IN THE FAMILY DIVISION OF THE HIGH COURT **ORIGINAL JURISDICTION**	
CASE NUMBER:	**19/Suv/0001**
BETWEEN:	**PSJ for Ritesh Bhan**
AND:	**Anita Lal**
Appearances:	Ms. S. Ali and Ms. S. Chand for the Applicant . Ms. P. Kumar for the Respondent.
Date/Place of judgment:	*Wednesday 29 April 2020 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 persons referred to. Any similarity to any persons is purely coincidental.*
Anonymised Case Citation:	*PSJ for Ritesh v. Anita - Family High Court Number 0001Suv of 2019*

JUDGMENT OF THE COURT

A. Catchwords:

FAMILY LAW – CHILD ABDUCTION CONVENTION – *Application by Central Authority of Fiji on behalf of the father of the child to return her to New Zealand on the basis that she was wrongfully removed and is now wrongfully retained by the mother in Fiji – mother raises that there was no wrongful removal as she had to come to Fiji with the child because the father had withdrawn his support to her as a dependent to secure a visa – this, according to the mother, makes Fiji, the habitual residence of the child – is the restriction or circumstances surrounding the visa of the mother and the child a matter that affects the question of habitual residence of the child or a question that affects another element of wrongful removal which is that the removal is in breach of the father's rights of custody, if it could be successfully argued that the father caused the removal of the child and the mother cannot be blamed for that – the*

mother also raised in her defence that the child is settled in the new environment which defence is statutorily not available to the mother as the child has not been in Fiji for over a year preceding the date of filing the application- whether there is grave risk that the child will suffer physical and psychological harm or otherwise be put in an intolerable situation if her return is ordered – is NZ able to cater for the child's safety at this stage- wrongful removal not established – the application for return is refused.

B. Cases:

i. C v. C [1989] 2 All ER 465.

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

iii. Damiano v. Damiano [1993] NZFLR 549.

iv. Evans v. Evans [1989] FCR 153.

v. Macmillan v. Macmillan [1989] SLT (Scots Law Times) 350.

C. Legislation:

i. Family Law Regulations 2005 ("FLR"): Reg. 73.

A. Cause

1. The Central Authority of Fiji ***("CAF")*** has brought an application on behalf of the father for return of his child to New Zealand ***("NZ")***. The child is a female named Tara aged 8 years.

2. It is alleged that the child was wrongfully removed from New Zealand on 13 July 2019 and now wrongfully retained in Fiji. The father says that the habitual residence of the child, immediately prior to her wrongful removal was New Zealand.

3. He also says that immediately before the removal of the child, he had rights of custody of the child. The wrongful removal and retention of the child has breached those rights of custody and if it was not for the wrongful actions of the mother, the father would have exercised those rights of custody.

4. The mother's position in a nutshell is that the child's habitual residence should be the same as hers and that is Fiji. If that is established than there is no wrongful removal. She also raises two specific defences under the law. The first is that the child is now settled in Fiji and the

second is that the child will suffer grave physical or psychological harm or will otherwise be put in an intolerable situation if the order for return is made.

5. There are no other matters raised by the mother either regarding other elements of wrongful removal or the statutory defences available to her. I shall therefore confine within the parties' position.

B. Backgound

6. The parties were married in October 2010. They are citizens of Fiji and have lived here until early 2016. In March 2016, they moved to NZ with their child. The father went to NZ on a student visa whilst the mother and the child initially went on visitor's visa.

7. There is clear evidence from the mother's documentary evidence (the passport of the child mother and the child) that the mother was in NZ on visitor's visa from 7 March 2016 to 30 June 2017 and again from 14 November 2017 to 20 May 2018. The mother acquired a work visa on 9 June 2018 to 7 May 2019.

8. The child was on visitor's visa from 7 March 2016 to 30 June 2017 and again from 14 November 2017 to 20 May 2018. She was granted a student visa on 9 June 2018 to 7 May 2019.

9. There is no evidence of the mother and the child having any sort of visa from 30 Jun 2017 to 14 November 2017. It therefore follows that the mother and the child could not have been in NZ during this period. This is also substantiated by the mother's evidence that they had to return to Fiji as their visas had expired. The father, however, remained in NZ.

