ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILDREN OR ANY IDENTIFIED PARTS OF THE EVIDENCE.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-679

UNDER	the Hague Convention on the Civil Aspects of International Child Abduction and Care of Children Act 2004
IN THE MATTER OF	an appeal of a decision of the New Zealand Family Court at Manukau
BETWEEN	TB Appellant
AND	JPB Respondent

Hearing: 31 May 2011

Appearances: F C Deliu for the Appellant
G M Cameron and D M Partridge for the Respondent
M M Casey for the Child

Judgment: 29 June 2011

RESERVED JUDGMENT OF PETERS J

This judgment was delivered by me on 29 June 2011 at 4:00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: .....

[1] This is an appeal from a decision of a judge of the Family Court at Manukau. The Judge ordered that the parties' children, LL and TJ, should be returned promptly from New Zealand to Australia. The Judge made the order on the application of the father, F, who is living in Australia. The children's mother, M, appeals the decision.

[2] The Judge made the order pursuant to s 105(2) Care of Children Act 2004 ("Act"). Section 143(2) of the Act gives a party to proceedings of that nature a right of appeal to the High Court against the decision. On appeal, M raises a number of issues. I go on to set out the approach to be taken on appeal, the background to this case, the issues which are raised on the appeal and the result.

Approach on appeal

[3] As Andrews J said in *ACH v CAC*[1] a judgment on an application for an order for the return of a child involves findings of fact and the evaluation of factual matters. Depending on the case, such a judgment may also involve the exercise of a discretion under s 106(1) of the Act as to whether to refuse to make an order for the return of the children.

[4] To the extent that the judgment at first instance involved findings of fact and the evaluation of factual matters, the principles which the Supreme Court expressed in *Austin, Nichols & Co Inc v Stichting Lodestar*[2] apply[3]. That means this court is free to reconsider the judgment of the Family Court and to substitute its own views on questions of fact and evaluation, if satisfied that the Family Court decision was wrong. To the extent that the Family Court Judge exercised a discretion, then this court should only interfere if satisfied that the Judge acted on a wrong principle, took into account irrelevant matters, failed to take relevant matters into account, or was plainly wrong[4].

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[1] *AHC v CAC* HC Auckland CIV2011-404-727, 4 May 2011
[2] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141
[3] *B v F* [2010] NZFLR 67 (HC) at [8]
[4] See *May v May* (1982) 1 NZFLR 165 (CA) and *Blackstone v Blackstone* [2008] NZCA 312, (2008) 19 PRNZ 40.

Background

[5] F and M are New Zealand citizens. They married in Auckland on 5 January 2001. They have two children, LL born in April 2003 and TJ born in November 2007. It is common ground that the family moved to live in New South Wales, Australia in April 2009. They established a home, arranged school and day care for the children, F obtained employment and M assumed primary responsibility for running the household.

[6] Unexpectedly, M was hospitalised for a period on 13 July 2010. During her time in hospital, F and M agreed that M should return to New Zealand after she was discharged, so that she could recuperate with her immediate family in Auckland. F was working and the family would be without an income if he stopped work. F and M also agreed that the children would go with M to New Zealand. TJ was withdrawn from day care. LL was taken out of school, on a temporary basis. F arranged that LL should bring three weeks' school work to New Zealand and there was evidence to this effect at trial from a teacher at LL's school.

[7] M and the children returned to New Zealand on 23 July 2010, travelling to New Zealand on one way tickets. Members of M's family came over assist her on the return trip. F stayed in Australia.

[8] The arrangement between F and M as to when the children would return to Australia from New Zealand was an important issue at the trial and on appeal. F's evidence was that he and M agreed that M should stay in New Zealand until she was fully recovered but that the children would be absent from Australia for no more than three weeks. F's evidence was that, as a result, he expected the children to have returned to Australia by 15 August 2010, hopefully with M but realising that she might need to follow later.

[9] M's evidence was that she and F did not have any agreement as to when the children would return and that the date of their return would depend on her state of health.

[10] F's evidence was that he purchased one way tickets for M and the children because the precise date of return was uncertain and he and M wished to avoid having to pay rebooking fees if they had to change the flights. Return tickets were to be purchased once the precise date of return was known.

