

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

ORIGINAL JURISDICTION

ACTION NUMBER: 15/Suv/ 0002

BETWEEN: THE PERMANENT SECRETARY FOR JUSTICE
APPLICANT

AND: HANIFF
RESPONDENT

Appearances: Ms. K. Naidu and Ms. S. Ali for the Applicant.

Mr. A. Sen for the Respondent.

Date/Place of Oral Judgment: Wednesday 30 September 2015 at Suva.

Date/Place of Written Judgment: Monday 12 October 2015 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

Category: All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all person referred to. Any similarities to any persons is purely coincidental.

Anonymised Case Citation: PSJ v. HANIFF– Fiji Family High Court Case Number: 15/Suv/0002.

JUDGMENT

CHILD ABDUCTION – HAGUE CONVENTION – Application on behalf of mother in Australia for return of children who had been removed by father from Australia as agreed by parties on 15 June 2015 and retained after 8 July 2015 being the date when it is alleged that the children were agreed to be returned to Australia- whether children wrongfully retained in Fiji since 8 July 2015; whether the children were habitually resident in Australia prior to their retention; whether the mother was actually exercising the rights of custody when the children were retained in Fiji or whether those rights would have been exercised if the children had not been so retained; whether the mother had consented or subsequently acquiesced in the children being retained in the country of Fiji Islands, whether there is a grave risk that the return of the children under the Convention would expose the children to physical or psychological harm or otherwise place the children in intolerable situation, and whether

the children have settled in their environment- application for return of children refused with no order as to costs.

Cases/Texts Referred To:

1. *C v. C* [1989] 2 All ER 465.
2. *C v. S (Minor: Abduction: Illegitimate Child)* [1990] 2 All ER 960.
3. *Damiano v. Damiano* [1993] NZFLR 549.
4. *Evans v. Evans* [1989] FCR 153.
5. *Macmillan v. Macmillan* [1989] SLT (Scots Law Times) 350.
6. *Mozes v. Mozes* 239 F. 3d 1067 (9th Cir. 2001)

Conventions:

1. *Convention on the Civil Aspects of International Child Abduction* (“Convention”).

Legislation:

1. *Family Law Act No. 18 of 2003* (“FLA”): s. 17(3).
2. *Family Law Regulations 2005* (“FLR”): Regs. 71(1) (a); 73 (2); 73(3); 73(4); 73(6).

Cause

1. The applicant is the Central Authority of Fiji (“CAF”) for the purposes of enforcing the obligations of Fiji Islands under the Convention.
2. The Family Division of the High Court has exclusive jurisdiction to hear applications under the Convention: **s. 17 (3)**.
3. The CAF has filed an application under Reg. 71(1) (a) of the FLR for the return of two children namely Zarina, a female, born in 2010 and Alia, also a female, born in the year 2014 in Australia. The children are citizens of Australia. They were born in Australia and lived there before they came to Fiji in June 2015.

4. When the children came to Fiji, the elder child was over 4 years old and younger child was 1 year 3 months old.
5. The application is filed on behalf of the mother Myra.
6. The parties were married in 2009 and have lived in Australia since 2009. They are now permanent residents of Australia but citizens of Fiji. They are still married and have lived together at all times except when the father came to Fiji with the children.
7. The father had initially left for Australia on a work permit and he was joined by his wife 5 months after marriage. He was initially in Fiji and went to New Zealand first. There, he was again on a work permit, which was not renewed, and he came back to Fiji, from where he went to Australia.
8. The father is alleged to have wrongfully retained the children in Fiji in 2015. It is the mother's contention that the children accompanied the father to Fiji in June 2015 for a holiday and for the purposes of clearing items of substantial value from customs department of Fiji Islands. The items were to be gifted to both their family members.
9. The mother says that on 23 June 2015, the father told her that he was not returning to Australia with the children and that she was free to do what she liked.
10. The father's version is very different which will appear later in my judgment but it is clear from his answer and evidence that he is opposing the application on various grounds as follows:
 - a. ***The children were not habitually resident in Australia prior to their retention;***
 - b. ***At the time the children were retained in Fiji Islands, the mother was not exercising her rights of custody and nor would she have exercised those rights if the children had not been retained in Fiji.***
 - c. ***The mother had consented to the retention of the children in Fiji;***

- d. *There is grave risk that the return of the children would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation; and that*
- e. *The children have now settled in Fiji.*

Issues

11. Based on the application and the evidence I find that the Court has to decide the following issues:
 1. *Was the retention of the children in Fiji Islands wrongful? The following sub-issues have to be decided and established in the affirmative for wrongful retention to be established: Reg. 73(2).*
 - (i) *Were the children habitually resident in Australia immediately before their retention in Fiji Islands? Reg. 73(2) (b).*
 - (ii) *At the time of the retention of the children in Fiji Islands, was the mother actually exercising the rights of custody or would have exercised those rights if the children had not been retained in Fiji Islands? Reg. 73(2) (e) (i) and (ii).*
 2. *Has the mother consented to or subsequently acquiesced in the children being retained in Fiji Islands? Reg. 73(4) (a) (ii).*
 3. *Is there a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation? Reg. 73(4)(b).*
 4. *Have the children settled in their new environment? Reg. 73 (3) (c).*
 5. *If the statutory defences are established, will the Court exercise its discretion to make an order for the return of the children? Reg. 73 (6).*

Evidence/Law/Analysis

A. Wrongful Removal: Reg. 73(2)

(i) Habitual Residence

12. The first issue for me to decide is whether the children were habitually resident in Australia before their retention in Fiji Islands?