10. It is not denied by the parties that the mother and the child were always granted the visa on the basis of the father's visa. He had included them in his application as they were his dependents.

11. The father says that the move to NZ was to enable him to study Diploma in Business. When they went to NZ, they initially lived in Auckland. They lived with his sister. The father studied in Auckland.

12. The father says that they intended to live in NZ permanently and started regarding NZ as their home. The parties had sold their home in Fiji in order to settle in New Zealand.

13. When the father completed his studies in September 2018, the family moved from Auckland to Tauranga, NZ. The reason for the move was to enable the father to work in a company which was going to open up a branch office in that location.

14. The mother was a full time homemaker until the child started school. When the child started school in Tauranga, the mother started working part-time.

15. The parties separated on 16 December 2018. I do not think that I should identify the reason for the same. What is relevant however is the father's admission of assaulting the mother on 11 December 2018. The father was charged with common assault for which he was discharged without conviction on 19 June 2019.

16. Upon their separation, the mother moved back to Auckland and took the child with her. She enrolled the child in a different school in Auckland. The father asserts that this was done without his consultation. Upon discovering this, the father said that he decided to leave the arrangement as it was, since he did not wish for the child and her education to be disrupted.

17. The mother applied to the NZ Family Court for a temporary protection order as well as parenting order for the child. The orders were granted ex-parte on 17 January 2019. A final protection order was granted against the father on 10 June 2019.

18. The parties entered into an arrangement regarding the child and the final parenting order was granted on 10 June 2019 pursuant to the arrangement. A consent order was made for

the mother to have full time day to day care of the child and for the father to have contact, which was defined by the court as follows:

1. *4 x Saturdays 10am to 4pm*

    - *Saturday 22 June 2019 in Auckland. Father to pick up and drop off at McDonald's Manurewa.*
    - *Saturday 29 June 2019 in Tauranga. Father to pick up and drop off at McDonald's, 11 Avenue.*
    - *Saturday 06 July 2019 in Auckland. Father to pick up and drop off at McDonald's Manurewa.*
    - *Saturday 13 July 2019 in Tauranga. Mother to drop off and pick up at McDonald's Manurewa.*

2. *From 27 July 2019 alternate weekends commencing from 10am Saturday to 4pm Sunday. Changeovers at Paeroa McDonald's both ways.*

3. *Telephone/Facebook/Messenger contact on Wednesday's at 7pm, commencing 31 July 2019 with father calling the mother with an additional Telephone/Facebook/Messenger contact on 15 June 2019 on the child's birthday.*

4. *Additional contact agreement, provided no less than 24 hours' notice is provided.*

5. *All contacts are to be supervised by Maya until completion of living without violence programme. Copy of the completion certificate to be provided to the mother via email.*

19. It is the father's position that the mother brought the child to Fiji on 13 July 2019. He did not consent to the child being brought to Fiji or for her to permanently stay here. The father says that the mother is using the issues around her visa to justify removing the child from NZ to Fiji. She is alleged to have blocked the father from obtaining any information relating to the

child's visa. If he had known about the issues surrounding the child's visa or was allowed to obtain the information, he would have applied for the child's visa himself. The father contends that he would not have had any difficulty in obtaining a student visa for the child.

20. Since the removal of the child, he has not been able to make any contacts with the child as the mother has refused to respond to any of his communication attempts. He has tried to approach the mother's sister to seek assistance to speak to his child and to persuade the mother to return the child to NZ. The mother's sister does not wish to get involved in the issues between the parties.

21. The father also described how he came to know about the child leaving for Fiji. He said that as per the final parenting orders, he was due to have contact of the child on 13 July 2019. The mother was to have delivered the child to him but when she failed to do so, that gave him the first indication that something was wrong.

22. He then received an email from the mother when she came to Fiji. She stated in the email about her immigration issues. However, before she left, she did not advise him of any such issues and provide him with any opportunity to apply for the child's visa.

C. Mother's Position - Defence

23. I have briefly identified the mother's position in the earlier parts of my judgment. It is important that I expand on the same at this stage.

