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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA540/2024
[2024] NZCA 674

BETWEEN	MCDONALD Appellant
AND	SANCHEZ Respondent

Hearing:	22 November 2024
Court:	Goddard, Cooke and Hinton JJ
Counsel:	K P Lane for Appellant I M Blackford and J M Gandy for Respondent S N van Bohemen as lawyer for the children
Judgment:	17 December 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made by the Family Court are set aside.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Goddard J)

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Introduction

[1] This appeal is about whether two children, Andrew and Sophia,[1] should be returned to Spain under the Hague Convention on the Civil Aspects of International Child Abduction (the Convention).[2]

[2] Andrew was born in New Zealand in November 2010. Sophia was born in New Zealand in December 2012. They lived here with their parents, Ms Sanchez and Mr McDonald, in their early years. They moved to Spain with their parents in September 2016. Shortly afterwards their parents separated. Both parents continued to live in Spain and shared the care of the children. During this period the children were habitually resident in Spain. But they maintained strong ties with New Zealand, visiting for extended periods on three occasions.

[3] The children came to New Zealand with their father in November 2021. Since then they have lived with their father in a small town in New Zealand. The parents' original intention (based on an agreement following their separation, reflected in orders made by a Spanish court) was that the children would spend a year in New Zealand then return to Spain. However in December 2022 Mr McDonald emailed Ms Sanchez to say that he and the children would not be returning to Spain.

[4] Ms Sanchez sought an order for the return of the children to Spain under the provisions of the Care of Children Act 2004 (the Act) which give effect to the Convention in New Zealand. That application was successful.[3] Mr McDonald appealed to the High Court. That appeal was unsuccessful.[4]

[5] Leave was granted to Mr McDonald to bring a further appeal to this Court.[5] The appeal raises two issues.

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1 The names of the parties and the children have been anonymised to protect their privacy.
2 Convention on the Civil Aspects of International Child Abduction 1343 UNTS 98 (opened for signature 25 October 1980, entered into force 1 December 1983).
3 *[Sanchez] v [McDonald]* [2023] NZFC 12247 [Family Court judgment].
4 *McDonald v Sanchez* [2024] NZHC 2110 [High Court judgment].
5 *McDonald v Sanchez* [2024] NZCA 542 [Leave judgment].

[6] First, were the children habitually resident in Spain in December 2022, when Mr McDonald declined to return them to Spain? The Convention provides for return of children to their State of habitual residence. If the children were habitually resident in New Zealand rather than Spain in December 2022, no order for their return to Spain could be made under the Act. Both the Family Court and the High Court held that the children were habitually resident in Spain as at December 2022. That finding was challenged on appeal by Mr McDonald and by the lawyer for the children.

[7] Second, both children firmly object to returning to Spain. They want to continue to live in New Zealand. The Convention and the Act provide that where a child objects to returning to their habitual residence, the Court may decline to make an order for the return of that child. In the Family Court, Judge Dravitzki considered that despite the children's objection an order should be made for their return to Spain. His decision was upheld by Osborne J in the High Court. On appeal Mr McDonald challenged the approach adopted by the Courts below to the exercise of this discretion, arguing that the children's objection to leaving New Zealand was consistent with their welfare and best interests, and they should not be compelled to return to Spain contrary to their clearly expressed and reasonable objections. His argument was supported by the lawyer appointed to represent the children.

Summary

[8] A person's habitual residence is a question of fact that must be assessed having regard to all relevant circumstances. By December 2022 the children had been living in New Zealand for a little over a year. They were happy and settled in the small town where they lived with their father and paternal grandmother, attending school and actively participating in family, community and sporting activities. We consider that as at December 2022 the children's integration into social, family and community environments in the small town in New Zealand, and the stability they had enjoyed for a little over one year, lead to the conclusion that they were habitually resident in New Zealand as at December 2022. In the case of Andrew, that conclusion is reinforced by evidence that as at December 2022 he planned to continue to live in New Zealand unless required to leave.

[9] We consider that the Courts below put too much emphasis on the parents' original plan for the children to live in New Zealand for one year, and the orders of the Spanish Courts giving effect to that plan. Circumstances change, and plans change. And, importantly in this case, children grow up and form views and plans of their own. The original intention of the parents, and the orders made by the Spanish Courts, provide important background. But when one focusses, as one must, on the factual inquiry into each child's habitual residence as at December 2022 we are firmly of the view that Andrew and Sophia were, by that time, habitually resident in New Zealand. It follows that the appeal must be allowed.

[10] If we had considered that Andrew and Sophia were habitually resident in Spain in December 2022, we would nonetheless have declined to make an order for their return in light of their clearly expressed and reasoned objections. Both children, and especially Andrew, are at an age and maturity where their objection to leaving New Zealand and returning to Spain should be given considerable weight. In those circumstances the courts have a discretion to decline to make an order for return of the children to Spain.

[11] We consider that the Courts below erred in their assessment of the welfare and best interests of the children. Insufficient weight was given to each child's views, and to the disruption and harm that would be caused by taking them out of their current settled living arrangement and compelling them to return to Spain contrary to their wishes. It is clearly very important for the welfare and best interests of both children that they maintain a substantial and meaningful relationship with their mother. We share the Family Court Judge's concern that contact has been problematic over the last few years. But Ms Sanchez and Mr McDonald are both loving, caring parents who are committed to the wellbeing of Andrew and Sophia. We are optimistic that once these proceedings are behind them they will be able to work together to ensure that Ms Sanchez has frequent online contact with the children, and regular contact in person, including spending time in Spain to maintain wider family and cultural connections. The Family Court can be expected to make any orders that may be required to support that outcome. We add that if the children were required to return to Spain despite their clearly expressed reluctance to do so, that would introduce considerable tension in the relationship between the children (in particular, Andrew)

and Ms Sanchez. And if the children were returned to Spain, similar concerns might well arise concerning the ability of the children to maintain their relationship with their father. On the evidence before us, it is not apparent that making an order for return would promote substantial and meaningful relationships between the children and both their mother and father.

[12] Weighing all relevant factors, we are satisfied that it would be contrary to the welfare and best interests of Andrew and Sophia to remove them from their settled life in New Zealand and require them to return to Spain despite their objections.

[13] We consider that it follows from that finding that if it had been necessary for the Court to exercise the discretion conferred by the Act, that discretion would have been exercised against making an order for return. The Courts below erred in treating "Convention principles" relating to deterrence of child abduction as a significant factor weighing in favour of an order for return. As we explain below, it would in fact be inconsistent with the principles that underpin the Convention to override the welfare and best interests of a particular child in order to deter future would-be abductors of other children. The Convention is a nuanced instrument under which the exceptions to the requirement to make an order for return of a child are as integral to the overall scheme as the presumption in favour of prompt return absent any relevant exception. The exceptions exist in order to advance the best interests of the particular child in each case. Where one or more exceptions applies, there is no Convention principle that tilts the balance in favour of return.

[14] Thus even if we had found that the children were habitually resident in Spain as at December 2022, we would have allowed the appeal and declined to make an order for their return to Spain.

[15] Our reasons are set out in more detail below.

Background

[16] We draw with gratitude on the summary of facts set out in the High Court judgment.[6]

[17] Ms Sanchez was born in Spain. She holds dual Spanish and New Zealand citizenship. Mr McDonald was born in New Zealand. He holds dual New Zealand and British citizenship.

[18] Ms Sanchez and Mr McDonald met in France in 2007 at a time when they were both living in the United Kingdom (UK). They returned to the UK to live together before moving to New Zealand in early 2009. They were married in Spain in April 2009. They continued to live in New Zealand from 2009 until August 2016, with the exception of a year spent living in Brisbane, Australia.

[19] Andrew was born in New Zealand in November 2010. Sophia was born in New Zealand in December 2012.

[20] In September 2016 Ms Sanchez, Andrew and Sophia moved to live in a large city in Spain. Mr McDonald followed shortly afterwards. Very soon after, Ms Sanchez and Mr McDonald separated.

[21] In December 2016 Ms Sanchez and Mr McDonald signed an agreement recording:

(a) The relevant Spanish provincial law would govern their divorce in relation to parental responsibilities and child maintenance matters and they would submit to the jurisdiction of the Spanish courts.

(b) The children's care would be shared on a week-about basis for most of the year with longer periods in the summer and Christmas and Easter holidays.

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6 High Court judgment, above n 4, at [5]–[25].

(c) From January 2020 both parents would move to New Zealand with the children for one year, maintaining joint custody. In January 2021 the children would move to Spain to permanently establish their residence there.

[22] The agreement was approved by the Spanish Court and formalised as a court order on 22 February 2017 (2017 order).

[23] The children's care was shared in Spain in terms of the agreement and 2017 order for five years from November 2016 to November 2021. Extended holiday periods were spent in New Zealand in 2017 and 2018 (approximately a month each) and in 2020 (six weeks).

[24] In 2019 Ms Sanchez applied to the Spanish Court to remove the requirement that the parties live in New Zealand for the 2020/2021 year. Her application was granted on 16 December 2019 (2019 decision).

[25] In March 2020 Mr McDonald appealed the 2019 decision. In February 2021 the relevant Spanish appellate court overturned the 2019 decision and reinstated a requirement that the children live in New Zealand for one year. The appellate court made the following orders (Spanish orders):

(a) the children were to travel to New Zealand with Mr McDonald for the period of one year approximately from 1 November 2021 to completion of the New Zealand 2022 school year;

(b) if Ms Sanchez travelled to New Zealand, Mr McDonald was to pay her financial support;

(c) if Ms Sanchez did not travel to New Zealand, a visiting regime was to be established for Ms Sanchez and the children and she was to pay Mr McDonald financial support;

(d) the children were to be returned to Spain in late 2022; and

(e) after the return of the children to Spain, the provisions of the original 2017 order were to apply.

[26] On 11 November 2021 Mr McDonald and the children travelled to New Zealand to live in a small town in the South Island. The children were enrolled in the local school and from that time onwards were actively engaged in school, family, community and sporting activities. It appears that Ms Sanchez also intended to travel to New Zealand at this time, but her travel plans were affected by the border restrictions in place at the time as a result of the COVID-19 pandemic.