[11] The relationship between F and M deteriorated shortly after M and the children arrived in New Zealand. As a result, M decided that neither she nor the children would be returning to Australia and she informed F of that fact. The parties were in communication throughout the next three weeks, during which time M's position did not change.

[12] On or shortly after 15 August 2010, F commenced enquiries as to what he could do to ensure the return of the children to Australia. F gave evidence in cross examination that he made enquiries to this effect initially of a free legal advice line. He was then put in touch with and given assistance by the Central Authority in Australia for Hague Convention matters. F commenced proceedings in the Family Court at Manukau on 30 September 2010. He applied to the Court for an order for the return of the children to Australia, pursuant to s 105(2) of the Act. Pending determination of that application, F obtained an order preventing the removal of the children from New Zealand.

[13] F's application for an order for the return of the children was heard in January 2011. There was no cross-examination of any of the witnesses at the hearing. Counsel for each party presented and spoke to written submissions. The Judge gave her decision shortly after the hearing. M then filed her notice of appeal.

Interlocutory matters

[14] It is necessary to mention some of the interlocutory steps taken prior to the appeal.

[15] First, a ground on which M sought to appeal was that she had not received effective assistance from counsel at first instance. The Court directed that a copy of the notice of appeal and other documents should be served on M's counsel at first

instance, with leave to that counsel to file an affidavit, M having waived any privilege she might have in the legal advice she was given. Counsel for M at first instance did swear an affidavit. Having read that affidavit and having heard the case, I do not consider there could be any criticism of the manner in which she conducted M's case.

[16] Secondly, on its face the notice of appeal raised an issue as to the procedure which the Family Court adopted in dealing with F's application, namely to decide the matter on the affidavit evidence, with the benefit of submissions but without cross-examination. It is unclear whether any party sought to cross examine any of the deponents at first instance. Notwithstanding this, M contended that there had been a failure to meet the requirements of s 27(1) New Zealand Bill of Rights Act 1990 ("NZBORA"), namely the right to the observance of the principles of natural justice.

[17] The court ordered that the Attorney-General should have an opportunity to make submissions, which the Attorney-General then did.

[18] As it turned out, however, counsel for M did not pursue any point at the hearing of the appeal to the effect that the first instance proceedings were conducted in such a way as to deprive M of her rights under s 27(1) NZBORA. Given that, it is not necessary for me to address the Attorney-General's submissions, other than to thank the Attorney for them.

[19] Thirdly, in April 2010 the court appointed counsel for the child to enquire into matters which might bear on s 106(1)(d) of the Act, which provision is set out below. In advance of the appeal, Counsel for the child filed a memorandum setting out the gist of her discussions with LL.

[20] Lastly, counsel for M sought leave to cross-examine F at the hearing of the appeal. Counsel for F opposed this application. I allowed cross-examination, having first agreed with all counsel the list of relevant topics which counsel might cover with F. Counsel for M then cross-examined F by video link up.

Relevant provisions of the Act

[21] The provisions of the Act which are relevant to determination of this appeal are ss 105(1) and (2) and s 106(1). These provisions 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.

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.

[22] Accordingly, subject to s 106(2), s 105(2) requires the court to make an order for the return of the child if the applicant for the order satisfies the court that the grounds set out in s 105(1) are made out. As the Judge noted in this case at [10] of her decision, F had the onus of satisfying the court on the balance of probabilities that each ground was made out.

[23] The court may only refuse to make an order for return if it is first satisfied that one or more of the grounds listed in s 106(1) is made out. The party opposing the return of the children, in this case M, has the onus of satisfying the court that one of those grounds exists. If the court is satisfied that one or more of the grounds listed in s 106(1) is made out, then the court has a discretion to refuse an order for return under s 105(2).

Grounds of appeal

Section 105

[24] The first ground in M’s notice of appeal concerned the manner in which the Judge determined that F had made out the grounds in s 105(1)(a), (c) and (d).

At first instance, M, through her counsel, conceded that F had established these matters.

[25] On appeal, M contended that the Judge failed to exercise her judicial function under the Act by accepting the concession and in failing to analyse the evidence herself and reach her own view as to whether F had made out each of these grounds.