13. ***“The expression ‘habitual resident’ in art 3 of the Convention is not to be treated as a term of art with some special meaning, but it is understood according to the ordinary and natural meaning of the two words it contains. The question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. There is a significant difference between a person ceasing to be habitually resident in a country, and his subsequently becoming resident in another country, since a person may cease to be habitually resident in country A in a single day whereas an appreciable period of time and settled intention are necessary for him to become habitually resident in country B. Furthermore, where a very young child is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessary be the same as hers”***

C v. S (Minor: Abduction: Illegitimate Child) [1990] 2 All ER 960 at 960-961.

14. The father’s evidence on the issue of habitual residence was that his main purpose to leave the Fiji shores was to only earn some money and come back to Fiji. He had always shared his intention with his wife who had always embraced the idea that when they earn enough money they would return to Fiji Islands.

15. The father says that he always wanted to look after his parents and work in his family business situated in Vanua Levu, Labasa which company was owned by his parents but as recent as a week ago he has been appointed the Director of the Family Company.

16. The father further testified that he sustained injuries whilst he was working in Australia and he was impaired to the tune of 28 per cent. That is his permanent disability. For his personal injuries

at work he received a sum of AUD548, 000 which was the only payment that he received. He could not perform the same work in Australia and his employer adjusted his work duty to suit his needs.

17. The doctors had told him that with his condition of impairment the country that suited him was one with tropical climate. Since he always wanted to return to Fiji, which idea was shared by his wife, he found it an opportune time to move to Fiji.
18. He discussed the matter with his wife and she agreed that they should move to Fiji. Upon that agreement they came to Fiji in December 2014 when he undertook extensive renovations to his house and father's workshop.
19. The purpose of renovating the house was to suit his family to adjust and live in Fiji. He also renovated the father's workshop as he was to come and live in Fiji and work here too. He spent close to F\$120 in renovating the house. He also bought a car in the name of the Company for which he paid \$13,000 deposit and the rest was financed through Merchant Bank of Fiji. He had also brought to Fiji workshop tools for about AUD38, 000 to \$40,000 in six pallets.
20. When he was on a holiday in December 2014, he also talked to the Customs people in Fiji about whether he can get his vehicle duty free as he was to return to Fiji permanently. When he spoke about this, his wife was present and endorsed the conversation.
21. He also got a DVD and play station fitted in the new Twin cab vehicle that he bought as he wanted his daughters to have comfort when they came to Fiji. He also got a car seat fitted in the vehicle. The DVD and play station had to be fixed at a cost of F\$1,800 in Nadi as no one in Labasa could fit the same to correct specification. These were all in preparation for the family to come and live in Fiji. He would not engage in this expensive exercise for his children if they were in Fiji for a holiday only.
22. He returned to Australia on February 2015 and the wife stayed back with the children as she wanted to oversee the work that was being done and she wanted to ensure that everything was done according to her taste.

23. When everyone returned from Fiji, the appellant bought a new Four wheel drive vehicle for himself and a new car for his wife. It was intended that these two vehicles will be brought to Fiji as each returning resident is entitled to bring a vehicle to Fiji free of any duty or tax.
24. In April 2015, there was an incident at their home. The wife's behavior, as usual, became irrational. She is suffering from depression and is on anti-depression tablets. She is also schizophrenic and on 10 April 2015 he assaulted his wife because he was very frustrated at her behavior. She caused him to assault her but that was a one-off action when he was really fed up with her attitude. At other times he was able to calm her down and manage her. This behavior of his was out of character for which he got charged and was issued with an Apprehended Domestic Violence Order ("**AVO**").
25. When he was incarcerated for the assault, the wife withdrew AUD100, 000 from his account without his permission or consent and deposited that in her own account. She had authority to operate his account but she was not a joint account holder.
26. His brother had to spend about AUD20, 000 in legal fees for him arising out of the assault leading to the AVO and the charges. He then gave his Four wheel drive to his brother to realize his debt and the balance from the purchase price of AUD50, 000, that is, AUD30, 000 is yet to be paid to him. His brother will pay him in Fiji.
27. He had also bought a Harley Davidson Motor Bike in A\$35,000 which he intended to bring to Fiji but he sold that to pay for the freight cost of the items that he shipped to Fiji.
28. After the AVO, the parties reconciled and he again said to his wife that he wants to move to Fiji and the wife agreed that the plans to move to Fiji must be put in place. They therefore bought a lot of household items for use in Fiji to the tune of AUD10, 000. He also bought tools and machineries for his Workshop in Fiji. Altogether the items cost him about more than AUD40,000.
29. The parties had decided that he would take the children to Fiji with all the goods they had purchased for their home in Labasa and the workshop and get customs clearance on the basis that the family is permanently moving to Fiji. They also brought 6 suitcases of personal belongings of the children and him. The suitcases contained children's clothes and toys as well.

