NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA398/2018
[2019] NZCA 579

BETWEEN	SIMPSON Appellant
AND	HAMILTON Respondent

Hearing:	23 July 2019
Court:	French, Miller and Gilbert JJ
Counsel:	Appellant in person A E Ashmore and N J Fairley for Respondent T A Gunn lawyer for child M M Casey QC and D Sothieson for Central Authority
Judgment:	22 November 2019 at 9.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

FRENCH AND GILBERT JJ

(Given by Gilbert J)

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Introduction

[1] This appeal concerns whether an order should be made under s 105 of the Care of Children Act 2004 (the Act) for the return to Germany of a girl, now aged 12, who was unlawfully abducted by her mother and brought to New Zealand on 23 January

2015 in defiance of a German court order awarding sole custody of the child to the father.

[2] Subpart 4 of the Act (which includes s 105) implements the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) which responded to the need to protect children internationally from the harmful effects of their wrongful removal or retention outside the State of their habitual residence. The dual objects of the Hague Convention are to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the others.

[3] The child and her parents are German nationals. So too is the child's stepfather and her younger half-sister. Despite having no family or other support in this country, the mother, the child, her stepfather and half-sister arrived in Christchurch in January 2015 and relocated to the Coromandel region in March 2015. The stepfather left behind in Germany his other daughter, then aged six, from a previous marriage.

[4] To comply with the publication restrictions in s 139 of the Care of Children Act, we anonymise the parties' names and adopt the same pseudonyms used in the High Court. We refer to the child as "Anna", her father as "Mr Simpson", her mother as "Ms Hamilton" and her stepfather as "Mr Hamilton".

[5] Because the family was in hiding, nearly two years passed before the father discovered that Anna was living in New Zealand. This explains why it was not until 22 February 2017 that the Central Authority in New Zealand filed an application on behalf of the father under s 105 seeking an order for Anna's return to Germany.

[6] In a judgment delivered on 1 September 2017, the Family Court at Tauranga declined to make an order for Anna's return.[1] Judge Coyle found that two grounds for refusing to make a return order were made out. First, the application was made more than one year after removal and Anna was now settled in her new environment

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1 *[Simpson] v [Hamilton]* [2017] NZFC 6923 [Family Court judgment].

(s 106(1)(a)).[2] Secondly, Anna objected to being returned and had attained an age and degree of maturity such that it was appropriate to take her views into account (s 106(1)(d)).[3] The Judge considered that the discretion should be exercised by not making an order for return.[4]

[7] The father's appeal from the Family Court judgment was dismissed by the High Court in a results judgment delivered on 18 May 2018.[5] Paul Davison J gave his reasons in a judgment delivered on 11 June 2018.[6]

[8] This Court granted leave for a second appeal on 26 February 2019.[7] The Secretary for Justice, as the Central Authority for New Zealand under the Hague Convention, was given leave to intervene because the appeal raises issues of general public importance. The Authority is particularly concerned to ensure that the objectives and purposes of the Convention are not diluted.

[9] Following that brief introduction, it will be helpful to give a fuller overview of the background facts before addressing the grounds of appeal.

Background

Breach of access orders in Germany

[10] Anna was born in Germany on 3 July 2007. Her parents separated in 2009 and her mother has had day-to-day care of Anna ever since.[8] The mother persistently failed to cooperate over access in breach of various access orders made by the German courts.[9] As a result, the father's access became progressively less frequent: in 2011 he had access to Anna on 25 days instead of the 72 ordered; in 2012 on three days instead of 60; and in 2013 and 2014 he had no access at all.

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2 At [6]–[31].
3 At [47]–[56].
4 At [32]–[46] and [57].
5 *Simpson v Hamilton* [2018] NZHC 1098.
6 *Simpson v Hamilton* [2018] NZHC 1365 [High Court judgment].
7 *Simpson v Hamilton* [2019] NZCA 21 [Leave judgment].
8 There is a dispute about the date of separation, but it is recorded as having occurred in 2009 by the Nüernberg Higher Regional Court in a judgment dated 31 May 2016.
9 Ansbach District Court orders dated 8 July 2010 and 14 April 2011; Nüernberg Higher Regional Court dated 6 December 2012; Fürth District Court dated 9 July 2013; and Nüernberg Higher Regional Court dated 28 March 2014.

[11] In about February 2014, the mother advised the Nüernberg Higher Regional Court that she and her husband, Mr Hamilton, had decided to travel to Costa Rica for six months and wished to take Anna with them. The Court ordered that the father was to have contact via Skype every Saturday for at least 15 minutes during this time. None of these contact sessions took place despite the father doing his best to make them happen. It transpired that the family did not go to Costa Rica. Instead, they made two separate overseas trips. They went first to Brazil in March 2014, returning to Fürth, Germany in May 2014. They then went to Scotland in July 2014 returning to a different town in Germany, Gräfenberg, in September 2014.

Abduction

[12] Anna, who was then aged seven, was enrolled in a school in Fürth in September 2014. Six weeks later, the mother reported that Anna was sick, but she never returned her to school and no reason was given. In fact, on 11 November 2014, the mother and Mr Hamilton took Anna overseas (together with their daughter who was then aged three) without telling anyone where they were going. This was in contravention of the existing access orders and just 15 days before the hearing in the Fürth District Court of the father's application for sole custody of Anna. The father initially applied, in November 2013, for the right to determine Anna's place of residence. Then, in August 2014, he amended his application to include sole custody. Although the mother absconded before the hearing, she was represented by counsel at the hearing. She also provided written statements in opposition to the application. These were submitted both before and after her departure.

Custody order in favour of the father is made in Germany

[13] The Fürth District Court awarded sole custody of Anna to her father on 17 December 2014. This outcome was supported by the Guardian *ad litem* for Anna. The Court made various pertinent observations which provide important context for the present appeal. It is therefore helpful to set these out (translated as follows):

> While the [father] seeks to have regular contact with [Anna], the [mother], for years, has been trying to completely thwart his right of access where possible.
>
> …

The [mother] has for many years harboured a deep-seated resentment towards the [father]. She is trying to hide from him and is practically on the run. That a joint parental custody is not possible under these circumstances and requires no further explanation.

The transfer of parental custody to the father is in the best interest of the child. The ingrained resentment the mother of the child holds against the father of the child, by now significantly impairs the mother's ability to raise her daughter. It has now developed into the driving force behind the actions taken by the mother. With her actions, the mother wilfully and significantly disregards the interests of her daughter. From numerous statements the child made at access proceedings, from the psychological assessment created on that occasion by expert Dr. Marianne Schwabe-Höllein, from statements made by the Youth Welfare Office and the Guardian *ad litem*, it is not only known to the court, but also to the mother of the child, that her daughter desperately yearns for contact with her father. This has not changed to this day. Even after her having spent several months at an unknown location and even in light of an incident that happened on 20.09.2013, where [Anna] became eye-witness to a dramatic encounter between her father and her mother's husband, who was operating a passenger vehicle at the time, and on which the child only has the perspective of her mother for explanation, [Anna] told the contact supervisor that she would like to do 'everything with her father' again. That [Anna], in light of her mother's hugely rejectionist attitude, which would not have gone unnoticed by her and her mother's prerogative of interpretation of the events on 20.09.2013, also entrusted in the contact supervisor that she did not have the courage, does not seem surprising and is not to be interpreted as a limitation of the clear wish of the child to see her father.

