IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2012-412-60
[2012] NZHC 874

UNDER	the Care of Children Act 2004
IN THE MATTER OF	an appeal against a decision of the Family Court at Dunedin
BETWEEN	M Appellant
AND	M Respondent

Hearing: 17 April 2012

Counsel: S van Bohemen for Appellant
L Harrison for Respondent
G J de Courcy for Child

Judgment: 2 May 2012

JUDGMENT OF MILLER J

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[1] This is a Hague Convention appeal, brought against a Family Court decision[1] in which an absconding father, the appellant here, failed to stave off an order that his son, P, return to the United States, where a court in the state of Oregon has awarded custody to P's left-behind mother, the respondent. It is convenient to call the parties Father and Mother.

[2] One of Father's grounds - the only one pursued on appeal - was that P objects to being returned and has attained an age and degree of maturity at which it is

[1] *AAM v MM* FC Dunedin FAM-2011-012-000522, 28 October 2011 (with reasons delivered on 1 November 2011).

appropriate to give weight to his views.[2] P was born on 24 March 2001. He was 10 years and seven months of age at the time of the Family Court hearing in October 2011.

[3] This judgment should be read with one dated 2 April 2012 in which I refused Father leave to call further evidence on appeal, including evidence challenging the interviewing technique employed by the Family Court Judge, who met P and inquired into his wishes.[3] In that interview P expressed a clear preference for remaining in New Zealand, but his reasons were found to lack cogency.

The background

[4] The parties are United States citizens, although Mother is originally Russian. They met in Moscow in 1999. She already had one child, a daughter, D, who is now aged 17. The couple married in Oregon in 2000, and in 2005 Father adopted D.

[5] In March 2008 the parties separated and the Circuit Court of the State of Oregon awarded Father temporary custody of both children.

[6] In March 2009 a custody and parenting time study was completed by a psychologist, Zvi Strassberg. It concluded that Father has "displayed anxiety and personality attributes of being analytic and planful", to the point of being controlling and unresponsive to Mother, but he was not "pathological" as Mother had claimed. By contrast, Mother displayed emotional instability, deception, aggression and emotionally punitive behaviour toward the children.

[7] In September 2009 Father was awarded legal custody. A parenting time regime was established under which Mother had P with her every second weekend and otherwise on occasional evenings and during holidays. Neither parent was to move more than 60 miles from the other without prior notice. These orders were apparently made by consent, indicating that Father was not especially concerned

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2 Care of Children Act 2004, s 106(1)(d).
3 *M v M* HC Dunedin CIV-2012-412-60, 2 April 2012.

about Mother having unsupervised access. A parenting time co-ordinator and psychologist, Ed Vien, was appointed and counselling for both parties was ordered.

[8] Mother wanted significantly more time with the children. In April 2010 the Circuit Court granted her application, which Dr Vien supported.

[9] Father, who is an academic, promptly sought permission to take P to live in Scotland for a year, citing professional development reasons. This application was declined in June 2010 on the ground that it was not in P's best interests, presumably because of the loss of contact time with Mother. The Circuit Court commended the professional opportunity to Father, but made it clear that if he went overseas the custodial arrangements would be reversed, P living with Mother.

[10] In October 2010 Father began to withhold Mother's parenting time. He took P to a doctor, who recorded his complaints that Mother had hit him in the stomach and he was afraid of her. At about the same time the police investigated Mother's complaint that Father had interfered in her parenting time. A police report records that P claimed Mother hit him every time he visited her. The allegations were investigated by Dr Vien and a caseworker with the Department of Human Services, Sony Gruginski.

[11] Mother also moved for orders enforcing her parenting time. There was a hearing on 6 December 2010. Father appeared by counsel and admitted his breach. Mr Gruginski was present and available for questioning, but Father did not seek a ruling on his claim that Mother's abuse of P justified his actions. A subsequent DHS report records that the allegations of abuse were unfounded. The Circuit Court ruled that Father had withheld parenting time and granted orders under which the lost time would be made up.

[12] On 10 December Father left the United States for New Zealand, taking P with him. He did not give notice to Mother or seek the Circuit Court's approval. Mother then sought emergency custody orders.

[13] Father sought to resist Mother's application, the hearing of which was delayed until 26 February 2011 to give him the opportunity to return. On that date the Circuit Court granted temporary custody of P and D to Mother and denied Father parenting time until further order. It appears that at some time in February the Court also issued a warrant for Father's arrest, he having been charged with custodial interference, which is a felony. A substantial bail bond was set.

