ANY PUBLICATION OF A REPORT OF THESE PROCEEDINGS MUST COMPLY WITH S 139 OF THE CARE OF CHILDREN ACT 2004

IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2009-009-001668

UNDER	"The Care of Children Act 2004" and in "The Ratification thereby of the Hague Convention on the Civil Aspects of International Child Abduction 1980"
BETWEEN	A P N Applicant
AND	T M H Respondent

Hearing: 26 June 2009

Appearances: G Nation and Ms Hall for the Applicant
C Fogarty for the Respondent

Judgment: 1 July 2009

RESERVED JUDGMENT OF JUDGE S J COYLE
AS TO REASONS FOR ORDER FOR RETURN

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[1] Mr N and Ms H are the parents and guardians of G born August 2001. G is their only child.

[2] On 26 June 2009 I heard oral argument from counsel in relation to the application by Mr N for an order that G be returned to Fiji pursuant to s 105 of the Care of Children Act 2004. At the conclusion of that hearing I made an order pursuant to s 105(2) of the Act for the prompt return of G born August 2001, to Fiji. At that time I indicated that I would give my reasons for reaching my decision to make an order for return, and this judgment sets out those reasons.

Background

[3] Mr N and Ms H met in Papua New Guinea in 1995, and shortly thereafter commenced a de facto relationship. In 1998 they moved to live in Fiji, and at the end of 2000, they returned to live in New Zealand. Both Mr N and Ms H are New Zealanders by birth. While in New Zealand, G was born in Christchurch in August 2001. In late 2004, due to work opportunities, the parties returned to reside in Fiji, and they both have lived in Fiji until relatively recently.

[4] In August 2007 Mr N and Ms H separated, with them both living a short distance from each other in Nadi, Fiji. Without any assistance from the Family Division of the Fijian Magistrates' Court, they reached any agreement as between themselves in relation to the care arrangements for G. Each Monday and Tuesday night G was in his mother's house; each Wednesday and Thursday night G living in his father's house and G spent alternate weekends with each parent. Colloquially this has become known as the "Joan Kelly Model", being a model for shared care first proposed by the world renowned Dr Joan Kelly.

[5] From time to time Ms H would return to New Zealand, at times with G. Most recently over the April school holidays in 2009 with the agreement of Mr N, Ms H and G came to New Zealand to spend time with family. On or about 17 April 2009, Ms H filed an application in the Christchurch Family Court for a parenting order seeking that G be in her primary day to day care, and proposing that Mr N have contact with G in New Zealand only. On or about 19 April, the day the G and his

mother were due to fly back to Fiji, Ms H sent a text to Mr N advising that she and G would now be living in New Zealand. Ms H then enrolled G at the W School in Christchurch where, it would appear, he has settled and doing well.

[6] Ms H' affidavit sworn 17 April 2009 in support of her application for her parenting order set out the reasons why she wanted G to be in her day to day care. She deposed that:

(1) She had difficulties in obtaining employment in Fiji.

(2) She had concerns as to who was caring for G when G was in his father's care in Fiji.

(3) She raised issues around the renewal of her work permit, which expires in July of this year.

(4) She raised a concern that G (who at the time of the affidavit was aged seven and a half) was likely to return to New Zealand for schooling purposes during his high school education and on that basis should remain in New Zealand.

(5) She relied upon strong family support in New Zealand.

(6) At paragraph 8 she deposed "there is also the reality of the political climate in Fiji, which is another factor for not wishing to remain there in the meantime".

[7] Ms H proposed that G live with her in Christchurch, and that G have contact with Mr N in Christchurch, and not in Fiji. She expressed a concern the if contact occurred in Fiji, Mr N would not return G to New Zealand. The irony of that assertion, given the unlawful retention of G in New Zealand by Ms H, appeared to be lost on her. In summary, notwithstanding that there had been an equal shared care regime in Fiji, Ms H unilaterally severed that care arrangement, enrolled him in a new school, changed G's country of residence from Fiji to New Zealand, and then sought to severely limit the amount of contact G was to have with his father,

requiring it to only occur in Christchurch, New Zealand. It is hard to see this other than being a situation where Ms H has demonstrated a fundamental disregard to the role that Mr N has played in their son's life as a parent and guardian.