The [mother], however, has been ignoring this, her daughter's dearest wish, all-out and consistently for years. For this, she is prepared to accept further significant disadvantages for her daughter. She, time and again, changes their place of residence, practically being on the run from the [father], and keeps in hiding. After [Anna] started her primary schooling in September 2013, she had to leave the school again only a few months later. In the autumn of [2014], she briefly attended the school again, only to stop attending without an excuse being given. Since that time, there has been uncertainty, if and where the child has been attending school. The mother's game of hide and seek is certainly not suited to allow for or let alone encourage relatively solid social relationships for the child outside of the family.

Although the court does not fail to appreciate that the child [Anna] has been living with her mother since birth and loves her for sure, it has to be concluded that a transfer into the care of the father is in the best interest of the child.

Other than the mother, who clearly puts living out her grudge towards the father of the child before the interests of her child, the father has already agreed to allow generous contact with the mother of the child.

He is living in well-ordered circumstances and there is no doubt that he is able to give the child the opportunity to have a 'normal life', without one parent's behaviour being fuelled by hatred of the other parent and with contact to both parents.

As already illustrated above, the child loves her father and wishes to see him again.

> The transfer of the parental custody to the father of the child does not seem undue either.
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> The Nüernberg Higher Regional Court, with a decision dated 28.03.2014, tried to resolve the stagnant situation, especially the longstanding denial of access through the [mother], by ordering a Right of Access decree. In those proceedings, the appointment of a contact supervisor was expressly seen as the less severe means than the removal of the right to determine the place of residence.
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> But the [mother] not only ignored the order of contact sessions via skype and after that in person mediated through the contact supervisor, but also unambiguously told the contact supervisor that she also is not willing to allow contact sessions in the foreseeable future. Moreover, the [mother] has gone into hiding since the adoption of said decision. It cannot be ascertained, whether the child regularly attends school.

Arrest warrant issued for Mr Hamilton

[14] On 27 November 2014, the Fürth District Court issued an arrest warrant for Mr Hamilton on a charge of causing grievous bodily harm to the father by deliberately running into him with his car on 20 September 2013. This is the "incident" referred to by the Court at [13] above and witnessed by Anna, who was in the car at the time.

The mother's appeal against the custody order is dismissed

[15] The mother filed an appeal against the decision of the Fürth District Court on 21 January 2015 but did not participate in the hearing. The Nüernberg Higher Regional Court appointed an independent expert psychologist, Professor Dr Gottfried Spangler, to report on the available options and make recommendations on how Anna's welfare requirements would best be served. Professor Spangler considered that by ignoring court decisions and not allowing the father to have access to Anna, the mother "endangered [Anna's] bond with the father". The Court found that the mother's conduct "hazarded significant developmental risks for [Anna]" and accepted Professor Spangler's opinion that it would be in Anna's best interests to live with her father while maintaining contact with her mother. The Court accordingly dismissed the appeal on 31 May 2016.

Family arrives in New Zealand

[16] After leaving Germany, the family travelled to Australia. They arrived in Christchurch on 23 January 2015 and were issued with three-month visitor visas.

They travelled around New Zealand for two months before going back to Australia on 21 April 2015. They re-entered New Zealand on 27 May 2015 and were again granted three-month visitor visas. These were subsequently extended to 27 November 2015. Three-year work visas were then granted to the mother and Mr Hamilton. The children received student and visitor visas. The mother procured these visas by falsely stating that she had sole custody of Anna. In support of this claim, she produced a document from the Nüernberg Higher Regional Court dated 13 February 2012 stating she had sole custody of Anna. However, the mother knew that sole custody had been awarded to the father by the Fürth District Court on 17 December 2014. She was served with that order on 23 December 2014 and she appealed against it on 21 January 2015, two days before her arrival in New Zealand. Unfortunately, Immigration New Zealand failed to question whether the father had visitation rights or had consented to the mother removing Anna from Germany. The Immigration and Protection Tribunal subsequently described the document produced by the mother as "obviously on its face an incomplete and suspicious document that did not prove that the [mother] had the right to remove [Anna] from Germany".[10]

The father's attempts to locate Anna

[17] The father did not know where the mother was in hiding with Anna. On 7 June 2015, he filed a missing person's report with the police in Germany. On 1 March 2016, public prosecutors in Germany issued an alert for the search of Anna and added her to the international list of wanted persons.

Arrest warrant issued for the mother

[18] On 25 May 2016, the Fürth District Court issued an arrest warrant for the mother on the basis she was suspected of misappropriating Anna's assets in violation of her fiduciary duty in breach of the German Criminal Code and was "absconding" in terms of the Criminal Procedure Code in that she was "on the run or is keeping herself concealed". The assets comprised EUR 85,481 held in Anna's bank account and government bonds realised for EUR 14,682. The mother transferred the bulk of these funds to her own account on 8 December 2014, first to her bank account

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10 *Re AE (Germany)* NZIPT 503385 at [67].

in Germany and then, on the same day, to her bank account in Australia. These investments are said to have been established for Anna by her paternal great grandmother and her father and were intended to fund her university education. A corresponding European arrest warrant was issued on 31 May 2016.

Surrender order for Anna

[19] In August 2016, following an extensive media and internet campaign, the father received an anonymous telephone call indicating Anna might be in New Zealand. On 18 October 2016, the Fürth District Court issued a surrender order for Anna to be released to the father's custody.

Orders preventing Anna's removal from New Zealand

[20] On 10 November 2016, the father received a letter from the German Embassy in Wellington advising that a passport had been issued for Anna in New Zealand. On 6 December 2016, the father filed a request for Anna's return with the Central Authority in Germany. On 14 February 2017, orders were made on the application of the Central Authority in New Zealand preventing Anna's removal from New Zealand and for surrender of all passports and travel documents.

Application under s 105 filed in the Family Court

[21] On 22 February 2017, the Central Authority commenced the present proceeding by filing on behalf of the father an application in the Family Court at Thames for an order for the return of Anna to Germany. The proceeding was transferred to the Family Court at Tauranga on 1 March 2017. The mother was served on 3 March 2017.

Deportation notices issued

[22] On 22 May 2017, the mother was issued with a deportation liability notice by Immigration New Zealand on the basis she had concealed relevant information on her visa application. Consequently, Anna and her half-sister also became liable for deportation and they were issued with deportation liability notices on 30 May 2017. Mr Hamilton was also issued with a deportation liability notice, on 14 June 2017.

[23] Through counsel, the mother filed submissions under s 157 of the Immigration Act 2009 attempting to show good reason why deportation should not proceed. The mother claimed she understood that by lodging an appeal (on 21 January 2015), her position as the custodial parent was preserved and she did not learn the outcome of the appeal (delivered on 31 May 2016) until 2 March 2017. This submission was rejected by Immigration New Zealand on 27 July 2017. It advised that deportation was to proceed. The mother filed an appeal to the Immigration and Protection Tribunal, but this was not determined until 30 October 2017, after the release of the Family Court's decision on 1 September 2017.

