circumstances are set out in s 106 of the Act. It is important to note that if a ground of defence is made out it is still a matter of discretion whether the Court makes, or refuses to make, an order under s 105(2) for the return of the child.

[42] The mother's amended notice of defence of 24 May 2016 pleaded in terms of s 106 the following grounds:

(a) Section 4 of the Act considering the child's welfare and best interests; and

(b) Section 106(1)(c) that there is a grave risk that the child's return would:

(i) Expose the child to physical or psychological harm; or

(ii) Would otherwise place the child in an intolerable situation; and

(c) Section 106(1)(d) that Alise objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking into account her views in accordance with s 6(2)(b) of the Act, also to give weight to the child's views.

[43] I note with respect to the s 4 argument that the question of welfare and best interests is only relevant in the event that a defence is first made out. Only then does the Court have the opportunity to exercise its discretion pursuant to s 106(1). It follows that the s 4 child's welfare and best interests is not a defence in itself under s 106.

[44] When I consider the law and the evidence in this matter I consider that I must do so by focusing on the approach taken by the Higher Courts particularly in *S v S* which was endorsed by the Supreme Court in *Secretary for Justice v HJ*.

Section 106 (1)(c)

Grave risk

[45] The mother's first defence is that there is a grave risk if the Court were to make an order returning Alise to Germany that she would be exposed to physical or psychological harm; or would otherwise placed in an intolerable situation.

[46] The law on this aspect of the Convention is well settled both in New Zealand and internationally. The principles in this regard I consider to be as follows:

(a) There is a high threshold to establish the ground of a grave risk of physical or psychological harm or an intolerable situation;

(b) The "grave risk" defences are to be construed narrowly;

(c) As set out above the onus of proving the existence of such grave risk is on the respondent;

(d) The child's return is to the country of habitual residence, not the remaining parent;

(e) The onus is on the parent removing the child from its habitual residence to demonstrate why, where the Court in the country of return has as its focus the best interests of children, that Court cannot properly and lawfully protect the child on return;

(f) Where the Court in the country of return has as its focus the best interests of the children, the presumption is that it is in the best interests of a child to have matters related to their best interests determined in a Court in the country of their habitual residence;

(g) The Court is required to consider first the child's exposure to physical or psychological harm (s 106(1)(c)(i)). Only when that defence is determined as not proven to the high standard required can the Court consider the defence of s 106(1)(c)(ii); that the child would be placed in an intolerable situation if required to return; and

(h) The focus must be on the child's position; not the abducting parent's situation.[4]

[4] The principles set out in [46] derive from the cases of *Damiano v Damiano* [1993] NZFLR 548, *Adams v Wigfield* (1993) 11 FRNZ 270, *A v A* (1996) 14 FRNZ 348 and *Secretary for Justice v HJ*.

[47] The inquiry into whether a child will be exposed by a return to a grave risk of harm is not to be an enquiry to determine the child's best interests. In *S v S* the High Court held "*a Convention application may not be used as an occasion for rehearsing those matters which would be relevant if and when custody and access issues fell to be determined*".

[48] The authorities also disclose that in considering the level of physical or psychological harm the Court ought to consider how much any psychological harm suffered may be the result of the respondent's wrongful removal of the child.

> "An abducting parent cannot create a situation of potential psychological harm and then rely on it to prevent the return of the child".[5]

Physical or psychological harm

[49] The physical or psychological harm must be substantial or severe, and more than merely transitory, and must be "*more than simply the inevitable stress which occurs or is caused to a child in the circumstances where the abducting parent and the children are uprooted from a situation in which they may have become settled, and forced to return to another*".[6]

Intolerable situation

[50] In *H v H* Greig J held that "intolerable means something that cannot be tolerated. It is not just disruption or trauma, inconvenience, or anger. It is something which must be of some lasting serious nature which cannot be tolerated".[7]

[51] In *Damiano v Damiano* intolerable was defined as "simply and demonstrably not able to be countenanced".

[52] More recently the definition of intolerable was considered by the House of Lords in the decision in *Re D (a child) (abduction: rights of custody)*[8]. In respect of the definition of intolerable that Court said:

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[5] *C v C* (Minor: Abduction: Rights of Custody Abroad) [1989] 1 WLR 654. Cited in "*Coates v Bowden.*
[6] *Coates v Bowden* (2007) 26 FRNZ 210 (HC).
[7] *H v H* (1995) 13 FRNZ 498, at 504.

> Intolerable is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". It is as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect.