24. The mother says that the child's habitual residence ought to be the same as hers since she is the primary caregiver and the final orders bestows on her the full time day to day care of the child.

25. She says that their visas, irrespective of the nature of it, was always dependent on the father's support. After the separation, the immigration was advised of the change in their marital status and the father no longer provided the support for them to obtain the renewal of their visa. She therefore had to apply on her own for work visa.

26. She was advised by the NZ immigration on 13 March 2019 that she could apply on her own. She proceeded to make an application for herself and the child as her dependent. For herself, she applied under the *"skilled worker"* category and for the child she applied for a student visa.

27. Subsequently her case officer called her and informed her over the phone that her application will be declined as she did not fall under the category of *"skilled worker".* She therefore withdrew her application to avoid any negative records of having received a refusal. If she did not do so, she would be affected in future if she intended to make any application for the visa.

28. Since the child was included in her application, the same was withdrawn for her too. Upon withdrawal of the applications, their visas expired and she therefore had to return to Fiji immediately.

29. Given the status that the father no longer supported their visa application, it is contended that the mother and child could no longer stay in NZ and had to return to Fiji. This made their habitual residence as Fiji and not NZ.

30. On the question of settled environment, the mother says that when she reached Fiji with her child, she admitted the child to a school. She is now well settled in her new school environment and her academic performance is impressive too.

31. The mother says that the child now does not intend to go back to NZ due to the aggressive and violent nature of both the father and his partner particulars of which are identified below.

32. In relation to the father and his partner being abusive towards the child, the mother says that when the father used to pick the child from school, he used to keep her at his workplace. He had issues with the child. His complaint was that the child was very naughty

and did not behave well. He had difficulty looking after her and asked her to arrange for someone to look after the child.

33. When the father got involved with his partner in 2018, he devoted more time with his partner and ignored the child and her welfare. He refused and/or ignored to help the child in her studies. He also refused to cook for the child when she was at work. He started staying away from home and failed to give the required love, care and attention that the child deserved.

34. When she confronted the father in August 2018 about his relationship, he asked them to pack their belongings and leave the house and if they failed to do so, he was going to kill them. Simultaneously, the father's partner also threatened them on her phone when the child was with her and heard the conversation. The child thereafter became scared of the father and his partner due to their aggressive behavior.

35. The father also became aggressive and asked them to get out of the car a number of times when she confronted him about his relationship. She had to find her way back to the home with the child.

36. The father had also slapped the child and locked her in the car for 30 minutes at one time. He had threatened to cut her hand with a knife.

37. The mother says that she was so scared of her safety that she left the house and entered the home of women's support group named as Shakti Ethnic Women's Support. When she found work in Auckland, she shifted there with her child. The child then started schooling in Auckland.

38. The father and his partner are alcoholic people and were very violent towards her whenever the child visited them. The child was very hesitant to visit the father and his partner as she was aware of the bullies and the ill-treatment at the father's place. It is therefore unsafe for

the child to return to NZ. The child also does not wish to return too. The child is safer with her as she is well versed with her routine and welfare.

D. Issues - Evidence – Law – Analysis

39. It has been made very clear to me at the beginning of the trial that the basis on which the mother contests the application is that there was no wrongful removal as the mother and the child are habitually resident in Fiji and under this category the specific concern of the mother has been outlined to be that she was not able to stay in NZ due to issues surrounding her visa.

40. Apart from the above, the affidavit also raises issues of violence on the child at the hands of the father and his partner for which the child does not wish to return to NZ. The mother also raised the defence of settled environment.

41. For reasons of clarity, I think that it is important for me to identify the specific questions that this court needs to address. From the pleadings, the evidence and the submissions of the parties, I am of the finding that this matter requires determination of the following:

1. Was the child wrongfully removed from New Zealand? To answer this, an examination of two elements of wrongful removal is necessary.

The first is whether the child was habitually resident in NZ immediately prior to her removal? ***Reg. 73(2) (b).***

Under this aspect I need to ascertain whether the issues surrounding the visa of the mother and the child is relevant in deciding the question of habitual residence or is it relevant in examination of another element of wrongful removal? This brings me to the second element.