Three defences pleaded opposing order for Anna's return

[24] The mother accepted that the jurisdictional requirements under s 105 of the Act were met and no one has subsequently raised any issue about this. We therefore proceed on that basis. The mother raised three defences in response to the father's application for an order that Anna be returned to Germany. The first was in terms of s 106(1)(a) of the Act, namely that the father's application was made more than one year after Anna's removal from Germany and she was now settled in her new environment. The second, relying on s 106(1)(c), alleged there was a grave risk that Anna's return would expose her to physical or psychological harm or place her in an intolerable position. In her amended statement of defence, the mother also relied on s 106(1)(d), contending that Anna objected to being returned and had attained an age and degree of maturity such that it was appropriate to give weight to her views.

Psychologist's report

[25] The Court appointed a clinical psychologist, Sue Lightfoot, to provide a report under s 133 of the Act. In her report dated 15 June 2017, Ms Lightfoot recorded her brief as having two components. First, in relation to Anna's objection to returning to Germany: the basis for that objection; whether the objection is reality-based or affected by undue influence; and whether Anna has sufficient maturity and understanding to recognise the implications of the objection. Secondly, having regard to the defence that Anna might be exposed to grave risk of physical or psychological harm or otherwise placed in an intolerable situation, the psychological impact on Anna

of an order returning her to Germany and the measures that could be taken to ameliorate this.

[26] Ms Lightfoot's report was prepared following discussions and meetings with Anna and her mother. She did not speak to the father.

[27] Ms Lightfoot reported that Anna was "very opposed to returning to Germany". She considered that Anna has a "very good level of maturity, and fully understands her current position". Ms Lightfoot considered Anna's decision was "completely logical and appropriate for her" and "likely to be the same decision most older children and adults would make in her situation".

[28] It is necessary to examine Anna's understanding of "her situation" because it forms the foundation for her objection. Ms Lightfoot recorded in her report that Anna's mother had "clearly explained" to Anna that if she is returned to Germany, she will go alone, without her mother, her half-sister and Mr Hamilton, because they would choose to remain in New Zealand. Ms Lightfoot accepted that this "would indeed be the reality for [Anna]"; "she will be leaving her whole significant world behind". This no doubt explains why Ms Lightfoot considered that most older children and adults would make the same decision as Anna faced with this choice. In her conclusion regarding Anna's opposition to returning to Germany, Ms Lightfoot reported:

> [The mother] told me she has clearly explained to [Anna] the implications for her, if [her father] is successful in his Application to have [Anna] returned to Germany. Whilst [Anna] on occasion appeared not to believe she would need to return without her mother, overall her comments to both myself and Mr Blair Lawyer for Child, clearly indicated she understood she would have to leave her mother — her most important adult, her sister, and [Mr Hamilton], as well as her friends, and NZ lifestyle, behind. This would indeed be the reality for [Anna].

Ms Lightfoot considered that Anna's objection to returning to Germany was *not* based on "parental influence, alignment, or alienation".

[29] Ms Lightfoot concluded that the likely psychological impact for Anna of an order for return to Germany would be trauma, anger and conflict with her father, loss of primary attachment to her mother, loss of sibling relationship with her

half-sister and loss of sense of self, all at a particularly challenging stage of her development when insecurities are common.

Family Court decision

[30] Judge Coyle found that Anna was physically and emotionally settled in her new environment and had achieved a high level of social integration.[11] The Judge found that the appeal against deportation was likely to fail, but he placed no weight on this because it was only a future possibility, not a present certainty.[12] He considered the immigration status would only be relevant if the appeal had been rejected before the Family Court hearing.[13]

[31] Having found the "settled" defence under s 106(1)(a) of the Act made out, the Judge turned to consider the exercise of his discretion having regard to the principles set out in s 5 for assessing the best interests of the child. In view of the German court's decision, confirmed on appeal, awarding sole custody of Anna to the father, the Judge was satisfied that the father presents no safety risks to her in terms of s 5(a).[14] The Judge considered the principles in s 5(b) and (c) (a child's care, development and upbringing should be primarily the responsibility of her parents and guardians and should be facilitated by ongoing consultation and cooperation between them) were "entirely aspirational" because of the "ongoing lack of willingness" of the mother to allow the father to be involved in Anna's life. The mother's "actions in removing Anna from Germany and hiding from [the father]" excluded all prospect of this.[15]

[32] The Judge viewed the principles of continuity of care as set out in s 5(d) and (e) as particularly important in this case. He considered it impossible for Anna to have a relationship with both her parents because of the mother's decisions.[16] The Judge accepted the mother's evidence that "she will not return with [Anna] and will remain in New Zealand with [Mr Hamilton] and [their daughter].[17] The Judge accepted

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11 Family Court judgment, above n 1, at [23].
12 At [30].
13 At [31].
14 At [34].
15 At [35].
16 At [36].
17 At [36].

Ms Lightfoot's evidence that returning Anna to Germany in these circumstances would place her in an "intolerable situation".[18] The Judge considered this would be "too cataclysmic" for Anna and he therefore exercised his discretion against making an order for her return:[19]

> ... I have reached the view that to require [Anna] to return to Germany would be too cataclysmic for her. It would require her to be in the primary care of her father whom she has not physically seen since 2013. It would require her to leave behind her mother, her stepfather and her sister. It would require her to leave behind the life that she has in New Zealand and move to a life in Germany, the present realities of which are unknown to [Anna]. I agree with Ms Lightfoot's evidence that for [Anna] that would be an intolerable situation (in a psychological sense).

[33] The Judge also found the defence under s 106(1)(b) was established in that Anna objected to returning to Germany and had obtained the age and degree of maturity at which it was appropriate to give weight to her views.[20] The Judge summarised the basis for Anna's objection as set out in Ms Lightfoot's report:[21]

> 1. She would be taken away from her mother who is very important to her;
> 2. She would be taken away from her family in New Zealand;
> 3. She would be taken away from her friends and other relationships;
> 4. She would be taken away from her home;
> 5. She is "kiwi", enjoys living in New Zealand, and prefers to live in this country in comparison to Germany; and
> 6. She would be returned to an overall context of her father's care in a country, in which she associated with adult conflict and being unhappy.

[34] The Judge stated there was no evidence that Anna's views had been influenced by her mother.[22] He accepted Ms Lightfoot's evidence that although she had just turned 10, Anna was more mature than many children her age and most older children or adults would make the same decision in her situation:[23]

> … [Anna] has an advanced developmental ability for her age, and would be more mature than many children her age in most areas. I consider that she has made a decision that has been understandably, both emotionally logically based, and aimed at meeting her current needs.

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18 At [39].
19 At [46].
20 At [47]–[56].
21 At [50].
22 At [56].
23 At [52] (footnote omitted).

> While [Anna] is perhaps yet too young to apply a high order analytical, multi-factorial assessment of her situation, her decision has been completely logical and appropriate for her. It is also likely to be the same decision most older children or adults would make in her situation.