[8] On or about 7 May 2009, Mr N filed in the Christchurch Family Court an application for the return of G to Fiji pursuant to s 105 of the Care of Children Act 2004. An unusual feature of this case is that Mr N, rather than being represented by counsel appointed by the New Zealand Central Authority, instructed his own counsel, and this application was filed by Mr Nation on Mr N's behalf as his privately instructed counsel.

[9] Ms H filed a notice of defence to the application for return on or about 21 May 2009. In particular she relied upon defences set out in s 106(1)(c)(i) and (ii), and (e) of the Act.

The applicable legislation

[10] The Civil Convention on the International Aspects of Child Abduction (The Hague Convention) has been adopted into our domestic legislation through the provisions of the Care of Children Act 2004. Fiji and New Zealand signed the Convention as between the two states on 1 February 2000.

[11] An application for the return of a child abducted to New Zealand is made pursuant to s 105 of the Act which states:

> **105 Application to Court for return of child abducted to New Zealand**
>
> (1) An application for an order for the return of a child may be made to a Court having jurisdiction under this subpart by, or on behalf of, a person who claims—
>
> (a) that the child is present in New Zealand; and
>
> (b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and
>
> (c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

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

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

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

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

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

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

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

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

[12] The grounds for the Court to refuse to make an order for return (known as the Statutory Defences) are set out in s 106 of the Act. Section 106 states:

106 Grounds for refusal of order for return of child

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[13] For the purpose of this application, Ms H accepted that the grounds set out in s 105(1) of the Act had been complied with. Therefore, pursuant to s 105(2) the Court is required to make an order for the prompt return of G to Fiji unless one of the s 106 defences have been established. Even if such a defence is established, there still resides in the Court a residual discretion as to whether to make an order for return or not. The Supreme Court in *Secretary for Justice as the New Zealand Central Authority on behalf of TJ v HJ* [2007] 2 NZLR 289 has reiterated that if the s 105 grounds are established, and in the absence of any s 106 defences being made out, the Court must mandatorily order the prompt return of, in this case, G to Fiji.

[14] As was apparent from my judgment given on 26 June in relation to the orders I then made, I was not satisfied that the s 106 defences were made out, and accordingly an order for the prompt return of G to Fiji was made by me.

Section 106 defences

[15] The first defence relied upon by Ms H was that contained in s 106(1)(c)(i) and (ii) of the Act. That is, Ms H asserted that there is grave risk that G's return to Fiji would expose G to physical or psychological harm; or would otherwise place G in an intolerable situation. In the context of this case there are no allegations that there would be risk to G's physical harm in returning to Fiji. Rather the submissions were focused upon the risk to the psychological harm to G and/or G being placed in an intolerable situation should there be a return to Fiji.

[16] The Court of Appeal in *HJ v Secretary for Justice* [2006] 2 NZFLR 1005 at paragraph [33], per Young J, stated:

> 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.

[17] The high threshold was affirmed by the Supreme Court in *The Secretary for Justice v HJ* decision (supra). Furthermore in *KS v Elliot* [2003] NZFLR 817 at p 835 the Full Bench of the High Court (Priestly and Frater JJ) stated:

> In addition to an evidential requirement for a sound foundation to s 13(1)(c) ground, the evidence must disclose psychological damage and/or an intolerable situation, which is more than transitory. The intolerable situation which the Judge found must have a degree of permanence. Similar considerations should apply to psychological harm.

[18] That is, if such a defence is to be asserted, it must be based on a sound evidential basis, and not be transitory or illusory.

[19] The central thrust of Ms H' argument was based upon the proposition that the current political situation in Fiji amounts to an "intolerable" situation. She asserts that due to the political instability that is alleged to currently exist in Fiji, there is a grave risk of psychological harm or that G would be placed in an intolerable

situation should he be returned. Ms H asserts that as a consequence of Colonel Bainimarana's coup and subsequent military rule, that there now exists in Fiji a state of political turmoil.