[26] At [20] the Judge said as follows:

> In respect of the matters that the applicant must prove to establish jurisdiction, mother quite properly concedes in my view that the children are present in New Zealand (s.105(1)(a)), father has rights of custody which he was exercising at the time of the removal/retention (s.105(1)(c)), and Australia is the children's habitual residence (s.105(1)(d)). Accordingly I do not see the need to take those issues any further.

[27] In her affidavit, counsel for M at first instance gives her evidence as to how the concession came to be made. It appears from counsel's affidavit that she advised M that she considered F would satisfy the court as to the matters in s 105(1)(a), (c) and (d). Counsel's evidence is that M accepted that advice, hence the concession.

[28] I consider that any criticism of the Judge for accepting the concession is misplaced. First, the Judge recorded that she considered the concessions were "quite properly" made. Accordingly, it is clear the Judge did turn her mind to the matter. Secondly, if counsel, and in this case experienced counsel, advises that a party concedes that particular factual matters in a statute are satisfied, it would not usually be necessary or appropriate for the judge to look beyond that statement.

[29] Regardless, to avoid further dispute on this point, it is better to consider whether any issue might possibly have arisen by reviewing the grounds in s 105(1) and considering whether F made out those grounds.

[30] Dealing with each matter in turn, clearly the children were present in New Zealand, so no issue could arise under s 105(1)(a).

[31] In so far as concerns s 105(1)(d), counsel for M accepted at the appeal that the children were habitually resident in Australia immediately before their removal and that Australia is a Contracting State. Accordingly, no issue arises as to s 105(1)(d).

[32] To satisfy s 105(1)(b), F was required to satisfy the court that he had custody rights in respect of the children, that the children were removed from Australia, and that the removal was in breach of his custody rights.

[33] Section 97 of the Act defines rights of custody as follows:

> For the purposes of this subpart, **rights of custody**, in relation to a child, include the following rights attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the child's removal or retention:
>
> (a) rights relating to the care of the person of the child (for example, the role of providing day-to-day care for the child); and
>
> (b) in particular, the right to determine the child's place of residence.

[34] There was no dispute at the appeal that F had rights of custody as defined in s 97 of the Act. Evidence as to this matter was filed when F first filed his application in the Family Court. The relevant evidence was given by Ms Deborah Field, a lawyer of the Supreme Court of the Australian Capital Territory and a senior legal officer in the International Family Law Section of the Commonwealth Attorney-General's department.

[35] What was in dispute at first instance and on appeal was whether the children had been "removed" from Australia.

[36] Section 95 of the Act defines "removal" as follows:

> **removal**, in relation to a child, means the wrongful removal or retention of the child within the meaning of Article 3 of the Convention.

[37] Article 3 of the Convention reads as follows:

> The removal or the retention of a child is to be considered wrongful where—
>
> a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
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> b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[38] F agreed to the children coming to New Zealand, and so there could have been no wrongful removal. The issue at first instance and on appeal was whether the children were "wrongfully retained" in New Zealand within the meaning of Article 3 of the Convention.

[39] It was common ground that wrongful retention occurs if consent is given to a child leaving the country for an agreed period and the child is not returned at the end of that period in accordance with the agreement. The issue in this case was whether there had been an agreement that the children would return to Australia and, if so, when.

[40] I have already set out the gist of the evidence which the parties gave as to the arrangements they made when M left Australia in July 2010. F says he agreed to the children leaving on the basis that they would be back within three weeks. M did not dispute that the children were to return to Australia. Her case was that there was no fixed agreement as to when they would return.

[41] At [25] of her decision, the Judge determined that M and F had agreed the children would come to New Zealand for a maximum of three weeks, even though it might be necessary for M herself to remain in New Zealand for a longer period, depending on her health. The Judge determined this on the basis of the affidavit evidence, including the evidence to which I have referred as to the three weeks' school work which F arranged for LL.