[27] In February 2022 Ms Sanchez moved to Sydney, Australia and obtained employment there. She visited the children in the small town in New Zealand in June 2022 and September 2022.

[28] On 5 December 2022 Mr McDonald emailed Ms Sanchez to advise that he and the children would not be leaving New Zealand on 18 December 2022, saying:

> Neither parent has been living and working in Spain this year and I can advise that we will not be departing on the 18th to Spain.

[29] From 19 December 2022 Ms Sanchez spent a week visiting the children in New Zealand.

[30] In March 2023 Ms Sanchez obtained an order from the Spanish Court enforcing the Spanish orders by requiring the children's return to Spain.

[31] Mr McDonald unsuccessfully applied to the Spanish Court for an order that the children not be required to return to Spain. That application was dismissed in July 2023.

[32] In the meantime, on 13 April 2023, Ms Sanchez had applied to the Spanish Central Authority for assistance with the return of the children under the Convention. The Spanish Central Authority communicated the request to the New Zealand Central Authority, as contemplated by the Convention. An application under s 105 of the Act was filed in the Family Court on 25 July 2023.

[33] In June 2024 Ms Sanchez left Australia and returned to live in her home in Spain.

The Convention and the New Zealand implementing legislation

[34] The Convention was adopted by the Hague Conference on Private International Law on 25 October 1980. New Zealand became a party to the Convention with effect from 1 August 1991. Spain is also a party to the Convention. The Convention is widely ratified.

[35] The rationale for adoption of the Convention is summarised in its Preamble:

> The States signatory to the present Convention,
>
> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
>
> Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
>
> Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

[36] The objects of the Convention are set out in art 1, which provides:

> ARTICLE 1
>
> The objects of the present Convention are—
>
> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[37] Article 3 provides that the removal or retention of a child is considered wrongful where it is in breach of a person's rights of custody under the law of the State in which the child was habitually resident, and at the time of removal or retention those rights were actually exercised. The term "rights of custody" is defined in art 5 to include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

[38] Article 4 provides that the Convention ceases to apply when a child attains the age of 16 years.

[39] Chapter 3 of the Convention provides for the return of children who have been wrongfully removed from a Contracting State, or wrongfully retained away from a Contracting State. An application can be made through the Central Authority of the child's State of habitual residence, which in turn transmits the application to the Central Authority of the State in which it has reason to believe the child can be found.

[40] The Convention seeks to ensure the prompt return of an abducted child to the child's State of habitual residence, unless one of the prescribed exceptions applies and return is not appropriate. Article 11 requires judicial and administrative authorities of Contracting States to act expeditiously in proceedings for the return of children. If a decision is not reached within six weeks from the date of commencement of proceedings for the return of a child, art 11 provides that the applicant or Central Authority has the right to request a statement of the reasons for the delay.

[41] The operative provisions of the Convention for the purposes of the present appeal are arts 12 and 13:

> ARTICLE 12
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.
>
> ARTICLE 13
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return

of the child if the person, institution or other body which opposes its return establishes that—

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[42] Articles 12 and 13 are implemented in New Zealand by ss 105 and 106 of the Act. Consistent with art 4 of the Convention, the term "child" is defined for the purpose of the provisions of the Act giving effect to the Convention as a person under the age of 16 years.[7]

[43] If the requirements set out in s 105 are satisfied, a New Zealand court must make an order for the return of a child to that child's State of habitual residence unless one of the exceptions in s 106 applies. The Act requires a court to which an application is made under s 105 to give priority to the proceedings so far as practicable, to ensure they are dealt with speedily.[8]

[44] As relevant, s 105 provides:

105 Application to court for return of child abducted to New Zealand

(1) An application for an order for the return of a child may be made to a court having jurisdiction under this subpart by, or on behalf of, a person who claims—

(a) that the child is present in New Zealand; and

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7 Care of Children Act 2004, s 95.

8 Section 107(1).

(b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

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

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

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

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

…

[45] In this case it is common ground that the requirements set out in s 105(1)(a), (b) and (c) are satisfied. The term "removal" is defined to include the retention of a child within the meaning of art 3 of the Convention.[9] It is common ground that the children were retained in New Zealand within the meaning of the Convention and the Act. It is also now common ground that the date of that retention was 16 December 2022.

[46] However the parents differ on whether Andrew and Sophia were habitually resident in Spain in December 2022.

[47] If the children were habitually resident in New Zealand rather than in Spain as at 16 December 2022, the pre-conditions in s 105 would not be met and an order for the return of the children could not be made. If the children were habitually resident in Spain as at 16 December 2022, the next issue becomes whether any ground for refusal of a return order set out in s 106 is made out. Section 106 provides, so far as relevant:

106 Grounds for refusal of order for return of child

(1) If an application under section 105(1) is made to a court in relation to the removal of a child from a Contracting State to New Zealand,

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9 Section 95.

> the court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the court—
>
> (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or
>
> (b) that the person by whom or on whose behalf the application is made—
>
> (i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or
>
> (ii) consented to, or later acquiesced in, the removal; or
>
> (c) that there is a grave risk that the child's return—
>
> (i) would expose the child to physical or psychological harm; or
>
> (ii) would otherwise place the child in an intolerable situation; or
>
> (d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or
>
> (e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.
>
> …

[48] Before the Courts below, and in this Court, Mr McDonald relied on s 106(1)(d). Before this Court it was common ground that both children object to being returned and have attained an age and degree of maturity at which it is appropriate to give weight to their views. So that limb of s 106(1) is satisfied. The result is that the Court *may* refuse to make an order for return of the children. The focus before us was thus on the correct approach to the exercise of that discretion, and on the outcome of a proper exercise of that discretion.

Appointment of lawyer for the children

[49] The Family Court appointed Mr van Bohemen as lawyer for the children. His role, as prescribed by s 9B(1) of the Family Court Act 1980, included:

(a) acting for the children in the proceedings in a way that he considers promotes the welfare and best interests of the children; and

(b) ensuring that any views expressed by the children relevant to the proceedings are communicated to the court.

[50] As contemplated by s 9B(2) of the Family Court Act, Mr van Bohemen met with the children to ascertain their views. He communicated those views — including their objection to returning to Spain, and the reasons they gave for that objection — to the Family Court.

[51] Mr van Bohemen was also appointed as lawyer for the children in the High Court and, when leave to appeal to this Court was granted to Mr McDonald, in this Court. He met with the children on six occasions in total, and prepared a number of reports to assist the Courts considering this proceeding. The content of those reports is discussed in more detail below. But for present purposes it is sufficient to note that having met the children and ascertained their views, Mr van Bohemen made submissions in each court to the effect that:

(a) The children were habitually resident in New Zealand as at December 2022.

(b) If the relevant court took a different view on that issue then an order for return should nonetheless be declined in light of the children's objection to return. Continuing to live with their father in the small town in New Zealand, while maintaining meaningful contact with their mother, would promote the children's welfare and best interests.

Family Court judgment

[52] The only limb of s 105 which was in issue before the Family Court was whether the children were habitually resident in Spain at the date they were retained in New Zealand. Also in issue were three of the s 106(1) grounds relied on by Mr McDonald. Before the Family Court, in addition to relying on the "child objects" ground in s 106(1)(d), Mr McDonald relied on s 106(1)(b)(ii), arguing that Ms Sanchez had consented to or acquiesced in the retention of the children in New Zealand, and on s 106(1)(c)(ii), arguing that there was a grave risk that return of the children to Spain would place them in an intolerable situation.

Habitual residence

[53] The Family Court Judge found that the date of retention was 16 December 2022.[10] He was satisfied the children were habitually resident in Spain when they travelled to New Zealand in November 2021. He considered that they remained habitually resident in Spain in December 2022. He summarised his reasoning as follows:

> [97] I accept they are settled and engaged in New Zealand and that is important in considering the issue of habitual residence as at December 2022. However, the purpose of their time in New Zealand and particularly that it was time-limited and impermanent also remains important. That is particularly relevant for children of [Andrew] and [Sophia's] age who are aware of the temporary nature of their stay. In my view, the fact the children must have known they were always to return to Spain at the end of 2022 makes it more difficult for them to obtain habitual residence here. That applies when looking at the issue from a "child-centred" viewpoint. It is hard to see how [Andrew] and [Sophia] could ever have viewed New Zealand as their "home" or the place they "lived" or were "settled" on a long-term basis when they always knew they were to return to Spain at the end of the school year.
>
> [98] I am satisfied that in December 2022, the children retained substantive links to Spain and continued to see Spain as at least an equal "home" to New Zealand. I am satisfied, when considering all of the circumstances, the children remain habitually resident in Spain.

[54] It followed that the requirements of s 105 were made out.

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[10] Family Court judgment, above n 3, at [38].

The children's objection and the s 106 discretion

[55] The Family Court Judge then moved on to consider whether any of the s 106 grounds relied on by Mr McDonald were established.

[56] He did not accept that the s 106(1)(b) or (c) exceptions were made out.[11] Because those exceptions are no longer in issue, we need not set out his analysis. Rather, we focus on his discussion of the s 106(1)(d) "child objects" exception. The Family Court Judge considered that the exception was made out. He said:[12]

> [126] Overall, the children's views show a clear desire to remain living in New Zealand (ideally with their mother present if possible). Those views are wholly understandable and rationally based given their recent experiences of both countries, particularly over the COVID "snapshot" period of time.
>
> [127] Considering the *Whyte v Northumberland* test, I record I am satisfied:
>
> (a) the children object to return;
>
> (b) they have obtained an age and degree of maturity at which it is appropriate to give weight to those views; and
>
> (c) I consider there is a rational and understandable basis to their views —— significant weight should be given to them.