[14] The Circuit Court presumably had before it a report dated 19 January from Dr Vien. It recorded that Mother had been accused of abuse but police and welfare investigations had resulted in inconclusive findings and the caseworker and Dr Vien had recommended immediate resumption of parenting time to minimise harm to P. Father had then left the jurisdiction, in the most recent in a series of unilateral actions designed to restrict access. He had always claimed justification, describing Mother as insensitive and lacking empathy and suffering personality dysfunction. Dr Vien remarked that this description seemed to fit Father better than it did Mother, who had advocated for P's welfare. Loss of contact with Mother was likely to cause P long term harm.

[15] Father has since been held in contempt. When making that decision the Circuit Court held that there is no credible concern for the safety of either child. It appears that Father will be arrested and held in custody pending a bail application, should he return to the United States.

[16] On the face of it, then, should P be returned to the United States there will be an abrupt change of caregiving arrangements which have subsisted since 2008. To say that is not to criticise the American authorities, whose stance may be said to benefit children generally by deterring absconding parents, consistent with the policy of the Convention. It is to introduce a factor which may affect this Court's use of its discretion under the Convention as enacted in domestic law, and the Court's assessment of P's expressed wishes.

[17] For that reason, it is important to record that the position is more complex than the bare legal orders suggest. There have been offers on both sides, designed to facilitate P's return to the United States. For my purposes a short summary suffices.

Father appeared by counsel on 26 April 2011 and sought to have the order revisited, asking to appear by telephone. The Circuit Court refused to entertain such application unless he appeared in person. An attempt was later made to negotiate P's return for the commencement of the school year in September 2011. The Court and the District Attorney offered that should Father return with P he would be brought before a Judge at once and his bail bond would be adjusted so that he could be released on bail the same day. Mother offered to have P live with a third party for at least a month and undergo therapy during that time, following which there would be a parenting hearing. Father was not prepared to accept those terms, but on several occasions he has offered to return. Most recently, in December 2011, he indicated that he would return if P remained in his custody or that of other named persons, P undertook therapy with a named therapist, P returned to his former school, Mother's parenting time was supervised, an independent expert was appointed to assess the advisability of unsupervised access by Mother, and the bail bond was reduced to $5,000.

[18] I record that there have been some judicial communications about P's removal. They were begun by the Circuit Court, which requested a conference after the Family Court made an order, on Father's application, prohibiting P's removal from the jurisdiction. It seems that Father was concerned that Mother might come to this country and "abduct" P. I am told that the Hague Convention application had not been filed when that order was made, which may go some way to explain it. Father later offered to return and the Family Court communicated that offer to the Circuit Court, reasoning that Father's fate on return to the United States was relevant to the exercise of its discretion. The Circuit Court responded that judicial comity ought to have led the Family Court to order P's return.

[19] D also lives in New Zealand with Father. When Father left the United States with P, D was in India on a fellowship. When that ended in June 2011 she decided not to return to the United States and joined Father here. Although she is technically still subject to the Oregon orders, this proceeding does not concern her. She now supports Father and has sworn an affidavit deposing to Mother's alleged abuse of her and P. She concedes that on 24 June 2010 she wrote a letter opposing Father's attempt to take P to Scotland. In that letter she spoke very positively of Mother,

stated that P was very happy with Mother, and complained that Father spent all his time working at the computer. She now says that she always felt compelled to protect Mother, who made her write the letter, but gained the ability to stand up for herself while in India.

[20] The application for an order that P be returned to the United States was made in August 2011. The long delay in instituting Convention proceedings following Father's departure from the United States resulted, I am told, from a decision by authorities there to pursue extradition initially.

The Family Court hearing

[21] It was not in dispute in the Family Court that Mother qualified under s 105 of the Care of Children Act 2004 for an order and it was for Father to make out one of more defences under s 106, following which the Court might exercise a discretion in his favour. He not only relied on the child preference defence but also alleged that P would face a grave risk of psychological or physical harm in the United States and that child protection services there would not be able to protect him.

[22] The parties filed affidavit evidence, including evidence about the history of litigation in Oregon. There was no oral evidence.

[23] I have already mentioned that the Judge interviewed P. The Judge inquired about abuse. P reported that he had been held by the ear by Mother and dragged into his bedroom on one occasion, and that on others she has hit him. P was unable to tell the Judge more about the other allegations, such as where and how he was hit. The Judge noted that Mother admits the ear incident, but not the others. P gave other reasons for wanting to remain; I refer to those at [24], [29] and [36] below.