[35] The Judge determined that his discretion in relation to this defence should be exercised in the same way as for the "settled" defence, for the same reasons.[24]

[36] For completeness, the Judge stated that he would have dismissed the further defence under s 106(1)(c). He did not consider that returning Anna to Germany would expose her to a grave risk of physical or psychological harm or would place her in an intolerable situation.[25]

[37] The Judge did not discharge the order preventing Anna from being removed from New Zealand because he was concerned there was a real risk that the mother and Mr Hamilton would "attempt to flee the jurisdiction of this Court in order to prevent [the father] progressing proceedings under [the Act] relating to day-to-day care and contact in relation to [Anna]".[26]

Appeal to the High Court

[38] There was no challenge by the mother in the High Court to the finding that the "grave risk" defence under s 106(1)(c) was not established. The father contended that the other two defences should also have been rejected. He argued that Anna should not have been regarded as settled in her new environment, particularly given the lack of immigration status to remain in New Zealand, the long history of transience, the German court's finding that the mother was "on the run" and the Judge's finding that the mother may attempt to flee the jurisdiction of the Court in New Zealand. The father did not challenge the Family Court's finding that Anna objected to returning to Germany and had attained an age and degree of maturity such that her views should be taken into account. However, he noted that Anna's objection was based on her understanding that her mother would not return to Germany with her. He submitted that this assumption should not have been accepted at face value.

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24 At [57].
25 At [59]–[66].
26 At [68].

The father contended that Anna's views were clearly influenced by the mother. He also challenged the exercise of the discretion, contending that the Judge failed to take various matters into account including measures that could be taken to ameliorate Anna's understandable concerns about future care arrangements.

High Court decision

[39] Paul Davison J considered that to the extent the appeal concerned whether the defences were made out, it should be treated as a general appeal governed by the principles set out by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[27] However, the second stage of the analysis — the discretion whether to make an order — was to be approached applying the principles in *May v May*.[28] The exercise of this discretion could not be interfered with unless it were shown the Judge acted on a wrong principle, failed to take into account some relevant matter, took account of some irrelevant matter, or was plainly wrong.[29]

[40] The Judge agreed with the Family Court that Anna is now settled in her new environment.[30] He did not consider the Judge made any appealable error in exercising the discretion.[31] The Judge agreed that "Anna's return to Germany, without her mother and sister, to a live with her father is likely to have what Ms Lightfoot describes as a profoundly negative psychological impact on her".[32] He agreed with Judge Coyle that these effects would be "too cataclysmic for her".[33]

[41] The Judge also agreed with the Family Court finding that Anna has a strong objection to returning to Germany and her views should be given considerable weight.[34] Again, the Judge considered no appealable error had been demonstrated concerning the exercise of the discretion in the Family Court.[35]

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27 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
28 *May v May* (1982) 1 NZFLR 165 (CA) at 169–170.
29 High Court judgment, above n 6, at [71]–[72].
30 At [97]–[98].
31 At [125].
32 At [119].
33 At [119].
34 At [139] and [141].
35 At [143].

Appeal to this Court

Grounds of appeal

[42] The father's notice of appeal lists four grounds which may be summarised as follows:

(a) Anna cannot be regarded as being settled in New Zealand given she has no legal entitlement to remain here.

(b) Anna's objection to returning to Germany is influenced by her mother and Mr Hamilton.

(c) Ms Lightfoot's evidence was unsound.

(d) The High Court failed to consider that the alienation of Anna from her father will have long-term developmental risks.

Issues

[43] It will be convenient to address these grounds with reference to the three main issues:

(a) Was the settled defence under s 106(1)(a) made out?

(b) Was the child objection defence under s 106(1)(d) made out?

(c) Was the discretion to decline return appropriately exercised?

[44] Before addressing these issues, we note that the High Court should not have treated any aspect of the appeal as being governed by the approach directed by this Court in *May v May*. All counsel agreed that the standard to be applied is as directed by the Supreme Court in *Austin, Nichols*. This was confirmed by the Supreme Court in *Kacem v Bashir*.[36] Because of the approach taken in the High Court, we will focus our attention on the Family Court judgment.

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[36] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

Was the settled defence made out?

Submissions on appeal

[45] The father submits that the grounds for refusal to order return should be narrowly construed to give effect to the objectives of the Convention. He contends it will be very difficult for an abducting parent opposing an order for return to her place of habitual residence to show that the child is settled in her new environment when she is being concealed or where she does not have legal status entitling her to remain.

Analysis

[46] The exceptions in the Hague Convention, relieving the obligation to return a child abducted from her place of habitual residence, were not intended to be given an expansive interpretation. Professor Elisa Pérez-Vera, the official Hague Conference reporter, made this clear in her explanatory report on the Convention:[37]

> … it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them — those of the child's habitual residence — are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

[47] Neither the Hague Convention nor the Explanatory Report provide guidance on what is intended by the concept of being "settled" in a new environment. However, its ordinary meaning suggests a relocation that is not just temporary but one that is sufficiently established to provide a sense of stability and security.[38] The assessment will usually focus on the position at the time the application is heard.[39]

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37 Elisa Pérez-Vera *Explanatory Report* (Hague Convention on Private International Law, Madrid April 1981) at [34].

38 *Re N (Minors) (Abduction)* [1991] 1 FLR 413 (HC).

39 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289

It is necessary to consider not only whether the child is physically and emotionally settled, but also whether she is socially integrated.[40] This is a broad ranging enquiry and could include consideration of a child's immigration status if relevant. For example, if there is a real and imminent threat of deportation, this is likely to bear on the assessment of whether a child is settled.[41]

[48] It will likely be difficult for an abducting parent to demonstrate that a child is settled in her new environment, overcoming the Court's obligation to order return, in cases of concealment or subterfuge. The reasons for this were explained by Thorpe LJ in *Cannon v Cannon*:[42]

> The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest.
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> …
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> … A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge.
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> …
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> … In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased. The judges in the Family Division should not apply a rigid rule of disregard but they should look critically at any alleged settlement that is built on concealment and deceit especially if the defendant is a fugitive from criminal justice.

[49] With these principles in mind, we turn to consider whether the mother established that Anna was settled in her new environment at the time of the hearing in the Family Court in August 2017. By then, the family had effectively been on the run and in hiding since they had fled Germany in November 2014. After trips back and forth between Australia and New Zealand, Anna arrived in a remote area of the Coromandel Peninsula on 27 May 2015. Since then, she had lived at three

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[*Secretary for Justice v HJ*] at [57].

40 At [55].

41 *Lozano v Alvarez* 697 F 3d 41 (2d Cir 2012) at 56–58. See also Micheal Singer "Across the Border and Back Again: Immigration Status and the Article 12 'Well-Settled' Defense" (2013) 81 Fordham L Rev 3693.

42 *Cannon v Cannon* [2004] EWCA CIV 1330, [2005] 1 WLR 32 at [56]–[61]. Approved in *Secretary for Justice v HJ*, above n 39, at [29] per Elias CJ and at [69] per Blanchard, Tipping and Anderson JJ.

addresses in that general area, moving in February 2016 and in May 2017. By the time of the hearing, she had been living at her current address for three months. Anna was initially enrolled at a local school on 15 June 2015 but she left in December 2016. She enrolled at a second school in February 2017 and at the time of the hearing she had been there for six months. The principals of both schools confirmed that Anna could speak English fluently and had settled well to her studies. She had participated in various activities including singing and guitar lessons, a school kapa haka group and school sports. She had made friends and was evidently enjoying her new surroundings. However, Anna was clearly not insulated from the effects of being in hiding. For example, her class teacher reported in a letter dated 20 March 2017 that Anna "had moments of anxiety and has expressed that she feels worried about her family situation".

[50] The Family Court recognised that, now the father had located Anna in New Zealand, there was a real risk the mother and Mr Hamilton would continue their determined efforts to evade him by fleeing to another jurisdiction.[43] We agree with that assessment. This is the reason why the Court did not discharge the order preventing Anna from being removed from New Zealand.