The child's objections

[53] This is explicitly a child-focused ground.[9]

[54] In *Re D* the Court also held that when a Court considers the child objection defence it needs to be aware that:

> there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child more than anyone else, who will have to live with what the court decides.

[55] The approach of the House of Lords has been endorsed in New Zealand by the Court of Appeal.[10]

[56] In *W v N [Child Abduction]*[11] the High Court undertook an analysis of the English and New Zealand authorities in relation to this child objection defence. The Court concluded that consideration of a child's objection under s 106(1)(d) involved four issues:

(g) Does the child object to return? If so:

(h) 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;

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

(j) How should the residuary statutory discretion be exercised?

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[8] *Re D (a child) (abduction:rights of custody)* [2007] 1 All ER 783.
[9] *Van Poppel v Arthur* (2004) 24 FRNZ 141.
[10] *B v Secretary for Justice* – [2007] 3 NZLR 447 at 452.
[11] *W v N [Child Abduction]* [2006] NZFLR 793 at [46].

[57] This approach and analysis was also endorsed by the Court of Appeal on appeal.

Does the child object?

[58] This Court in *Van Poppel v Arthur* and *LJG v RTP [Child Abduction]*[12] has held that the Court's function is to consider whether the child wishes to remain and if so then to give that child's views the weight that they might properly require.

Has the child attained an age and degree of maturity in which is appropriate to give weight to her views?

[59] It has been opined that a child's age and maturity for the purpose of reliable weight should be the time that children are able to properly reason.[13]

[60] The Courts have variously deemed that children within the age range of 8 to 15 years are of an age and maturity at which it is appropriate to give weight to their views.[14] It is important that the Court does not minimise the weight to be attached to the objections of children but that objection must have a reasoned base to it.

[61] It follows that the Courts have held that the older the child the greater the weight that the objection is likely to carry,[15] and the stronger the child's view, the more weight is to be attached to it.[16]

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[12] *LJG v RTP [Child Abduction]* [2006] NZFLR 589.
[13] *Clarke v Carson at* 932; *Hollins v Crozier* [2000] NZFLR 775.
[14] *Secretary for Justice v Penney* [1995] NZFLR 827, 835; *Clarke v Carson*; *W v N*; *White v Northumberland* [2006] NZFLR 1105; *S v S*.
[15] *M and another (children)(abduction)* [2008] 1 All ER 1157; [2007] UKHL 55 at [46] (HL)
[16] *W v N* and *White v Northumberland*.

What weight should be given to this child's views?

[62] In *S v S*[17] Fisher J observed that the weight to be attached to the child's wishes will turn upon:

(a) age;

(b) maturity;

(c) reasons given by the child;

(d) possible influences upon the child;

(e) competing considerations, and

(f) all the surrounding circumstances.

[63] In *W v N*[18] modest weight was attributed to the views of an eight year old but significant weight to the views of a 14 year old child.

[64] The issue that I note from the cases cited on this point by counsel is that on the occasions a younger child (being eight and over) had expressed a view which the Court gave significant weight to that child's views were expressed along with those of an older sibling. That is not the case here.

[65] Lawyer for child helpfully submitted that the case of *Secretary for Justice v LHM (Child Abduction)*[19] set out an appropriate approach:

> Counsel have referred to other cases where children of about the same age have had their views considered favourably. However, it is necessary in my opinion to approach this question on the basis that it is this child, in this family and in these circumstances which must be considered. The case is peculiar to J and little is to be gained by drawing on other cases which are all decided on their own facts.[20] (my emphasis)

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[17] At 522.

[18] At [40].

[19] *Secretary for Justice v LHM (Child Abduction)*[2009] NZFLR 1033.

[20] *Secretary for Justice v LHM* at [56].

[66] In my view this approach is analogous to the approach taken by the Supreme Court in *Kacem v Bashir*[21] where the Supreme Court directed a Court's enquiry to be to this particular child in these particular circumstances at this particular time. That case while not a Hague Convention matter dealt with the similar issue of an international relocation application.

Exercise of Discretion

[67] It is well settled law in New Zealand and internationally that once the Court is satisfied that one of the grounds of defence as set out in s 106 is made out, the Court has a discretion as to whether to make an order for return.

[68] In the Supreme Court's decision of *Secretary of Justice v HJ* the Supreme Court held that the correct approach in the exercise of the discretion is as follows:

(a) Once a ground of defence is established there is no presumption in favour of an order for return;

(b) The discretion must be exercised in the context of the Convention and the Act which incorporates it;

(c) In New Zealand the Convention is incorporated into the Care of Children Act 2004. That Act has as its primary focus the best interests and welfare of the child.