[57] The Family Court Judge then went on to consider whether or not to make an order for return in the exercise of the discretion conferred by s 106(1). He identified the majority decision in *Secretary for Justice (New Zealand Central Authority) v H J* as the leading authority in New Zealand on the exercise of the discretion.[13] On that approach, he said, a court is required to weigh potentially but not necessarily competing considerations. On the one hand, the welfare and best interests of the children. On the other, the purpose of the Convention, which is to deter unlawful removal or retention of children.[14] The weight to be given to these competing considerations will vary, the Family Court Judge said, according to which exception has been established.[15]

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11 At [178] and [207].
12 Footnote omitted.
13 Family Court judgment, above n 3, at [210], referring to *Secretary for Justice (New Zealand Central Authority) v H J* [2006] NZSC 97, [2007] 2 NZLR 289.
14 Family Court judgment, above n 3, at [210].
15 At [211].

[58] The Family Court Judge accepted the children's return to Spain would be a major change for them and would be challenging. Remaining in New Zealand would be less disruptive to their current lives.[16] But he was concerned about the lack of contact the children had had with their mother while in New Zealand.[17] He expressed concerns about the welfare and best interests of the children if they remained in New Zealand, which he considered would probably mean their mother would be largely physically absent from their lives and even remote contact would at times be problematic.[18] However as he noted, "[i]t is not possible to say whether the same difficulties would be experienced if the children were living with their mother in Spain and their father was in New Zealand … the distance itself causes substantial challenges with frequent physical contact".[19]

[59] The Family Court Judge also considered that Convention principles were important in weighing the discretion in this case. He said that one of the fundamental objectives of the Convention is to establish an international order under which there would be certainty about return. This was a clear case where a foreign court made an order for children to travel to another country with a clear expectation they would be returned to their usual home (Spain) at a specific given time. If an order for return is not made, he said:[20]

> … it is difficult to see how a court in any jurisdiction (including a New Zealand court) can have confidence that children will be returned at the end of a permitted period overseas (particularly a longer period) if the travelling parent changes their mind and refuses to return the children.

[60] The Family Court Judge expanded on these concerns about the future implications of declining to make an order for return, saying:

> [239] It does not require significant imagination to predict courts could become reluctant to agree to children spending extended periods overseas if they were concerned the children would not be returned. That is particularly if the travel was to spend extended time with family members. Courts' permission to travel may become harder to obtain over opposition from parents (like [Ms Sanchez]) who are worried that once out of the jurisdiction, the children will be retained there and not returned. Children could end up

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16 At [216].
17 At [217]–[221].
18 At [227].
19 At [228].
20 At [236].

required to remain in their "home" country without extended periods outside that country.

[240] Usually, the country the parent wants to take children to will be that parent's country of origin. It is likely the parent's extended family still lives there. That probably includes the children's grandparents. All of that is the case here.

[241] If longer periods overseas became "too risky" for courts to sanction because of the risk of non-return, children could be denied the opportunity to spend extended time in the country of origin of one of their parents. They are thereby denied the opportunity to learn about that parent's culture and background in the place the parent comes from (which, of course, is culture and background the children share).

[242] Children would also be denied the opportunity to forge deep relationships (deeper than can be achieved on brief holidays) with family members who could and should be important to them including their grandparents. This is particularly the case if health, economic or other reasons prevent grandparents travelling to the children's home country for extended periods.

[243] That cannot be a desirable outcome.

[244] In the specific facts of this case, I consider general convention principles which favour return have significant importance.

[245] More broadly, respect for the decisions of a foreign country favour return. While those decision are not binding on me, in a more general sense, I do consider them relevant. If New Zealand courts expect and rely on foreign courts to respect and at least take into account New Zealand courts' decisions (including in Hague Convention matters), then New Zealand courts should show similar respect.

[246] These considerations favour an order for return.

[247] Weighing and considering all these matters, I am satisfied it is appropriate and correct to make an order for [Andrew] and [Sophia's] return to Spain, even though the children object to return.

[61] The Family Court Judge made an order for the return of the children.[21]

High Court judgment

Approach on appeal

[62] Before the High Court counsel for the parents agreed that the appeal was a general appeal by way of rehearing in accordance with the principles set out by the

[21] At [248] and [253]–[254].

Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* (*Austin, Nichols*).[22] On that approach, the parties are entitled to a judgment in accordance with the view of the appeal court on the merits. However Mr van Bohemen, appearing as counsel for the children, suggested it was arguable that the appeal against the s 106 decision was an appeal against an exercise of discretion, with the result that the stricter criteria for a successful appeal set out in *May v May* would apply: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of relevant considerations; or (4) the decision is plainly wrong.[23]

[63] The Judge accepted the parents' submission that the appeal was a general appeal, to be decided on the principles set out in *Austin, Nichols*, insofar as it related to a decision under s 105 of the Act, or to whether any of the five situations identified in s 106(1) exists. But the Judge proceeded on the basis that if one of those situations exists, and the Family Court has exercised the discretion provided for in s 106(1), the more restrictive approach set out in *May v May* would apply to the appeal against the exercise of the s 106(1) discretion.[24]

Habitual residence

[64] The Judge considered that a child-centred model for assessing habitual residence would recognise not only that the children have acquired significant ties to New Zealand and have been significantly assimilated into New Zealand including in their living and schooling arrangements, and in cultural, social and economic integration. A child-centred model would also recognise that the children retain a significant strength of ties to Spain.[25] The Judge went on to consider what he described as "other factors identified as relevant in *SK v KP* and *Punter 2*":[26]

> [149] For children of the ages of Andrew and Sophia at the time of retention (13 years and 11 years respectively) the settled purpose of their parents is

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22 High Court judgment, above n 4, at [100], referring to *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

23 High Court judgment, above n 4, at [100], referring to *May v May* (1982) 1 NZFLR 165 (CA) at 170. See the summary of those principles provided by the Supreme Court in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32] per Blanchard, Tipping and McGrath JJ.

24 High Court judgment, above n 4, at [102]–[103].

25 At [147].

26 At [148], referring to [43]; *SK v KP* [2005] 3 NZLR 590 (CA); and *Punter v Secretary for Justice* [2007] 1 NZLR 40.

important (although not necessarily decisive). This was correctly recognised by the Judge.

[150] The settled purpose in this case was, as the Judge described it, a "strictly temporary time-limited impermanent move". After five years of working, shared-care arrangements with parents living and working in Spain, the children departed for New Zealand in the context of carefully negotiated arrangements ultimately reinforced by the Spanish judgment with a committed time for the return to Spain. The situation, as the Judge found, is appreciably removed from the relatively informal and changing arrangements in many other cases where parents have done no more than privately negotiate over and/or informally relax the arrangements for their children. The Spanish courts considered, approved and ultimately reimposed the arrangements agreed on by the parents.

[151] The agreed and ordered stay was well short of the "two years or more" which was recognised in *Punter 2* as not so clearly being temporary, with the result that habitual residence in the old state has usually been held to have been lost immediately on leaving the old state.

[152] In this case the settled purpose, having regard to the actual and intended length of stay in New Zealand and the purpose of the stay, pointed to the children remaining habitually resident in Spain for the period of their temporary stay in New Zealand.

[153] The Judge was also correct to find that the children must have known their move to New Zealand was temporary and time limited and that their departure from Spain to New Zealand had been authorised on a finite basis. So too they would have understood concepts of time and that their return to Spain was not at an undefined time. This was accordingly not a case in which the affected children were of such a young age that the settled purpose of the parents would not have been known and understood by the children leading up to and throughout their intended period of stay.

[154] Notwithstanding the submissions made by Mr Guest and Mr van Bohemen suggesting "advances" in the law as it relates to habitual residence, the application of the authorities which bound the Family Court and bind this Court leads clearly to the conclusion that the Judge reached, namely that Ms Sanchez had established that all requirements of s 105 of the Act (including that the children were habitually resident in Spain immediately before their retention), were satisfied. In short, I am not satisfied the Judge was wrong to conclude the children were at 16 December 2022 habitually resident in Spain.

Discretion to refuse return

[65] There was no challenge before the High Court to the finding that the "child objects" ground for refusal under s 106(1)(d) had been made out, and that both

children had attained an age and a degree of maturity at which it was appropriate to give weight to their views.[27]

[66] The Judge proceeded to apply the *May v May* criteria for an appeal against the exercise of a discretion. He focused on the reasoning of the Family Court, rather than undertaking his own substantive analysis. He identified the key considerations that led the Judge to make an order for return despite the children's objections as follows:[28]

> (a) the appropriate forum is to be considered having regard to potentially but not necessarily competing considerations, namely the welfare and best interests of the children and the deterrence purpose of the Convention;
>
> (b) the weighting of competing considerations will vary according to the s 106 exception established;
>
> (c) the children's objections to return to Spain are to be given weight given their age and degree of maturity;
>
> (d) the children's integration into New Zealand means remaining in New Zealand would be less disruptive for them and returning to Spain would be a major change for them and challenging. It was not established their return would be deeply traumatising or give rise to a grave risk of psychological harm;
>
> (e) the promotion of the children's relationship with both parents, for the purpose of their welfare and best interest, has occurred more meaningfully in Spain than in New Zealand;
>
> (f) their mother has been largely physically absent from their lives while in New Zealand, and there are accordingly concerns for the children's welfare and best interests if they remain in New Zealand;
>
> (g) the principles of the Convention, providing for their home country to be the forum for decisions on substantive care and conduct, recognise it is generally in children's interests not to be unilaterally removed by one parent;
>
> (h) the objectives of the Convention also favour certainty of return in a case such as this, where (after five years of living in Spain) the children came to New Zealand on a time-limited specific base in accordance with a clearly defined, formal court order.
>
> (i) courts could have little confidence in children being returned after permitted overseas travel if an order for return is not made in the present circumstances, with the result that longer periods overseas would become "too risky" for courts to sanction and children would be denied the opportunity to have time with family members;

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27 High Court judgment, above n 4, at [155].
28 At [191]–[192].

(j) beyond general Convention principles, respect for the decisions of a foreign country (comity) also favour an order for return.