30. The father further testified that the parties had planned that upon their arrival in Fiji, the father was to seek exemption for the children on the basis that he was in Fiji permanently and if there were no Immigration issues, he would continue to live in Fiji and the mother was to join them later.
31. The mother, therefore, on her part wrote a letter to the Customs Department and informed them that they are moving to Fiji permanently in December 2015 and that the tax or duty to be levied on the items be exempted.
32. She also wrote a letter to the Immigration Fiji and Australia indicating that the children will leave for Fiji and return on 8 July 2015 or even before or later as the case maybe.
33. The father also wrote a letter to the Immigration and Customs indicating that he is leaving for Fiji permanently.
34. He applied for all possible leave and informed the employer that he will not return if he is able to keep his children in Fiji and if he cannot then he will return to Australia and start work on 9 July 2015.
35. When he arrived in Fiji, he managed to clear all his items without tax and duty and he applied for exemption for his children which was granted by the Immigration. He was excited by the news and rang his wife in Australia on 23 June 2015 to inform her of the same. The wife upon hearing the news did not share the same excitement and said that she will not come to Fiji. The father said he felt cheated and lied to because all the time, she stood by him in his decision to come to Fiji. This sudden change was very disheartening to him as he wants his children to have love and affection of both his parents.
36. He continued to live in Fiji after 8 July 2015 as he had nothing to go back to Australia for. He had spent most of his money in Fiji with the hope and expectation of living here. If he knew that he was to go back and not able to come, he would not spend such large sums of money as he will never be able to save that kind of money in his lifetime. He was only on a wage level of \$48,000 and spending any money unnecessary was detrimental as he was unfit to carry out any heavy work with tools.

37. He now wishes to live in Fiji as planned and agreed before marriage and endorsed by the wife after marriage and he will not return to Australia. He does not want his children to go back to Australia as his wife had never worked in Australia and lives on government assistance which sum will not be sufficient for his two children in light of the demand for rent and the cost of living.
38. He believes that his wife only reneged on the agreement as she wants to stay in Australia on government allowance and the need for the children arises because there is hope and wishes to get more allowance from the government of Australia.
39. The wife's version is very different. She says that when she got married, the husband always expressed wishes to go back to Fiji. She never agreed that they would or should go back to Fiji.
40. In September 2014, when the husband got personal injury compensation, they decided to have a holiday in Fiji. They came to Fiji in December 2014. She had decided to stay for a longer period than the husband because she wanted to see her sister's baby which was due for delivery in March and not to supervise the renovations in the house as claimed by the husband.
41. She stated that the sister's child was born on 01 March 2015 and she tendered in the birth certificate of the child born on 01 March 2015 in evidence. The name of the child was Romeena.
42. When she was in Fiji, she gave her husband a sum of AUD33,000 to buy a Twin cab as a birthday gift for his father which fell on 01st December. The vehicle was not to be used as a family vehicle when they arrived in Fiji as claimed by the husband. There were also no car seats fitted in the car and when she was driving this vehicle, she had to ask her sister to accompany her and hold the little child.
43. She admitted that when they were there in Fiji in December 2014, she accompanied her husband to FIRCA office where he discussed about bringing the Australian vehicle to Fiji but she had never agreed to come to Fiji at any time.
44. She also admitted that a DVD was fitted in the vehicle and that the husband had to go to Nadi to get the DVD fitted in the vehicle.

45. She said that after the birth of the sister's child, she went back to Australia, and in April 2015, the husband assaulted her. He used to be very violent on her and she had been tolerating him but this incident she had to report the matter to the police. She stated that the husband was also violent on the children. He used to lock the children up in the bedroom and assault them with the belt.
46. When she reported the matter to the police, the husband was charged and she obtained an AVO in her favour but later she reconciled and one of the conditions of the reconciliation was that she will not go to Fiji. The husband had agreed to this.
47. Before the AVO, they had bought a new Four wheel drive for the husband and a new car for herself.
48. The husband had also bought a Harley - Davidson Motor Bike. She said that the husband's brother took the Four wheel drive and is keeping it with him and the Motor Bike was sold as the husband said that it was too dangerous for him to ride on that. The Bike was therefore returned to the dealer and he sold it at an under value.
49. She stated that both of them decided that they will buy gifts for their family and tools for the father's workshop. They therefore bought goods to the tune of AUD10,000 as gifts for both families and tools for the workshop for his father.
50. These items that were shipped to Fiji were gifts and tools for the Workshop and not meant for them at all. The parties had decided that the husband will accompany the goods to get customs clearance so that there is no duty charged as returning residents and that they would come to Fiji for a holiday for the last time so she sent the children with the father.
51. The children were to return to Australia in 2015. The children also had suitcases of clothes which were to be given to the sister's child and not for their use in Fiji.
52. She wrote a letter on 12 May 2015 to the Customs Authority in Fiji and stated that she was to move back to Fiji permanently in December 2015 because her husband stated that if she did that, they will not be charged any duty and that he can then give the gifts to their parents.