The second element is whether the removal of the child from New Zealand was in breach of the father's rights of custody? ***Reg. 73(2) (d).***

If it can be established that the father's actions led to the removal of the child and the mother cannot be blamed for this situation, then the breach cannot be laid at the mother's door step. This element would thus not be established.

2. ***Is there a grave risk that the return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation? Reg. 73(4) (b).***

3. ***Is the defence that the child has settled in her new environment available to the mother? Reg. 73 (3) (c).***

4. ***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).***

42. I now turn to the determination of each issue and in doing so, I will where relevant, identify the evidence of the parties and the applicable law.

(i) Habitual Residence

43. In order to establish wrongful removal, the applicant must establish that the child was habitually resident in NZ immediately prior to her removal.

44. ***"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 <u>whereas an appreciable period of time and settled intention are necessary for him to become habitually resident in country B.</u> 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.

45. The father has to establish that their living in NZ was for an appreciable period of time and that there was a settled intention to live in NZ.

46. In this case, I find from the evidence that the parties have lived in NZ since 2016 except for a period of 6 months in 2017 when the mother and the child had to come to Fiji as their visa had expired. I would regard their living in NZ to be for an appreciable period of time. Was there settled intention to stay in NZ?

47. The evidence of the parties is clear that they left Fiji to reside in NZ. Their intention was to live there. They had been living there since 3 years. The mother had always intended to live in New Zealand even until the time she returned to Fiji. Her evidence is clear from her messages to the father's family that she wished to secure her visa to be able to stay in NZ. She did not want to come back to Fiji.

48. The father has deposed an affidavit which contains her messages to his family. This has not been disputed to my satisfaction. In those messages, the mother had always indicated the need for her to stay back in NZ.

49. The mother also gave evidence that when the father did not support her visa application, she applied on her own under the "skilled worker" category and she was advised by her case officer that she did not fall under that category and that her visa will be declined. If that

happened that would blemish her records and affect her future application into NZ. She therefore withdrew the application.

50. I find that when the mother withdrew the application, she did so because she did not want to have her future applications jeopardized due to the potential refusal. This clearly shows her intention to return to New Zealand at some point in time. Her evidence does not show that she had an intention to return to Fiji permanently and not to go back to NZ.

51. If that was not the case, she would have taken the risk of getting an answer on her visa application because the result would not have mattered to her as she would have by then formed an intention to return to Fiji permanently.

52. Having said that, I must make it clear that in this case one cannot look at settled intention in isolation. This is a case where the parties settled intention is not sufficient to make a finding of habitual residence. I have to find whether the parties could have formed a clear intention without having to fulfill any other obligations, requirements or responsibilities imposed on them.

53. I find that the settled intention of the parties was always conditional upon the fact that there would be no impediment to the parties in getting their visas to remain in NZ. They knew at all times, that if their visa expired and they could not seek a renewal under any circumstances, the return to Fiji was inevitable.

54. In that regard, their intention alone cannot be examined to find the issue of habitual residence. What I need to examine from the facts of this case is whether the condition based on which the parties' intention could be given effect was not curbed by any circumstance. To that end, I find that the issue of the mother and the child's visa is very important in examining the question of habitual residence.

55. It is very clear from the evidence of the parties that until 7 May 2019, the wife had her work visa intact. Unfortunately, the separation occurred in December 2018 and the mother obtained temporary protection orders against the father in favour of herself and the child.

56. The father then took an active step in January 2019 and wrote to the NZ immigration to inform it of his separation with the mother. This is clear form his own affidavit sworn on 27 September 2019. His same affidavit indicates that he wrote an email to NZ immigration on 4 March 2019 and informed it of the following (as summarized):

i. That he has separated from his wife.

ii. The wife has all along been on a dependent visa.

iii. That he has written to immigration about this earlier.

iv. His wife has been pressuring him and his family members to provide her an extension of her visa and that he is very harassed by her actions.

v. That there are pending proceedings in court against him including parenting order applications and if she has to return to Fiji, he does not wish to take any responsibility for this.

vi. The visa of the wife and child expires on 7 May 2019.

vii. He wishes to remove the wife from the dependent visa but not the child for whom he takes responsibility. He needs assistance from the immigration in this regard.