[67] The Judge did not consider that the Family Court Judge had failed to consider the welfare and best interests of the children, or failed to treat them as a consideration at the forefront of the exercise.[29]

[68] The Judge did not accept the submission made by counsel for Mr McDonald that these were objections of "mature" children. Rather, he said, the children might be described as still relatively young children.[30] The Judge considered that the Family Court Judge's assessment of the welfare and best interests of the children of itself led properly to the conclusion the s 106 discretion should be exercised against refusing to make an order under s 105.[31]

[69] The Judge said that it was only after welfare and best interests considerations had been addressed that the Family Court Judge turned to consider what he described as "the principles under the Convention". The Judge did not understand counsel for Mr McDonald or counsel for the children to suggest that those principles had not been correctly identified.[32] The main criticism that was advanced in the High Court was that the Family Court Judge had in some way elevated the importance of the Spanish Court orders and the objects of the Convention beyond the best interests of the children.[33] The Judge identified two responses to that submission:

> [202] First, there is a fundamentally important difference between a case such as this, where the relevant s 106(1) exception involves the objections of children aged 13 and 11 years, and the fact situation in *LRR v COL* where it was established there was a grave risk the child's return to Australia would place him in an intolerable situation. The father in *LRR v COL* faced charges of assault and breach of family violence orders, and had since been convicted on a number of those charges … Nothing in the Court of Appeal's observations in *LRR v COL* addressed to the latter situation required the Judge in the quite different factual circumstances of this case to disregard or place little weight on broader Convention principles.
>
> [203] Secondly, the Judge's analysis was grounded in a consideration of the welfare and best interests of the children. The Judge's consideration of Convention principles and objects reinforced the earlier part of his analysis.

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29 At [193]–[194], referring to *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610.
30 High Court judgment, above n 4, at [194].
31 At [197].
32 At [198]–[199].
33 At [200].

> It did not elevate Convention principles or considerations to a level that cut across the children's welfare and best interests. In that regard it is properly viewed as complementing the primary focus on welfare and interests.

[70] The Judge concluded (applying the *May v May* criteria) that he was not satisfied that the Family Court Judge, in exercising the s 106(1) discretion, relied on a wrong principle, took into account irrelevant matters, failed to take relevant matters into account, or was plainly wrong.[34]

[71] The appeal to the High Court was dismissed.[35]

Approach on appeal

[72] Ms Lane, who appeared for Mr McDonald before this Court, submitted that the appeal is a general appeal both in respect of the issue of habitual residence and in respect of the exercise of the discretion under s 106(1) of the Act. She submitted that the Judge erred in adopting the more restrictive approach that applies to truly discretionary decisions (*May v May*).

[73] Ms Blackford, who appeared for Ms Sanchez, did not seek to support the Judge's approach. She agreed that the appeal to the High Court, and the further appeal to this Court, are general appeals to which the *Austin, Nichols* approach applies.

[74] Mr van Bohemen did not take issue with this approach.

[75] The appeal to the High Court under s 143 of the Act was a general appeal. Plainly, as the Judge held, the *Austin, Nichols* approach applied in relation to the question of whether the children were habitually resident in Spain as at December 2022. That approach also applies where there is an issue as to whether one or more of the grounds set out in s 106(1) is established (although in the present case, that was no longer in dispute before the High Court).

[76] Where one or more of the s 106(1) grounds is made out, it is common to refer to the Court having a "discretion" as to whether an order for return should be made.

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34 At [204].
35 At [205].

But this is not a discretion of the kind to which the *May v May* approach applies. Rather, determining whether an order should be made involves an assessment of fact and degree and entails a value judgement. In those circumstances, as this Court said in *Simpson v Hamilton*, a party exercising a general right of appeal is entitled to judgment in accordance with the opinion of the appellate court.[36]

[77] As the Supreme Court observed in *Kacem v Bashir*, the distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgement does not of itself mean the decision is discretionary.[37] The Supreme Court confirmed that an appeal from an assessment of what is in the best interests of a child, in the context of a relocation dispute, does not involve an appeal from a discretionary decision. That decision is a matter of assessment and judgement, not discretion.[38]

[78] Where one or more of the s 106(1) grounds is made out, determining whether to make an order for return of the child involves factual evaluation and a value judgement centred on the welfare and best interests of the child. This is discussed in more detail below. A party exercising a general right of appeal to the High Court from a decision made under s 106(1) is entitled to judgment in accordance with the opinion of the High Court. The approach in *May v May* is not applicable. The same applies to an appeal from the High Court to this Court.

[79] We must therefore form our own view on both the question of habitual residence and (if the children were habitually resident in Spain in December 2022) on whether an order for the return of the children to Spain should be made despite their objection to return.

[80] Before we turn to those issues, we make some general observations about the principles that apply to applications under the Convention.

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36 *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 22, at [16] per Elias CJ; *Kacem v Bashir*, above n 23, at [32] per Blanchard, Tipping and McGrath JJ; and *Simpson v Hamilton* [2019] NZCA 579, [2019] NZFLR 338 at [44].

37 *Kacem v Bashir*, above n 23, at [32] per Blanchard, Tipping and McGrath JJ.

38 At [32] per Blanchard, Tipping and McGrath JJ.

The Convention — general principles

[81] In *LRR v COL* this Court set out some general principles that underpin the Convention which should guide New Zealand courts considering s 105 applications. Because these principles are important when it comes to applying the s 106 discretion, we repeat that outline here.[39]

[82] The Convention seeks to protect children from the harmful effects of their wrongful removal or retention from the State in which they are habitually resident. It does this by securing the prompt return of children who have been wrongfully removed or retained, unless one of the prescribed exceptions applies. Prompt return of children in cases where no exception applies can be expected to deter wrongful removals, and will in most cases ensure that the status quo is restored.

[83] The Convention is framed on the assumption that prompt return, in cases where no exception applies, will be in the best interests of the child. The child will return to their familiar home environment, and to the place where the courts are best placed to determine matters of custody and access. The courts of the State in which the child is habitually resident can be expected to have better access to information about the interests of the child, the family situation, and the availability and effectiveness of measures to avoid risks of harm to the child.

[84] However the Convention identifies certain circumstances in which the return of a child to their State of habitual residence may not be appropriate, because return would be contrary to the interests of that child. The presumption that the best interests of the child will be served by a prompt return to the country where they are habitually resident is displaced in these circumstances.

[85] It cannot be emphasised too strongly that the exceptions set out in art 13 are as integral to the scheme of the Convention as the art 12 provision for prompt orders for return. The circumstances in which the Convention does not require an order for return of the child are carefully circumscribed. It is not the function of the requested State to conduct a wide-ranging inquiry into the best interests of the child. But the prompt

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39 *LRR v COL*, above n 29, at [76]–[85].

and focused inquiry required by the provisions of the Convention is designed to ensure that the outcome does serve the interests of the particular child. As Baroness Hale said in *Re D (A Child) (Abduction: Rights of Custody)*:[40]

> … No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.

[86] The relationship between the Convention and international human rights instruments, including the United Nations Convention on the Rights of the Child (UNCRC),[41] was considered by the United Kingdom Supreme Court in *Re E (Children) (Abduction: Custody Appeal)*. Delivering the judgment of the Court, Baroness Hale and Lord Wilson said:[42]

> [14] … the fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean that they are not at the forefront of the whole exercise. The Preamble to the Convention declares that the signatory states are "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention …" This objective is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this: see the Explanatory Report of Professor Pérez-Vera, at para 25.
>
> [15] Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right. As our own Children Act

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40 *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 at [52] per Baroness Hale. See also the discussion of the relevance of the interests of the child in the Explanatory Report that accompanies the Convention: Elisa Pérez-Vera *Explanatory Report on the 1980 Hague Convention on International Child Abduction* (Hague Conference Permanent Bureau, Madrid, April 1981) at [23]–[25], [29] and [116].

41 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

42 *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144.

> 1989 makes clear, in section 1(3)(c), the likely effect upon a child of any change in her circumstances is always a relevant factor in deciding what will be best. But it is also seen as likely to promote the best resolution for her of any dispute about her future, for the courts and the public authorities in her own country will have access to the best evidence and information about what that will be.
>
> [16] Those assumptions may be rebutted, albeit in a limited range of circumstances, but all of them are inspired by the best interests of the child. Thus the requested state may decline to order the return of a child if proceedings were begun more than a year after her removal and she is now settled in her new environment (article 12); or if the person left-behind has consented to or acquiesced in the removal or retention or was not exercising his rights at the time (article 13(a)); or if the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of her views (article 13); or, of course, if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation": article 13(b). These are all situations in which the general underlying assumptions about what will best serve the interests of the child may not be valid. We now understand that, although children do not always know what is best for them, they may have an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters.

[87] As the United Kingdom Supreme Court went on to say, the exceptions to the obligation to return are by their very nature restricted in scope. They do not need any extra interpretation or gloss.[43] Similarly, the High Court of Australia has rejected the proposition that the exceptions should be "narrowly construed".[44]

[88] These observations are equally relevant to the Act. Their relevance is underscored by s 4 of the Act:

> **4 Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

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43 At [52] per Baroness Hale and Lord Wilson.

44 *DP v Commonwealth Central Authority* [2001] HCA 39, 206 CLR 401 at [41]–[45] per Gaudron, Gummow and Hayne JJ.

(2) Any person considering the welfare and best interests of a child in his or her particular circumstances—

(a) must take into account—

(i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and

(ii) the principles in section 5; and

(b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.

(3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.

(4) This section does not—

(a) limit section 6 or 83, or subpart 4 of Part 2; or

(b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

[89] Section 5 of the Act sets out the principles referred to in s 4(2)(a)(ii) that must be taken into account when considering a child's welfare and best interests:

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:

(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

(d) a child should have continuity in his or her care, development, and upbringing:

(e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her

> family group, whānau, hapū, or iwi should be preserved and strengthened:
>
> (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened:
>
> (g) a child must be given reasonable opportunities to participate in any decision affecting them.