53. She also stated that she wrote that letter after copying from what her husband wrote and gave to her.
54. She also admitted writing another letter on 14 June 2015 stating that she consented to the children going to Fiji and returning on 08 July 2015 and that an extension to stay could be obtained as well.
55. She stated that this letter was written because the husband said to her that it was necessary in light of the AVO that if the Airport Authority's questioned him he would be able to show her consent.
56. She saw the letter and said that it was dated 27 May 2015 but that she wrote it on 14 June 2015, a day before the family arrived in Fiji.
57. She was asked on why she wrote "*residence*" in the letter and she stated that she does not know what it means and that she also copy wrote this letter from what her husband presented to her.
58. She said that the errors in spelling of some words are because she could not understand the husband's writing and that she asked him for clarification and that he is how he told her to write.
59. She stated that the letters were written to avoid duty and to allow the children a holiday in Fiji for the last time.
60. When the children arrived in Fiji, she continued to be in touch with them and on 23 June 2015, the husband told her that he is not coming back and that he will keep the children in Fiji. He also told her that he had not paid the rent and that very soon the landlord was going to kick her out. She said that he did all this to her in vengeance because she had taken out an AVO against him and even though he had reconciled, he was planning to punish her. She said that his malicious intention was evidence from one of his messages on facebook of 22 July 2015 where he spills the beans.
61. The wife admitted that she had access to her husband's facebook and email but she did not create these mails to find a case for herself under the Convention.

62. When her husband told her that he had not paid the rent and that the landlord will kick her out, she went to the landlord and enquired about the unpaid rent and the landlord confirmed that the rent was unpaid. She then went to seek Housing Assistance which was not provided to her because the tenancy agreement was in the husband's name.
63. She then kept all the house hold items in storage and moved to a friend's granny flat, the address of which she does not want to provide as she has genuine apprehension that the husband and his family will interfere with her.
64. She has never consented to the children being retained in Fiji and as a result the children should be returned to their habitual residence.
65. Having heard the two contrary positions of the parties, it is necessary that the Court decides the question of habitual residence with reference to the case law governing such circumstances and the evidence of the parties.
66. The case of *C v. S (minor: abduction: illegitimate child)* [1990] 2 All E. R. 960 at 965 illustrates that the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind. Otherwise, one is not habitually residing: one is away for a temporary absence of long or short duration. One need not have this settled intention at the moment of departure, it could coalesce during the course of a stay abroad originally intended to be temporary. Nor need the intention be expressly declared, if it is manifest from one's actions; indeed, one's actions may belie any declaration that no abandonment was intended.
67. The next issue is whose settled intention in this case is the Court going to look at to find the question of habitual residence?
68. In this case the parties have always lived together with the children. They have jointly cared for the children and have always exercised rights of custody over the children. Both parents therefore are jointly entitled to fix the place of the children's residence. The children are very small and they lack the material and psychological wherewithal to decide where they will reside. The intentions of both the parents therefore are material in this case.

Mozes v. Mozes (2001) 239 F. 3d 1067 (9th Cir. 2001)

69. The case of **Mozes (supra)** appreciates that difficulty will arise when the persons entitled to fix the children's residence no longer agree on where it has been fixed. This is a situation that for obvious reasons will arise in cases under the Convention.

70. **Mozes** then states that *"in these cases, representations of the parties cannot be accepted at face value, and courts must determine from all available evidence whether a parent petitioning for a return of a child has already agreed to the child's taking up habitual residence where it is. The factual circumstances in which this question arises are diverse, but we can divide the cases into three broad categories.*

On one side are cases where the court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly, this occurs when both parents and the children translocate under circumstances suggesting that they intend to make their home in the new country. When courts find that a family has jointly taken all steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's alleged reservations about the move stand in way of finding a shared and settled purpose.

On the other side are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period. In these cases, courts have generally refused to find that the changed intentions of one parent led to an alteration of the child's habitual residence.

In between are cases where the petitioning parent has earlier consented to let the child stay abroad for some period of ambiguous duration. Sometimes the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the courts find the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment of the child's prior habitual residence. Other times, the circumstances are such that, even though the exact length of the stay was left open to

negotiation, the court is able to find no settled mutual intent from which such abandonment can be inferred...”.

71. The parties have given two conflicting versions in their evidence. The father says that when he left for Australia in 2009 and was later joined by the wife 5 months after, the parties were always of the understanding that they would return to Fiji. They only went to Australia to work and earn some money. The wife disputes that she has ever agreed to coming to Fiji.
72. From the evidence I have to find what the settled intention of the parties were.
73. The father was the sole provider for the family. The wife and the children always depended on him for financial support. They were provided for by the husband. The wife’s evidence was that she is very obedient to her husband and will do as she says and she even went to the extent of writing a letter to her detriment. She even goes to the extent of misrepresenting facts in order to obey her husband. I will discuss this later but for now it is sufficient for me to say that with that financial dependence on the husband and her respect and obedience, there is no reason for me to disbelieve the evidence of the husband that she always endorsed and embraced the idea of returning to Fiji and that she even assisted the husband to pack and leave with the children. She was to follow later.
74. There is no denial by the wife that the husband always wanted to go back to Fiji but she says that she never agreed to his decision. If that is the case, her evidence that she would obey her husband and do what he says is contradictory.
75. She stated that when she reconciled after the AVO against her husband, she made it a condition of the reconciliation that they would not go to Fiji and the husband agreed with the same. I do not accept the wife’s evidence as credible because if there was any such condition, it would be noted in the Court records in New Zealand and produced in this Court.
76. I find that after the AVO, the parties jointly took steps to move to Fiji in that they came to Fiji in December 2014 to carry out substantial renovations to the husband’s house so that when the family moves to Fiji they would have a comfortable living. The husband also purchased a vehicle and fitted car seats, DVD, and play station in it.

