MHS v PIW HC New Plymouth CIV 2010-443-292 [2010] NZHC 1462 (12 August 2010)

Last Updated: 30 August 2010

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO

11D OF THE FAMILY COURTS ACT 1980

IN THE HIGH COURT OF NEW ZEALAND NEW PLYMOUTH REGISTRY

CIV-2010-443-000292

UNDER the Care of Children Act 2004

IN THE MATTER OF an appeal pursuant to s 143(2) of the Act

BETWEEN MHS Appellant

AND PIW Respondent

Hearing: 9 August 2010

Appearances: S T Hurley for Appellant

C B Wilkinson for Respondent

H L Tyree for Child

Judgment: 12 August 2010

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on

12 August 2010 at 3.00 p.m., pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Solicitors:

S T Hurley, PO Box 516, New Plymouth 4340

Reeves Middleton Young, Private Bag 2031, New Plymouth, 4342

Till Henderson, PO Box 1, New Plymouth

MHS V PIW HC NWP CIV-2010-443-000292 12 August 2010

Introduction

[1] The appellant ("MHS") appeals from a decision of the Family Court in which the respondent ("PIW") succeeded in his application for an order under s 105(2) of the Care of Children Act 2004 ("the Act") requiring the return of their son T to Australia. T was born on 2 August 2006, in Brisbane. The Court found that MHS had taken T from Australia without PIW's consent.

[2] T is presently living with MHS in Taranaki. The Judge described him as well settled. He is attending kindergarten and being cared for by MHS and her extended family. It is thought that he suffers from Asperger's syndrome, displaying behaviours which Judge Murfitt found were "indicative of the lower end of the Autistic Spectrum Disorder" and with language skills well below that of his developmental age. He has a tendency to echo words that he has heard, rather than interpreting and responding to them, a condition described as echolalia. The Judge found, on the medical evidence, that the diagnosis of Asperger's syndrome could only be tentative because T was too young for the diagnosis to be certain. Nevertheless, the Judge found that T's development was such that he would deal with changes in routine with more difficulty and take more time to adapt to them than would be the case for a normal child. The Judge also accepted that T would benefit from a life of clear routines and lack of controversy and that he would need specialist medical monitoring. Such monitoring and care would be as available in Australia as in New Zealand.

[3] If the present appeal does not succeed, MHS has responsibly accepted that it would be her duty to return to Australia with T.

Preliminary issue

[4] At the outset of the hearing it was necessary to deal with an application made by MHS for leave to adduce further evidence on the appeal. The proposed evidence was from CM, the half-sister of PIW and was broadly supportive of MHS's appeal, expressing her support for her decision to return to New Zealand with T.

[5] Having heard counsel I dismissed the application. The evidence did not relate to matters that have arisen since the date of the decision of the Family Court nor was there any explanation proffered as to why it could not have been obtained prior to the hearing in the Family Court.

Background

[6] MHS is a person of the Maori race whose whanau live in South Taranaki, but she left to live in Australia in 1997. PIW is a 39 year old Australian who lives in Queensland. He began a *de facto* relationship with MHS in December 1999.

[7] Judge Murfitt found that the relationship between the couple was volatile and that they had separated for a period of six months in early 2004. They separated again in the latter part of 2008 and reached agreement at that stage that T would live with his mother during the week but be in his father's care on the weekends. Although PIW claims that their separation was "amicable" MHS obtained a protection order against him on 11 June 2009. PIW, although served with the application for protection order on 25 May 2009 did not, at the time, dispute the allegations against him. They included evidence by MHS of problems he had with alcohol, demanding money from her and an assault on 19 October 2008 in which he had grabbed her by the throat. She claimed also that there were occasions on which PIW had kept T beyond the times when he should have been returned to her.

[8] The Judge referred to ongoing tension and disputes after the couple separated. He referred to concerns that MHS had about what was happening to T whilst in his father's care. On 30 August 2009 the home where the family had lived was sold and MHS had become increasingly anxious about discord over T's future. By this stage PIW had entered into a new relationship with a woman called B. The Judge described the relationship between MHS and B as "unhealthy and conflict ridden".