[20] Mr Fogarty, on behalf of Ms H, also sought to rely upon the events of April of this year following the then Fijian Court of Appeal's ruling that the military government that took power after the 2006 coup was illegal. Upon receipt of that decision, President Ratu Josefa Illoilos subsequently announced that he had abolished the Constitution, assumed all governing powers and revoked all judicial appointments. There was then promulgated an "Administration of Justice Decree 2009" establishing an entirely new judicial system.

[21] The potential for political instability and its impact in terms of the application of grave risk defence are not new concepts, either within our domestic jurisprudence, or within other jurisdictions. The New Zealand Court of Appeal in *A v A* [1996] 2 NZLR 517 at p 523 stated:

> 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 gain say 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 emphasis the best interests of the child are paramount but there are no mechanism 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 in the laws of that country do not reflect the principle that the best interests of the child are paramount.

[22] Similarly, Justice Fisher in *S v S* [1999] NZLR 528 commented at p 520:

> An overseas legal system might lack the necessary principles or resources to protect the child; military, political or social unrest might be too dangerous … these are simply examples of situations in which the overseas country might be incapable of protecting the interests of the child, as distinct from situations in which custody or access should be withheld from the applicant parent.

[23] Mr Fogarty sought to gain support for his proposition from decisions from English and Australian jurisdictions. In particular he referred to the English decisions *TB v JB* [2001] 2 FLR 515, and *S (a child)* [2002] EWCA 908. The latter case was in reference to an application for a request for the return of a child to Israel in a situation where at that time there was escalating violence in Israel, and what are referred to in the judgment as "terrorist attacks over which the parties have no control".

[24] Mr Fogarty also made reference to a decision of the Australian Family Court, *Department of Community Services v Carmichael* [2008] FAM CA690. That case related to an application for the return of a child to Zimbabwe. The Australian Family Court placed great reliance upon a "Trade and Travel Advice" issued by the Australian Department of Foreign Affairs. Mr Fogarty asked me to draw correlation between that Trade and Travel Advice from the Australian Department of Foreign Affairs, and the "Travel Advice Warnings" issued by the Ministry of Foreign Affairs in New Zealand, as well as recent Travel Advice Warnings issues by the Australian Government and the Government of the United States of America in relation to Fiji. I decline to do so for the reasons set out in paragraph 27 below.

[25] Both the New Zealand and international cases show that in certain circumstances, there is a grave risk to a child's return because of political instability. Fowler J in the Australian Family Court decision *Genish-Grant v Director-General, Department of Community Services* [2002] FLC 93-111 quoted the US Court of Appeal decision in *Friedrich v Friedrich* 78F3d1060 [1996] (6 CIR) (at pra [18] of *Genish-Grant*):

> Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm if the return of the child puts

> the child in imminent danger prior to the resolution of the custody dispute – eg. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

[26] It is my view that the approach of the US Court of Appeal is logical in its application. That is, for G I must be satisfied that there is a grave risk of harm in returning G to Fiji prior to the resolution of the substantive dispute as to G's care arrangements by the Fijian Courts, and that the Fijian Court are incapable or unwilling to give G adequate protection.

[27] I have reached the view that the evidence falls well short of that threshold. Whilst I take notice of the travel advice issued by the New Zealand Government, "Exhibit K" to Ms H' affidavit of 27 March 2009 sets out the three categories of Travel Advisories issued by the Ministry of Foreign Affairs. The first is classed as a "extreme risk", advising against all travel. The second tier is a "high risk", which supports non-essential travel including tourist travel being deferred. The third and lowest is that of "some risk" which indicates a level of risk that warrants caution. The travel advice given by the New Zealand Ministry of Foreign Affairs in relation to Fiji is at the lowest level, i.e. "some risk". That can be contrasted with the *Carmichael* decision where the Australian Family Court relied upon the high level travel advice issued by the Australian Ministry of Foreign Affairs which contained references to:

(a) Violence escalating without warnings;

(b) Beatings, torture and murder;

(c) Concern that police and security forces are likely to act indiscriminately against the general public;

(d) A situation where there was hyper inflation, food shortages, mass unemployment, shortages of basic services such as power, water, transport and fuel.