77. If the husband was just here in Fiji for a holiday, he would not buy a vehicle and carry out such renovations and spent large sums of money as he would need the money in Australia. He is already a partially impaired person and it was not in his and the family's interest to spend such large sums of money for the family in gifts and renovations.
78. The husband is a wage earner of only AUD 48,000 per annum. It is untenable that instead of buying a house in Australia for his family, he would spend his compensation money in large amounts to only renovate his parents' house and buy gifts for families to the tune of more than Fijian one hundred and fifty thousand dollars.
79. I find that even the wife would not agree to spend so lavishly on gifts when she had a husband who had suffered personal injuries and his working ability had been impaired. She would be alert and agile enough to curb such expenses.
80. The only reason such expensive exercise of renovations and bringing household items was undertaken was that the parties had executed their shared settled intention to come and live in Fiji. Their stay in Australia was temporary and for a limited purpose to earn money. The purpose was complete when the husband received almost close to Fijian three quarter million dollars in compensation. They therefore had to come to Fiji and majority of the family members did on 15 June 2015. The mother, who agreed to join later, reneged on her agreement and now wants to stay in Australia. Her changed feelings and desires cannot stand in the way of finding "*shared settled intention*".
81. The shared intention of the parties to return to Fiji can be further ascertained from the wife's statutory declaration of 12 May 2015 which reads as follows:

" To:

Immigrations Fiji/Australian

Customs Fiji/Australian

Authorities concerned/ Fiji/Aus

I Myra of Australia declare that I've decided to move to Fiji for the purpose of living with my husband Haniff of Fiji. And by December 2015 we will move permanently to Fiji, As now I've bought some items out of my personal money receipts are provided in my husband's name where I used my debit card to pay and these are gifts to our parents, As we will be staying wid them in that these are my words in writing. I fully support my husband to travel wid out kids on 15th of June 2015 for the purpose of clearing iteams thru customs and authorities concerned we currently live at above address in Australia. My contact details are ...I will be finishing mu studies and course training otherwise I would love to travel with him and kids. I hereby declare that these words onces again should help my husband to achives his goals in Fiji and will not be taxed or dutied on any items as we are planning to grow and do business back home.

Thanking you

sgd.

Myra 12/05/2015"

[Underlining is Mine]

82. The wife says that she wrote the letter because her husband asked her to do it. She obeys her husband and therefore copy wrote from what her husband presented to her. She says that the only purpose was to avoid duty on the gifts.

83. I find the wife's evidence incredible and untenable on many basis, some of which needs to be identified.

84. If the wife says that she wrote that letter out of her obedience to her husband, then she would definitely out of obedience agree to coming to Fiji when her husband decided to. That letter is to her detriment as she admits lying in that letter only because she is obedient to her husband. If she could go to the extent of lying to obey her husband, there is no reason why she would refuse to agree with her husband's decision to come to Fiji.

85. The wife stated that the reason she sent the two children to Fiji was because that was the last time when they were going to Fiji for a holiday and when they returned on 08 July 2015, they were to buy a house. The balance money was enough for the deposit only. The rest of the purchase price was to be financed through a bank.
86. If there was any agreement at all to buy the house, neither the husband nor the wife would send any more than a thousand dollars in gifts as the husband was not a very high income earner to qualify for large sums of money for loan as he said that he saved very little out of his earnings. Any prudent lender will first look at the serviceability of the loan. Houses in Australia do not sell cheap and any money for that matter was important for the parties.
87. Moreover, the parties had just had a holiday in Fiji 3 months prior to 15 June 2015. There was no need for them to come to Fiji for a final time. The more prudent option was for them to wait for some time for the final holiday as they had just visited Fiji.
88. I find that the reason why the children were sent was as the husband says that they left for Fiji permanently and all depended on whether the children could get an exemption under the Immigration laws in Fiji. The agreement was that if they could stay back, they would and the mother was to join later.
89. Again, there would be no need for the parents to apply for leave from the elder child's school albeit that she attended kindergarten and send the children to Fiji for holidays again. Indisputably, it was not even school holidays when the children arrived in Fiji.
90. Further, if the purpose of writing the letter was to avoid duty and save money, there was in the end no such saving from duties. The husband ended up paying fares for the business class for three people. There was no point in saving the duty and paying the fare. Someone in Fiji could have received the goods on behalf of the family. This is not a difficult an arrangement to make.
91. There was also no need to send large suitcases of clothes for the children resulting in payment of excess baggage of AUD 1,800 which evidence was not contradicted. The wife only said in her evidence that she did not have knowledge that excess baggage to the tune of AUD1, 800 was paid. She said that the clothes were to be given to the new born of her sister's. I find her

evidence alarming on how her children's clothes who were more than a year and a half old fit the new born. The elder daughter was of course more than 4 years at the time. Her clothes would naturally be kept for the younger sister if anything.