[42] At [46], [47], [48] and [51] of his first affidavit, F deposes as follows:

> 46. The mother and I agreed that that [sic] the children and her would go to New Zealand with her for a maximum period of 3 weeks and should she need to stay longer, then my mother or I would bring them back to Australia. This would then allow me time to make alternative arrangements for the children should this be required.
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> 47. On 22 July 2010, under our instruction, the children's maternal uncle, collected [TJ] from her day care, and formally withdrew her. We decided to do this as it would mean that we would not have to pay for fees on days our daughter was not able to attend. We also felt we could put her into a better day care when she returned as the current one could only offer two days a week. We made this decided [sic] knowing that the second car would allow a greater area for day care facilities.
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> 48. On the same day, I then went into [LL's] school to remove him for 3 weeks due to family reasons. I recall that [LL's] teacher made up some homework activities for him in that 3 week time, which [LL] took with him. Both kids took only few toys with them to enjoy & remind them of home. It was at this stage a holiday to them. I note that the mother left [sic] has left behind a significant number of personal belongings.
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> ...
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> 51. At no stage did I agree for the children to be gone longer than 3 weeks maximum. I remember hugging my son as he started crying telling him 'you will be back before you know it & mum will be fine. Look after your sister and mother for me'.

[43] At [9] and [10] of her first affidavit, M says as follows:

> We originally agreed to a period of 3 weeks to stay in New Zealand, but we discussed that it could be longer depending upon my recovery. A one-way ticket was purchased for each of me and the children as a result of the uncertainty of return.
>
> We returned to New Zealand on 23rd July 2010. There was no discussion about returning on 15th August 2010 as there was never any certainty around return date. Definitely after some texting interchanges between us it was clear I had decided to stay in New Zealand with the children where I had family support.

[44] In a later affidavit sworn on 14 April 2011, M says that a three week period was mentioned but never agreed upon. She also says that there was discussion of whether LL would stay in Australia with F rather than return to New Zealand but ultimately it was decided he would return with M.

[45] Having read the affidavits and having heard F give evidence, I am satisfied that the Judge's finding that the parties agreed the children would be away for no more than three weeks was correct. I am satisfied that M wrongfully retained the children in New Zealand in breach of F's custody rights. M changed her mind after she arrived in New Zealand.

[46] I said above that F commenced enquiries as to his legal position after 15 August 2010. Counsel for M submitted that, if F expected the children back on 15 August 2010, he could have been expected to take legal advice as soon as M advised him that the children would not be returning. From F's delay in taking that advice, counsel for M sought to draw an inference against F that there had in fact been no agreement as to the children's return.

[47] I do not consider that any adverse inference against F can be drawn because he waited until 15 August 2010 to seek legal advice. In cross-examination, F said that he believed he had to wait until the agreed time had elapsed and that is what he did.

[48] Turning to s 105(1)(c), again there could be no dispute that at the time of the children's wrongful retention, F was exercising his rights of custody in respect of the children, or he would have been doing so but for their wrongful retention.

[49] Accordingly, I consider that the Judge was correct in finding that all of the grounds listed in s 105(1) of the Act were made out. That meant the only issue was whether M could establish one of the grounds in s 106(1), so as to trigger the discretion to which I have referred already.

Section 106

[50] On appeal, M contended that the Judge erred in holding that M had not made out the ground in s 106(1)(b)(ii), namely that F acquiesced in the retention of the children. In addition, affidavit evidence filed by M prior to hearing the appeal raised an issue as to s 106(2)(d) of the Act, namely whether LL objected to being returned to Australia.

Section 106(1)(b)(ii)

[51] In *JHL v Secretary for Justice*[5] Ronald Young J summarised the legal position regarding acquiescence for the purpose of s 106(2)(b)(ii) as follows:

> [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 tat [sic] the wronged parent be held to have acquiesced.
>
> ...
>
> [27] A parent cannot be said to have acquiesced unless they are aware the other parent's actions of removal and retention are unlawful and know, at least in general terms, their legal rights: *In Re A & Ors (Minors) (Abduction: Acquiescence)* [1992] 1 All ER 929. However, in this case the mother does not claim, nor could she, that she was unaware that the abduction was unlawful. She accepted she knew, at least in a general sense, her Hague Convention rights.

[52] M relied on various communications from F and aspects of his conduct as evidence of acquiescence.

