

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

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**IN THE FAMILY COURT
AT NORTH SHORE**

**I TE KŌTI WHĀNAU
KI ŌKAHUKURA**

**FAM-2019-044-000756
[2021] NZFC 7903**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MEGAN KANDA] Applicant
AND	[ABHISHEK KANDA] Respondent

Hearing: 2 August 2021

Appearances: L Kenny for the Applicant
Respondent appears in Person
S de Luen as Lawyer for the Child

Judgment: 2 August 2021

ORAL JUDGMENT OF JUDGE S J MAUDE

[1] This is an oral decision.

[2] Ms [Kanda] applies to suspend an order preventing the removal of she and Mr [Kanda]’s son, [Brad] aged [under five], from New Zealand to enable her to travel with him to Germany for her grandmother’s funeral.

[3] Ms [Kanda]'s grandmother died on [date deleted].

[4] [Brad]'s father, while sympathetic, opposes the application primarily because of the risks presented by COVID-19 of unpredicted lockdowns and intervention with travel.

[5] Ms [Kanda] proposes to be away from New Zealand for four weeks before spending two weeks upon return in managed isolation. She proposes travel through one of three ports, Doha, Kuala Lumpur or Dubai. In Germany she proposes to live within a small family bubble. She asserts that:

- (a) None of the stopover destinations are regarded as high risk.
- (b) All passengers travelling will have been subjected to predeparture COVID tests, therefore reducing the risk of contracting COVID-19.
- (c) She will, she says, maintain COVID safe practices while away.
- (d) The risks to be associated with Germany are, she urges, not high at present.
- (e) On contraction of COVID-19 within Germany she has provided statistics suggestive of the average recovery time being seven days.
- (f) She reminds the Court that Germany is a Hague convention country.

[6] Mr [Kanda] for his part urges:

- (a) That stopovers present risks.
- (b) That borders can close at short notice due to rises in COVID-19 cases.
- (c) That Ms [Kanda] and [Brad] could be stranded unable to return to New Zealand

- (d) That there would be a risk for them of contracting COVID-19.
- (e) He urges that Ms [Kanda] has no MIQ voucher obtained for her return, though I do observe at the outset that in fact Ms [Kanda] does have a voucher though one likely that she would need to seek a return extension on.
- (f) Ms [Kanda]'s temporary residence visa Mr [Kanda] urges will expire in November necessitating application for renewal or permanent residency, Ms [Kanda] he says needing to be in New Zealand for that to be achieved. In that respect I do note, again at the outset, that there are provisions that deal with the ability for applications to renew visas offshore.
- (g) He observes the government recommendations are against travel.

[7] The law relevant is:

- (a) That the Court must have regard to [Brad]'s welfare and best interest as its first and paramount consideration.
- (b) That it must take into account the principles set out in s 5 of the Care of Children Act 2004 when forming a view as to what is in [Brad]'s welfare and best interests.
- (c) That it must give to [Brad] the opportunity to have his views made known, those views to be taken into account by the Court though not necessarily determinative.

[8] [Brad] has been interviewed by his lawyer, Ms de Luen, who has reported that [Brad] recalls travelling to Germany in the past; that he recalls a little lack of comfort with ears and tummy and that he does not want to travel again anytime soon. That observed at age [under five], and with the complexity of the issue the Court is asked to determine, I do not pay particular notice to [Brad]'s view about travel.

[9] The Court has regard to the background circumstances for [Brad] which involve:

- (a) The parties having married in [date deleted] 2017.
- (b) They having separated in [date deleted] 2019.
- (c) Ms [Kanda] at separation, as is the case now, holding a temporary residence visa.
- (d) Ms [Kanda] being German raised in Germany, [Brad] speaking English and German fluently.
- (e) [Brad] post the parties separation having travelled to Germany three times with his mother.
- (f) [Brad] lives in a nine day five day parenting regime as between his mother and father, nine nights with his mother and five nights with his father per fortnight.

[10] Ms de Luen, who is [Brad]'s lawyer, expresses the view that travel as proposed would have cultural benefit for [Brad].

[11] She urges at the same time that the Court must weigh that advantage against the risks of travel.

[12] She points out that the borders could close with little warning. She points out that delay in return could impact Ms [Kanda]'s visa status.

[13] She refers me to a decision of my own delivered last week when I declined travel for COVID-19 reasons for a child proposed to be travelling to Pakistan, though I do observe that each case must be dealt with on its own particular merits.

[14] I turn to consider what my decision is to be.

[15] Section 5(f) of the Care of Children Act draws the courts attention to the value and importance of identity for a child with its cultural background.

[16] If proposed travel is allowed clearly [Brad] will return and be immersed with his German family.

[17] Clearly that principle favours travel for [Brad].

[18] Section 5(e) of the Act urges consideration of the desirability of sustaining and strengthening a child's relationship with whānau, hapū and iwi.

[19] For this little boy clearly the opportunity to travel to Germany would strengthen his relationships with his German family.

[20] Section 5(d) of the Act informs the Court as to the desirability in continuity for a child in its day-to-day care arrangements.

[21] Plainly there is a risk that prevention of return would interrupt with the existing shared parenting arrangement, that not in [Brad]'s welfare and best interests.

[22] I have no doubt that Ms [Kanda]'s reason for travel for her grandmother's funeral is entirely well motivated.

[23] Security of return is guaranteed by the provisions of the Hague convention with relation to international child abduction barring COVID-19 intervention.

[24] No suggestion is made that Ms [Kanda] is not intent on returning to New Zealand and maintaining she and [Brad]'s life here.

[25] What is clear is that there is a New Zealand government warning against unnecessary international travel.

[26] The world, I believe I can take judicial notice of, is experiencing growing and unknown outcomes in respect of COVID-19 and in particular its variants, and in particular again at the moment the Delta variant.

[27] There is evidence of countries at short notice imposing lockdowns and the closing of borders. In particular of course I note the recent shut downs closing the borders as between New Zealand and Australia. They occurred entirely unexpectedly. Shut down of the borders does and can trap travellers.

[28] [Brad] lives in a shared parenting arrangement that I have already referred to. To be trapped in Germany or elsewhere would significantly impact [Brad]'s relationship with his father for a period or periods unknown.

[29] It is not in [Brad]'s welfare and best interest to be separated from either parent for an indefinite period.

[30] In my view there must be a real and appreciable risk of that. It is only a risk, but it is a real and appreciable risk.

[31] To Ms [Kanda]'s absolute credit, she has stated that she will not travel to Germany without [Brad].

[32] If she intended to travel to Germany irrespective of the court's decision, the courts task would have been more difficult because there would have been risk that [Brad] could have been in New Zealand separated indefinitely from his mother and of course the Court has no ability to control an adult decision about its own life.

[33] At the end of the day I accept [Brad]'s lawyers' concerns.

[34] As she put it, when COVID is brought under control there will no impediment to travel for [Brad] to Germany and in the interim there remains regular Skype contact available.

[35] With regret it is my decision that Ms [Kanda]'s application must be declined, but I wish to stress in declining it that it is only COVID that forces me to that decision

so that in future when COVID is controlled at a satisfactory level I would have little difficulty on the same circumstances as presented today otherwise in allowing the travel.

Judge SJ Maude
Family Court Judge

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