57. The father clearly knew that when he had written the letter in January 2019 and an email on 4 March 2019, he did not have contact with his child due to the protection orders against him. He had no right to contact the child without the permission of the court which granted

the protection orders. The child was in the sole care of the mother and he could not have applied for the child's visa. In that regard, his withdrawing his support on the mother's visa application meant that he was withdrawing support for the child's visa application too.

58. The father may have taken this active step to ensure that the mother is bereft of any support on her application and that she returns to Fiji so that she does not continue with the proceedings in NZ court. His intention may have also been to get the child back when the mother is asked to leave NZ. I find that he calculated all this and then withdrew support for the wife's application. However, he ought to have known that at the time he withdrew the support, the child was with the mother and that the child's application was dependent on his support. If he withdrew the support for the mother, she will have to make an application on her own which she did on 15 March 2019. The mother had applied for "essential skills work visa". There was never any clear passage for the mother to have acquired a visa on her own.

59. Although there is lack of documentary evidence that the mother was asked by her case officer that her application was unlikely to succeed, I find her evidence credible that she only took such an action because she indeed was advised by her case officer to do so. She did not prefer any refusals because she wanted a clean record for future purposes. She was waiting for an answer on her application filed in March 2019. She only withdrew the application on 28 June 2019.

60. If she was interested in taking the child away from the father, she would not have applied for the visa on her own at all. She could have conveniently come back to Fiji when the visa expired. The child would have had to return with the mother since she was in the care of the mother at that stage and there were restrictions placed on the father in having any sort of contact with the child.

61. If it was not for the father's action in withdrawing the support, she would have got her extension and the child would have remained in NZ. The mother did her best to seek support from the father. I cannot turn a blind eye to the evidence being the statutory

declaration of the mother of 11 January 2019 in which she indicated that she wanted to reconcile with her husband as she needs his support in all ways. This declaration was, to my mind, prepared to assist the father in his criminal case in the hope and expectation that he would support the mother's visa application.

62. When the condition of her settled intention to stay in NZ could not fulfilled, the mother had to return to Fiji. In that regard I cannot find that the habitual residence was NZ as it was always conditional upon her being able to stay there without any impediment. That impediment was caused by the father and therefore she had to leave. She could not meet the State's requirement to stay there any longer.

63. It may be a thinking in hindsight that the mother could have applied for the visa under some other category but once she had made an application and withdrawn the same on 28 June 2019, she did not have any time at hand to file another one. Her interim visa was expiring on 19 July 2019.

64. What concerns me additionally is that when the final parenting orders were made on 10 June 2019, the father had by then not made any arrangements with the mother to support the child's visa application. He could have sought legal advice to that effect and also informed the court that he has withdrawn the support for the mother. I am sure that if these matters were brought up, it would have been easy for him to ascertain his position in regards the child's visa.

65. It is my finding that after the final orders, the mother had the full day to day care of the child and as such, she was the proper person to apply for the child's visa and that the child's visa was dependent upon the mother's. If the mother's application failed, the child would have to leave the country with the mother.

66. Leaving my findings aside for a while, the father, never made any application on behalf of the child to allow the child to stay in New Zealand. He only did so when the proceedings for the return were initiated by him. If he applied for the child's visa, he would have been

advised by the immigration properly as to whether he could do so given the nature of the protection and parenting orders. If he could not then he could have made a considered decision to support the application for the mother despite the separation on the basis that he needed the child to be in the country.

67. I find that it is due to the actions of the father that impeded the mother's settled intention to stay in NZ and therefore she cannot be said to be habitually resident in NZ. Since she has the full day to day care of the child, the child's habitual residence is the same as the mother's. I therefore find that the habitual residence of the child immediately prior to the removal was Fiji.

ii. Was the removal in breach of the father's rights of custody?

68. If the issues surrounding the child's visa is not a matter that can be used to examine the issue of habitual residence then the same facts that I have identified above indicates that it was due to the father's making that the child had to be removed from NZ and the removal therefore cannot be said to be in breach of the father's rights. The mother cannot be liable for the breach as the circumstances were caused by the father.

iii. Settled Environment

69. I will now turn to the first defence raised by the mother. She has stated that the child is well settled in the environment. The law 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.

