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IN THE FAMILY COURT
AT NORTH SHORE

FAM-2017-044-000024
[2017] NZFC 1017

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[GREG RUNGE] Applicant
AND	[CORA LEVINE] Respondent

Hearing:	9 February 2017
Appearances:	Ms L Soljan for the Applicant Ms J Connell for the Respondent
Judgment:	15 February 2017

RESERVED JUDGMENT OF JUDGE S J MAUDE
[Application for return of children to the United States of America pursuant to s 105 Care of Children Act 2004 (Hague Convention on the civil aspects of international child abduction) – acquiesence or not]

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[1] Mr [Runge] seeks return to the United States of America of his children [Rosemary Levine] and [Victor Levine] pursuant to s 105 of the Care of Children Act.

[2] The section implements in New Zealand articles 1 to 15 of the Hague Convention of the Civil Aspects of International Child Abduction.

[3] The objects of the convention are set out in article 1 and read as follows:

(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.

[4] The children's mother, Ms [Levine], opposes Mr [Runge]'s application.

[5] Mr [Runge] was at hearing represented by counsel Ms Soljan engaged by the central authority.

[6] Ms [Levine] was represented by Ms Connell.

[7] The hearing progressed as is customary on a submissions only basis.

[8] Prior to commencement of the hearing I made certain rulings as to the admissibility of affidavits sought to be admitted into evidence by Ms [Levine], whether the Court should seek a declaration from the United States as to whether the children's removal was wrongful and whether the hearing should be adjourned.

I declined Ms [Levine]'s application for adjournment.

[9] I declined to obtain a declaration as to whether the children's removal from the United States was wrongful and declined her application for an adjournment.

My reasons for the rulings made by me were set out in a separate decision.

The law

[10] Sections 105 and 106 of the Care of Children Act read as follows:

105 Application to court for return of child abducted to New Zealand

(1) An application for an order for the return of a child may be made to a court having jurisdiction under this subpart by, or on behalf of, a person who claims—

(a) that the child is present in New Zealand; and

(b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) that the child was habitually resident in that other Contracting State immediately before the removal.

(2) Subject to section 106, a court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—

(a) an application under subsection (1) is made to the court; and

(b) the court is satisfied that the grounds of the application are made out.

(3) A court hearing an application made under subsection (1) in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a court of that State, or a decision of a competent authority of that State, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State, and may adjourn the proceedings for that purpose.

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

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

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

106 Grounds for refusal of order for return of child

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

opposes the making of the order establishes to the satisfaction of the court—

(a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) that the person by whom or on whose behalf the application is made—

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or

(ii) consented to, or later acquiesced in, the removal; or

(c) that there is a grave risk that the child's return—

(i) would expose the child to physical or psychological harm; or

(ii) would otherwise place the child in an intolerable situation; or

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

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

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

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

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

[11] It will be clear from consideration of the two sections that s 105 sets out the criteria that must be established for a parent to obtain an order for return of a child to the country sought and that s 106 sets out the grounds upon which a Court may decline return if the s 105 criteria have been met by the applicant seeking return.

[12] The grounds under s 105 that must be established by Mr [Runge] to gain return of the children are:

(a) That the children are present in New Zealand.

(b) That the children were removed from a contracting state (the United States of America).

(c) That at the time of removal rights of custody Mr [Runge] had were being exercised or would have been exercised but for the removal.

(d) That at the time of removal from the United States of America the children were resident in that country.

[13] The hearing proceeded on the basis that the above criteria were acknowledged to have been established Ms [Levine] arguing that in terms of ss 106(1)(b)(ii) Mr [Runge], after retention by the children in New Zealand, acquiesced to their remaining in New Zealand.

[14] I was referred by Ms Soljan to the decision of Justice Andrews in *AHC v CAC*[1] in which Her Honour summarised and adopted the law relating to "retention" as set out by the House of Lords in *Re H v S*[2].

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[1] High Court, Auckland 4-5-2011
[2] [1991] 2 AC 476

[15] Justice Andrews observed that "removal" and "retention" are events occurring on a specific occasion the two being "mutually exclusive concepts".

She said at paragraph [30] of her judgment:

> Removal occurs when a child, who has previously been in a state of its habitual residence, is taken away across the frontier of that state.

[16] She then cited the Court of Appeal for England and Wales in *Re P*[3] as saying at paragraph [33] of that judgment:

> If the giving of consent prior to the removal had the effect that the removal could never be classified as wrongful or in breach of the right of custody, then there would be no need for Article 13 at all. Whereas acquiescence is expressly recognised to be acquiescence subsequent to the removal …

[17] She accepted the English observations.