[9] Events came to a climax. At [14] to [16] of his judgment the Judge recounted what occurred:

[14] After several consecutive weekends of contract occurring as per the parenting agreement between the parties, on 14 October MHS and T flew to New Zealand, and she has lived in Taranaki since that time. She did not consult with PIW before she left, and he was unaware of her planned departure.

[15] On 16 October MHS texted PIW as follows:

"After everything that u hav put me thru + more + god nos what u hav done 2 make T scream + not want 2 go near u. I have asked him if he wants to stay the nite at daddies + he freezes + yells out no. We hav movd + u wont c him eva. Don't both callin."

[16] B sent a text message back by return as follows:

"U have no idea what you have done. U stupid fuckin cow. U have just gone down the wrong track and are in a lot of trouble. Believe me I have been there with my boys. Wrong wrong move. The law in on your ass. I have friends in high places there. Your ass is fucked. Don't ever close your eyes bitch. B"

[10] Although PIW denied that B sent that text message, the Judge accepted MHS's evidence that she did so. He noted that, As Ms Hurley had volunteered, that evidence in fact tended to confirm PIW's claim that T's removal from Australia was without his consent.

[11] PIW's evidence was that within a few days he took legal advice and made application to the Queensland State Central Authority to initiate an application for an order for the return of T to Australia. For reasons which have not been directly explained the application was not in fact filed in the Family Court in New Zealand until 23 March 2010. The Judge recorded PIW's evidence that for some time he did not know where MHS and T were living, although he had a "fair idea" that they would be in South Taranaki with her whanau. MHS gave evidence that after a period of time she had tried to arrange contact and in February 2010 she applied to the Family Court at New Plymouth for a parenting order, including definition of PIW's rights of contact. That application is unable to be progressed pending determination of the present proceeding.

The relevant statutory provisions

[12] Before addressing the arguments raised in the Family Court and on the appeal it will be convenient to set out the relevant statutory provisions.

[13] Section 105(1) and (2) of the Act provide:

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.

[14] Section 106(1) provides as follows:

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.

[15] There was no controversy in the Family Court as to PIW's entitlement to make an application under s 105 of the Act, because each of paragraphs (a) to (d) of subs (1) applied. Consequently, the Family Court was obliged to make the order unless one or more of the grounds for refusal to do so set out in s 106 applied.

The argument in the Family Court

[16] Relying on s 106, MHS argued that PIW had consented to or later acquiesced in the removal (the grounds set out in s 106(1)(b)(ii) of the Act) and that there were grave risks that T's return to Queensland would expose him to psychological harm (it was not said that there would be a risk of *physical* harm) or would otherwise place T in an intolerable situation (s 106(1)(c)(i) and (ii)).

[17] The Judge rejected MHS's contentions. He held that there had been no consent. Nor was he satisfied that PIW had acquiesced in T's removal. Noting that PIW had engaged the Queensland State Central Authority to initiate action under the

Hague Convention to secure T's return, the Judge referred to the significant delay that then ensued before the application was made to the Family Court in New Zealand. While he was prepared to accept that a delay in bringing proceedings could give rise to a finding of acquiescence by an applicant, the Judge considered that there would need to be evidence attributing the delay to the applicant. He did not consider that there was such evidence in the present case. He thought that there were a variety of possible explanations for the delay and that he could not exclude reasons that were unrelated to PIW's own actions. He mentioned the possibility of "bureaucratic inefficiency."