[51] The family's immigration status at the time of the hearing was precarious. Deportation liability notices had been served and the mother's attempt to show good reason why deportation should not proceed had failed. The Judge accepted it was more likely than not that their appeal to the Immigration and Protection Tribunal would also fail and they would be deported.[44] We do not agree with the Judge that this issue could be disregarded on the basis it was not "a certainty".[45] At the time of the hearing, there was a real and imminent threat of deportation and this was clearly relevant to whether Anna could be regarded as being settled in New Zealand.

[52] It is clear the family would have been deported had it not been for the Family Court decision finding that the consequences for Anna of returning to Germany to live

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43 Family Court judgment, above n 1, at [68].
44 At [30].
45 At [30].

with her father would be "cataclysmic" and "intolerable". This is apparent from the following extracts from the Tribunal's decision:

> [71] The consequences for [Anna] if she has to return to Germany and be placed in the custody of her father have been assessed by the Family Court and found to be "cataclysmic" and "intolerable". Even though this assessment appears to accept a scenario where the daughter will leave her family behind in New Zealand, rather than the whole family having to return to Germany, the Tribunal has found that, even if all the family return so that contact with them would be maintained, the experience of enforced living with her father will still be traumatic for her.
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> [72] The appellants have no family or particular nexus to New Zealand. They hold only temporary visas based on the wife's employment and whether they can establish a pathway to residence is not known. The wife and husband appear to have come to New Zealand with the intention of ensuring that the father could not have custody of or contact with [Anna].
>
> [73] Had the family been able to return to Germany without the prospect that [Anna's] father would seek to enforce the December 2014 custody order, which the New Zealand Family Court has found not to be in [Anna's] best interests, the Tribunal would unhesitatingly have dismissed the appeals, even though returning to Germany would expose [Anna] to further conflict over the father's contact. Regrettably, that conflict has been a given in her life thus far and has continued in New Zealand.
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> …
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> [80] If the Tribunal allows these appeals the appellants will remain here on temporary visas only. If the High Court was to uphold the father's appeal, [Anna] will have to return to Germany regardless. Having regard for [Anna's] exceptional humanitarian circumstances, the Tribunal finds that it would not in all the circumstances be contrary to the public interest for the appellants to remain in New Zealand on a temporary basis pending resolution of the Hague Convention proceedings and for the Family Court to consider any application of the father for contact.

[53] The mother's claim of settlement in New Zealand was, to borrow Thorpe LJ's expression, "built on concealment and deceit". The mother left Germany secretively, without telling anyone where she was going. She obtained temporary immigration status by falsely claiming she had sole custody of Anna. She ended up hiding with Anna in a remote location on the other side of the world from her place of habitual residence, all the while knowing that the father and the authorities would be in pursuit. Inevitably, Anna became enmeshed in her mother's deceit. For example, one of the strategies employed to avoid detection was to prohibit Anna from using the internet at school even though this restricted her learning. Anna, like many children, quickly adjusted to her new surroundings but that does not mean she was

settled. By the time of the hearing in the Family Court, the chosen hiding place was no longer serving its purpose. We agree with the Judge's assessment that it is likely the family would have attempted to move on again once the authorities and the father caught up with them. An order preventing Anna's removal from New Zealand was therefore necessary.

[54] We do not consider the mother discharged the onus of proving that Anna was settled in New Zealand in the required sense at the time of the Family Court hearing in August 2017. To summarise, the "settled" defence was founded on a strategy of concealment and deceit. The family had come to a remote part of New Zealand unlawfully with the intention of hiding and frustrating the German Court orders designed to serve Anna's best interests. Anna had been living at her current address for only three months. She had been at her current school for six months. The mother had procured visas allowing them to enter and temporarily remain in New Zealand by making false claims about her right to be here with Anna. The family had been issued with deportation liability notices and their initial attempt to show good reason why they should not be deported had failed. It was unlikely their appeal against deportation to the Immigration and Protection Tribunal would succeed. In any event, the hiding place having been discovered by the German authorities and the father, the family would likely have moved on again had it not been for an order preventing Anna from leaving the country. We do not consider Anna could be said to be physically and emotionally settled in all the circumstances.

Was the child objection defence made out?

Submissions on appeal

[55] The father submits that Anna's attitude towards him is plainly influenced by her mother, as was accepted by the courts in Germany. He contends that the Family Court wrongly disregarded this evidence.

[56] The mother's estranging behaviour had an important bearing on Anna's objection in two respects. First, as the Family Court observed based on Ms Lightfoot's report, Anna's concern about seeing her father related to the car incident on 20 September 2013 (referred to by the Fürth District Court in the quotation

at [13] above). This is the incident in respect of which a warrant for Mr Hamilton's arrest has been issued on a charge of causing grievous bodily harm to the father (referred to at [14] above). Ms Lightfoot reported Anna's perception that her father was "in the wrong" and the incident had "upset her, made her feel scared, and changed how she felt about seeing her father". The father says Anna has obviously adopted her mother's view about this incident. Judge Coyle said it did not matter what had happened, only its effect on Anna:[46]

> What did or did not happen outside [Anna's] school in September 2013 is irrelevant. What is relevant is that [Anna] has a strong recollection of that event and for her it is traumatic and associated with her father. It is my finding that [Anna] has a strong objection to returning to Germany.

[57] Secondly, the father submits that Anna's objection was founded on the false assumption, based on what her mother had told her, that she would have to return to Germany on her own and the rest of the family would remain in New Zealand. The father states that if Anna returns with her mother, he recognises that Anna would need to remain living with her mother, at least initially.

[58] While the father does not suggest that Anna's views should be disregarded, he submits that involving children under 14 years of age in custody or relocation decisions is fraught. He argues they should not be expected to make such difficult decisions and confront serious loyalty conflicts when they are not sufficiently developed to be able to evaluate the consequences of their decisions. In the unlikely event Anna's mother did not return with her, the father says he would pay for Anna to spend her school holidays in New Zealand or wherever her mother was living at the time.

Analysis

[59] There is no contest that despite having just turned 10 at the time of the hearing in the Family Court, Anna's views were properly taken account of. The real issue concerns what she was objecting to and the basis for that objection.

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46 Family Court judgment, above n 1, at [51].

[60] Anna was understandably concerned about, and objected to, being forced to return to Germany alone, leaving her family in New Zealand, to live with her father who she currently fears. Despite Anna's scepticism, this is the scenario her mother had impressed upon her. In addition to the references already given at [28] above, Ms Lightfoot recorded in her report:

> [The mother] said she tried to explain the implications of the current Court proceedings to [Anna], several weeks prior to my visit, to clarify the rest of the family would not be able to follow her back to Germany — "*we got the papers and I thought she needed to know what was happening. She is mature enough to work it out, so I explained what would probably happen if I lose this case. And her reaction to that was I'm not going anywhere. And she's tried to ignore it all, but yes she does get how totally big the situation is … and she said to [the first lawyer for the child], why would someone who loves me take me away from my home*".

