**NOTE: THERE IS TO BE NO PUBLICATION OF THE NAMES OF THE TWO CHILDREN REFERRED TO IN THIS JUDGMENT.**

**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**CIV-2017-409-000073**
**[2017] NZHC 217**

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| | Under the Habeas Corpus Act 2001 |
| In the matter of | an application for a writ of habeas corpus |
| BETWEEN | ANNA CECILIA ADELE OLSSON<br>Applicant |
| AND | NEILL VALENTINE CULPAN<br>Respondent |

Hearing: 17 February 2017

Appearances: L J Kearns for the Applicant
I M Mitchell for the Respondent
A J F Wilding as counsel to assist

Judgment: 21 February 2017

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**ORAL JUDGMENT 1 OF NATION J**

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## The issues

[1] A boy aged 8 Joe and a girl aged 4 Abby, had been living with their parents in Abu Dhabi in the United Arab Emirates (UAE) since December 2015.[1] On 14

[1] Pursuant to s 11B Family Courts Act 1980, a person may not, without the leave of the Court, publish a report of proceedings in a Family Court that includes identifying information of a child under 18 who is the subject of the proceeding. Section 139 Care of Children Act 2004 (COCA), states s 11B will apply under COCA.
The proceedings in this instance were brought under the Habeas Corpus Act 2001. That Act does not expressly require suppression of children's names or empower the Court to make suppression orders. Ultimately the parties agreed to certain orders being made under the COCA but the judgments are primarily concerned with issues as to the application of the Habeas Corpus legislation. When parties become involved in proceedings in the High Court, there is a presumption of open justice. Consistent with this, the names of the parties will normally be published. In its inherent jurisdiction, the Court can nevertheless have particular regard to the welfare and interests of young children. I consider it appropriate to suppress the names of the children involved in these proceedings. In recognition of that suppression order, the names adopted for the children in the publicly available copy of this

December 2016, the parents signed an agreement in which the children were to be able to travel to New Zealand with their father, with the commitment they would be returned to Abu Dhabi on 31 December 2016. Their father has failed and refused to return them as agreed. The mother has made an application under the Habeas Corpus Act 2001 (the Act) for a writ of habeas corpus to obtain their return to Abu Dhabi.

[2] In the circumstances of this case, the issues I must consider are:

(a) have the children been detained in New Zealand;

(b) if so, has the father established that their detention in New Zealand is lawful; and

(c) if not, should the issue of the writ be refused because the habeas corpus application is not the appropriate procedure for considering the alleged breach of the agreement.

**Procedural background**

[3] The application was filed on 13 February 2017, supported by an affidavit from the mother, Ms Olsson. I appointed Mr Wilding as counsel to assist the Court.

[4] There was an initial hearing by way of a telephone conference at 2.15 pm on 14 February 2017. On 14 February 2017, Mr Wilding and Ms Kearns both filed detailed memoranda setting out their submissions as to the jurisdiction of the Court to make the orders sought. Miss Mitchell participated as counsel for Mr Culpan. Mr Culpan had been served with the application only a short time before that conference took place.

[5] After discussions with counsel, I directed there would be a hearing on 17 February 2017. I gave Mr Culpan the opportunity to file an affidavit in response, which he has taken. Miss Mitchell has now also filed a memorandum in response. I

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judgment are anonymised and fictitious.

heard further submissions from counsel this morning at the hearing on 17 February 2017.

**Jurisdiction**

[6] For Mr Culpan, Miss Mitchell has accepted as correct the submissions which Mr Wilding made as to this Court's jurisdiction.

[7] Section 6 of the Act permits an application to be made to challenge the legality of a person's detention through an application for a writ of habeas corpus. Under the Act, "detention" is defined as including "every form of restraint of liberty of the person". There are various provisions of the Act which require the Court to deal with such an application urgently.