[18] Nor did the Judge consider that the return of T to Australia would expose him to psychological harm, or otherwise place him in an intolerable situation. The Judge accepted that T had witnessed "quite significant domestic violence". There had been "gross verbal abuse" and "some physical man-handling" of MHS by PIW. However, the Judge considered that allegations of the nature made by MHS were far from unusual, and noted that MHS had the benefit of a protection order which could be enforced against PIW if she returned to Australia. While T needed particular care because of his condition, and he would be better able to be managed by MHS if she was in a secure and emotionally stable situation, the Judge was not persuaded that the grave risks on which MHS relied under s 106(1)(c) were present. He considered that the matters raised would be able to be taken into account by the Courts in Queensland in providing for the care and contact arrangements there.

[19] Consequently, he found that none of the defences raised were established and that an order for return should be made.

The appeal

[20] On appeal, MHS has pursued the same arguments that she advanced in the Family Court. She alleges that PIW acquiesced in T's removal to New Zealand. Alternatively, it is argued that ss 106(1)(c)(i) and (ii) T would be exposed to grave risk if he returned to Australia.

[21] MHS's claim that PIW acquiesced in T's removal rests on the facts that MHS

left Queensland with T on 14 October 2009, that PIW learned what had occurred on

16 October, and that it was not until 22 March 2010, more than five months later, that the application for an order for return was filed in the Family Court at New Plymouth.

[22] Ms Hurley pointed out that there was no independent evidence that supported claims made by PIW that he had made efforts to contact MHS. She referred to the lack of evidence of consultation by PIW with his Australian solicitors, or documents showing his dealings with the Queensland State Central Authority. Ms Hurley submitted that PIW's solicitors seemed to have taken no steps in relation to the matter, and invited the Court to infer that that was because he had not provided them with instructions to take any action. Nor was there evidence of other steps taken by PIW, such as reporting T as missing or abducted to the police in Australia and enlisting their help to find him in New Zealand, correspondence in the form of a solicitor's letter to MHS or any of her family members, application for a parenting order in the equivalent Australian jurisdiction, contact with family members to persuade them to persuade MHS to return to Australia with T, or contacting MHS directly by telephone, or text messaging.

[23] Ms Hurley submitted that the lack of any action by PIW after learning that MHS had left Queensland for New Zealand taking T with her showed that he had acquiesced in T's removal.

[24] As to the issue of grave risk, Ms Hurley acknowledged that the risk had to be a likely rather than a possible risk and that its consequences for the child must be "most serious". Ms Hurley referred to the evidence that MHS had given in support of her application for a protection order in Australia which had referred to PIW's drunken verbal abuse, and yelling and screaming in front of T. There was the incident when PIW grabbed her by the throat, pushing her back as T was screaming. On occasions he had demanded money in an intimidating way and when he had failed to arrive an occasions when he had been due to take care of T. There

was also evidence that on other occasions PIW had failed to return T when he was due to do so.

[25] Ms Hurley submitted that the psychological harm referred to in s 106(1)(c)(i) can refer to harm T would be likely to suffer as a result of psychological abuse of MHS by PIW as well as of T himself. Although she did not refer me to an instance of the latter, Ms Hurley submitted that T's right to a peaceful, loving existence had been over-shadowed by PIW's inability to control his anger and alcohol and drug abuse issues. She referred to evidence that MHS gave in her affidavit of 19 April referring to:

Holding my son on the contact visits commencing on a Friday night and have T's arms wrenched around my neck tightly, his legs gripping my waist, feeling and listening to his pant-like breathing because he did not want to go with PIW showed me the fear he was already experiencing at the hands of his father, or whoever else was in that environment.

[26] Ms Hurley submitted that since T had suffered from trauma as a result of earlier exposure to domestic violence, he would be more susceptible to harm if returned to the situation where he might be subjected to further threats or violence. Ms Hurley acknowledged that there was no evidence before the Court which directly referred to the psychological impact on T of a return to Australia. She referred, however, to evidence given by Dr Jacquemard responding to a question that had been asked by Ms Tyree, who (as on the appeal) appeared as counsel for T in the Family Court. The question posed was, if T was to be returned to Australia, what advice the doctor would give to his parents as to how to lessen the impact of the transfer. Dr Jacquemard replied:

... For autistic children, procedures and rules and environment needs to be clear. So if there's a good arrangement between parents and there's a smooth way of doing these things where the child knows what's going to happen and why and it happens in a peaceful way without confusing the child more, it can be done. These things, of course, this type of situation is not ideal at all for an autistic child because it's not conductive to a stable environment on both sides. If you've got a good organised arrangements, then autistic children do well. I mean, this is an extreme case because you talk between Australia and New Zealand. We see the same thing with two home environments for the child within New Plymouth. If those parents make clear arrangements and they agree in what they do and they demonstrate that to the child, it's not a problem. If they fight and argue and make things unstable for the child, it does become a problem. I think it actually, for anybody that knows about autism, it's pretty obvious.

[27] Ms Hurley also argued, essentially on the basis of the same facts, that to return T to Australia would be to place him in an "intolerable situation". She

submitted that T was a very young child, he would not have the maturity to be able to remove himself from what she described as PIW's anger, alcohol abuse issues, violence and unpredictability. Once again, Ms Hurley emphasised the effect on T of witnessing serious verbal and occasionally physical arguments between his parents, the use and abuse of alcohol by PIW, concerns about the standard of care for T when in the care of PIW and his new partner B, and indications of fear on T's part of spending time with his father. Ms Hurley also noted that MHS was in receipt of a Domestic Purposes Benefit in New Zealand, with no savings or employment prospects. She asserted that as a New Zealand citizen she would not be eligible for financial support in Australia. She also noted that currently, T is scheduled to undergo a surgical procedure in respect of an undescended testicle later this month at the Taranaki Base Hospital.

[28] Mr Wilkinson rejected MHS's allegations that that PIW had acquiesced in

T's removal. He pointed out that on the evidence, PIW had contacted his solicitor on

20 October, having found out about T's removal on 16 October. The advice he received was to make an application to the Queensland State Central Authority to commence proceedings under the Hague Convention. On 3 November 2009, which was just two weeks after T's removal, he engaged the Queensland State Central Authority to initiate the Hague Convention application seeking T's return to Australia. Mr Wilkinson submitted that once he had done that, he was entitled then to leave the progression of the matter to the Queensland State Central Authority. In this case, the formal authorisation to the New Zealand Central Authority was not signed by PIW until 1 March 2010, but thereafter matters proceeded swiftly. Mr Wilkinson was asked to act by the New Zealand Central Authority and was instructed on 17 March 2010. The application was promptly filed on 22 March

2010. Having taken these steps to initiate the process, it was not for PIW to take independent steps to endeavour to secure T's return. Nor would it have been appropriate for him to commence a proceeding in Australia, which would inevitably have been stayed pending resolution of the Hague Convention proceeding.

[29] As to the allegations of grave risk to T if he returned to Australia, Mr Wilkinson submitted that many children witness arguments and abuse without being exposed to grave risk of psychological harm and he pointed out that the

domestic violence order in Australia had not been extended to T. The fact that PIW had not opposed the order did not provide confirmation that his conduct posed any risk for T.

[30] Further, there was no basis for any suggestion that Australian welfare agencies would be unable to address any of the issues raised by MHS as amounting to grave risk to T's safety and welfare if returned to Australia. The laws of Australia and New Zealand both have as their focus the paramount principle of a child's best interests and welfare and there is no reason to suppose that MHS's concerns could not be dealt with by the relevant Australian authorities. Similar considerations applied in respect of MHS's assertion of T being placed in an intolerable situation.

Counsel for T

[31] Mrs Tyree, appeared for T. Properly, she did not address the acquiescence point, abiding the Court's decision. In respect of the issues raised under ss 106(1)(c), Mrs Tyree submitted that in assessing whether or not to make the order sought, the task of the Family Court had not been to decide whether T would be likely to receive the highest standard of care in New Zealand or Australia. While the evidence indicated that if T were in the care of PIW he would be exposed to a level of risk, there were considerations indicating that the risk would not be grave. They included the fact that for a number of months prior to coming to New Zealand T had been in the care of PIW every weekend and MHS had not taken steps in the Australia Courts to limit his contact with T. While there were allegations that T had been witness to domestic violence between PIW and MHS, there was no evidence that violence had been directed T himself. Further, MHS had indicated that if T is to be returned to Australia she would go with him and remain his primary care-giver. The medical evidence indicated that monitoring and co-operative parenting would be required for management of T's condition and if necessary treatment would be as available in Australia as it is in this country.