[24] The Court appointed counsel for P, Mr de Courcy, whose brief extended to inquiring into P's preferences and reasons. He met P at school on one occasion, then prepared a report dated 20 September 2011, in which he recorded P's objection to returning to the United States and P's reasons. He found P's comments age-appropriate. P said he has a lot of friends in New Zealand and does not want to go

back because of the abuse. He expressed a fear that Mother would take him to Russia. He identified positive things about being in Oregon and said he did not want to hurt Mother's feelings. Mr de Courcy expressed the opinion that P had weighed up the alternatives and reached his own view. He found P settled in Dunedin, with friends at school.

[25] The Court did not seek a psychological report, noting that Father had engaged his own expert, Bernadette Berry. She opined that P is mature for his age, and happy and settled in Dunedin, He is doing well at school and is well liked by his peers. However, he experiences anxiety about contact with Mother. She expressed the opinion that he suffers post-traumatic stress disorder as a result of Mother's abuse.

The Family Court decision

[26] The Court delivered its reasons for granting the application in a judgment dated 1 November 2011.

[27] After surveying the facts, the Judge dealt with the claim that P would suffer grave harm should he be returned because he has suffered abuse at Mother's hands. There is evidence that complaints were made in the United States about her parenting, but the Judge noted that Father consented in 2009 to Mother having significant periods of unsupervised contact, and that in April 2010 the Circuit Court had extended her care of P, apparently without Father claiming abuse. Not until he disrupted her access late in 2010 did he make that allegation. It was investigated by child protection services and the police, but P's evidence was found contradictory and no further action was taken. Father then agreed to access resuming, passing up an opportunity to have the Court rule on the issue. The Judge also cited Dr Vien's report. He also found that P's description of the abuse in interview was not persuasive; he was not specific about the nature of the abuse and its frequency. The Judge was not persuaded that Mother had abused P. Nor was there any evidence to suggest that US authorities are incapable of protecting P.

[28] The Judge next dismissed a claim that return would put P in an intolerable position since he would be placed in Mother's custody and Father would be arrested.

The Judge reasoned that Father cannot create an intolerable situation for the child then seek to rely upon it, referring to judgments of this Court which highlight the policy reasons for adopting that view.[4]

[29] Finally the Judge turned to the child objection defence. He noted that P had been given a reasonable opportunity to express his views in the judicial interview and in a series of meetings with counsel for the child. P stated that Dunedin is more fun than Oregon, it is bigger, people are nicer, and the weather is better. He also said, however, that he has friends in Dunedin and he is concerned that if he spends time with Mother she may hit him and take him to Russia.

[30] The Judge found that P objects to returning to the United States. Further, he has a degree of maturity consistent with his age, and it is appropriate to have regard to his views. Those conclusions are not in dispute on appeal. The issues are what weight ought to be attached to P's views and how the residual discretion ought to be exercised.

[31] As to that, the Judge found some of P's expressed reasons trite, and he found no real evidence that P has any meaningful appreciation of the difference between the two places. As noted above, he discounted P's allegations of abuse, and he also noted a lack of clarity about other reasons for not wanting to see Mother. In the circumstances, the Judge decided that P's objection to returning should be given "little weight" or no "significant" weight. The Judge concluded that the defence under s 106(1)(c) was not made out.

[32] On the assumption that he might be wrong in that conclusion, the Judge next turned to the discretion under s 106.

[33] He began by noting that the Convention aims to ensure that abducted children are returned promptly so courts in their home jurisdiction can deal with custody and access. It is not the Family Court's function to decide whether P is better off in New Zealand. The Circuit Court has been seised of the case since 2009 and any number

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[4] *KMIT v Chief Executive of the Department of Courts* [2001] NZFLR 825 at 847; and *KS v LS* HC Auckland CIV-2002-404-73, 14 May 2003 at [51].

of professionals have been involved with the family. He accepted Ms Harrison's submissions that only in exceptional circumstances can departure from the Convention be justified. By that, I take him to mean that the Court should be slow to exercise the discretion to refuse an order for return.

[34] The Judge accepted that he must consider P's welfare and best interests, but they are not determinative. P has settled in New Zealand and the school system and has made good friends, but those are welfare factors which should be given little weight. In any event, it is in P's interests to have a relationship with both parents but Father had been attempting to thwart that interest for some years.