It concluded with a strong warning that "Australians are advised not to travel to Zimbabwe or to consider leaving if already there".

[28] The situation, according to the Ministry of Foreign Affairs contained in the New Zealand Travel Advisory, is nowhere near that level of concern or risk. Indeed it was accepted by Mr Fogarty, that New Zealand tourists continue to travel to Fiji, and there have been no evidence or reports to the safety of New Zealand tourists in Fiji.

[29] Should there have been evidence of extreme political unrest, a high level of breakdown of law and order, and a deprivation of the basic necessities of life, then this Court may have had great difficulty in ordering the return of G to Fiji. I find the evidence falls well short of this threshold.

[30] In fact the evidence before the Court, is that the situation at present in Fiji is fairly "normal". Indeed, Mr Fogarty accepted a proposition that I put to him, but for a breakdown in the ability of people to legitimately protest about the Bainimarana Government, and restrictions upon political opposition and freedom of the press, the balance of life in Fiji continues unchanged, including Fijian's access to Courts, including the Family Division of the Magistrates' Court.

[31] I was assisted in reaching this view by the affidavit evidence of Mr Sharma, a Barrister and Solicitor in Fiji, and the affidavit evidence of Mr Johnson, a Barrister in Christchurch who was contracted in 2006 to go to Fiji and assist in the establishment of an Anti-corruption Commission in Fiji. He was again in Suva assisting with anti-corruption prosecution in the Magistrates' Court in 2008, and Mr Johnson had also returned to Fiji in February and April of this year. Both affidavits deposed a situation in Fiji of relative normality, and they had seen no evidence to give them cause for concern for their own staff.

[32] Finally I was assisted by the affidavit evidence of Mr Ali, the manager of the ANZ Bank in Nadi, Fiji. He deposed that in Fiji:

> "There has been no breakdown of law and order. Police go about their business in the normal way … health, education and welfare services operate

> as normal. Life goes on at school in the communities around us as it has done throughout the time [Mr Ali has been living in Nadi].

[33] Whilst there may be tensions and disputes in Fiji arising out of Colonel Bainimarana's coup, and the actions of the President in April of this year, the evidence before me indicates that the political situation in Fiji in no way presents a grave risk to G's return, and not would he be exposed to physical or psychological risk, or otherwise placed in an intolerable situation.

[34] Mr Fogarty, in the context of this defence, also submitted that I should find a grave risk in that G would be placed in an intolerable situation because of the uncertainty as to the status and validity of the current Fijian legal system. In support of this assertion Mr Fogarty referred to Exhibit "E" to Ms H' affidavit of 27 May 2009, which was an opinion provided to the Fijian Law Society by Professor Joseph. Professor Joseph's opinion makes interesting reading but in my view it does not assist me at all in exercising my functions in relation to the application before the Court. I was invited to determine that there were serious constitutional issues in Fiji which impact upon the operation of the Fijian legal system, and in particular with the status of the judiciary and the independence of the Bar. Indeed Mr Fogarty submitted that there was:

> An opportunity for this Court to say that notwithstanding that the Fijian Courts may or may not be continuing to function in a reasonably normal fashion, that mere fact of itself is not sufficient to justify returning a vulnerable child to Fiji to have his future resolved under a political and judicial system that in this country's understanding cannot be regarded as being either legal or acceptable.

[35] It is not the function of this Court to criticise or attack the validity of another jurisdiction without a clear and proper evidential foundation. Indeed it would be highly irresponsible for a New Zealand Family Court Judge to pass judgment on both the legitimacy or otherwise of the Fijian Government, the Fijian legal system, and/or the independence of the Fijian judiciary. As Justice Fisher said in *S v S*:

> The party resisting return must go further and show why the legal system of the country of habitual residence cannot be entrusted to safeguard the interests of the child pending the outcome of custody and access issues.