[32] Mrs Tyree also submitted that risks to which T might be subject as a result of being in the care of PIW, did not necessarily equate to risks inherent in simply

returning him to Australia, especially as MHS has indicated that she would also return.

Discussion

[33] Section 106 of the Act is part of the New Zealand legislature's restatement of the statutory provisions originally enacted by the Guardianship Amendment Act

1991 so as to give legislative effect to the Convention on the Civil Aspects of International Child Abduction known as the Hague Convention. The 1991 Act was discussed by a full Court of the Court of Appeal in *A v Central Authority for New Zealand.*[1] At 522, Doogue J, writing for the Court noted that it was plain that the Convention is concerned with the appropriate forum for determining the best interests of the child. At 523 he continued:

Where the system of law of the country of habitual residence makes the best interests of the child paramount and provides mechanisms by which the best interests of the child can be protected and properly dealt with, it is for the Courts of that country and not the country to which the child has been abducted to determine the best interests of the child.

In most instances where the best interests of the child are paramount in the country of habitual residence the Courts of that country will be able to deal with any possible risk to a child, thus overcoming the possible defence of the abducting parent. That does not gainsay the fact that in some instances there will be situations where the Courts of the country to which the child has been abducted will not be so satisfied. This will not necessarily be limited to cases where there is turmoil or unrest in the country of habitual residence. There may well be cases, for example, where the laws of the home country may emphasise the best interests of the child are paramount but there are no mechanisms by which that might be achieved, or it may be established that the Courts of that country construe such provisions in a limiting way, or even that the laws of that country do not reflect the principle that the best interests of the child are paramount.

[34] The relevant principles to be applied were also addressed by Elias J in *Clarke v Carson.*[2] She said, at 351, again with reference to the Guardianship Amendment Act 1991:

It is clear that the function of a New Zealand Court hearing an application under the 1991 Act is circumscribed. It is not its function to determine the underlying merits of whether the child is better off in one country or another.

That is emphasised by s 35 which displaces the injunction contained in s 23(3) of the principal Act that in proceedings under it the welfare of the child is the first and paramount consideration.[3] Rather, the Act is designed to achieve international co-operation in preventing the wrongful removal of children and proceeds on the basis that, except in the special circumstances provided for by s 13,[4] the appropriate place to determine questions of custody, access and residence is the country from which the child was wrongfully removed.

[35] As Fisher J recognised in *S v S*[5] the primary emphasis of the Convention is on prompt return of children wrongfully removed or retained and the Court of the country of the child's habitual residence is presumed to be the appropriate forum for determining custody and access issues. Application of the Convention's provisions has an impact not only in respect of the child who is the subject of the particular application before the Court but, as Fisher J said at 519:

There is the future of other children to consider. Their interests will be promoted by demonstrating to potential abductors that there is no future in interstate abductions. A firm attitude to the return of children, in other words, discourages those parents who might otherwise be tempted to contemplate unilateral removal.

[36] Fisher J also observed at 520:

In the case of s 13(1)(c)[6] in particular, the presumption is strengthened by its restrictive wording. The restrictions stem from the placing of the onus upon the party opposing return ("establishes to the satisfaction of the Court"), the gravity of the required risk

("there is a grave risk"), the use of the word "intolerable" (s 13(1)(c)(ii)), and the way in which the word "intolerable" indirectly qualifies the phrase "expose the child to physical or psychological harm" in s 13(1)(c)(i) (see retrospective significance of the word "otherwise" in s 13(1)(c)(ii)).