[8] Section 14 relevantly provides:

> **14 Determination of applications**
>
> (1) If the defendant fails to establish that the detention of the detained person is lawful, the High Court must grant as a matter of right a writ of habeas corpus ordering the release of the detained person from detention.
>
> (1A) Despite subsection (1), the High Court may refuse an application for the issue of the writ, without requiring the defendant to establish that the detention of the detained person is lawful, if the court is satisfied that—
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> …
>
> (b) an application for the issue of a writ of habeas corpus is not the appropriate procedure for considering the allegations made by the applicant.
>
> …
>
> (3) Subject to section 13(2), a Judge must determine an application by—
>
> (a) refusing the application for the issue of the writ; or
>
> (b) issuing the writ ordering the release from detention of the detained person.
>
> …

[9] I am satisfied that, in the way Mr Culpan has taken control of these children, made them live with him in Christchurch and refused to return them to Abu Dhabi, he has detained them in a manner that gives the Court jurisdiction to deal with the situation through the application which Ms Olsson has made for this writ.

[10] In *Re Jayamohan*, Blanchard J adopted a comment from Sharpe, The Law of Habeas Corpus as follows:[2]

> That habeas corpus in custody cases differs fundamentally from its use to secure personal liberty has always been recognized. It is seen to involve 'not a question of liberty, but of nurture, control, and education' [Barnardo v McHugh [1891] 1 QB 194 at 204 per Lord Esher MR (aff'd) [1891] AC 388], it 'is being used not for the body, but for the soul of the child' . . . [Re Carroll [1931] 1 KB 317 at 331, per Scrutton LJ]. Accordingly, the courts have consistently held that neither the allegation that the child is under no restraint, nor that the child consents to his situation, will prevent them from acting on habeas corpus. [R v Greenhill (1836) 4 A & E 624; R v Clarke, re Race (1857) 7 E & B 186; Exp M'Lellan (1831) 1 Dowl 81; R v Howes (1860) 3 E & 332; Stevenson v Florant [1925] SCR 532.]

[11] Blanchard J referred to the case of *Crain v Crain* as an example of the way the habeas corpus jurisdiction had been used in the context of a child being unlawfully held in the de facto custody of one parent.[3]

[12] In *Kaufusi v Klavenes*, the High Court issued a writ for habeas corpus against a defendant who had removed his children from Tonga contrary to the terms of the Tongan Supreme Court that essentially provided for a type of joint custody.[4]

[13] There has been no disagreement with Mr Wilding's submission that a detention may be unlawful by reason of a breach of a private care agreement.[5]

[14] The Act expressly recognises the potential for the habeas corpus jurisdiction to be used in the context of a dispute between parents over the care of the child. I refer to s 13(1) as follows:

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2 *Re Jayamohan* [1996] 1 NZLR 172, citing Sharpe, The Law of Habeas Corpus (2nd ed, 1989) p 174.

3 *Crain v Crain* [1991] NZFLR 224.

4 *Kaufusi v Klavenes* [2010] NZAR 598.

5 See David Clark and Gerard McCauley, Habeas Corpus Australia, New Zealand, the South Pacific at pg 125; *Kaufusi v Klavenes*, above n 4.

**13 Powers if person detained is young person**

(1) In dealing with an application in relation to a detained person who is under the age of 18 years, the High Court may exercise the powers that are conferred on a Family Court by the Care of Children Act 2004.

[15] I have regard to the way in which the courts have recognised that, in recent times, the use of habeas corpus in custody cases has been rare, given the Family Court is a specialist jurisdiction particularly qualified to determine disputes over the care of children.[6] The Care of Children Act 2004 provides a comprehensive framework and sets out the principles relating to a child's welfare and best interests which must guide the Family Court in determining disputes over the roles of providing day-to-day care or contact in terms of the welfare and best interests of a child as the first and paramount consideration.

[16] Mr Culpan has already filed proceedings in the Family Court in Christchurch although they have not yet been served and no orders have been made in those proceedings. He has said he wants to pursue an application for parenting orders so as to have issues as to what arrangements should be made in the long term for these children considered through that Court.

[17] A significant issue in this case could thus have been whether or not the application should be declined on the basis the current application should be effectively transferred to the Family Court and whether, as to Mr Culpan's alleged breach of an agreement between them, it should be more properly considered by the Family Court. As Mr Wilding pointed out this morning, no application has been made for such a transfer. Ms Kearns has made it clear, the transfer would be firmly opposed by Ms Olsson.

[18] As might be expected, it is apparent from the judgments to which I have been referred that the particular circumstances of the children and the parties and of the case generally have significantly impacted on the way the Judges have exercised the discretion they have to refuse an application on the basis the issue should be more

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6 *Jones v Skelton* [2006] NZSC 113; *Arumalla v Kalari* [2009] NZAR 450 (CA).

appropriately considered in the Family Court or to transfer the proceedings to the Family Court.