(d) The Court in exercising its discretion must strike a balance between the best interests of the child on the one hand and the deterrent factor of the Convention on the other. In undertaking this balancing exercise, the Court should consider whether return would, or would not be in the best interests of the child.

[21] *Kacem v Bashir* [2012] NZSC 112.

[69] The above principles apply to the exercise of discretion in relation to all section 106 defences. As Tipping J set out:

> … all the exceptions must be approached with an understanding of their shared context, within a convention that has the general purpose of deterring child abductions. This is achieved by ensuring prompt return in cases where no ground to refuse return is established. When such a ground is established the convention envisages an inquiry into whether its deterrent purpose should prevail over the interests of the particular child or children.

[70] In rejecting the submission that there was a presumption of return when exercising the discretion, Justice Tipping added:

> It is not appropriate to speak in terms of a presumption of return in a discretionary situation. This is because the exercise of the discretion must recognise, and seek to balance, both the welfare and best interests of the child, and the general purpose of the convention.[22]

[71] When considering the welfare and best interests of the child, the Court is to concern itself only with that period of time until an appropriate Court, whether a foreign Court or the local Court, can deal with the substantive question of where the child should live.[23]

[72] Also in considering the exercise of its discretion in child objection cases, the Courts have held it relevant to consider also matters of

(a) influence;

(b) the independence of the child's views; and

(c) the ability of the child to formulate reasons independent of the adults around them.

It has been held that less weight will be attributed to the child's views where the evidence demonstrates that the child's views have been influenced by the abducting parent.

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[22] *Secretary of Justice v HJ* at [66] and [68].
[23] *White v Northumberland* at [54] and [55].

[73] The Courts have acknowledged however that it may be inevitable that there will be some influence on a child's views, but that where it is found that a child has valid reasons for their objections the Court may still refuse to order their return.[24]

Evidence and process

[74] In accordance with the general approach in Convention cases the evidence in this case has consisted of affidavits sworn by both parties together with some supplementary affidavits filed by members of the father's wider family. I have also received copies of certain documents or letters which may assist me in the consideration of this matter.

[75] I have had also the assistance of an s 133 report prepared by Ms Naughton Psychologist who prepared a report dated 8 July 2016. She was available for cross-examination at the hearing. I appointed Ms Naughton because she is an extremely experienced psychologist with over 35 years experience in Family Court matters. Ms Naughton also gave oral evidence at the hearing.

[76] I appointed Ms Naughton as soon as I was aware that the child's objection to return defence was pleaded. This was in accordance with the principle that the child's right to be heard, either directly or through counsel, in judicial proceedings affecting them is protected under Article 12.2 United Nations Convention on the Rights of the Child together with s 6 of the Care of Children Act 2004 and s 27 of the New Zealand Bill of Rights Act 1990. As Judge Doogue (as she then was) set out in *Van Poppel v Arthur* counsel for the child should be appointed as soon as a Court becomes aware that a child may have an objection to return despite the statutory requirement for an expeditious hearing (s 107).

[77] In *Basingstoke v Groot*[25] the Court of Appeal discussed the assessment of affidavit evidence. It held the view that decisions upon conflicts of evidence are resolved by taking into account such factors as any independent extraneous evidence, the consistency of evidence both internally and externally, and any

[24] *S (a minor) (abduction)* [1993] 2 All ER 683 at 691; *S v S*; *Hollins v Crozier*.
[25] *Basingstoke v Groot* [2007] NZFLR 363 at [39]

inherent probabilities within the evidence. In respect of Convention matters the Court opined that more weight should be attached to contemporaneous words and actions of parent than to any bare assertion or evidence as to their positions.

[78] In this case there were parts of the mother's evidence which I consider raised credibility issues. The first of these relates to her intentions in travelling to New Zealand with Alise. She arrived in New Zealand with Alise on 13 December 2015. It is not disputed that she came ostensibly for the purpose of a Christmas holiday with her family. However within no more than a week of her arrival she had approached the [name of school deleted] at [New Zealand location deleted] to ascertain whether Alise might be enrolled at that school in the 2016 year.

[79] That action is clearly inconsistent with her initial request of father to permit a three week Christmas holiday in New Zealand. It is also inconsistent with her later advice to the father on 4 January 2016 that she could not return to Germany because of illness. Furthermore there is no issue here of the father acquiescing to Alise remaining in New Zealand. His affidavit evidence which is not contradicted is that when he learned of the mother's illness he offered to travel to New Zealand to pick up Alise to return her for the start of her school term.[26]

[80] On this evidence I consider that at the time mother left Germany she planned to remain in New Zealand with Alise after her arrival.