70. In this case the removal of the child occurred on 13 July 2019. The application was filed on 5 August 2019 which is less than a month of the removal. The matter was heard in October 2019. It is not more than a month since the removal that the application was filed, matter heard and the judgment delivered. The defence of settled environment is thus not available under the law.

iv. Grave Physical or Psychological Harm

71. The second defence that the mother has raised is that the father and his partner are both violent and aggressive persons and it is not safe for the child to return to them. I must say that the mother is entitled to raise a defence under the law that there is a grave risk to the child and that she would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.

72. The onus of proving such a defence is on the person raising it and in this case is the mother. There is a very heavy burden of proving such defence: ***Lincoln, J.***, ***Evans v. Evans [1989] FCR 153.***

73. 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.***

74. 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".

75. 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".

76. I find from the evidence that the mother has not been able to establish that the father's partner is a violent and aggressive person and that the child would be put to grave physical or psychosocial harm or would be put in an intolerable situation.

77. The partner was ready to give evidence in court but the mother's counsel advised me that she need not be cross-examined. The partner has filed an affidavit opposing any violence on the child either by her or the father of the child. That evidence was not contested.

78. The partner also disclosed a judgment of the Court in NZ. In that matter the question of whether the partner is a violent person and had been violent towards the mother and the child was heard. Judge S J Coyle found that the mother did not establish her case and therefore the application against the partner was discontinued. The judgment is dated 10 June 2019.

79. Further, there was a parenting order issued by the Court in NZ on 10 June 2019. In that order, the partner is nominated as the supervisor during the periods of contacts until such time the father completes the programme of living without violence. If the partner was such a violent person, the mother ought not to have consented to her being the supervisor. It should have immediately occurred to her that with the father she would be detrimental to the child.

80. There is no evidence before me that the partner has been violent, abusive and aggressive towards the mother and the child post the date of the finding of Justice S J Coyle. The mother has, in Tauranga court, made bald assertions of violence and so did she in this court. Her evidence does not meet the defence.

81. In respect of the father, despite the fact that there is protection order against him in favour of the child, I do not find that he will cause grave risk to the child mentally or physically or put the child in an intolerable situation. He has been having supervised contacts with the child. The supervision was provided by child care. There are about 8 extensive reports from the supervisor when the father had contacts with the child. The reports range from the period 5 March 2019 to 18 May 2019. These reports are very positive regarding the bonding between the father and the child. It also speaks of how comfortable and happy the child was

with the father during the times of contact. These reports cover contact with the child for the periods after separation.

82. A child who has been severely traumatized by a parent will not display the friendliness and closeness that the report speaks of. The report also enclosed photos of the times when the father had contact with the child. The child undeniably looks very happy and comfortable with the father.

83. The report has not been challenged in evidence and I find that it is uncontroverted. In my finding it carries substantial weight in determining the allegation raised by the mother.

84. I find from the evidence that there indeed was a dispute between the parents. Each has been accusing the other of extra marital affairs and the child came to the receiving end of the separation and now being dragged in this matter.

85. I do not find that the defence is met. I also have regard to the fact that the father is to attend a course on living without violence. There is no evidence that he is an inherent violent man and would inflict violence to his child. Although there is no evidence that he has completed the course, I find that if the return was to be ordered, some measures could conveniently be put in place to ensure that the child is supervised by the NZ authorities. If I were to return the child, I would have imposed some conditions regarding the child being monitored by the supervising agencies in NZ and an undertaking entered into before the child was sent away.

E. Final Orders

86. In the final analysis, I find that the CAF has not been able to establish wrongful removal and as a result I dismiss the application for return of the child to NZ.

87. Each party must bear their own costs of the application.

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Hon. Madam Justice Anjala Wati

Judge

29.04.2020

To:

1. ***AG's Chambers for the Applicant.***
2. ***Patrick Kumar Lawyers for the Respondent.***
3. ***File: 19/Suv/0001.***