[53] The Judge was not satisfied that there was evidence of acquiescence on F's part in the sense of Ronald Young J's words. I have some advantage on the Judge in this matter, having heard counsel for M cross-examine F. Having done so, I am satisfied that F did not acquiesce in the children's retention. Moreover, all of the matters on which M relied occurred before F had sought legal advice as to his position. There is no evidence that F knew M's actions of removal were unlawful and knew, at least in general terms, his legal rights prior to 15 August 2010.

[54] The first of the matters on which M relied as evidence of F's acquiescence was F's alleged "emptying" of joint bank accounts. The Judge proceeded on the basis that F had withdrawn all funds from the couple's joint bank accounts, both in

[5] *JHL v Secretary for Justice* [2008] NZFLR 54

Australia and New Zealand. In cross-examination, however, F denied this. It was apparent from F's evidence that F and M had two or more joint bank accounts. M continued with access to at least one of those accounts and F's evidence was that M herself had withdrawn all of the funds in that account a couple of weeks prior to the appeal being heard. Accordingly, the allegation that F had withdrawn all of the joint funds was incorrect.

[55] The second matter on which M relied was that F had advised her in an email that if he were able to sell one of the couple's vehicles he would ship her and the children's belongings to New Zealand. F's explanation for this was that the car in question had to be sold. It required re-registration and there was no point in registering the vehicle if M was not returning. F wished to sell the car and he believed he had a buyer. F wished M to sign the necessary papers. F's evidence was that he held the prospect of shipping the belongings, as an incentive to get M to sign as F wished her to do.

[56] The Judge did not consider that that email constituted evidence of unequivocal acquiescence. In my view, that email is not sufficient on its own to establish evidence of F's acquiescence.

[57] The next matter on which M relied was the fact that F had terminated the lease on the family home and had vacated the property. F's explanation for this was that there was no point in paying rent on a substantial family home when it was clear that the children would not be returning any time soon. In my view, that is not evidence of acquiescence.

[58] The next ground on which M relied was that F had taken steps to notify the authorities that no more family assistance payments should be made. F's explanation for this was that it seemed wrong to him to be receiving family assistance payments from the Australian authorities when the family were not in Australia. Again, in my view, F's notification to the authorities is not evidence of acquiescence.

[59] The next matter concerned F's cancellation of contents insurance. F's evidence on this point was that the contents insurance related to the family home.

When he vacated the property, he put the contents into storage and it was part of the agreement with the storage facility that the facility insured the goods. Again, in my view, F's cancellation of the contents insurance in those circumstances is not evidence of acquiescence.

[60] The final matter relied on by M is that F sold a family vehicle. The explanation was that there was no point in incurring the running costs on two cars if M did not propose to return. Again, in my view, that evidence does not establish acquiescence on F's part.

[61] Given that, acquiescence in terms of s 106(1)(b)(ii) of the Act was not made out.

Section 106(1)(d)

[62] The other ground on which M relied on appeal was s 106(1)(d). That provision requires that there is evidence the child objects to being returned. If there is evidence that the child objects to being returned, then there is an issue as to whether the child has attained an age and maturity at which it is appropriate to give weight to the child's views. Affidavit evidence from M and others in M's family was to the effect that LL objected to being returned to Australia.

[63] In a memorandum to the court dated 21 May 2011, counsel for the child said that she did not consider that the first limb of s 106(1)(b) was satisfied, that is that counsel for the child did not consider LL objected to returning to Australia.

[64] Counsel for the child expressed that view based on a meeting with LL for about an hour at which she discussed with LL his views about returning to Australia. It does not appear from counsel for the child's memorandum that LL expressed any objection to returning to Australia. As a result, counsel for the child said that she would not be advancing s 106(1)(d) in the appeal.

[65] With no disrespect to M or her family, clearly a child can express a view that he or she believes the adults close to him or her wish to hear. Given the contents of

the memorandum from counsel for the child to which I have referred, I do not consider that M could make out the ground in s 106(1)(b).

[66] Given that, the court has no discretion to refuse to make an order under s 105(2) of the Act.

Result

[67] I dismiss the appeal. I confirm the order at [42] of the decision of the Family Court in this matter dated 28 January 2011.

[68] The respondent having succeeded he would normally be entitled to his costs on this appeal. I invite counsel to submit memoranda if they cannot resolve the matter of costs between themselves within the next two weeks.

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PETERS J

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