[81] The next portion of her evidence which gives me concern relates to Alise's schooling in Germany. In mother's sworn evidence as to Alise's unhappiness at her school in [name of city deleted] she alleged that "she was very unhappy at school and was bullied by other students. She was constantly teased by other students because she was not fluent in German. On one occasion some students pulled her underpants down in the presence of other students. She was marginalised through no fault of her own".[27]

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[26] Father's affidavit 27 June 2016 p 35.
[27] Mother's affidavit 13 May 2016 10 [41].

[82] In the father's affidavit of 27 June 2016 the father exhibited a letter from Alise's school teacher in Germany. I note that Alise's teacher in that exhibit states:

> … she quickly established relationships with her class – comrades and was very popular and wanted as a playing and working partner. … This way she quickly learnt the German language, so that she had no striking understanding problems in playing with others and in school activities.

He added further:

> Problems of isolation, exclusion from the class community, mobbing and a lack of playmates could never be observed in connection with Alise. Alise has been very popular in her class. She was invited by her classmates to their birthday parties, and she also celebrated her birthday together with her friends from the class. … the class reacted very dismayed and emotional to Alise's not - returning to [name of city deleted]. Many children asked me in person for her address and contact data in New Zealand. In the community emerged the desire to write her letters to New Zealand. For that, all of the children bought with them special photographs and partly things they had made themselves. All of the children were very happy about Alise's answering letter with the enclosed photographs.[28]

[83] There is a clear inconsistency between these two positions.

[84] The mother also alleged that the father was involved in the distribution of illegal drugs. Moreover she alleged that her recording of that fact in her affidavits was such as to make her personal position unsafe should she have to return to Germany. For his part the father denied that allegation completely and in his affidavit of 27 June 2016 he annexed a drug test certificate which indicated that he had not consumed or ingested any illegal drugs at that time. The father also stated that he had no criminal record in Germany or [overseas location deleted] and produced documentation to that effect in respect of the time he has been resident in Germany.

[85] Finally there are issues about the credibility of the mother's assertions that she cannot return to Germany because she and her husband acted illegally in terms of obtaining her entry to Germany in 2013. The difficulty of her assertion is that she is unable to support that in any way whereas both the father and independent evidence indicates to the contrary. As the father says her visa card indicates that she

[28] Father's affidavit 27 June 2016 Exhibit A.

is a family member of a citizen of the European Union and she was therefore entitled to live with him in Germany.[29]

[86] Perhaps more importantly the point is made by both the father and the Central Authority that present visa requirements for a New Zealand national visiting Germany are such that the mother could stay in Germany for a period of up to 12 months. Clearly the appropriate Family Court in [name of city deleted] will dispose of this matter, as a Convention matter, well within that period of time.

[87] As to the issue of the mother's illness being such that she cannot return to [name of city deleted] I note that in her application to this Court for an interim parenting order on 21 January while she stated she was unwell that ill health ended, she said, in September 2015. I note that there is no independent expert evidence which indicates that mother's physical or psychological health is such that her return to Germany would place her directly, and Alise indirectly, at grave risk. Additionally there was no reference to Alise being unhappy in, or the father's use of illegal drugs. That affidavit also referred to the "beautiful parks and facilities for children"[30] in [name of city deleted].

[88] On this issue of the mother's evidence I choose to follow the view expressed by Muir J in *KN v CN*. He said:

> Nevertheless, short of evidence of suicide risk or psychosis, considerable care must in my view be exercised before finding that a mother's mental health is such as to expose a child to the grave risk of physical or psychological harm on return, as the evidence on which such a defence is based has the capacity to be self-serving.[31]

[89] Overall I was troubled by these inconsistencies in her evidence. I see the mother conflating Alise's interests and her own. As I read her affidavit evidence it was directed primarily at her concerns and her apparent claimed inability to be able to return to Germany with Alise. However as the authorities indicate this Court's focus must be upon the child not the parent and, to repeat, only upon which forum is the appropriate one to determine issues as to Alise's care and custody. Furthermore

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[29] Father's affidavit 27 June 2016 [12], [26], [37] and [39].
[30] Mother's affidavit 21 January 2016.
[31] *KN v CN* [2016] NZHC 2049.

on balance I find that where there are inconsistencies or conflicts in the evidence between the mother and the father I prefer the evidence of the father.

Analysis

Section 106(1)(c)Grave risk of physical or psychological harm

[90] As I have indicated earlier the mother's position is that there is a grave risk to Alise if an order is made requiring her to return to Germany and that, if so, she would be at grave risk of exposure to both physical and psychological harm.