92. I also do not believe that the wife copy wrote what her husband gave her. If she says that she had made it clear to her husband that she would only reconcile if the husband abandoned the idea of going to Fiji which in fact became a condition of the reconciliation, she would never, for the purposes of avoiding tax, write in her letter that she was intending to move to Fiji permanently by December 2015. She would have protected the condition of reconciliation as it would be very important for her and what she genuinely wanted.
93. I find that she only wrote this letter because she had agreed that she would go back to Fiji with her husband when they have had enough money. Even if she did not agree then, she decided after the husband received compensation that the parties will abandon Australia and live in Fiji permanently. In furtherance of that settled purpose, she came to Fiji and set up a home and bought household items in Australia to be sent to Fiji. She made her intentions clear when she wrote the letter saying that the family has decided to move permanently to Fiji.
94. With the settled intention to stay here, the father brought the children and after getting the permission from the Immigration he has been staying here since 15 June 2015. With all the developments that he has made for his children and settled them here I find that there is an appreciable period of time accompanying the settled intention to find that the habitual residence of the parties is not Australia but Fiji Islands.
95. I come to the next letter that was written by the wife. She again alleges that this letter was copy written from a letter produced by the husband. This became subject of much contention on intention of the parties to settle in Fiji to give effect to the initial arrangement of the parties that they were to return to Fiji after earning money.
96. I do not believe the evidence of the wife that she copy wrote the letter. She did it out of her own will and if she was in anyway under duress or pressure she would have sought assistance of the authorities in Australia especially if she maintains that there was an agreement not to leave for Fiji. This letter appears to be in breach of the condition of the AVO.

97. I find the wife to be a person who understands her rights and will not easily succumb to pressures of this kind to allow the husband to impress upon her to write letters.
98. She stated that she wrote the letter to allow the husband a safe passage to Fiji with the children. Firstly there was no need for the children to travel to Fiji at that point in time.
99. Secondly there was no question of safe passage as the husband has the rights to take the children to Fiji without the consent of the mother. The children were not protected persons under the AVO to require consent of the mother.
100. I find that the mother's evidence that the father is a violent man to be dishonest. I find this to be the opportune time to say this because if the father was such a violent man, would lock the children up in a room and belt them habitually, the mother will not let the children with the father alone.
101. She said that after the AVO the father had changed into a better husband and a better parent. This letter was written on 27 May 15 and the AVO was issued on 10 April 2015. It was barely two months for the mother to make an assessment that a person with a history of violent behavior would change to allow such risk by sending children with him.
102. I do not therefore find that the father was a violent man. The incident giving rise to the AVO was an out of character behavior of the husband and much has been made out of that to portray him to be an unsuitable parent which I find is baseless.
103. The letter of the wife of 27 May 2015 reads:

“

RE: Letter of Consent

Travel/ Residence/Hospitality

For Zarina and Alia To:

**Immigrations and Customs Dept.
Fiji/Australia**

I Myra of Australia being the parent (mother) of the above named kids hereby give full consent for my kid to travel with there father MR Haniffwho also lives with me at the above address kids being under 18 years old and fully understand that the father can manage and look after the kids well-being and living & food, as they are going to Fiji on 15/06/15 and returning on 08/07/2015 and if situations change maybe earlier or extension if needed. With these note I belive the father and the kids should have no hesitation on travel, residence, hosipility etc. looking forward your co- operations and positive resuts. Pliz if any consern do not hesitate to contact me on ... via post (above address).

Thanking you

27/05/15

sgd

Myra

104. The counsel for the respondent Mr. Sen put in his cross-examination that the reason why the term “residence” was used in the letter was that the wife meant that the children will live in Fiji. There is no mention of a holiday in Fiji and this coupled with the earlier letter of 12 May 2015 spells out the parties’ clear intention to live in Fiji.
105. The wife stated that she did not know what “residence” meant and she only wrote it because the husband had asked her to copy write. If she did not know what the term meant she should have asked someone. She ought to have been careful as she would not want to write anything to breach her own condition of not coming to Fiji.
106. The term “residence” means to live in a particular place. The term indicates that the wife intended that the children will live in Fiji as she wrote the letter using the term specifically.
107. The letter also states that the return date was 08 July 2015 which could be shortened or extended. This is said because the return ticket was for 08 July 2015. The letter appreciates that the travel may be shortened and enlarged and I find that this depended on a situation and that

situation cannot be anything apart from the one described by the husband which is to see if the children can stay in Fiji and if they could the return date of 08 July 2015 became immaterial.

108. I do not find that there was any express agreement to return on 08 July 2015. The tickets were purchased to allow the children to board the aircraft as they are nationals of Australia and under the Immigration Rules of most country, a return ticket is mandatory. Since the children were minors, the father also had to buy a return ticket in his name too. He spent large sums of money in buying the tickets which he could have saved to pay the duty if the shipment of household items and workshop tools were meant as gifts for both the families as alleged by the wife.

109. I then come to the leave letter. The wife says that the husband's boss told him that the husband had only gone on leave and that he would come back. The leave letter is dated 29 May 2015 and from that leave letter two crucial matters become apparent. The first is that the husband had taken all possible leave being **annual leave, leave without pay, long service leave and leave loading**. I believe him when he stated that he did that so that if he was able to stay he would use all his leave and if he was to return he would still have a job back in Australia and can continue work without prejudicing the employer as he would be on leave without pay.

110. The other matter that becomes clear is that the husband had clearly stated his intention in the letter that he intends to stay back in Fiji. At the bottom of the leave application he writes:

“ Note

GREG, I may not return if I get legally advised that I can keep my kids with me in Fiji, If I do return I will start on 9/7/15”.

111. The letter supports the husband's evidence that there was an intention to move to Fiji. If he could not keep his children in Fiji then he would go back and try again but at all relevant times there was a shared intention that Fiji is where they will come back and live.