[36] I have reached the clear view that there is no evidence before me which would even enable me to remotely conclude that Fiji is unable to safeguard the interests of G pending the outcome of the parenting order matters in that Court by the Family Division of the Fijian Magistrates' Court. In fact, when I look at the affidavit of Mr Sharma of 22 May 2009, and the references contained therein as to the relevant provisions of the Fijian Family Law Act 2003, it seems to me that there is a legislative enshrinement of the type of standard and values that we have come to accept in the New Zealand Family Court. By way of example, s 66 of the Act, in relation to the making of parenting orders, mandates that a Court "must regard the best interests of the child as a paramount consideration". The Act also provides the making of parenting plans, parenting orders, the provision of counselling, and indeed in many respects it appears to mirror the provisions of the Care of Children Act 2004.

[37] I accordingly find that the defence of grave risk based upon the current political situation in Fiji is not established on the evidence before the Court, and I decline to make any criticism of the political or judicial system in Fiji. On the evidence before me I am quite satisfied that should G be returned to Fiji, there is a system of law that is operating which places his best interests as the paramount consideration in which, in the day to day and practical level, functions to a high standard. The defence pursuant to s 106(c) of the Act is therefore not made out.

[38] Ms H secondly relies upon the defence that the return of G to Fiji is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedom. This was not a defence strenuously argued by Mr Fogarty. As Mr Nation refers to in his submissions, this defence has, within international jurisprudence, been used rarely and relatively unsuccessfully. In relation to this defence I adopt the dicta of Justice Kirby in *DP v Commonwealth Central Authority* (supra) where at paragraph 102, he cited in support Paul Beaumont and Peter McEleav in their article, *The Hague Convention on International Child Abduction* (OUP, Oxford, 1999) 174-175:

> [The equivalent of paragraph 106(1)(e)] would apply where the person opposing the order established that, in the country of habitual residence, matters regarded in [New Zealand] as fundamental to the protection of

> human rights and freedom would not be observed were the child returned. Amongst other things, this would include a case where it was demonstrated that, notwithstanding formal adherence to the Convention, the authorities and official of the country of habitual residence were corrupt, that due process would be denied to the child or to the custodial parent or that, otherwise, basic human rights would not be respected.

[39] Central to Mr Fogarty's submissions were the assertions made in relation to the grave risk argument. That is, that fundamental issues of legality and legitimacy of the Fijian Government and legal system need to be addressed. In addition Ms H attached various "press reports" to her affidavit which in her opinion pointed to a breakdown of law and order in Fiji. Again, the evidential threshold is a high one and in my view there is a total lack of evidence to establish any degree insofar that it affects G, that there is a breakdown in Fiji of the fundamental principles of New Zealand relating to the protection of human rights and fundamental freedoms so as to not permit his return to Fiji when those principles in the context of New Zealand law are taken into account.

[40] Press clippings and "bloggs" cannot be accepted by this Court as cogent evidence upon which the Court should rely. Mr Fogarty submitted that his client could not obtain such evidence, as the deponents of such evidence would then themselves be at risk from unpalatable consequences from the Barnimarana government. I have no evidence that this is in fact true, but even if it were, it is dangerous for any Court to accept press articles as being the truth of the matters that are asserted. As I commented to Mr Fogarty, if so, we would have to conclude as fact that Elvis Presley is alive and well.

[41] Whilst there may be restrictions upon freedom of movement, freedom of political expression, freedom of the media, and indeed freedom to protest about any aspect of Colonel Bainimarana's government, the evidence before me indicates that in all other aspects of the day to day functioning in the lives of Fijian citizens, little has changed, including since the events of April of this year. On the evidence of Mr Sharma and Mr Ali, there would appear to be no discernible difference in their lives or in the operation of the Fijian legal system to any significant degree since April 2009.

[42] Accordingly I find that that defence is similarly not established on the basis that there is no evidence for the Court to enable to Court to make a determination under s 106(1)(e) of the Act.

[43] Finally, I note that Mr Fogarty invited me to find that the situation for G and the applicant would become intolerable because of:

(1) Difficulties Ms H may have in renewing her work visa;

(2) The estimated timeframe in which this matter is likely to be heard by the Family Division of the Fijian Magistrates' Court (estimated to be a similar timeframe in terms of delay as would be experienced in this Court);

(3) That Ms H would therefore have to remain in Fiji for an unspecified period of time until matters are finalised;

(4) The concern, therefore, that Ms H would therefore have to return to New Zealand, and G not be in her care.