[91] There is no evidence before me that Alise would be at grave risk of any physical harm should she be returned to Germany. The mother's allegations about the father's lack of parenting skills do not in my view reach anywhere near the high threshold required by the Convention and the law. They are in my view more than contradicted by the mother's agreement to share Alise's care with the father throughout 2015.

[92] Moreover if there was reliable evidence of those concerns there is neither allegation nor evidence that Alise could not, and would not, be kept safe by the German authorities should she return to [name of city deleted]. It is important to repeat that if this Court orders that Alise return to [name of city deleted] that is not a final determination of what is in her best interests and welfare and with whom she should live. Again it is a hearing to decide only whether the German or New Zealand Court should be the Court to determine that issue.

[93] As to the second limb that Alise would be exposed to psychological harm if returned to Germany this appears to be based on the assumption that should Alise be returned to Germany she would be deprived of the care, company and love of her mother because Ms Tobin states she is unable to return to Germany.

[94] On the evidence before me there are two points that need to be made about this claim. The first is that on that evidence there is no apparent reason why the

mother could not return to Germany for the purposes of the full "geographical relocation" hearing which is the next issue in this matter.

[95] I do not accept the view that Alise, or indeed her mother, would be at any risk from the father who, for his part, has said he wishes the mother would return so the earlier shared care regime can be re-established.[32] Indeed he has offered to assist her upon her return.

[96] I note also that the mother, by way of counsel, stated that should Alise be returned to Germany then she would return to [overseas location deleted] where she has personal history, an ability to speak the language, and a general love of that country. Clearly if she did so she would be able to continue her relationship with Alise more easily than if she were to remain in New Zealand.

[97] The second point is that there is no reliable evidence that the mother cannot travel to, and remain for a hearing in Germany. As I set out earlier in this judgment a New Zealand citizen has a right to visit Germany as a tourist for up to twelve months.

[98] However the issue to be determined is not about the mother. It is whether Alise would be at grave risk of psychological harm if she has to return to Germany. Importantly there is clear evidence from Ms Naughton on this issue which contradicts mother's argument that Alise would be at such risk.

[99] Based on the evidence before the Court, and Ms Naughton's meetings with Alise and Alise's school teacher, it is Ms Naughton's opinion that Alise has had a history of disrupted attachment; spending significant periods of time away from both of her parents. As a consequence she opined in her report Alise has developed into a very resilient child and that she would adapt once again should the Court order her return to Germany.

[100] Ms Naughton extrapolated on her report in cross-examination. She talked first of Alise's attachment figures; the persons who are of real importance to her as

[32] Father's affidavit 27 June 2016 [43].

she grows into maturity. She said, in the context of any break in the relationship between Alise and her mother, as follows:

> A break with – from the relationship that she is currently having with her mother is going to be very disturbing for her, it is going to be very emotionally arousing, she's probably going to become depressed, she's going to grieve, she's going to lose what she's currently got. But what we have to understand is that her mother is only one of her attachment figures … she had a multiple number of attachment figures and some of these, many of those, are in fact in Germany.[33]

She continued:

> … so I expect that those people would be able to provide her with support … the emotional support she needs to cope with that and to work through that grief.[34]

The other attachment figures Ms Naughton referred to are Alise's father, her paternal aunt Natalia Perugia, her partner John Martez, and importantly her paternal grandmother Katheryn Borgogni.

[101] In respect of Alise's attachment figures Ms Naughton commented particularly on the importance of her paternal grandmother. She said that Alise has had considerable involvement with her [ethnicity deleted] family throughout her life particularly from her grandmother. She noted that Mrs Borgogni had been a primary caregiver, in the absence of both of Alise's parents, for a period of seven or eight months and has been a caregiver on other occasions.[35] Ms Naughton opined that she thought:

> that relationship is very significant … probably the most significant relationship outside the parents.[36]

[102] Ms Naughton also considered that Alise's ability to cope with the stress and grief consequent upon any rupture in her relationship with her mother would be assisted by the fact that she has an unusual family history. She noted that Alise had lived in a number of different countries and that during her short life she had experienced lengthy periods of separation from her parents. She added there was no

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[33] NOE 10.
[34] NOE 10.
[35] See also father's affidavit of 27 June 2016 penultimate page at [4].
[36] NOE 13.

evidence that she had not been able to manage those periods of separation from her parents well and then be able to reconnect with them later on. She said:

> … she's got a robust hierarchy of attachment figures and that makes her, perhaps, more resilient than the average eight year old.[37]

This evidence confirms the view expressed by Ms Naughton in her written report that:

> … these events appear to have created a very resilient child who would arguably adapt once again given some time.[38]

[103] For her part Ms McLeod for Alise questioned Ms Naughton about the loss of her [ethnicity deleted]/German family. Ms Naughton confirmed that with Alise's removal to New Zealand she had lost for the first time in her life living in the shared care of her parents. Additionally she had lost the friends that the German teacher advised she had made at her school in [name of city deleted]. Finally she had lost the contacts she had with her aunt and uncle who were living in Germany and, of course, her grandmother who while living in [overseas location deleted] had visited Alise in Germany.