[18] Put another way, it seems to me that removal of a child from its habitual residence occurs if the child is taken from the country with the "effect" of defeating the remaining parent's rights of custody.

An "intent" to defeat need not be shown.

Retention however occurs when the removing parents fails to return the child to the habitual residence by the end of the period of removal that had been anticipated.

[19] For the purpose of considering the proceedings before me Ms [Levine] argues that the end of the anticipated period of removal was never reached due to Mr [Runge]'s acquiescence with children's presence with her in New Zealand.

[20] Acquiescence is different to consent.

In *CE of Department for Courts v Phelps*[4] the following was observed:

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[3] [2004] EWCA CIV 971 (CA)
[4] (2000) 1 NZLR 168

> Consent as a ground for refusal relates to the parents' actions before the removal while acquiescence relates to the parents' actions subsequent to retention.

[21] As to acquiescence Justice Ronald Young in *JHL v Secretary for Justice*[5] observed at paragraph [24]:

> [24] New Zealand Courts have followed the House of Lords approach in *Re H and Others*. The fundamental principle identified in *Re H* is that whether a parent has acquiesced in the removal or retention of a child will depend upon the state of mind of the parent who is said to have acquiesced. The burden of proving a parent has acquiesced is on the abducting parent on the balance of probabilities. The one exception to the rule expressed by their Lordships was:
>
> > There is 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 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.

[22] Lord Browne-Wilkinson in the House of Lords in *Re H*[6] observed:

> In the process of this fact finding operation, the Judge, as a matter of ordinary judicial commonsense, is likely to attach more weight to the express words or conduct of the wrong parent than to his subsequent evidence as to state of mind. In reaching conclusions of fact, Judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intention. But in doing so the Judge is finding the actual facts. He can infer the actual subjective intention from the outward and visible acts of the wronged parents.

Background facts

[23] The parties married in October 2011 in [United States location 1 deleted] .

[24] [Rosemary] was born in [United States, State 1 deleted] on [date deleted] May 2013.

[25] [Victor] was born in [United States, State 2 deleted] on [date deleted] November 2014.

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[5] [2008] NZFLR 54
[6] [1997] 2 All ER 225

[26] The parties moved from living in [United States, State 2 deleted] to living in [United States, State 3 deleted] in January 2016.

[27] The parties separated on [date deleted] March 2016.

[28] Ms [Levine] and the children travelled to New Zealand for either a short vacation for two to four weeks or until Mr [Runge] had time to settle post-separation on [date deleted] March 2016.

[29] On 7 April 2016 Ms [Levine] filed in [United States, State 2 deleted] application for separation and related orders including parenting orders.

[30] On 29 May 2016 Mr [Runge] filed in [United States, State 2 deleted] to dismiss Ms [Levine]'s applications on jurisdictional grounds (he professing that [United States, State 3 deleted] was the appropriate jurisdiction to hear proceedings).

[31] On 13 June 2016 Mr [Runge]'s 10 June 2016 application without notice to an [United States, State 3 deleted] Court was declined though an order preventing removal of the children from [United States, State 3 deleted] without the consent of both parties was made.

[32] On 26 August 2016 Ms [Levine] filed in [United States, State 2 deleted] for child support.

[33] On 23 September 2016 the [United States, State 2 deleted] Court dismissed Mr [Runge]'s challenge to its jurisdiction.

[34] In October 2016 Ms [Levine]'s counsel advised the [United States, State 2 deleted] Court that his client might decide to remain with the children in New Zealand.

[35] On 29 October 2016 Mr [Runge] emailed Ms [Levine] saying:

> As your lawyer stated in the last hearing you are thinking about staying in New Zealand rather than returning to [United States, State 2 deleted]. That may be a better option for you as it will be easier for you to find employment

> there and you have more family and friends there that will be able to help support you. If this what you are wanting please let me know …

[36] Attached to the above email was a draft agreement that I will refer to later in this judgment.

[37] On 1 November 2016 child support orders were made in the [United States, State 2 deleted] Court in favour of Ms [Levine].

Setoff was allowed with relation to child support in favour of Mr [Runge] in respect of arrears equivalent to father's travel costs to New Zealand of $2,913.00.

[38] On 10 November 2016 Mr [Runge] signed proceedings pursuant to the Hague Convention.

[39] On 23 December 2016 Mr [Runge] filed in the [United States, State 3 deleted] Court seeking exclusive decision-making rights with relation to the children which application was dismissed.