112. The wife's evidence that the husband's boss told her that he went on leave only and will come back is not true. His boss cannot say that he went on leave and would come back because the husband did indicate that he might not come back although he had taken his leave.
113. The counsel for the applicant makes an issue about why legal advice was needed when the same could be obtained in Australia. She states in her closing submission that s. 8 of the Immigration Act of Fiji is very clear. She argued that pursuant to s. 8 makes there is no reason why the Immigration Department in Fiji would not allow the children to reside in Fiji if both parents are intending to reside in Fiji. The counsel says that exemption to children is automatic upon proof of a Fijian passport.
114. I do not agree with the submissions of the counsel that exemption is automatic. The Immigration Department will have to grant the exemption and there is no contradictory evidence that the Fiji Immigration required that the father who was a Permanent Resident of Australia to be physically present in the country with his belongings to request for exemption. I therefore have no reason to disbelieve the evidence of the father and accept that he had to be in Fiji with his belongings to make an application for exemption for his children on the basis that he has returned to live in Fiji.
115. I also believe the evidence of the father that he could not seek such legal advice in Australia as it is costly and he had to do what the immigration had asked him in that he was to be in the country with all his amenities to set up a home in Fiji.
116. Still on the question of settled intention, I come to the Facebook account of the husband through which a message was sent. The message reads:

“ N yah I played her this time as she did to me, she thought she was smart but I just kept quite n planned well before I left. She was shocked n couldn't believe me when I told what I did, I was careful not to be played by her, she demanded me to do housework, laundry, pick and drop kids to school, she didn't want to go for Fiji for good, she didn't want to give my money back and wanted me to be under her authority at home, no way I was doing that for the rest of my life. So I did all that for 9 weeks after my case and when all was finalized I left but thanks to Allah my kids are with me not them”.

117. The wife's contention is that the above message reveals that she never agreed to come to Fiji and that her husband tricked her. The husband refutes writing that message at all and says that it was generated by the wife to find a case for herself as she is the one who logs in his Facebook account and emails.
118. The wife in her evidence admitted that she used to log in her husband's Facebook account. She said that she stopped doing that because the husband had changed the password. However the husband alleged that she did that even when the trial continued and when he rang the wife to ask her why she had hacked into her account, she quickly went offline.
119. When the wife was being cross-examined, I saw her demeanour and having observed it, I found her to be very evasive on the issue of logging in the husband's account. I also find that she has not established on the balance of probability that it is the husband who wrote that message as it is more probable than not that she wrote it to serve her interest as alleged by the husband.
120. From the tenor of writing in short forms, it appears that these are the words of the wife and not the husband's as she is the one who is very fond of writing short forms even in official mails.
121. I also cannot accept that the husband would be writing this public email to create evidence against himself. If he wanted to tell his friends and family that he cheated the wife, he would not be using Facebook because that can be very well used in evidence against him especially when he has tricked the wife and allegedly been so crafty.
122. I now deal with the telephone text message of the husband to the wife on 29 Jun 2015 which neither party denies being sent. The message of the husband reads:
- “Don't even try and call my parents home again, I've reported in police that you are causing problems in my life style. again you tricked me. Lied to me, and called home. Leave us alone”***
123. From this message the husband's evidence is that the wife only changed her stance not to come to Fiji on 23 June 2015 and that is why he said to her that she tricked him and lied to him after originally agreeing to come to Fiji.

124. When the wife was asked whether there was any other explanation for the husband to write that, she said she did not have any.

125. This may not be the sole reason for me to find that the wife reneged on the arrangement to come to Fiji around 23 June 2015 but it goes on to substantiate the evidence of the husband on shared settled intention of the parties.

126. I therefore find the issue of habitual residence in favour of the husband and in particular find that the habitual residence of the children is Fiji Islands and not Australia. Australia was only a temporary arrangement for the parties and since the children are very small and under the care and custody of their parents, their habitual residence is the same as theirs.

(ii). Actual or Potential Exercise of Rights of Custody

127. The next and the final factor to establish wrongful retention is the issue of whether the mother was actually exercising the rights of custody or would have exercised those rights if the children were not retained in the country.

128. The children were always in the care and custody of both parents and the mother was looking after them as well. She was exercising her rights of custody and at no point in time did that exercise cease. She was to continue to exercise her rights of custody but that was to be exercised in Fiji after 15 June 2015.

129. If the children were not retained in Fiji, she would have definitely lived with the children and looked after them and exercised her rights of custody in Australia as she always did.

B. STATUTORY DEFENCES: Reg. 73(4)

(i) Actual and Potential Exercise of Rights of Custody.

130. The first statutory defence is that the mother was not actually exercising the rights of custody when the children were removed **and** those rights would not have been exercised if the children had not been removed.

131. To establish wrongful removal, the alternative has to be established, that is, either the mother was actually exercising the rights of custody **or** would have exercised those rights but for the wrongful removal. However to establish the defence, both the limbs have to be established, in that, the mother was not exercising the rights of custody **and** would not have exercised those rights.

132. I have already made a finding that the mother was exercising the rights of custody and would have done so if the children were not retained in Fiji. There is no need to deal with this head any further than that.

(ii) Consent to Retention in Fiji

133. I have discussed this matter at length and find that the wife had agreed that the children be taken to Fiji and that they live in Fiji. It was later, when the children came to Fiji and obtained an exemption to stay in Fiji, that she changed her mind on the issue.