[104] However Ms Naughton's evidence was clear that while a separation from her mother would cause her stress and grief, Alise has the ability to cope with that. Also as her lawyer submitted that stress and grief is not outside of the ordinary realm of responses that could be expected within the context of Hague Convention abduction proceedings.

[105] I agree with the submissions made by counsel for the Central Authority, and Alise's counsel in particular, that there is no compelling evidence, which meets the high threshold required, that a return to Germany would put Alise at grave risk of physical or psychological harm.

Section 106(1)(c)(ii) intolerable situation

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[37] NOE 14..
[38] Ms Naughton report 8 July 2016 6 [34].

[106] As a result of my determination that the s 106(1)(c)(i) defence is not proven I must now consider whether the evidence before me establishes that there is a grave risk that an order requiring Alise to return to Germany would place her in an intolerable situation.

[107] In respect of this issue the mother has advanced the same evidence as in the physical and psychological harm defence. In my view even if her position is that Alise's return would have such an impact on her, the mother's, mental health that it would be devastating to her, with a corresponding effect upon Alise, I have no expert psychological or psychiatric evidence before me advising me as to the likelihood of this occurring. In such circumstances to accept the mother's position simpliciter would be to risk just the situation the Court referred to in *KN v CN* and *C v C*. On this point I remind myself that the test of grave risk must apply to Alise, not her mother, and the effect on the latter's mental health of Alise's return to Germany is relevant only to the extent it will impact on Alise.

[108] I also heard from Ms Naughton on this issue. I asked her whether in her opinion it would it be intolerable for Alise to lose her relationship with her mother and return to Germany to live with her father. Ms Naughton's response was:

> I think intolerable is too strong a word. I think it will cause her some grief and some loss but I … my assumption is that the father is at least competent and that he has been an involved father throughout her life and that he will prioritise her needs.[39]

She agreed that her assumption was based on the fact that mother and father had agreed, in Germany, that they would share the care of Alise on a week and week about basis.[40]

[109] The evidence is clear, and undisputed, that Alise has spent significant periods of time being cared for by persons other than her mother and father. In particular, as I noted earlier, Alise has been cared for, and for extensive periods, by her paternal grandmother. As Ms Naughton said she has learnt to accommodate change. She was born in New Zealand, lived in [overseas location deleted], moved to Germany and

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[39] NOE 16.
[40] NOE 16.

has now returned to New Zealand. She has attended schools in two countries with quite different languages. She has friends and family in Germany and New Zealand. She speaks three languages. Both her teachers say she is coping well and is up to expectations for a child of her age.[41] In my view it is clear she is resilient and has adapted and can adapt to change.

[110] In my view Alise's return to Germany for the purpose of allowing the German Court to determine which country shall be her place of habitual residence will not place Alise in an intolerable situation. As Ms Naughton said if Alise was to return to Germany that return would be "for the purpose of a thorough assessment of geographical relocation and we know that needs to cover a whole range of things … but we don't have a lot of the information that we need and I think the only way to gather that information is to do that assessment in Germany."[42]

[111] In my view that is an appropriate opinion because in this case there is no reliable independent evidence to show that in Alise's particular circumstances any ill health of the mother because of her return will have significant effect upon this very resilient child. While I note the mother's German doctor's evidence [43] that was an ex post facto report, its untested reference to "familiary conflict" does not in any way meet the high threshold the convention requires for this defence. As for the mother's New Zealand counsellor's report[44] I determined at the commencement of the hearing that it was hearsay and opinion evidence to such an extent I could place no weight upon it.

Section 106(1)(d) Child's objection to a return

Alise's objection

a. Does Alise object?

[41] NOE 21.
[42] NOE 17.
[43] Mother's affidavit of 21 July 2016 Exhibit B.
[44] Mother's affidavit of 21 July 2016 Exhibit D.

[112] In this case Alise has clearly objected to any notion that she might be returned to Germany. She has been consistent in that view to her mother, to her lawyer and to Ms Naughton the report writer. Similarly she has expressed consistently that she wishes to remain in [New Zealand location deleted].

b. Has Alise attained an age and degree of maturity at which it is appropriate to give weight to her views?