[40] On 17 January 2017 Mr [Runge]'s application pursuant to the Hague Convention was filed in New Zealand.

[41] On 20 January 2017 Mr [Runge]'s Hague Convention proceedings were served on Ms [Levine].

[42] On 27 January 2017 Ms [Levine] filed in [United States, State 2 deleted] for sole parental rights with supervised contact to be reserved for Mr [Runge].

A hearing is scheduled in [United States, State 2 deleted] for 14 April 2017.

Consideration

[43] That the children were removed from the United States is accepted.

[44] That the effect of the removal was to deny Mr [Runge] custody rights is not contested though if there was any doubt as to this Ms [Levine]'s January application

for reduction of Mr [Runge]'s access rights to supervised access plainly by inference acknowledges that he has access rights.

[45] That the children had habitual residence in the United States on removal is accepted.

[46] That the children are now in New Zealand is accepted.

[47] The s 105 criteria referred to above are established such that the only issues remaining for me to determine as to whether the children are to be returned to the United States of America are:

(a) Has there been retention of the children in New Zealand beyond the date that travel to New Zealand was envisaged to endure for?

(b) If so has Mr [Runge] acquiesced with such retention such that the Court should not order return?

(c) If satisfied that there has been retention with Mr [Runge]'s acquiescence, should the Court exercise its discretion in favour of return of the children?

[48] Ms Soljan argued that Mr [Runge] and his parents' understanding, on departure of the children for New Zealand in March 2016, was that Ms [Levine] and the children would be away for two to four weeks.

[49] She referred me to the evidence of Mr [Runge]'s parents stating that Ms [Levine] had told them that the trip would last less than four weeks.

They said that Ms [Levine] had told them this when they were spending time with she and the children at [name of museum deleted] on [date deleted] March, the day before the children left for New Zealand.

[50] Mr [Runge] in his 10 November 2016 affidavit stated that he had on 16 March told Ms [Levine] that he "needed some space".

He said that Ms [Levine] informed him that she wanted to visit with family and friends in New Zealand due to the stress and difficulty that they had been having since separation and that he had said to her that "it would be beneficial for her to have a short visit with her family …"

In his [date deleted] March 2016 text to Ms [Levine] he said:

> I hope you have a safe flight and I am sorry that you are so stressed about everything. I am not wanting you to be stressed and I am just trying to protect both of us and get better at the same time. Please take time and relax. I am sorry that you are having to do this.

[51] Mr [Runge] went on to describe that he, on visiting Ms [Levine]'s apartment and finding all belongings gone, began to suspect that the trip was other than a short one.

He said that he had expected the trip to be for around two to four weeks "as the longest they had ever vacationed with Ms [Levine]'s parents was for one month".

[52] Ms Soljan pointed me to the statement made on 25 July 2016 by Ms [Levine]'s counsel in the [United States, State 2 deleted] proceedings in which he said:

> Petitioner (Ms[Levine]) asserts that she only came to be in New Zealand because respondent (Mr [Runge]) requested the parties take a break from the relationship by way of flying the children to New Zealand to visit the maternal grandparents.

(I note that the above accords with Mr [Runge]'s evidence but that the reason for travel is not relevant, relevance only being the issue of for how long the travel was to be and when retention began).

[53] In the same statement Ms [Levine]'s counsel stated:

> Petitioner asserts that she is currently in New Zealand solely because she does not have the funds to return to [United States, State 2 deleted] with the minor children.

[54] I note that Ms [Levine] at no time challenges the view expressed by Mr [Runge] and his parents that the trip to New Zealand was envisaged to be for a short period.

[55] On 29 October 2016 Mr [Runge], a matter of some days after Ms [Levine]'s counsel had suggested to the [United States, State 2 deleted] Court that his client may decide to reside with the children in New Zealand, sent to Ms [Levine] the email that I have already referred to in which he suggested that it might be a better option for her to remain in New Zealand, it being easier for her to find employment there and to have contact with family.

[56] Attached to the 29 October email was a draft agreement setting out Mr [Runge]'s resolution proposals.

The draft included a number of proposals as to separation, medical and dental insurance and provision, property division and support.

[57] The draft agreement also contained the following proposals:

(a) Mr [Runge] to pay Ms [Levine] NZ$1,600.00 per month in child support in accordance with the New Zealand Inland Revenue Child Support Liability Entitlement Calculator to be recalculated every two years in January based upon the same calculator.

(b) Joint legal custody (in New Zealand described as guardianship).

(c) Ms [Levine] to have primary physical custody (in New Zealand described as day to day care).