[35] The Judge accordingly ordered that P return to the United States. He urged the Central Authority to liaise with its United States counterpart to ensure that urgent hearing time is made available to consider interim care arrangements on P's return.

Updating matters

[36] I received some additional information, as noted earlier, about the so far unsuccessful negotiations for P's return. Mr de Courcy also updated his report. He spoke to P on three occasions since the Family Court decision, most recently on 22 March 2012. To summarise, P very much wants to stay here. "I don't want to go back…I really don't." He likes Dunedin and has lots of friends here. He is doing well at school and is well settled there and in the community. He enjoys sports. He acknowledges that there are good things about Oregon (friends whom he misses, a big back yard, family dogs, school, a big house). The only negative thing that he identifies about Oregon is Mother. He misses her somewhat, but he does not want contact as he does not feel safe around her. He "really, really" doesn't want to go back. If he must return, he would want supervision around him when dealing with Mother.

[37] Mr de Courcy expressed the opinion that P is articulate, and can discuss the pros and cons of life in Oregon and in Dunedin. He has made a comparative assessment and come to a clear and confident view which, so far as counsel can judge, is independent of any adult. Counsel submitted that the Judge in the Family

Court placed too little emphasis on P's views and too much on the judicial interview. There was evidence confirming that P's reasons for both wanting to remain here and not wanting to return to Oregon are well considered and substantive. He is also clear and consistent about the abuse. Counsel submitted that the residual discretion should not be exercised to return P to Oregon. The only justification for return is proximity to Mother, but that relationship is "marked by allegations of abusive conduct" and she has made little effort to contact P since he left. In oral argument counsel expressed the view that there is no reason to believe that P knows Father will be arrested on return. He appears to believe that should he return, he will remain in Father's custody.

[38] I am grateful to Mr de Courcy for his considerable assistance.

The law

[39] The applicable legal principles were not disputed before me. It is settled that a four-step test is applied: does the child object to return; if so, has the child attained an age and degree of maturity at which it is appropriate to give weight to his view; if so, what weight should be given to that view; and how should the residual discretion be exercised?[5]

[40] The Supreme Court has held that in a s 106(1)(a) case a court must compare and weigh the welfare and best interests of the child and the general purpose of the Convention, which may be stated as that of protecting children from the harmful effects of abduction by ensuring their prompt return to the state of habitual residence.[6] The court must consider whether return is in the child's best interests and, if not, whether some feature of the case, such as concealment by the abducting parent, clearly requires that the child be returned nonetheless.[7]

[41] The Supreme Court's reasoning is clearly applicable to other s 106(1) defences because it was founded on the proposition that, as a matter of construction

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5 *White v Northumberland* [2006] 26 FRNZ 189.
6 *Secretary for Justice v HJ* [2006] NZSC 97 at [85].
7 At [87].

of the statute, the discretion which applies to all s 106(1) grounds is not limited by the paramountcy principle in s 4(7); accordingly, that principle must be applied in a manner not inconsistent with the objectives of the Convention. That approach has since been applied in cases under ss106(1)(c) and (d),[8] and I adopt it here. In doing so I recognise that the balancing exercise under s 106(1)(d) also requires that the Court decide what weight should be attached to the child's preferences.

The child's views

[42] As noted earlier, it is not in dispute that it is appropriate to have regard to P's views. I agree. I accept Mr de Courcy's submission that in reaching that conclusion the Court should consider not only developmental level, maturity and capacity for reason, but also the strength of the objection and the actual reasons given. Counsel were not able to refer me to any case in which an 11-year old child's views had been decisive,[9] but I accept that P's age and maturity are such that his views would ordinarily require substantial weight. I say "ordinarily" because the weight ultimately given to them also depends on the quality of his reasons.

[43] I also accept that P has expressed a clear and articulate preference for Dunedin, and an equally clear preference against Oregon. He has given the reasons reported by Mr de Courcy and summarised above. The same views are to be found in the Family Court record, although not all were expressed in the judicial interview. Putting the question of abuse to one side for the moment, I find that P's reasons are substantive. I accept that some of the reasons given to the Judge were trite, but not all of P's reasons fall into that category and the trite ones should not be permitted to detract from the others.

[44] That said, P also identifies good reasons to live in Oregon. Some parallel his reasons for wanting to remain here; for instance, he has good friends in Oregon and appears to have been settled there. That suggests he might swiftly settle on return.