[113] The mother takes the view that Alise is mature for her age and that she, the mother, has not and will not attempt to influence her views.

[114] I have noted earlier that Alise is eight years old and that it is her current teacher's view that she is functioning within the normal range of intelligence for a girl of her age. That view is consistent with her teacher in [name of city deleted] who noted that:

> In my opinion Alise appears to be developed in accordance with her age, without any distinctive features.[45]

[115] Ms Naughton gave evidence in general terms about the ability of children of Alise's age to reason and the manner of their thinking. In her oral evidence Ms Naughton stated:

> I don't believe any eight year old can really evaluate the big term implications of this decision. She is eight years old; she's functioning in the concrete black and white, here and now thinking. She is living in the present. She can't possibly evaluate the long term implications of this situation.

She continued:

> She can't abstractly think about what the implications of such a move (back to Germany) would be. She can't evaluate what separation from her father long-term would mean in terms of her life. She can't evaluate what the potential for estrangement from her entire German and [ethnicity deleted] families are going to be, … you know she doesn't have the capacity to think at that level she's only eight years old.[46]

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[45] Father's affidavit 27 June 2016 exhibit A.
[46] NOE p 11.

[116] This oral evidence was consistent with Ms Naughton's report evidence in which she said that it was unlikely that any child of Alise's age would have "the skills to deal with more abstract concepts such as the lifetime implications of geographical separation".[47]

What weight should be given to Alise's views?

[117] If I determine that Alise has attained an age and degree of maturity at which it would be appropriate to give weight to her views I must then consider what weight I should give those views.

[118] On this issue I note that the mother's evidence is that Alise's view that she does not want to return to Germany is based almost completely on Alise being unhappy at school in Germany. She alleged that Alise was bullied by the students at her school and was unable to engage in after school activities because of her care arrangements. I have noted earlier the contrary and more independent view of Alise's teacher in [name of city deleted].

[119] In contrast the mother's evidence is that Alise is settled and happy in [New Zealand location deleted]. She loves her school and is engaged in a number of after school activities. She also has the benefit of spending time with her maternal grandparents.

[120] However when I consider what weight I should give to Alise's views I am concerned about the independence of those views as she expressed them to Ms Naughton. Those views were:

(a) She misses nobody in Germany including her friends. Additionally she did not miss her paternal grandmother. Indeed Ms Naughton said that she had the same response to every question she put to her about missing her paternal family. That response was "nah".[48]

[47] S 133 report 8 July 2016 5 [30].
[48] NOE p 14

(b) Next Alise informed Ms Naughton that "Germany is the ugliest place I've ever seen". However then, and with no reasoned justification for that view, added "I used to think was pretty but now Germany is the ugliest place I've ever seen".[49] Ms Naughton's was "that there was a potential here for this child to become aligned with her mother's viewpoint and to become estranged from that (her German) family.[50] As she said she worried that Alise was starting to lose the good memories she previously had about her life in Germany.[51] I note also the contrast between this statement and the mother's affidavit evidence as to the facilities available to Alise in [name of city deleted].[52]

(c) In her evidence Ms Naughton responsibly also noted that Alise's view of Germany could well have been affected "because Mummy was very sick and that was Germany's fault".[53] I see that comment as corroborating Ms Naughton's opinion that Alise is not as yet able to reason in a manner I can rely upon on this sort of issue.

(d) Ms Naughton also made it very clear, in her oral evidence in particular, that a number of Alise's statements were prefaced with the words "Me and Mum". Ms Naughton considered that the totality of Alise's responses gave her concern that there was a potential for Alise to become aligned with the mother's view point. One consequence of that was that Alise might become estranged from her paternal family, or indeed, more worryingly, there was the possibility of Alise being alienated from her paternal family.

[121] In response to a question from me as to whether the different picture of Germany that Alise was expressing now might arise from her loyalty and need to align with her mother Ms Naughton said:

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[49] NOE p 14.
[50] NOE 14.
[51] NOE 16.
[52] See [87] supra.
[53] NOE 17.