(d) Mr [Runge] to have parenting time as follows:

- Two full weeks every three months.

- Nine full weeks during summer vacation.

- One full week during Christmas vacation time.

- Two full additional weeks each year to be agreed upon.

(e) Provision that in respect of US Federal and State income tax exemption for the children they be allocated to Mr [Runge] between 2016 and 2020.

The reverse to apply in respect of New Zealand Inland Revenue tax exemptions (as he perceived them).

[58] What can be deduced from the above evidence is that:

(a) Mr [Runge] and his parents in March 2016 envisaged a short period of time for the children in New Zealand to give both parties post-separation space.

(b) From Ms [Levine]'s perspective she wanted to return to [United States, State 2 deleted] in the United States however as she put it, was unable to being stuck without funds in New Zealand.

(c) Mr [Runge] gained a child support exemption to enable him to travel to New Zealand to visit the children.

(d) On 29 October Mr [Runge] made a comprehensive proposal for resolution.

He flagged that living in New Zealand might be a better option for Ms [Levine] and the children, he seeking response as to that if it was her view.

The proposal he made was, it was suggested by Ms Connell, suggestive of New Zealand residence because it proposed block holiday times consistent with Mr [Runge] living at a distance from the children.

> That in my view is not so clear because the block holiday periods suggested by Mr [Runge] provided for nine weeks during summer holidays (more than is provided for in New Zealand) and an additional week in Christmas holidays which in New Zealand fall within the summer vacation.
>
> The holiday proposals were more consistent with United States School Holidays and resolution that took into account the dispute that existed between the parties as to whether the children should live in [United States, State 3 deleted] or [United States, State 2 deleted].
>
> The proposal referred to joint legal custody, a United States term.
>
> The proposal referred to child support in New Zealand dollars.
>
> The proposal referred to income tax exemptions in respect of both countries.

[59] The draft proposal made by Mr [Runge] under cover of his 29 October email is a little unclear as to what is proposed as to residence. It might reflect the fact that the proposal was made pre legal advice. On its face, on the balance of probabilities, it likely suggests residence in the United States because of the access or contact regime proposed for Mr [Runge] which gels with American School Holidays.

[60] In my view there is not evidence of clear acquiescence by Mr [Runge] established at the point in time that he proposed resolution undercover of his 29 October email.

I come to that conclusion mindful of the words expressed by the High Court in *L v Secretary for Justice*[7] as to acquiescence it stating that it is only established if:

> The words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his rights to the summary return of the child and

[7] [2007] 27 FRNZ 645

> are consistent with such return, justice requires that the wronged parent be held to have acquiesced.

I also observe that in *Clarke v Carson*[8] it was observed that evidence of acquiescence should be clear and compelling.

[61] There is no evidence of response by Ms [Levine] to Mr [Runge]'s 29 October proposal.

[62] On 28 October Ms [Levine] had stated to the [United States, State 2 deleted] Court:

> As I have stated before I am in New Zealand because I was lured there and trapped there by the respondent … The simple truth is that respondent requested that I go visit my parents to give him space …

[63] On 27 January 2011 Ms [Levine] filed in the [United States, State 2 deleted] Court seeking primary care and supervised contact for Mr [Runge].

She sought an adjournment of the proceedings in this Court pending outcome.

[64] Ms [Levine]'s application to the [United States, State 2 deleted] Court appears to have been in response to service of the Hague Convention proceedings commenced by Mr [Runge] on her.

[65] Ms Connell put her client's case as:

(a) Mr [Runge] overtly throughout until issuing the Hague proceedings said it was acceptable that Ms [Levine] and the children were in New Zealand as that saved him money.

(b) His application for return was prompted by the child support decision against him.

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[8] [1996] 1 NZLR 349

(c) He acquiesced in mother remaining in New Zealand until the child support determination on 10 November 2016, some 12 days after his 29 October proposal.

[66] That Ms [Levine] intended to return with the children to the United States until her October deposition in the [United States, State 2 deleted] Court when she suggested remaining in New Zealand is clear.

[67] There is no evidence that defines any mutual understanding as to how long the time that Ms [Levine] and the children would spend in New Zealand save for mother's comment to paternal grandparents not denied though in my view not specific by way of timeframe.

[68] What is clear from the evidence is that it was clearly understood that the children's time in New Zealand with their mother would be for a short period of time.