[61] We are troubled that the mother threatened to abandon Anna as part of her ongoing efforts to ensure Anna's father is not involved in her life. This threat must have been very distressing for Anna. We consider the scenario the mother carefully explained to Anna in preparation for her meeting with Ms Lightfoot was not realistic. First, it is clear Anna's mother loves her and would not want to abandon her. Secondly, the mother has gone to extraordinary lengths over many years to defeat the father's right (and Anna's right) to have any form of father-daughter relationship. That was the reason she brought Anna to New Zealand in the first place. It is highly unlikely that she would completely change course, give up all she sought to achieve, and remain here while Anna goes back to Germany alone to live with her father. Thirdly, it is very unlikely the mother would be permitted to remain in New Zealand if an order was made returning Anna to Germany. The Immigration and Protection Tribunal only allowed the mother to remain in New Zealand on a temporary basis pending resolution of the present proceedings.[47]

[62] Contrary to the Family Court's finding referred to at [34] above, there is ample evidence that Anna's views have been influenced by her mother. For example, Professor Spangler reported in February 2016 that Anna's fear of contact with her father "seemed hardly authentic, but influenced by the mother". The Nüernberg Higher Regional Court noted that Anna had told the contact supervisor that her wish

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47 *Re AE (Germany)*, above n 10, at [80].

to have contact with her father was conditional on him not being allowed to "start any nonsense or go to court again". The Court observed that these were "arguments adults would use" and indicated "manipulation of [Anna] with a tendency to achieve estrangement".

[63] In our assessment, Anna's objection was vitiated by the undue influence of her mother and was founded on an entirely false premise. Anna understandably objected to being separated from her family, not to returning to Germany with them. We do not consider this exception was made out either.

[64] Given our findings that none of the pleaded exceptions was established at the time the application was heard, the Family Court had no discretion to decline to make an order for Anna's return. Such an order should have been made. Nevertheless, we turn to consider whether the discretion was correctly exercised, assuming it had existed.

Was the discretion to decline return appropriately exercised?

Submissions on appeal

[65] The father submits the discretion ought to have been exercised in favour of ordering return. He argues this would be in Anna's best interests. He notes that alienation, loss of attachment and instrumentalisation of children can cause lifelong negative consequences for children. A return to Germany would not preclude Anna from continuing to live with her mother, indeed the father now strongly supports this. While acknowledging the inevitable short-term disruption, he says that returning Anna to Germany would have the benefits of promoting her relationship not only with him, but also with her wider family including grandparents. He says a return would give Anna security and stability. It would enable her to live in her country of birth and participate in all it has to offer. The father submits that an order for return would also promote the objectives of the Hague Convention. He argues that the Family Court and the High Court did not recognise or respect the decisions of the German courts regarding Anna's care and welfare.

Analysis

[66] In *Secretary for Justice (as the New Zealand Central Authority on behalf of TJ) v HJ*, the majority (Blanchard, Tipping and Anderson JJ) concluded that the discretion in a "settled" case under s 106(1)(a) of the Act requires the Court to balance the welfare and best interests of the particular child against the general purpose of the Convention in the circumstances of the case.[48] The majority continued:

> [86] When undertaking this exercise the judge should consider whether return would or would not be in the best interests of a child who has necessarily already been found to be settled in its new environment. That very settlement implies that an order for return may well not be in the child's best interests. Matters relevant to the assessment include the circumstances in which the child is now settled; the circumstances in which the child came to be wrongfully removed or retained; and the degree to which the child would be harmed by return. Other factors capable of being relevant will be the compass and likely outcome of the dispute between the parties, and the nature of any evidence directed to another ground of refusal, whether or not that ground is made out. In short, everything logically capable of bearing on whether it is in the best interests of the child to be returned should be considered.

[67] Even if the Court determines that return is not in the child's best interests, that is not necessarily the end of the matter. The Court must consider whether return should nevertheless be ordered to promote the objectives of the Hague Convention, for example to avoid perverse incentives created by rewarding concealment.[49]

[68] We have already addressed the circumstances in which Anna was wrongfully removed from Germany and the circumstances relied by on by her mother to support her claim that Anna was settled in New Zealand as at August 2017, the date of the hearing in the Family Court. These factors weigh in favour of exercising the discretion by ordering return.

[69] We now consider the likely harm to Anna, assessed as at that date, of an order for her return to Germany. Judge Coyle accepted Ms Lightfoot's evidence that this would place Anna in "an intolerable situation" and would be "too cataclysmic for

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48 *Secretary for Justice v HJ*, above n 39, at [85].
49 At [87].

her".[50] Ms Lightfoot's reasons for this conclusion were set out in her report and may be summarised as follows:

(a) Loss of primary attachment — the effects of Anna losing her secure attachment to her mother will be considerable and will extend over time.

(b) Loss of sibling relationship — Anna and her half-sister have a very close bond which would be lost if Anna returned to Germany.

(c) Loss of emerging sense of self — Anna has "recently begun to develop" a sense of self that identifies with New Zealand and the lifestyle here. A return to Germany would require her to redevelop her sense of self which is likely to be problematic "given she does not now identify as being German, and does not want to live there".

(d) Relationship with her father — returning Anna to Germany would require her to live with her father, effectively a stranger, with whom she associates "a traumatic memory" (the September 2013 car incident). Anna would likely experience "considerable anxiety, fears about her safety, and hyper-vigilance" in the company of her father until she began to know him.

[70] Once it is accepted, as we do, that the mother would not have been permitted to remain in New Zealand and would have returned to Germany with Anna and the rest of her family, the Judge's primary concerns based on Ms Lightfoot's evidence ((a) and (b) above) fall away. The "cataclysmic" consequence of "severing" Anna's primary attachment and separating her from her stepfather and half-sister was not a realistic prospect. An order for Anna's return would not have placed her in this "intolerable situation".

[71] The father has consistently maintained that he wishes to share Anna's care with her mother. He has always regarded this as being in Anna's best interests as he made

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[50] Family Court judgment, above n 1, at [39] and [46].

clear in his submissions to the Family Court and to the High Court. He confirmed before us that he does not expect Anna would be ready to live full-time with him and he would not seek to enforce such an outcome. To the contrary, he acknowledges that if Anna is returned to Germany, she should continue to live with her mother, at least initially. All he seeks at this stage is access. That would be a matter for the courts in Germany to determine. However, the prospect of Anna being returned alone to Germany to live solely with her father ((d) above) can be discounted.

[72] Leaving Anna in her mother's sole care in New Zealand clearly carries its own risks for Anna's future development. For example, Professor Spangler assessed the mother as having "[s]ignificant weaknesses and risk factors" shown by "her perception and interpretation of [Anna's] emotions and needs, which are mainly channelled by her own needs and points of view". He went on to say that the mother is "only to a limited extent able to orient her behaviour towards [Anna's] needs".

[73] In the context of considering whether Anna was settled, Judge Coyle referred to Ms Lightfoot's evidence that Anna sees herself as a "kiwi kid" in the sense that "a kiwi outdoors life" is important to her, "particularly the ability to be involved with animals".[51] This was the "sense of self" referred to by Ms Lightfoot in her report — "a well-stated sense of self that identifies with NZ and the lifestyle here". We place little weight on this factor ((c) above). It must be kept in mind that the present application is concerned with the forum in which Anna's best interests should be considered and does not require an analysis of all the factors that might weigh in any further decision about custody and access.[52] In any event, there is no reason to suppose that Anna's opportunities for development and fulfilment will be any less in Germany. She will still be able to enjoy the outdoors and be involved with animals. For example, her father owns 60,000 m^2 of parkland in Mönchengladbach where Anna was born. He is also responsible for the restoration of a nature reserve of some 250,000 m^2 in that area.