> I think we should always listen to the expressed views of children but there is a question of how much weight we put on those views given the age and capacity to think abstractively and there's also the fact that she is being in … a unique position where she's been removed from the day to day care of her father, so, you know her relationship with her mother has become very significant, and … it is adaptive for children in these circumstances to align themselves … with the view of the remaining parent. They oftentimes live in fear that that parent, too, might abandon them; they've lost the day to day relationship with one parent they might lose the other one. It's adaptive to express the same view as the people that are around you.[54]

[122] Later Ms Naughton confirmed this view and said:

> … it has become adaptive to align herself with the views of her remaining parent on whom she depends for her survival.[55]

[123] Finally on this point in answer to Ms McLeod Ms Naughton referred to Alise's need to align herself with the person from whom she obtains her safety now because she runs the risk that if she lost that safety then she would lose everything. As a consequence she considered that caution was required in the placing of weight upon her views. She noted that Alise's prefacing her statements with the words "me and mum" was just survival for her.[56]

[124] Finally Ms Naughton considered that Alise's total rejection of Germany was disproportionate[57] particularly where Alise's recent history in Germany was considered and she noted Alise "makes exactly the same arguments that her mother makes about the advantages of living in New Zealand".[58]

[125] I am aware that in child objection cases the higher Courts have stated that these matters concerning

(a) the influence on a child's views;

(b) the independence of the child's views; and

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[54] NOE 15.
[55] NOE 22.
[56] NOE 22.
[57] NOE 16.
[58] NOE 12.

(c) the ability of the child to formulate reasons independently with adults around them

are all factors that will go to the weight that can be attributed to a child's views. The clear corollary to this is that less weight will be attributed to a child's view where the evidence demonstrates those views have been influenced, either directly or indirectly, by the parent who has removed them and the child has a limited ability to reason for themselves.

[126] Finally on this issue I note Ms Naughton's opinion that Alise's reasons for her views were not all based in reality; particularly those directly involving her father and his family.[59] Again I see this conclusion as further evidence supporting her view that Alise does not yet have the ability for other than simple reasoning. Consequently that inability must affect the weight I can place on her views.

[127] Accordingly I find in this case that the issue of what weight I should give to Alise's views can be answered as, at best, minimal. Rather I am led to these conclusions:

(a) I find that there is a very real risk that Alise's views have been contaminated, directly or indirectly, by the influence of her mother and her maternal family in [New Zealand location deleted].

(b) Moreover these views of her situation have changed so significantly over the period of time she has been in New Zealand that I consider I cannot give them the weight required to permit me to find this defence to be proven.

(c) I also consider that her views, as expressed to her lawyer and Ms Naughton, are sufficiently extreme that they confirm Ms Naughton's evidence that Alise's current limited ability to reason is such that I cannot ascribe any real weight to her views in this case.

[59] Naughton report 4 [20] – [23].

(d) Additionally Alise's views about her enjoyment of her school in Germany compared with her school in [New Zealand location deleted] are not consistent with the "independent" evidence provided by Alise's teacher in [name of city deleted]. I note that letter was countersigned by the head mistress of that school.

(e) Finally there is the evidence of Ms Naughton. She said, and uncategorically, that Alise did not have the age or maturity to be able to formulate a proper or reasoned view as to her two worlds which the Court could rely upon. As importantly she was also clear that there was a real risk that Alise had aligned with her only "surviving" parent (as Alise would see it now) and that her views may well have been influenced by that need for loyalty to her mother.

(f) I do not ascribe directly fault to the mother for this situation. I consider Alise's views arise from her need to be loyal to the only parent currently in her life. Issues of relocation, whether unilateral or not, can provoke very strong emotions. As such they can have a very significant effect upon any child and, more particularly, a child without the ability to properly understand the implications of actions taken in her, or a parent's, name.

Conclusion

[128] I record that while I have placed significant weight on Ms Naughton's expert views they are only a part of the evidence I have relied upon to reach my decision in this case. I have reminded myself that "issues involving children are determined by judges not by psychologists" and have determined accordingly.[60]

[129] Therefore after considering all the evidence before me, from the parties, from Alise and from Ms Naughton and assessing that evidence on the balance of probabilities, I am not satisfied that the respondent mother has established any of her pleaded defences to meet the high threshold required.

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[60] *R v S* [2004] NZFLR 207 at [99].

[130] Consequently as the jurisdictional requirements in s 105 have been established, and indeed have not been challenged, and the respondent mother has failed to establish to the necessary standard any of her s 106 defences, I have no ability to exercise a discretion in this case.

[131] It follows that I find that for Alise now, in her family, and in these circumstances a return to Germany is necessary in order for a Court in [name of city deleted] to finally determine where, and with whom, she shall live.

[132] Accordingly I must order that Alise be returned promptly to[name of city deleted], Germany pursuant to s 105(2) of the Act.

[133] In my earlier oral judgment of 19 August 2016 I set out the disposition orders to effect Alise's return.

A B Lendrum
Family Court Judge