[90] The requirement to take the s 5 principles into account does not limit s 6 (which relates to the views of the child), or prevent a court from taking into account other matters relevant to the child's welfare and best interests.[45]

[91] The requirement to treat the welfare and best interests of the child as paramount applies to proceedings under subpt 4 of pt 2 seeking the return of a child under the Convention. Section 4(4) does not disapply s 4(1). Rather, s 4(4) makes it clear that the requirement to determine such proceedings speedily, and to return a child promptly if no exception is made out, is not limited by s 4(1). The inquiry into the best interests of the child must be approached in the manner contemplated by ss 105 to 107. But it remains the case that the welfare and best interests of the child are, as the United Kingdom Supreme Court put it in *Re E*, at the forefront of the whole exercise. The outcome does not turn on the interests of the parents or guardians of the child, or for that matter of the relevant Central Authorities or States.

[92] For essentially the same reasons there is no inconsistency between the Convention and the Act, properly understood and applied, and the UNCRC requirement that:[46]

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[93] We return below to the implications of this underlying concern for the best interests of the child in relation to whom an application is made, where one of the exceptions in art 13 is in issue.

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45 Care of Children Act, s 4(4).

46 Convention on the Rights of the Child, art 3(1).

First issue: where were the children habitually resident in December 2022?

[94] As already mentioned, the Family Court found that as at 16 December 2022 the children were habitually resident in Spain. The High Court agreed.

Submissions on appeal

[95] Ms Lane, who appeared for Mr McDonald in this Court, submitted that the reasoning and the result in the Courts below were wrong. The Courts below should have placed significant weight on the circumstances and experiences of the children in New Zealand at that time and immediately before. Instead, the Courts below placed decisive weight on the circumstances by which the children came to New Zealand a year before. Ms Lane submitted that the principles established by the authorities were helpfully summarised in *Langdon v Wyler*, where Dobson J said:[47]

> [14] In summary the assessment of whether a particular country is a child's habitual residence is a factual inquiry, necessarily tailored to the particular circumstances of the individual case. Parental purpose may be a factor, but it is not determinative. The focus is on the actual situation of the child, and his or her connection with and integration in the relevant country.

[96] On that approach, Ms Lane submitted:

(a) Parental intentions are only a factor, far from determinative, and less important with older children.

(b) Habitual residence is an assessment at the relevant time of determination, and not decided by earlier agreement of the parties or even a court order.

(c) A practical and sensible assessment must be made for the children, centred on their view of their lives at the relevant time.

[97] Ms Lane submitted the evidence established that the children were readily able to reacquire habitual residence in New Zealand. They had been born here, and had been habitually resident here. While resident in Spain they had enjoyed holidays here,

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[47] *Langdon v Wyler* [2017] NZHC 2535.

and had cultural and family links to New Zealand. So, she said, they reacquired habitual residence in New Zealand because of the time they had spent here by December 2022, the settled life they were leading with a stable address and schooling, and integration into a wide range of activities in New Zealand. Given the ages of the children, the child-centred approach ought to be robustly applied. What is the reality for these children? Do they see the small town in New Zealand as home? Or do they see the large city in Spain as their home?

[98] As Ms Lane accepted, these questions must be addressed by reference to evidence about the children's circumstances up to and as at 16 December 2022. Subsequent events cannot as a matter of logic be relevant to this inquiry.

[99] For the children, Mr van Bohemen submitted before us (as he had in the Courts below) that as at December 2022 the children were habitually resident in New Zealand, and not in Spain. He submitted that the Courts below erred by placing too much weight on parental intention, as reflected in the Spanish Court orders. The Courts below should have followed the approach of the United Kingdom courts which, in a series of decisions, have emphasised the need for a fact-specific, child-focussed inquiry, rather than an inquiry into what the parents thought or intended.[48]

[100] Mr van Bohemen emphasised the stability of Andrew and Sophia's lives in New Zealand and their integration into a social and family environment here. He submitted that the fact that in November 2021 when they came to New Zealand their time here was intended to run until the end of the 2022 school year was not a very powerful countervailing factor which could justify the determination made by the Family Court, and upheld by the High Court, that the children were still habitually resident in Spain in December 2022.

[101] Ms Blackford, who appeared for Ms Sanchez, submitted that New Zealand applies a "hybrid approach" to the determination of habitual residence. That, she said, is a multi-faceted approach which takes into account a child-centric view of the world,

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[48] Referring to *Re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, [2016] AC 76; *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, [2020] 4 WLR 137; and *F v M* [2021] CSOH 90.

parental intentions and other relevant factors. The existence of the Spanish Court orders is evidence as to the parental intention concerning the children's presence in New Zealand.

[102] Ms Blackford submitted that the Courts below were right to find that having regard to the actual and intended length of stay in the New Zealand, and the purpose of stay, all factors pointed to the children remaining habitually resident in Spain as at December 2022.

Discussion

[103] The Convention, in common with other instruments developed by the Hague Conference on Private International Law, uses the concept of "habitual residence" as the connecting factor for determining whether the Convention machinery is engaged.

[104] The explanatory report which accompanied the Convention, written by Professor Pérez-Vera, the rapporteur appointed for that purpose by the Hague Conference on Private International Law, noted that habitual residence is "a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile".[49]

[105] Thus, as Lord Brandon said in *Re J (A minor) (Abduction: Custody Rights)*:[50]

> The first point is that the expression "habitually resident" as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that 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.

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49 Elisa Pérez-Vera, above n 40, at [66].

50 *Re J (A minor) (Abduction: Custody Rights)* [1990] 2 AC 562 (HL) at 578 per Lord Brandon, referred to with approval by Baroness Hale in *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1 at [36].

[106] In *Punter v Secretary of Justice* a full court of this Court confirmed that this is the approach to be adopted when applying s 105 of the Act.[51] This Court said:[52]

> [88] In *SK v KP*, the inquiry into habitual residence was held, at para [80], to be a broad factual inquiry. *Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration.* In this catalogue, *SK v KP* held that *settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive*. *It should not in itself override* what McGrath J called, at para [22], *the underlying reality of the connection between the child and the particular state*:
>
> > "[22] There is also support for the proposition that the Court should be slow to infer a change in habitual residence in the absence of shared parental attempt to bring it about, this reflecting the weight attached to parental intention under the Convention: *Zenel v Haddow* 1993 SLT 975 at p 979. The decision of the Court on habitual residence must, however, in the end always reflect the underlying reality of the connection between the child and the particular state. Obviously there will be circumstances in which having been considered the facts indicate to the Court that all the circumstances of the case rather indicate this underlying reality."

[107] The approach in New Zealand is consistent with the approach that is adopted in the UK. That approach was helpfully summarised by Lord Reed in *Re R (Children) (Reunite International Child Abduction and others intervening)*:[53]

> [17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.
> …

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51 *Punter v Secretary of Justice*, above n 26, at [88], referring to *SK v KP*, above n 26. See also *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)*, above n 50, at [36] and [54] per Baroness Hale.

52 Emphasis added.

53 *Re R (Children) (Reunite International Child Abduction Centre and others intervening)*, above n 48, referring to *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)*, above n 50, at [54] per Baroness Hale.

[108] As Lord Reed also noted, it is the stability of the residence that is important, not whether it is of a permanent character:[54]

> There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.

[109] Although "habitual residence" was always intended to be a question of fact, and despite repeated affirmation of that point by appellate courts in New Zealand and elsewhere, there has been a tendency to "legalise" the concept by adopting various legal constructs, rules and sub-rules about habitual residence.[55] That tendency should be resisted by New Zealand courts: at best it results in overly lengthy and complex analysis of this factual issue; at worst, it can distract attention from the proper inquiry and lead to an incorrect result. As we explain below, that appears to be what has happened in the Courts below in this case.

[110] At the risk of stating the obvious, the inquiry under s 105 concerns the habitual residence of the relevant child; not one or both of the child's parents. So the focus must be on the situation of the child, and the underlying reality of the connection between the child and the particular State, including the child's own sense of connection to the relevant State. One important indicator of whether a person's residence in a country is "habitual" is whether they have a settled purpose of continuing to live there. As this Court noted in *SK v KP*, and again in *Punter v Secretary of Justice*, with young children the settled purpose of the parents will be a an important (but not decisive factors).[56] For an infant or young child, the purposes and intentions of the parents will be the only relevant purposes and intentions. But as the child ages, their own authentic purposes and intentions may become increasingly relevant to the inquiry. This appears to have been lost sight of in the Courts below.

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54 *Re R (Children) (Reunite International Child Abduction Centre and others intervening)*, above n 48, at [16] per Lord Reed.

55 *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)*, above n 50, at [37] per Baroness Hale.

56 *SK v KP*, above n 26, at [74]; and *Punter v Secretary for Justice*, above n 26, at [97] and [106]. See also *Re R (Children) (Reunite International Child Abduction Centre and others intervening)*, above n 48, at [17] per Lord Reed.

[111] In most cases extensive reference to authority about how to ascertain a child's habitual residence should be unnecessary. It will generally be sufficient to identify that the test is a broad factual inquiry which takes into account all relevant factors that bear on the underlying reality of the connection between the child and the particular State. The court can then go on to carry out that inquiry.

[112] Adopting that approach, we agree with the Family Court Judge that the children were habitually resident in Spain at the time they left that country and came to New Zealand in November 2021.[57] Did they lose that habitual residence, and become habitually resident in New Zealand? They were certainly resident here. Could that residence properly be characterised as "habitual" as at 16 December 2022, having regard to all relevant factors?

[113] By that date the children had been living in the small town for a little over a year, with their father and their grandmother. They had attended school in New Zealand for part of the 2021 school year, and the whole of the 2022 school year. Their school reports confirm that they were well integrated into the school environment, and happy and flourishing there. They were involved in a range of sporting and community activities. As the Family Court Judge accepted, both children were settled and engaged in New Zealand.[58]

[114] It seems reasonably clear that by December 2022 Andrew (then aged 12) wished to continue to live in New Zealand, and planned to do so unless he was required to return to Spain. Mr McDonald's evidence is that by December 2022 both children wished to remain in New Zealand and not return to Spain. There is no first-hand record of Andrew's views at that time. But Mr McDonald's evidence is supported by the information and views Andrew conveyed to Mr van Bohemen at the time of their first meeting in August 2023, some eight months later. Those views were clearly expressed, rationally explained, and did not appear to be the product of any new developments or changes in views since December 2022. That evidence is also supported by the information in Andrew's school reports at the end of the 2022 school year, which recorded that he was well integrated at school, that he "displays great

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57 Family Court judgment, above n 3, at [64].
58 At [97].

citizenship in our classroom", and that his teacher would miss him as he moved into the next year group.