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51 At [22].

52 *A v Central Authority for New Zealand*, [1996] 2 NZLR 517 (CA); and *S v S* [1999] 3 NZLR 513 (CA) at [9].

[74] The likelihood of ongoing dispute between the parents could not be avoided by Anna remaining in New Zealand. The father did not abandon the prospect of having any involvement in Anna's life even in the face of her disappearance for over two years. He has the time, the means and the determination to pursue his rights (and what he perceives to be in Anna's best interests) and has demonstrated he will do so regardless of whether the forum is Germany or New Zealand. This was a neutral factor in determining whether an order for return should have been made.

[75] The mother's strategy of running and hiding to prevent the German courts from being able to implement care and access arrangements assessed as being in Anna's best interests should not have been encouraged by declining to make a return order. This risked creating perverse incentives. It tended to justify the mother's decision to defy the authority of the German courts and come to New Zealand unlawfully. The decision rewarded her behaviour in fleeing that jurisdiction with Anna and concealing her in New Zealand, contrary to Anna's best interests. It also effectively lent assistance to the mother's ongoing efforts to defeat the father's right to be involved in Anna's life. These consequences ran directly counter to the objectives of the Hague Convention.

[76] The courts in Germany were perfectly well-placed to determine what was in Anna's best interests. Those courts, and the independent experts in Germany who had been involved with this family, had accumulated significant knowledge about the issues having dealt with them over the course of six years, from early 2010 to February 2016. In our view, at the time of the hearing in the Family Court, the Federal Republic of Germany was the appropriate forum to resolve all questions of custody and access for Anna, not the courts in New Zealand. In conclusion, we see no good reason why any discretion should have been exercised against ordering Anna's return to Germany at that time.

Disposition

[77] Regrettably, two years have passed since the Family Court decision. Anna is now aged 12 and has lived more than a third of her life in New Zealand. The principal objective of the Hague Convention of securing the prompt return of an abducted child

can no longer be met. What course should now be taken? For reasons we now come to, this issue has caused us the greatest difficulty.

[78] Delay occasioned by the appeal process will not generally justify declining to make an order for return if no exception was established at the time of the hearing of the application.[53] In the normal course, decisions under the Hague Convention are dealt with promptly and any delay in the appeal process will be inconsequential.[54] However, as this Court observed in *B v Secretary for Justice*, the possibility cannot be excluded that there may be cases where a significant change of circumstances occurring during the appeal process dictate that a return order can no longer be justified at the time an appeal is heard, even though such an order would have been appropriate at first instance.[55] The Supreme Court left open this possibility in *Secretary for Justice v HJ*.[56] Although the paramountcy principle does not apply, Anna's welfare and best interests must always be considered. For these reasons, and in view of the father's criticisms of Ms Lightfoot's report, an updated psychologist's report was commissioned by this Court from Dr Sarah Calvert.[57]

[79] Before addressing Dr Calvert's report, it is necessary to relate a significant incident that occurred on 28 September 2017, some four weeks after the Family Court judgment was delivered. Shortly after 10 am that day, the father, accompanied by a man and a woman, arrived at Anna's school classroom without any forewarning and forcibly uplifted Anna in front of her teacher and classmates while the class was in session. The male associate stood in front of the teacher and blocked her attempt to protect Anna while her father picked her up out of her seat. The three adults bundled Anna into a car and took her away.[58] They drove to the nearby town of Tairua where they had a short stop before continuing to an address in Auckland where German friends of the father were living. Seeing that Anna was upset, the female at the address contacted the police and advised them where Anna was and that she was in a distressed

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53 Pérez-Vera, above n 37, at [108]; and Nigel Lowe and Michael Nicholls *International Movement of Children: Law, Practice and Procedure* (2nd ed, LexisNexis, Bristol, 2016) at [22.11].

54 Care of Children Act, s 107.

55 *B v Secretary for Justice* [2007] NZCA 210, [2007] 3 NZLR 447 at [23].

56 *Secretary for Justice v HJ*, above n 39, at [57].

57 Section 145(2)(b) of the Care of Children Act authorises the receipt of further evidence on appeal if the interests of justice so require.

58 It appears a third person assisted by presenting papers at the school office purporting to show that they were authorised to uplift Anna.

state. The mother was informed and immediately made a without notice application for an interim parenting order. This order was granted by Judge Coyle that day along with a warrant to uplift Anna and return her to her mother's care. The police executed the warrant and Anna was returned to her mother later that same evening.

[80] This incident has had a profound effect on Anna. Dr Calvert says in her report that Anna suffers from Post Traumatic Stress Disorder directly associated with her experience on that day. Dr Calvert reports that Anna was "extremely distressed, anxious and displayed frank hypervigilance" throughout the time she spoke to her about this incident even though this was some 18 months after it happened. Anna told Dr Calvert she thought her father was taking her to Germany. She remembered she was "shaking", "terrified" and "thought [she] was going to die". Anna says she remains scared of her father because of this incident. She reports that sometimes she has "bad dreams" because she is worried it might happen to her again.

[81] In Dr Calvert's opinion, this event clearly traumatised Anna and it "now forms a very significant component of her views about a potential return to Germany and her father's care". She reports that Anna is now strongly opposed to returning to Germany. Anna says she is "scared of her father because of 'one big thing' that is his removal of her from her school in 2017".

[82] Consistent with the view we have already expressed at [62] above, Dr Calvert considers that Anna will have been influenced by her mother and stepfather's views of her father. Nevertheless, she reports that Anna consistently indicated a willingness to engage with her father until he uplifted her from her school. Dr Calvert says this event "changed [Anna's] perception of what she felt and thought". Relying on academic literature, Dr Calvert considers Anna became more "realistically estranged" from her father as a result of this event. The change in Anna's position from the time of the Family Court hearing and now is summarised in the following passage from Dr Calvert's report:

> At the time of the initial Family Court hearing in New Zealand, although likely 'influenced' by her mother and by her own experiences, [Anna's] evidence is that she was prepared to engage with her father and even (it transpires) to think about going to Germany to see him.

> However, in my opinion, currently (and for the last 18 months) [Anna's] views are most significantly impacted by her direct experiences of the events of September 2017. That is her uplift/abduction, by her father and persons unknown to her, in front of her classmates at school. I have provided to the Court data about that event as perceived by [Anna] and independent collateral data provided contemporaneously. I have indicated that it is my professional opinion that the uplift/abduction caused [Anna] to develop (or re-develop) Post Traumatic Stress Disorder because she did believe she might die and she was terrified. There have been alterations in her cognition and in her emotional and social responses as a result of this experience and they persist into the present.

[83] Dr Calvert's firm view is that Anna will be adversely psychologically impacted if an order is made for her to return to Germany despite her objection. Dr Calvert says Anna is "a traumatised child currently and her need (in terms of her welfare and wellbeing) is for stability and consistency within her 'secure attachments' so that she can make effective use of the therapy now being provided for her (finally)". Dr Calvert considers that if the Court were to make an order returning Anna to Germany it would replicate the damaging process created when her mother removed her from Germany in 2014. Dr Calvert warns of the "very real danger" that if an order is made requiring her to return to Germany, Anna, who she describes as "a highly vulnerable child" will "grow into an adult who distrusts all adult relationships and who has a significant risk of major mental illness".