134. I find the mother's consent from her letter of 12 May 2015 and 27 May 2015 and her actions in assisting the husband to renovate the house and Workshop in Fiji to suit the needs of the family and also to ship all necessary household items for their comfort in Fiji.

135. She also acted in furtherance with the plan in sending the children to Fiji with all their belongings.

136. Her two letters and her actions are sufficient for me to find that she consented that the children live in Fiji as long as they are able to obtain an exemption which they did.

(iii). **Grave Risk of Physical or Psychological Harm or Intolerable Situation**

137. The third defence raised by the respondent is that there is grave risk that the children would be exposed to physical or psychological harm or otherwise place the children in an intolerable situation.

138. The onus of proving such defence is on the respondent. There is a very heavy burden of proving this defence: **Evans v. Evans [1989] FCR 153 per Lincoln, J:**

“ In my judgment there is a very heavy burden indeed upon a person alleged to have abducted a child bringing himself or herself within the provisions of Article 13, and the Court should hesitate very long before it grants which is in effect an exemption from the urgency which is characteristic of this Convention and the Act incorporating it”.

139. The harm must be severe and substantial. The test is not whether there appears to be unacceptable risk of physical or psychological harm. The risk is promoted to a much higher threshold. (“Grave”) and (“exposed”) import the most serious of situations: **Damiano v. Damiano [1993] NZFLR 549.**

140. In **Macmillan v. Macmillan [1989] SLT (Scots Law Times) 350** the Court was not persuaded that adequate welfare arrangements could be put in place for the safety of child. In that case the applicant father, with a history of depression and alcohol abuse, sought return of a child to Ontario, Canada, from Scotland. The Court said:

“Having regard to the long period over which this history of alcohol abuse and of depression extended, and to the fact that his state of depression recurred as recently as August 1988, it seems to me that to make an order the effect of which would be to place the child in the sole care of the petitioner would be highly undesirable from the child’s point of view. In terms of Art 13 of the Convention, the question is whether the respondent has established a grave risk to the health or welfare of the child. On the information before me, and particularly on the medical information, it seems to me that to place the child in the sole care of the petitioner, without some supervision,

support or backup would be to place her in an unstable situation in which she would be exposed to considerable risk if the petitioner's mental health suffered any deterioration.

The petitioner did not place before me any positive proposals for any arrangement by which the child's care should be supervised by an authority in Canada. Such suggestions as we made did not, in my view, form a sufficient basis for proceeding to grant the order given the risk which I think exists. Any necessary arrangements would require, in my view, to be spelt out with precision".

141. In *C v. C* [1989] 2 All ER 465 CA Lord Donaldson MR said:

"...in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or not returned. This is, I think, recognized by the words "or otherwise place the child in an intolerable situation", which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the Court of the state to which the child is to be returned to minimize or eliminate this harm, and in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those Courts in the circumstances of the case, the Courts of this country should assume that this will be done. Save in exceptional case, our concern, ie the concern of these Courts, should be limited to giving the child the maximum possible protection until the Courts of the other country; Australian in this case, can resume their normal role in relation to the child".

142. The allegations under this head are that since the mother is suffering from depression, she would not be able to look after the children on her own. The second allegation is that the mother is not working, does not have a shelter for herself and is living on government benefits. She is impecunious and that will affect the children's living standard, health and morale.

143. The mother admits that she had suffered from depression and was on tablets but says that she does not suffer from depression any more. She says that she receives close to AUD 700 per fortnight in benefits and that would be increased if the children live with her.

144. I do not find sufficient evidence before me to say that since the mother has depression issues, she is a threat or danger of any kind to the children. In fact she was the one who has raised the children since childhood and did not let her depression affect her children. There is no allegation of that kind.

145. There is no allegation of her being violent towards the children or that she had neglected the affairs of the children. There is also no medical evidence before me to say that she is unfit to look after herself or the children. I therefore reject the husband's contention that the children will be under grave physical or psychosocial risk if they are to stay with the mother.

146. Further, the husband has not disputed that the Australian government will provide for the children and the mother if she is not working. With the benefit provided by the government, the children may not live a luxurious life but there is no evidence before me that they would be put in an intolerable situation for want of food and shelter.

147. I therefore do not find that this defence is established on the facts.

(iv). Settled Environment

148. The last defence is settled environment. The legislation provides that if the application for return of the child is not made within one year from the removal, the respondent must prove that the children have settled in the environment. The court will then exercise its discretion and consider whether the return is necessary.

149. The application for the return was made immediately after the children were retained in Fiji and the time frame of one year did not expire. I therefore do not find that this defence is available to the respondent in law for me to make a finding on.

Final Analysis and Orders

150. In the final analysis, I find that the father did not wrongfully retain the children in Fiji since the habitual residence of the children is Fiji Islands and if I am wrong in my finding I reject the application for return on the ground that the mother had consented to the children being retained in Fiji Islands and that she was to come and live in Fiji as well.
151. I therefore refuse to make an order for the return of the children and dismiss the application by the CAF.
152. Each party must bear their own costs of the application.

Anjala Wati
Judge
12.10.2015

To:

1. The Central Authority of Fiji: The Applicant
2. Mr Sen for the Respondent.
3. File: 15/Suv/0002