[37] Fisher J's decision was upheld on appeal.[7] More recently in *HJ v Secretary for Justice*[8] the Court of Appeal noted that the s 106 exceptions are defined so narrowly that they apply in relatively few cases and that:[9]

The s 106(1)(c) defence is not easy to invoke successfully. This is in part a function of the hurdle provided by the expression "grave risk" and in part because of judicial expectations that, in the normal course of events, the legal systems of other countries will protect children from harm. In this context we think that references by Judge von Dadelszen to "heavy onus" (and we note that he did not say "heavy onus of proof") should simply be construed as a statement of the obvious – that the defence in question was, by its nature, difficult to make out.

[38] These cases show that in assessing whether T, if he returned to Australia, would be subjected to the grave risks identified in s 106(1)(c) the Court must take into account the similar content of that country's laws that provide for the welfare and best interests of children, and the sophistication of its legal system in dealing with issues concerning parenting and contact.

[39] Plainly, MHS has raised issues that give rise to a legitimate concern that PIW might be given to inappropriate behaviours directed at MHS, and that those behaviours would take place in the presence of T. That in turn might pose difficulty for T's future development and well-being, especially having regard to his special needs. The questions raised by the evidence about PIW's past conduct do have implications in respect of the future parenting and contact arrangements that should apply. Those issues are in fact raised in the proceeding that MHS has now commenced in the Family Court for a parenting order and definition of PIW's rights of contact.

[40] But the issues raised by the present proceeding are ultimately directed to which country's Courts are the most appropriate to deal with those issues. The stance of the Act is clear. The issues should be determined by the Australian Courts where T, a citizen of that country, was domiciled before being brought to New Zealand, unless one of the grounds for refusal of the order that PIW seeks can be established under s 106(1) of the Act.

[41] I do not consider that the Judge erred when he decided that neither s 106(1)(b)(ii) or s 106(1)(c) applied on the facts of this case.

[42] Taking the latter first, I note that in his affidavit of 19 May 2010, PIW states that the domestic violence order that MHS obtained in Australia was based on "false

and misleading information". Apart from that observation, he did not directly confront some of the issues on which MHS relied, essentially by attaching the application that she made to the Australian Court. Mr Wilkinson stated that PIW had deliberately not engaged with the issues raised in that setting, on the basis that the matters raised were not directly relevant to the present proceeding. That turns however, not so much on a question of relevance, but on whether the issues relied on by MHS are sufficiently serious to establish one of the grave risks under s 106(1)(c) of the Act. I do note however that in his affidavit, PIW stated that the domestic violence order that MHS had obtained in Australia was made on the basis of "false and misleading information". Later in his affidavit, he denied that he had any issues with alcohol, illegal drug use or domestic violence. He admitted to having had a problem with alcohol in the last year of his relationship with MHS, but stated that he was suffering from depression during that time and financial pressure as well.

[43] I note also that, in his affidavit, PIW states that approximately three months after their separation, MHS and he attended an appointment with a paediatrician at the Caboolture Hospital in relation to T's condition. Further, he has another child who has Asperger's syndrome and is aware of organisations in Brisbane which can provide specialist assistance and counselling for parents of children with that condition. Further it appears that after PIW and MHS separated, T was frequently in PIW's care at weekends, as acknowledged in MHS's affidavit of 19 April.

[44] In the absence of cross-examination, it is difficult to determine the extent to which PIW exhibited violent and aggressive behaviour towards MHS, and in the presence of T. However, for present purposes, I am prepared to assume that the behaviour was as MHS has described it. Even so, I am not satisfied that any of the issues that MHS has raised could not be accommodated by appropriate orders able to be made by the Court in Australia designed to ensure that PIW's contact with T did not result in the repetition of inappropriate conduct. Certainly, it does seem on the present facts that MHS and PIW would not be living together and that MHS would continue to be in the role of primary care-giver.