[84] This is a very sad case for which there is no ready resolution. While we are satisfied that a return order should have been made in 2017, we cannot overlook what has occurred in the two years since and ignore Anna's consequent present fragile state and vulnerability. What would be achieved now if we were to make an order for her return? And at what cost? As Baroness Hale observed in *Re M*, "the further away one gets from the speedy return envisaged by the Convention, the less weighty those general convention considerations must be".[59] The opportunity for a prompt return to Anna's place of habitual residence has long passed. The father acknowledges that Anna could not now be expected to live with him in Germany, at least for the short-term. It is accepted that Anna needs to remain with her mother for the time being. It follows that the custody rights the Hague Convention was designed to protect cannot currently be exercised. The father can seek orders for access and has the means to exercise any such rights whether Anna is in New Zealand or Germany. Anna has

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[59] *Re M (Children) (Abduction)* [2007] UKHL 55, [2008] AC 1288 at [44].

now lived more than a third of her life in New Zealand. Given her past transient lifestyle with her mother, she is probably more settled now than she has ever been. She has been placed under the guardianship of the Family Court and is currently receiving therapeutic counselling weekly. She has been granted a student visa valid until May 2021. The lawyer for the child reports that Anna is very happy at her school and has made good friendships. Anna is now aged 12 and she strongly objects to being returned to Germany, particularly after what happened in September 2017. Her views are important and must be taken into account. In the light of Dr Calvert's report, we consider that the significant risks to Anna's mental health and future development that would now be hazarded by a return order cannot be justified by any prospective benefit in terms of the Convention or otherwise.

[85] The appeal must accordingly be dismissed.

Result

[86] The appeal is dismissed.

MILLER J

[87] I generally adopt the reasoning in the principal judgment, which I respectfully find compelling until it reaches the troubling issue of disposition. I write separately on that issue.

[88] I accept that Dr Calvert's report can be relied upon as evidence for the following:

(a) Anna suffers anxiety and PTSD from traumatic events in 2013 (when the mother's partner drove a car at the father) and 2017 (when her father abducted her from school), and she associates that fear with her father; and

(b) she now has a fear of her father and a desire not to go back to Germany due, in part, to that fear;

It need not follow, however, that return to Germany is inappropriate or contrary to Anna's best interests.

[89] Regrettably, Dr Calvert's report rests on some of the same false assumptions that lead us to discount the report of Ms Lightfoot. Notably, she assumes that on return to Germany Anna would live with the father and the mother and partner would not return. She concludes that return to Germany will cause psychological harm for two reasons: the return will be to Anna's father's sole care and she will be in a situation where she will have no meaningful supports. This assumption is wrong on both counts, as is Dr Calvert's important conclusion that return would sever Anna's relationships with her mother, her mother's partner and her sibling. These errors require that those whose task it is to implement the Convention should subject Dr Calvert's conclusions to critical scrutiny. They also mean that Anna's own expressed views, which might otherwise prevail at her age, must be discounted to the extent that they are the product of a misunderstanding on her part.

[90] Dr Calvert's report also assumes that the psychological harm likely to result from "entrenched parental conflict" will not happen should Anna remain here. We have rejected that assumption, finding rather that the likelihood of ongoing dispute between the parents is high. There is every reason to think that the mother will go to almost any lengths to prevent contact.

[91] There is also every reason to think that a relationship with her father is essential for Anna's future wellbeing. Nothing in that regard has changed since the Fürth District Court explained its reasons in the compelling passage cited at [13] above. The evidence that has accrued since then rather confirms that there is much cause for concern about what the Court described as the mother's impaired parenting ability.

[92] Notably, it is a disturbing feature of this case that the mother has been prepared to manipulate Anna by "clearly" explaining that should the Hague Convention proceeding succeed the mother would not accompany Anna to Germany. This kind of manipulation appears to be a longstanding behaviour, as we note at [62]. It can only have exacerbated Anna's anxiety about return to Germany; indeed it seems calculated

to do so. It was also dishonest; at that time the mother was facing imminent deportation and knew full well that her own immigration status depended on Anna being permitted to remain. I am also troubled by evidence that Anna is denied use of the internet at school, presumably to prevent contact with her father, and that places her at an educational and social disadvantage in the school environment. Although not immediately harmful to Anna, the mother's misappropriation of a fund set up for her education is also evidence of an inability to separate Anna's interests from her own. In short, there is every reason to think that Professor Spangler's assessment, to which we refer at [72], is correct.

[93] Dr Calvert finds that Anna has supports here in the form of her school and her friends and activities. I accept that is so, and I recognise that these things are important. But Dr Calvert's implicit assumption that this situation will continue is not necessarily correct. I make two points. First, the father is seeking contact, which is important and should be encouraged and appropriately managed. As just noted, the mother is likely to respond in ways that are harmful to Anna. Second, the mother and her partner remain at real risk of deportation, although the risk now appears to be less imminent. As explained at [48]–[53], Anna's present circumstances are the product of concealment and deceit, some directed at New Zealand immigration authorities. We have found that at the time of the Family Court hearing there was a real and imminent threat of deportation. The mother and her partner have evaded deportation for a time (pending resolution of these proceedings) by persuading the Immigration and Protection Tribunal that Anna would experience "emotional trauma" caused by placement in the sole custody of her father in Germany.[60] We have found that that assumption is incorrect. I add that, as the Tribunal also recognised, now Anna is no longer in hiding the risk of emotional turmoil cannot be avoided.

[94] Dr Calvert makes one other assumption which must be called into question. It is that the counselling to which Anna has been given access in New Zealand will better serve her than the counselling she would be offered in Germany, which she would associate with her father. This assumption, which presumably underpins Dr Calvert's assumption that Anna would lack support in Germany, seems to me

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60 *AE (Germany)*, above n 11, at [75].

unwarranted. We were given to understand that Anna has had limited professional support in New Zealand and its provision has been belated. There is no reason to suppose that she would experience delay in Germany, or that counsellors there would be any less capable of gaining her trust. It likely remains the case that Anna's fear of her father is in part a product of her mother's manipulation, as Professor Spangler found. And of course her extended family is there.

[95] The policy of the Convention also remains a relevant consideration. We have found that an order for removal ought to have been made in September 2017. There was never any question of "grave risk"; on the contrary, a German court found that the father is the more suitable parent and we have no reason to disagree. The "settled" defence was not made out in the Family Court. Nor was the child objection defence; we have found that Anna's objection was vitiated by the undue influence of her mother. This case is a striking example of the sort of self-help behaviour that the Convention is intended both to discourage and to remedy. As at the date of the Family Court hearing all criteria for decision pointed to return.

[96] However, I accept that the unhappy combination of delay in rectifying the error made in the Family Court and the father's decision to take matters into his own hands following the Family Court hearing has made a difference. Anna experienced her removal from school as an abduction. It has led to her becoming fearful of him, as Dr Calvert has found, and that consequence cannot be discounted as the product of her mother's undue influence. She is now 12, an age at which her views must be given significant weight. I accept Dr Calvert's opinion that this is an important consideration in Anna's case. The Family Court has taken steps to ensure the mother cannot remove Anna from the jurisdiction, and it appears to be addressing Anna's need for a relationship with her father. It is for these reasons, and with the greatest reluctance, that I concur in the result.

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