[115] The evidence before us about Sophia's wishes and plans as at December 2022 is less clear. There is no first-hand record of her views at that time. Mr McDonald's evidence is that she wanted to remain in New Zealand. Mr van Bohemen's first report, based on his meetings with the children in August 2023, indicates that Sophia was keen not to be disloyal to either of her parents. She said she loved living where she was, and explained why, but was understandably reluctant to express a view about what should happen next. Mr van Bohemen's second report, prepared in November 2023 after meeting with the children to discuss the Family Court judgment, confirms that by that date she did not want to go back to Spain and was asking how she could stay in New Zealand. Sophia's 2022 end of year school report reported very positively about her year, including her support of younger children, and stated that she "should be proud of her dedication to the school Kapa Haka Roopu", and that "you will make an awesome Year 6 role model next year" (suggesting an expectation she would remain at the school). But we hesitate to draw any inferences about Sophia's wishes or plans in December 2022 based on the evidence before us — we think it is fair to say that her preference was that decisions about the future should be made by her parents and the courts.

[116] Both the Family Court Judge and the High Court Judge gave considerable emphasis, when assessing the children's habitual residence, to the circumstances in which they originally came to New Zealand in November 2021. Both Judges referred to the parents' agreement that the children would live in New Zealand for one year, then would return to live in Spain. That intention was reflected in the orders made by the Spanish Courts. The Family Court Judge considered that the children must have known that the move was temporary and time limited.[59] He considered that they would have understood that they were to return to Spain at the end of the next school year, and that the move to New Zealand was not intended to be indefinite or forever.[60] The children's time in New Zealand was not merely a holiday. It was something

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59 At [74].
60 At [76].

more than that. But it was never intended to be permanent or even undefined.[61] The Family Court Judge considered that the children would have known this when they came to New Zealand. He said that "would, or at least should, have remained their understanding while they were living here".[62]

[117] In these circumstances the Family Court Judge found it hard to see how the children could ever have viewed New Zealand as their "home" or the place they "lived" or "settled" on a long-term basis when they always knew they were to return to Spain at the end of the school year.[63]

[118] We consider that this analysis is problematic for a number of reasons.

[119] First, it takes as its starting point the intentions of the parents. Those intentions explain how and why the children came to New Zealand in November 2021. That is an important background factor. But the inquiry must focus on circumstances of the children in December 2022.

[120] Second, a great deal can change in the course of a year. That is a substantial period of time, especially in the life of a child. The children may well have known that the original plan was that they would spend one year in New Zealand. But they will also have known that plans can change. The Family Court Judge's suggestion that the time-bounded nature of the visit *should* have remained their understanding while they were living here insufficiently reflects this human reality. Circumstances change. Intentions change. Understandings change. We think it is tolerably clear from the evidence that the children's perception of where they were settled — where they had their home — evolved in the course of that year.

[121] That leads into the next point. As time passed, the children aged and matured. The weight to be given to their intentions correspondingly increased. For children aged 10 and 12 (as they then were), it cannot be assumed that their intentions are in all respects the same as their parents' intentions, even if the children are aware of those intentions. Still less can it be assumed that the views and intentions of a child

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61 At [77].
62 At [78].
63 At [97].

correspond to the terms of a court order made some years earlier in proceedings to which they were not parties, and in which their views were not ascertained or communicated to the court. That is not intended as a criticism of the Spanish Courts: indeed given the ages of the children at the times of the various proceedings before the Spanish Courts, it seems likely that only limited weight would have been given to the children's views even if they had been ascertained. But given the emphasis placed on the Spanish Court orders by the Courts below, it is worth pausing to note that it is difficult to draw any meaningful inferences about the children's perceptions and views as at December 2022 based on court decisions made in June 2017 or February 2021.

[122] We agree with the Family Court Judge's view that in December 2022 the children retained substantive links to Spain. But that does not preclude them acquiring habitual residence in New Zealand.

[123] The Courts below were right to reject as irrelevant to this inquiry the shared care living arrangements of the children in Spain. We struggle to understand how it could be suggested that that has any bearing on the strength of the children's connection to Spain as at November 2021 or as at December 2022.

[124] The Courts below were also right to dismiss Mr McDonald's argument that the children were less likely to have retained habitual residence in Spain because their mother lived and worked in Australia while they were in New Zealand. We cannot see how her presence in Australia, rather than Spain, in order to be closer to her children during what was intended to be a limited period away from Spain can shed any light on the habitual residence of the children at the relevant time.

[125] Drawing these threads together, it seems to us that the Courts below set too high a threshold for the acquisition of habitual residence, and placed too much emphasis on the original intention of the parents at the time the children came to New Zealand. Insufficient weight was given to the actual position of the children, and the extent to which they were connected to New Zealand, as at December 2022. A child's habitual residence cannot be prospectively determined by an agreement between the child's parents, or for that matter by a court order.

[126] In *F v M* the Scottish Court had to consider the effect of an express agreement between two parents that their children would remain habitually resident in New Zealand during a planned "trial period" living in Scotland of at least 12 and no more than 15 months.[64] Lady Wise found that by the end of the trial period the two young children were habitually resident in Scotland, despite that agreement. Their residence in Scotland since they arrived there had a stable and settled character.[65] That outweighed the background factor of the parents' intention and express agreement a year earlier. As the judge said, "[t]he parties cannot contract out of the Hague Convention to avoid their children becoming habitually resident in another state".[66] She summarised her conclusions as follows:[67]

> [23] I conclude that, while the intentions of the parties in June 2020 were to come to Scotland only for a trial period without altering the children's habitual residence, as a matter of fact that habitual residence had changed by 3 June 2021. The outcome may seem counterintuitive at first. Formal agreements entered into in good faith by two adults of sound mind should not be readily ignored or set aside. However, while the unusual feature of this case is the detail of the agreement and its formality, the principle remains the same. *It accords with the policy of the Convention that children are not parcels of property whose future can be determined solely by the contracts or actions of adults. An agreement that a child's habitual residence will not change cannot be enforced if, as a matter of fact, that child's residence is found to have changed*. I acknowledge that the development of the law on habitual residence as it applies to Hague Convention cases appears to have resulted in parents now being effectively unable to enter into a directly enforceable agreement on the temporary relocation of their children. Such agreements remain relevant as a factor, but will not be adhered to where, as here, the necessary social and family integration of the children in the "new" country is shown to be of a well settled character. It may be that different views exist in other Hague Convention jurisdictions about the relative significance of a formal agreement entered into with the benefit of legal advice such as that entered into by these parties. In this jurisdiction, however, it is clear that, no matter how formal the agreement, the analysis of the circumstances of the children at the material time must be the primary focus of the discussion. Of course each case is sufficiently fact sensitive that no absolute rules have been laid down. Had the children's settlement in Scotland been shallower, it may be that the nature and terms of the agreement would have had greater weight. On the current understanding of habitual residence as it applies to the Hague Convention, however, the agreement could never have been determinative.

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64 *F v M*, above n 48.
65 At [15].
66 At [22].
67 Emphasis added.

[127] That reasoning is equally applicable in New Zealand. It accords with the policy of the Convention that a child's future cannot be determined solely by the contracts or actions of adults — or, we would add, by prospective orders made by a court. An agreement (or court order) about where a child's habitual residence will be in the future cannot be enforced if, as a matter of fact, that child's habitual residence is found to have changed. In New Zealand, as in Scotland, it is clear that, no matter how formal the agreement, the circumstances of the children at the material time must be the primary focus.

[128] We are satisfied by an appreciable margin that as at 16 December 2022 Andrew was habitually resident in New Zealand. We are also satisfied, though the position is less clear-cut, that Sophia was habitually resident in New Zealand by that date.

[129] As already mentioned, the evidence establishes that both children were well settled in New Zealand as at December 2022. They had been attending school for just over one year, and were doing well at school. They had close links with their paternal family in New Zealand. They were well integrated into their community, engaging in a wide range of social and sporting activities. Their residence had the necessary stability to be described as "habitual"; it was irrelevant that their residence here was not necessarily permanent.

[130] The difference in the confidence with which we reach these conclusions in relation to each of the children stems from the difference in our findings on the weight to be given to each child's "settled intention". So far as Andrew (then aged 12) is concerned, his intention to remain in New Zealand unless required to leave is an important factor that carries substantial weight. So far as Sophia (then aged 10) is concerned we see "settled intention" as at December 2022 as a neutral factor. She was younger, which bears on the weight to be given to her intentions. And there is insufficient evidence before this Court to reach a confident conclusion about Sophia's own plans and intentions at that time. The younger the child, the more relevant the parents' settled intentions: but in the present case, by late 2022 Sophia's parents had different intentions.

[131] Our conclusion that as at December 2022 Andrew and Sophia were habitually resident in New Zealand, and not in Spain, means that the grounds for making an order under s 105 of the Act were not established. It was not open to the Family Court to make an order for the return of the children to Spain. The appeal must therefore be allowed.

Second issue: The children's objections to returning to Spain

[132] As we heard full argument on the issue, and in case this matter goes further, we proceed to consider the position under s 106 of the Act. If the children were habitually resident in Spain in December 2022, should an order for their return be declined in circumstances where they object to returning to Spain?

[133] We add that there was no suggestion in the submissions of either party, or of counsel for the children, that one possible outcome under s 106 might be that an order was made for one of the children to return to Spain while the other remained in New Zealand. We asked counsel whether any party considered that that was a possible outcome consistent with the Convention and the Act. Counsel confirmed that it was common ground that whatever resolution was reached should apply to both children: they should not be separated, as that would not be consistent with their welfare and best interests.

The objections expressed by the children

[134] As already mentioned, it was common ground that both children object to being returned to Spain, and that both children have attained an age and degree of maturity at which it is appropriate to give substantial weight to their views.