[45] In all the circumstances, I am not persuaded that the Judge was incorrect in concluding that the grave risks referred to in s 106(1)(c) had not been made out.

[46] As to the issue of acquiescence, PIW stated in his affidavit that on the day he learned that MHS had moved he contacted a number of government organisations, one of which was Queensland's welfare authority, the Department of Communities. On the following day, he rang a local law firm and made an appointment to seek legal advice. At that stage, he did not know that MHS had gone to New Zealand. Within a week he had consulted a solicitor who advised him to make contact with the Queensland State Central Authority and on 3 November 2009 he requested the Queensland State Central Authority to initiate the Hague Convention

application. There is no explanation of the delay that then ensued.

[47] Ms Hurley submitted that the situation was explicable on the basis that PIW changed his mind, and then later must have reactivated the application which was not formally signed by PIW until 1 March 2010. However, there is no evidence to that effect, and such a conclusion could only be based on inference. I am not satisfied that that inference should be drawn. It may well be, as Judge Murfitt was inclined to think, that the answer lies in administrative delay, perhaps reflecting the intervening holiday period. However, whatever the explanation, there is no satisfactory basis on which it could be assumed against PIW that he had acquiesced. Once PIW had initiated the necessary procedures with the Queensland State Central Authority, it was open to him to leave the matter in the hands of the Authority to be progressed. I would not infer acquiescence from the fact that he did that, rather than initiating further steps of his own, either personally or through his solicitors. The fact that he may have known where MHS was likely to have gone in New Zealand does not alter the position. Certainly, in the application that he signed requesting the Australian Central Authority to take action, he gave information as to the likely locations where T was to be found in south Taranaki. He also referred, in a part of the form inquiring about "other persons who might be able to supply additional information relating to the whereabouts" of T, to MHS's brother and grandmother.

[48] Overall, I am not satisfied that the Judge erred in deciding that acquiescence was not established under s 106(1)(b)(ii) of the Act.

Result

[49] For the reasons discussed, the appeal is dismissed.

[50] Mr Wilkinson asked that, if that was the decision at which the Court arrived, time should be afforded to the parties to agree arrangements for T's return to Australia and to avoid the Family Court's order having to be formally enforced. Ms Hurley did not address that particular issue.

[51] Section 105(2) refers to the Court making an order that the child in respect of whom an application has been made be returned promptly to the country specified in the order once the Court is satisfied that the grounds of the application are made out. In the present case, the Family Court's order for T's return to Australia was dated

5 July 2010 although, in his judgment of 17 June, Judge Murfitt had envisaged that the parties would first reach agreement on arrangements being made for the return. I understand that the formal order was issued to avoid any procedural difficulties with the appeal that by then had been filed.

[52] Under s 143(4) of the Act, the High Court Rules apply to the appeal. Under r 20.19(1) the Court is empowered to make a number of orders after hearing an appeal. They include, in paragraph (c), making any order that the Court thinks just. I consider that the appropriate way of accommodating Mr Wilkinson's request is to make an order dismissing the appeal, but to provide that the order is to lie in Court and not be enforced for a period of one week from today. I make an order accordingly.

[53] If there is any issue as to costs I will receive memoranda from counsel within

15 working days.

---

[1] *A v Central Authority for New Zealand* [1996] 2 NZLR 517.

[2] *Clarke v Carson* [1996] 1 NZLR 349.
[3] See now s 4(7) of the Care of Children Act 2004 which provides that s 4 (which provides for the welfare and best interests of the child to be the first and paramount consideration in proceedings under the Act or in any other proceedings involving guardianship, care and contact with a child) does not limit subpart 4 of Part 2, which contains the provisions dealing with international child abduction.
[4] See now s 106 of the Care of Children Act 2004.
[5] *S v S* [1999] 3 NZLR 513.
[6] See now s 106(1)(c) of the Care of Children Act 2004.
[7] *S v S* [1999] 3 NZLR 528.
[8] *HJ v Secretary for Justice* [2006] NZFLR 1005.
[9] At [33].