[69] The March to November period that Ms [Levine] and the children spent in New Zealand may well be explained as Ms [Levine] put it by a lack of funds enabling return (though she did return on three occasions for Court appearances) but as likely it would appear explained by the jurisdictional skirmish between the parties over whether the [United States, State 3 deleted] Court or the [United States, State 2 deleted] Courts would have jurisdiction coupled with Ms [Levine]'s wish to have that issue determined before her return.

[70] What is clear is that Mr [Runge] launched into activity seeking return of the children after the October child support case and Ms [Levine]'s indication that she might remain in New Zealand, he:

(a) Making application to the Court in [United States, State 3 deleted]; and

(b) Signing the Hague Convention proceedings.

That does not suggest acquiescence.

[71] That Mr [Runge] now says that his agreement to the children being in New Zealand while the parents recover from separation stress no longer subsists is clear.

He seeks their return.

[72] I do not find any acquiescence by Mr [Runge] prior to his 29 October email with proposals attached.

[73] Ms [Levine] and the children were in New Zealand longer than had been anticipated but both parents' minds were directed towards return and on what United States Court would have jurisdiction in respect of the children and presumably what state they would live in.

[74] Mr [Runge] sought and obtained a child support reduction in respect of travel to New Zealand but that this not inconsistent with an expectation of return of the children to the United States.

The child support order was not to halt support each month that Mr [Runge] travelled to New Zealand as suggested by Ms Connell but rather was simply a decision provided for a deduction from child support arrears for one specific sum.

[75] What has occurred is that after a moderate period of time in New Zealand, Mr [Runge] relying on Ms [Levine]'s consistent statements that she and the children would return, Ms [Levine] has announced that she might not after all return to New Zealand prompting Mr [Runge] into action.

[76] Mr [Runge] might on 29 October 2016 have been open to a negotiated change of position involving the children living with their mother in New Zealand, though on balance I have not interpreted his proposal that way but rather at best it was a "pre-advice" proposal dependent upon the nature of Ms [Levine]'s response. It was not acquiescence to the children living in New Zealand even if it, with ongoing negotiation, might have led to that. In any event Ms [Levine] did not respond.

Mr [Runge] proceeded to seek return of the children.

[77] The above factors ruminated on I observed that Justice Ronald Young in *L v Secretary for Justice*[9] as did the Court in *JHL v Secretary for Justice* (supra) identify the legal principles to be applied when determining the issue of acquiescence as:

(a) The question whether the wronged parent has acquiesced in the removal of the child depends on that parent's actual state of mind.

(b) The subjective intention of the wronged parent is a question of fact for the trial Judge in the light of all of the circumstances of the case, the burden of proof being on the abducting parent.

(c) The trial Judge, in reaching a 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/her mere assertions in evidence of his/her intention.

(d) There is only one exception. Where the word or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe, that the wronged parent is not asserting or going to assert his/her right to the summary return of the children and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.

[78] The onus falls on Ms [Levine] to show on the balance of probabilities that Mr [Runge] acquiesced in her retention of the children in New Zealand.

[79] Ms [Levine]'s retention of the children was signalled at the [United States, State 2 deleted] child support hearing in October 2016 and affirmed by:

(a) Her non-response to Mr [Runge]'s [date deleted] October proposal.

[9] [2007] 27 FRNZ 645

(b) Application by her for parenting orders in [United States, State 2 deleted] filed after service on her of Mr [Runge]'s application for return of the children, she through counsel at hearing indicating that the intent of those proceedings was to achieve orders in [United States, State 2 deleted] confirming the status quo of care in favour of Ms [Levine] and authority for relocation of the children to New Zealand.

[80] It would not be consistent with the Hague Convention's objects for a parent to retain the children against the other parent's wish, in a foreign jurisdiction, prolonging that retention then by the issue of proceedings in the home country which proceedings could well take some significant period of time to resolve, all the while cementing a new status quo favouring that parent when the home country Court eventually will be asked to make a determination on the basis of the children's then welfare and best interests.

[81] I have found that Ms [Levine] has retained the children in New Zealand contrary to what was a clear understanding that they travel to New Zealand for a short period of time.

I have found that Mr [Runge] did not acquiesce subsequent to retention of the children in New Zealand with them remaining here.

[82] The result of the above two determinations by me is that I am required pursuant to s 105(2) of the Care of Children Act to order that the children be returned to the United States of America. That I must do.

[83] Ms Soljan has urged that I adjourn Mr [Runge]'s application to a conference to be allocated before me in approximately three week's time so that arrangement can be put in place for the children's return, hopefully on a consensual basis.

[84] I direct the Registry to allocate the next available conference time before me for that purpose.

S J Maude
Family Court Judge

Signed on 15 February 2017 at am/pm