[135] It was also common ground before us that in the context of an appeal from a decision under the provisions of the Act that implement the Convention, the relevant time for ascertaining whether a child objects to being returned to their habitual residence is the date of hearing of the appeal.[68] It would make no sense for an appellate court to decline to make an order for return based on an objection expressed before

[68] See *Simpson v Hamilton*, above n 36, at [78]; and *Roberts v Cresswell* [2023] NZCA 36, [2023] NZFLR 364 at [172].

the first instance court, if that objection had subsequently been withdrawn. Conversely, if a child objects to being returned after a first instance decision, and before an appeal is heard, s 106(1) applies.

[136] It was thus necessary for us to receive and consider updating evidence about the children's views concerning return to Spain.

[137] After the High Court judgment was delivered Mr van Bohemen met with the children to discuss that judgment, and a possible appeal. Following that meeting Mr van Bohemen wrote a letter dated 12 August 2024 to the children's parents urging them to reach an agreement about the future residence of the children. He said, by way of summary:

> 23. In my view, [Andrew] and [Sophia] are two intelligent, thoughtful young people who love you both and are very unhappy at being stuck in this conflict.
>
> 24. I believe that their welfare and interests would be best served if you would reach an agreement which they understood and accepted and which took their views into account.
>
> 25. As their lawyer, I do not think it would be in their interests to require them to return to Spain for the following reasons:
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> a) In my view, they are well settled and happy here;
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> b) From all accounts they are doing well socially and academically in [the small town in New Zealand];
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> c) Their objections to returning to live in Spain are logical and understandable;
>
> d) I believe their opposition to returning to Spain is stronger now than it was when I first met them in 2023 or earlier this year;
>
> e) Both [Sophia] and [Andrew], but [Andrew] more forcefully, expressed their unhappiness at the prospect of being forced to return;
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> f) I am not a psychologist and, because the Court refused to grant my request for a psychological assessment, there is no independent evidence about their psychological well-being, but I am concerned that enforcement of the order for return might result in them trying to take matters into their own hands and have a significant adverse effect on their well-being.

[138] Andrew was quoted in that letter as saying that he would do whatever it takes to be able to stay. Sophia's objection as recorded in the letter was expressed less forcefully, but was nonetheless clear and firm.

[139] At the time this Court granted leave to appeal, it directed Mr van Bohemen to meet with the children to ascertain their views, and to communicate those views to the Court.[69] Mr van Bohemen met with the children together and separately on 24 October 2024. He provided a careful and comprehensive report to the Court on 30 October 2024.

[140] As Mr van Bohemen reported, and as both parents accepted, the children's objection to leaving New Zealand and returning to Spain had strengthened since the time of the Family Court judgment. Both children were unhappy with the outcome in the High Court. We summarise the children's views as follows.

[141] Andrew wanted this Court to know that he does not want to return to Spain. He indicated that he has a strong sense of belonging in New Zealand. His school, friends and the activities they do together, and not being separated from his father, are his core reasons for wanting to stay in New Zealand. He said that the Courts below were wrong in what was decided. He considered that returning to Spain would be stressful and emotional, and he was worried about making friends at high school in Spain. He indicated that he would feel less at home and like an outsider living in Spain. He said the thought of going back "shocks" him. Andrew said that he would be pleased about staying in New Zealand, as that would be consistent with his views and ambitions.

[142] Andrew would like to have more contact with his mother. If he stays in New Zealand, Andrew would like his mother to come to visit during holidays, and he would be interested in going to Spain on holiday.

[143] Sophia also indicated that she feels at home in New Zealand. Sophia described having a sense of place in New Zealand. She has friends in New Zealand and finds the small town beautiful and peaceful. Sophia enjoys her current school and wants to

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69 Leave judgment, above n 5, at [3].

go the local high school. She said that she would be worried about going to high school in Spain. She has not talked to her friends in Spain in over two years and does not know them anymore. Sophia said that if she returned to Spain, she would be extremely sad and angry because moving to Spain would feel strange and she would miss her friends. Sophia indicated that she would feel much less at home in Spain. Sophia said that if this Court decided she should stay in New Zealand she would be extremely happy and relieved it was over, and that she could stay where she wants to be.

[144] Sophia also told Mr van Bohemen that she misses her mum, that she loves it here, and that it would be "amazing" if her mother could come here too.

[145] The approach adopted by the High Court Judge to the nature of the appeal on the s 106 discretion meant that he did not make his own assessment of Andrew and Sophia's objections at the time of the High Court hearing. As already explained, the appeal to the High Court was a general appeal, and a fresh assessment at that time was required with the benefit of updating reports from counsel for the child. Likewise, we must assess their objections, and exercise the discretion, in light of the position at the time of the hearing before us with the benefit of the updating report that Mr van Bohemen was directed to provide.

Submissions on appeal

[146] Ms Blackford generally supported the approach of the Family Court Judge.

[147] Ms Lane and Mr van Bohemen submitted that the focus should have been on the welfare and best interests of the children, and that the Family Court Judge erred in giving significant weight to countervailing "Convention principles". They submitted that in light of the children's settled life in New Zealand, and their strong objections to returning to Spain, it would be contrary to their welfare and best interests to make an order for return.

Approach to the s 106 discretion

[148] We consider that the Courts below erred in the approach they took to the principles underpinning the Convention. This had a significant effect on the manner in which the discretion was exercised in the Family Court, and upheld in the High Court.

[149] One reason given by the Family Court Judge for exercising the s 106 discretion in favour of return, which he described as "important", concerned "Convention principles".[70] The Judge considered that one of the most fundamental objectives of the Convention "is to establish an international order under which there would be certainty about return".[71]

[150] The Spanish Courts had made an order for the children to travel to New Zealand with a clear expectation they would be returned to their usual home (Spain) at a specific given time. If an order for return is not made in these circumstances, the Family Court Judge said, it is difficult to see how a court in any jurisdiction (including a New Zealand court) "can have confidence that children will be returned at the end of a permitted period overseas (particularly a longer period) if the travelling parent changes their mind and refuses to return the children".[72] The Judge was concerned that if longer periods overseas became "too risky" for courts to sanction because of the risk of non-return, that would affect children's opportunity to spend extended time in the country of origin of one of their parents, and to forge deep relationships with family members who could and should be important to them. That, he said "cannot be a desirable outcome".[73]

[151] The Family Court Judge considered that on the specific facts of this case, general Convention principles which favour return have significant importance. More broadly, he said, respect for the decisions of a foreign country favour return.[74]

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70 Family Court judgment, above n 3, at [229].
71 At [231].
72 At [236].
73 At [241]–[243].
74 At [244]–[245].

[152] The High Court Judge considered that the Family Court Judge's consideration of Convention principles and objects reinforced the earlier part of his analysis concerned with the welfare and best interests of the children. He did not consider that it elevated Convention principles to a level that cut across the children's welfare and best interests.[75]

[153] The emphasis that the Family Court Judge placed on achieving certainty about return of children at the time parents enter into agreements, or at the time a court authorises travel to another country, was in our view misplaced for three reasons.

[154] First, and most importantly, it is not the objective of the Convention to achieve certainty about return. As this Court emphasised in *LRR v COL*, the exceptions set out in art 13 are as integral to the scheme of the Convention as the art 12 provision for prompt orders for return. The circumstances in which the Convention does not require an order for return of the child are carefully circumscribed. It is precisely in those circumstances that the Convention recognises that return may not be in the best interests of the particular child, and may not be required. The presumption that the best interests of the child will be served by a prompt return to the country where they are habitually resident is displaced in the circumstances identified in art 13 and in s 106(1) of the Act.[76] That structural feature of the Convention must not be lost sight of when identifying and weighing Convention principles.

[155] That leads into the second point. As this Court explained in *LRR v COL*, the best interests of the child are, as Baroness Hale and Lord Wilson put it, "at the forefront of the whole exercise".[77] It is not the purpose of the Convention to subordinate the interests of the particular child to broader institutional or national objectives.[78]

[156] The relevance of the best interests of the particular child in each case is, as this Court said in *LRR v COL*, underscored by s 4 of the Act.[79] Section 4(1) provides that the welfare and best interests of a child in his or her particular circumstances must be

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75 High Court judgment, above n 4, at [203].
76 *LRR v COL*, above n 29, at [78].
77 At [80] and [83], citing *Re E (Children) (Abduction: Custody Appeal)*, above n 42, at [14]–[16] per Baroness Hale and Lord Wilson.
78 *LRR v COL*, above n 29, at [78]–[81].
79 At [82].

the first and paramount consideration in the administration and application of the Act. As this Court went on to explain, that requirement applies to proceedings under subpt 4 of pt 2 seeking the return of a child under the Convention. Section 4(4) does not disapply s 4(1):

> [83] The requirement to treat the welfare and best interests of the child as paramount applies to proceedings under sub-pt 4 of pt 2 seeking the return of a child under the Convention. Section 4(4) does not disapply s 4(1). Rather, s 4(4) makes it clear that the requirement to determine such proceedings speedily, and to return a child promptly if no exception is made out, is not limited by s 4(1). The inquiry into the best interests of the child must be approached in the manner contemplated by ss 105 to 107. But it remains the case that the welfare and best interests of the child are, as the United Kingdom Supreme Court put it in *Re E*, at the forefront of the whole exercise. The outcome does not turn on the interests of the parents or guardians of the child, or for that matter of the relevant Central Authorities or States.

[157] The Family Court Judge referred to the passage in the judgment of Blanchard, Tipping and Anderson JJ in *Secretary for Justice (New Zealand Central Authority) v H J* suggesting that where an exception is made out, it may nonetheless be appropriate to exercise the s 106 discretion in favour of an order for return of the child in order to deter future abductions.[80] As this Court explained in *LRR v COL*, that observation was obiter.[81] This Court went on to express reservations about the suggestion that where an exception is made out under s 106, the interests of the particular child may nonetheless give way to the goal of deterring potential abductors in the future:[82]

> … That suggestion is in our view difficult to reconcile with the scheme of the Convention, with the UNCRC, and with s 4 of the Act. We are attracted to the view expressed by Elias CJ in *Secretary for Justice v HJ* that where the summary process contemplated by the Convention has been followed, and the Court finds that an exception is made out, the discretion must be exercised in the best interests of the child having regard to the circumstances that establish the exception. Applying s 4(1) in those circumstances would not limit the operation of the Convention. So s 4(4) does not preclude the application of s 4(1).