[44] These are issues which fairly and squarely are centred in the best interests and welfare argument and not arguments as to forum. As Butler-Sloss LJ said in *C v C* [1989] 2 All ER 465:

> The grave risk of psychological harm to a child is to inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention … Nor should the mother by her own actions, succeed in preventing the return of the child who should be living in his own country and deny him contact with his other parent.

[45] Ms H appears to be concerned at the loss of contact she may potentially have with G. Again, the irony appears to be lost upon her that should the Court acquiesce to her actions, Mr N, as a joint and equal guardian, and a parent who was providing as much care to G as Ms H, would then face the same issue of lack of contact that Ms H now complains about. I decline to take any of these issues into account as they are not relevant issues in terms of considering either of the pleaded defences but

go squarely to the "welfare and best interests" argument. It is regrettable from G's perspective that he may be faced with a situation upon return to Fiji where, for matters beyond Mr N and/or Ms H' control, he can no longer have the frequency of contact that he had with both parents. That is, an unfortunate and direct consequence of the choice Ms H made to attempt to act unilaterally as a parent of their son. The decision that G is to continue to be in the shared care of his parents, or to be in the primary care of Mr N in Fiji, or to be in the primary care of Ms H in New Zealand is to be a decision made in accordance with the Convention, by a Fijian Court, and not by unilateral and precipitous actions of Ms H.

[46] I was also asked by Mr Nation, should I decide to make an order for return, to attach conditions to return. I declined to do so as I do not accept that it is appropriate to attach conditions to return. In reaching this view I have taken into account the decision of the Principal Family Court Judge, Judge Boshier in *SJR v KMLS [Child Abduction]* [2006] NZFLR 299. In the context of that case His Honour considered the then reported decisions in which delay had been sanctioned by the Court. However His Honour was cognisant of the decision of a Full Bench of the High Court (Priestly and Frater JJ) in *KS v LS [Child Abduction]* [2003] 22 FRNZ 716. His Honour quoted from paragraph [111] of the High Court judgment, namely:

> Although s 23(3) [of the Care of Children Act's predecessor, the Guardianship Act 1968] expressly states that the provisions of Part 1 of the Guardianship Amendment Act 1991 are not limited by s 23, it would nonetheless be permissible, provided the child's return to the state of habitual residence was not artificially or unnecessarily delayed, to issue a warrant but let it lie in Court for an appropriate period.

Judge Boshier concluded:

> Under present legislation, a Court, if satisfied that a child should be returned to its country of origin, must make an order for *prompt* (emphasis added) return. Jurisdiction is firmly embedded and defined by statute. … Undoubtedly this is so because these provisions of the Care of Children Act are founded on an international treaty relating to child abduction. Consistency and firmness are hallmarks of successful international law instruments.

[47] I adopt the view of Judge Boshier. It seems clear to me, in reading s 105, that the only powers available to a Court upon rejecting the defences are to:

(1) Make an order for prompt return of a child to its habitual country of residence;

(2) To issue a warrant to facilitate the return of the child to its habitual country of residence (s 119 of the Act).

[48] The only discretion available to a Court is whether the warrant is to issue forthwith, or to lie in Court for a brief period, cognisant of the international obligations in terms of the Treaty. I therefore decline to attach conditions to the making of the order for return as I am without jurisdiction to do so.

[49] I reiterate that in reaching these conclusions I have been greatly assisted by the submissions of counsel and of the evidence put before me. If I have not referred to any of submissions of counsel or the evidence, that is not to say that I have ignored or overlooked those submissions and/or evidence.

Conclusion

(1) Accordingly I find that the respondent has failed to establish on the balance of probabilities the defences on which she relied pursuant to s 106 of the Act.

(2) Accordingly I have ordered the prompt return of G to Fiji, and directions so as to facilitate return have been referred to in my initial judgment of 26 June last.

S J Coyle
Family Court Judge

Signed at _____ am/pm on _____ 2009