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8 *Smith v Adam* [2007] NZFLR 447 at [13]; and *Coates v Bowden* (2007) 26 FRNZ 210 at [93] and [99].

9 John Caldwell "The Hague Convention and the "Child Objection" Defence" (2008) 6 NZFLJ 84.

But for the question of abuse, I consider that his preferences would be much more finely balanced.

[45] Several things may be said about P's statements that Mother has abused him. First, I accept that in this country P has consistently stated that Mother abused him physically and emotionally. His views appear to be independent of Father, and he is of an age and maturity where, as I have said, his views require respect. Second, there is a degree of support for what he says in the Oregon record, in the form of Dr Strassberg's negative conclusions about Mother. Third - and thanks entirely to Father – the Circuit Court has yet to decide in a fully contested hearing whether P has been abused. Finally, D has now given evidence that she and P were abused. Although she wrote the letter of 24 June 2010 to which I have referred above, she had earlier spoken to Dr Strassberg in terms consistent with what she now says.

[46] For these reasons, P's statements that he was abused and fears Mother for good reason do not lead me to discount his preferences. I respectfully differ from the Family Court Judge to that extent. It remains the position, however, that abuse has not been proved and the New Zealand courts are not in a position to decide whether it happened. Mother and witnesses are not here, and Convention proceedings are summary in nature.

[47] I conclude that P clearly objects to being returned and substantial weight must be attached to his views. The defence under s 106(1)(d) is made out, subject to the exercise of the discretion.

The discretion to refuse to order return

[48] I begin by listing the welfare and best interests considerations identified by counsel. They are: P has been in Father's custody since 2008; the relationship will be disrupted to some unknown extent on his return; for whatever reason, P has had little contact with Mother, and contact with her makes him anxious; he is settled here, with good friends; and he is doing well at school and in sport.

[49] I accept that these factors support P remaining in Dunedin, but not strongly so, for several reasons. First, there is evidence that under United States law P's welfare and best interests are the guiding principle for the Circuit Court, which is best placed to decide what his welfare requires vis-a-vis both parents. It must be assumed that the Court will take steps to preserve his important relationship with Father. Second, while I accept that contact with Mother causes P anxiety, he also misses her somewhat and there is evidence in the Circuit Court record that it is in his best interests to have a relationship with her. The Circuit Court is best placed to decide how that relationship is mediated, having regard to the long period of separation and P's undoubted fear of Mother. Third, P retains good friends in Oregon and there is no reason to suppose that he would not soon settle back into school and community there.

[50] I have accepted that P's views merit substantial weight. However, I have also noted that his strong resistance to returning to Oregon is based primarily on his view of Mother. As Mr de Courcy put it, the negatives about returning to Oregon concern P's care when he is with her. Had the Circuit Court record established abuse, P's views would tip the balance in favour of remaining here, as in *Coates v Bowen*.[10] It is instructive to compare that case, in which there was cogent evidence from the overseas jurisdiction of domestic violence by the left-behind parent. In this case the grave risk defence understandably failed in the Family Court, and it was not pursued on appeal. It must also be accepted that United States authorities are able to protect P and that it is in principle in his interests to have a relationship with Mother.

[51] The final consideration is the object of the Convention, which clearly favours P's return. This is an egregious case. In the conviction that he knows better, Father has evaded the Circuit Court's direction that Mother must have significant parenting time. By absconding, he denied P a meaningful relationship with Mother. He flagrantly violated orders which he had not opposed when given the opportunity. The inference is available that he took that course because he planned to abscond. He has passed up opportunities to return under conditions which would ensure P's safety. In the result, P has had minimal contact with Mother since late 2010.

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[10] *Coates v Bowden*, above n 8.

[52] I have reached the clear view that the Family Court Judge was right to decline to exercise the discretion not to order return, although for somewhat different reasons.

Decision

[53] The appeal is dismissed. P must return to the United States. I remit the case to the Family Court for any orders that may be necessary to effect return,[11] which should not be further delayed.

[54] Counsel must seek agreement on costs. If they cannot agree, memoranda may be filed, Ms Harrison's not later than four weeks after this judgment and Mr van Bohemen's two weeks thereafter.

Miller J

Solicitors:
Pitt & Moore, Nelson for Appellant

[11] As envisaged in paragraph [73] of the judgment under appeal, above n 1.