[158] In *LRR v COL*, a case about the grave risk exception, this Court noted that where return of a child would expose that child to a grave risk of an intolerable

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80 Family Court judgment, above n 3, at [209]–[210], referring to *Secretary for Justice (New Zealand Central Authority) v H J*, above n 13, at [50] per Blanchard, Tipping and Anderson JJ.

81 *LRR v COL*, above n 29, at [98].

82 At [99] (footnote omitted). See also the observations of this Court in *Smith v Adam* [2007] NZFLR 447 (CA) at [12]–[14].

situation, it would not be appropriate to make an order for the return of the child. The interests of the child in not being exposed to that risk cannot be outweighed by the goal of deterring future would-be abductors.[83] Similarly, we consider that if a child objects to being returned to their habitual residence, and it would be contrary to that child's welfare and best interests to make an order for their return, there is no Convention principle that weighs in favour of making an order for return.

[159] Our third reason for differing from the approach adopted in the Courts below is that it fails to take sufficient account of the impact of the passage of time on human affairs, an impact that may be particularly significant in the context of a child's sense of time (a concept referred to in s 4(2) of the Act). The goal of certainty in this domain is illusory. That is why orders made by the Family Court in relation to care of children, and contact with children, are never final in the sense they cannot be revisited if circumstances change. Just as decisions made by the New Zealand Family Court may have to be revisited and modified where there is a material change in circumstances, so too an order of a foreign court may be overtaken by developments in the lives of the children to whom the order relates.

[160] Of particular relevance in the present case, with the passage of time children age and mature. They can be expected to develop their own views about what is important to them and about where their interests lie. Those views are entitled to be given increasing weight over time.

[161] Parents are not precluded from revisiting orders made by the Family Court in relation to children where there is a material change in circumstances. Similarly — but if anything, even more clearly — children cannot be precluded from asking the court to act in their welfare and best interests by revisiting orders made by another courts at an earlier date. Those orders may or may not have taken into account the children's views at the earlier date. But either way, such orders cannot anticipate what the children's views will be further down the track as circumstances change, and as the children age and mature.

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83 *LRR v COL*, above n 29, at [100].

[162] For these reasons we consider that where one of the s 106(1) exceptions is made out and a court is required to decide whether to exercise the discretion under that provision, the welfare and best interests of the particular child must be the first and paramount consideration, as required by s 4(1). It is precisely where an exception is made out that the Convention recognises that there should be no presumption in favour of return. There are no "Convention principles" which a court should weigh against the interests of the particular child, and which might result in an order for return being made even though that is contrary to the welfare and best interests of that child.

[163] We echo this Court's observation in *LRR v COL* that we do not consider that this child-centred approach should encourage potential abductors to think that removing a child to this country, or retaining them here, is an attractive option.[84] The Family Court will continue to ensure that where no s 106(1) exception applies, an order is made for the prompt return of a child. Where a parent relies on one of the exceptions, the application will be given priority and determined promptly, as it was in this case. If an exception is not made out, an order for return will follow. It is only where an exception is made out that New Zealand courts will engage in a somewhat broader inquiry into the welfare and best interests of the particular child, and exercise the s 106(1) discretion in light of that inquiry. That outcome is consistent with the Convention's objectives, and with the careful balance struck by arts 12 and 13.

[164] We asked Ms Blackford, who was instructed by the New Zealand Central Authority, to provide this Court with data about the outcome of Convention applications over the last 10 years. She provided the table set out in the appendix to this judgment showing the outcome of applications made through the Central Authority. As that table shows, in most cases the result is that the child returns to their habitual residence. There has been no material change in the proportion of applications that result in orders for return being declined in recent years. We would not expect that to change as a result of this decision, which confirms and restates the approach to s 106 adopted by this Court in 2020 in *LRR v COL*.

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[84] At [148].

The exercise of the s 106 discretion in this case

[165] It follows that we need to determine whether an order for return would promote the welfare and best interests of Andrew and Sophia, having regard to their objections to return and all other relevant factors.

[166] As already mentioned, at the time this appeal was heard the children were almost 12 and almost 14. They strongly object to returning to Spain. They have attained an age and degree of maturity at which it is appropriate to give substantial weight to their views. We are satisfied that the views expressed are the authentic views of the children, and that those views have not been influenced by pressure from either parent.

[167] As Baroness Hale pointed out in *Re D (A Child) (Abduction: Rights of Custody)*, it is the children who will have to live with the consequences of whatever the court decides.[85]

[168] We do not agree with the High Court Judge's characterisation of Andrew and Sophia as "relatively young children".[86] Andrew is only two years away from the age at which the Convention will no longer apply to him. Sophia is younger but is also a happy, intelligent child whose understanding of her own circumstances is reasonable and grounded in the facts.

[169] Mr van Bohemen, who has now met with the children on six occasions over a period of more than a year, considers that remaining in New Zealand is consistent with their welfare and best interests.

[170] The Courts below acknowledged that the children are settled and happy in the small town in New Zealand where they live with their father and their grandmother. Return to Spain would be a major change for them and would be challenging. Remaining in New Zealand would be less disruptive to their current lives.[87] It is relevant in this context that both of the children were born in New Zealand, and had

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85 *Re D (A Child) (Abduction: Rights of Custody)*, above n 40, at [57] per Baroness Hale.
86 High Court judgment, above n 4, at [194].
87 Family Court judgment, above n 3, at [216].

returned to visit when the family moved to Spain. They have always moved between the two countries. When they returned to live here for a further year at their age and stage of life it is not surprising that they built the strong attachments relevant to both habitual residence and the assessment of whether return would promote their welfare and best interests.

[171] As noted above, the Convention is framed on the assumption that prompt return, in cases where no exception applies, will be in the best interests of the child because the child will return to their familiar home environment, and to the place where the courts are best placed to determine matters of custody and access. The courts of the State in which the child is habitually resident can be expected to have better access to information about the interests of the child, the family situation, and the availability and effectiveness of measures to avoid risks of harm to the child.

[172] In this case, however, the children's "familiar home environment" is the small town in New Zealand. And it seems clear that in late 2024 the New Zealand courts will have better access to up to date information about the children and their interests. Apart from Ms Sanchez, every person who can provide first-hand information relating to the last three years of the children's lives and their current circumstances (including the adults with whom they live, their teachers, their doctors, their sports coaches and other community members) is in New Zealand. The children will not be disadvantaged on either of these dimensions by remaining in New Zealand.

[173] We share Mr van Bohemen's concern about the impact on both children, especially Andrew, of requiring them to return to Spain contrary to their clearly and firmly expressed wishes. That is likely to be stressful and to have an adverse effect on their wellbeing in and of itself.

[174] The Family Court Judge and the High Court Judge were concerned that if the children remain in New Zealand that would have adverse implications for the degree of contact the children have with their mother, and thus for the relationship between the children and their mother. It is clearly very important for the welfare and best interests of both children that they maintain a substantial and meaningful relationship with their mother. But we do not consider that this factor is sufficient to outweigh the

other dimensions of the children's welfare that are best advanced by remaining in New Zealand for three reasons.

[175] First, the distance between Spain and New Zealand and the difficulties each parent will face living and working in the other's habitual residence mean that concerns about maintaining parental contact and relationships appear to us to be broadly symmetrical. It is not possible to predict with any confidence what will happen if the children remain in New Zealand, or conversely if they return to Spain. In either case they will be living primarily with one parent, and the other parent will either follow the children, which will entail significant personal disadvantage, or will be confined to remote contact using digital technologies and occasional physical visits. Any attempt to make predictions about these matters would be mere speculation. We accept Ms Lane's submission that this is an essentially neutral factor.

[176] Second, we consider that the difficulties that have been encountered with physical contact to date are in substantial measure a product of the continuing dispute between the parents, and the tensions this has engendered between them and between Ms Sanchez and the children. Andrew and Sophia have two loving, competent parents who are committed to their wellbeing. We are optimistic that once these proceedings are behind them Ms Sanchez and Mr McDonald will be able to work together to ensure that Ms Sanchez has frequent online contact with the children, and regular contact in person, including spending time in Spain to maintain wider family and cultural connections. The Family Court can be expected to make any orders that may be required to support that outcome.

[177] Third, we agree with Mr van Bohemen that compelling the children to return to Spain against their wishes is in itself likely to be damaging to the relationship between the children (especially Andrew) and their mother.

[178] In conclusion, we are firmly of the view that the welfare and best interests of Andrew and Sophia would be promoted by remaining in New Zealand, with appropriate measures in place to ensure substantial and meaningful contact with their mother. On the approach to the s 106(1) discretion that we have explained above, that conclusion would be decisive. Even if the children had been habitually resident in

Spain in December 2022, s 106(1) read in light of s 4 would require that an order for return be declined.

Result

[179] The appeal is allowed.

[180] The orders made by the Family Court are set aside.

[181] There is no order as to costs.

Solicitors:
Medlicotts Lawyers, Dunedin for Appellant

APPENDIX

1980 Hague Convention on the Civil Aspects of international Child Abduction

New Zealand

Overall Outcomes

Incoming Return Applications

These cases are about children brought to or retained in New Zealand and are decided by the Family Court in New Zealand

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Voluntary Return	6	6	5	4	5	8	2	1	3	1	1	1
By Consent Orders Made	6	9	6	14	12	9	9	8	7	5	7	10
Judicial Order for Return	9	6	11	10	12	11	13	9	8	12	6	7
Judicial Refusal	5	5	7	5	2	7	3	4	3	2	4	3
Withdrawn/ Discontinued	6	7	6	2	1	2	7	6	5	0	3	5
Pending	0	0	0	0	0	0	0	0	0	0	0	0
Total	32	33	37	35	32	40	34	28	27	20	21	26

* By consent orders may be for a non-return
*It is important to note that applications may be withdrawn as agreement is reached and/or parenting orders made.