[19] It is however important to note that it is only in relation to ss 13(2) and 14(1)(a) that I have a discretion to refuse a writ. In terms of s 14(1), I am otherwise required to issue a writ if a defendant (in this case Mr Culpan) has not established that the detention of the children is lawful.

**Factual background**

[20] Ms Olsson is Swedish. Mr Culpan is a New Zealander.

[21] The parties' relationship began in 1999 when they were in London. They have lived in different countries since then:

- six months in the Caribbean;
- three and a half years in Australia;
- 2005 to approximately 2009 in Dubai;
  (they married in Christchurch in 2005; their son Joe was born in Dubai in 2008);
- 2010 to 2012 in Thailand;
- 2012 to 2015 in Malaysia;
  (their daughter Abby was born in Malaysia in 2012); and
- December 2015 to December 2016 in Abu Dhabi.

There was also a reference in the evidence to the parents, or to the family, being in New Zealand for a period, as I recall it, of approximately three months at some point over that period.

[22] On the affidavits already filed, there is no dispute that the parties were experiencing some difficulties in their marriage in mid-2015. Ms Olsson was then made redundant from her job in Malaysia. There was no dispute that together they

agreed to try and patch things up for the sake of the children and to move to live in Abu Dhabi, which they did in December 2015.

[23] The children have dual citizenship, Sweden and New Zealand. In December 2015, both children were attending schools in Abu Dhabi. There is no dispute that they were involved in activities outside school including sports. They had friends and were involved in social activities there. Mr Culpan has said that Joe was involved in cricket, rugby and golf in Abu Dhabi and Abby was involved in gymnastics twice a week. Mr Culpan did not disagree with Ms Olsson's statement that in Abu Dhabi the children were attending two of the top schools in the Middle East.

[24] From 2012, Ms Olsson was the parent committed to full time employment. Mr Culpan had a greater role in looking after the children. Mr Culpan has not disagreed with Ms Olsson's statement in her affidavit that, when the children were not at school, they were cared for by their father because she was in full time employment but that she had a significant involvement with the children's care, attended all their school activities where parents were invited, was involved with both schools, spent time actively involved with them during the evenings and in the mornings, preparing their lunches and driving them to school, and that she was actively involved with them at weekends. He did make the point that her work required her to work long hours which sometimes meant that she got home from work a little later in the evenings. But, the undisputed evidence indicates that they were involved in co-parenting these children.

[25] A school report available for Abby from Abu Dhabi from December 2016, brief reports from the preschool and school at which the father has enrolled the children in Christchurch and a letter provided by a family friend of the Culpan family who is also a guidance counsellor all suggest these are both well adjusted young children without major problems.

[26] In an affidavit filed in the Christchurch Family Court, Mr Culpan has said that there were no safety concerns for the children in his or their mother's care. In that affidavit he also said that neither of the children has any special needs.

[27] In the latter part of 2016, the parents discussed arrangements for Mr Culpan to go to New Zealand with the children over Christmas for a time.

[28] Mr Culpan has not disagreed with Ms Olsson's statement that, in September 2016, they discussed Mr Culpan taking the children to New Zealand for a holiday, that Ms Olsson agreed to this but there was no further discussion about it until the first week of December 2016 when she agreed to that trip for two weeks, arranged for her free yearly air tickets to be used for the children and paid for Mr Culpan's air tickets. They also obviously considered the possibility of Ms Olsson travelling with the children to a country away from Abu Dhabi at Easter 2017.

[29] It appears, from the affidavits I have seen, that neither party discussed with the other the likely breakdown of their marriage. It is nevertheless apparent from emails which Ms Olsson produced with her affidavit that, from early November 2016, Mr Culpan was intending to separate. By December 2016, he had said to his parents that he had no wish to return to Abu Dhabi after the Christmas holiday. Through accessing Mr Culpan's emails (which she did without his agreement), Ms Olsson must have known of his intentions.

[30] As a result of seeing those emails, Ms Olsson said she wanted Mr Culpan to sign a document to assure her that the children would return to Abu Dhabi and their home after their holiday in New Zealand. She prepared a document which both parties signed. The full text of that document is set out below:

**Contract**

Between

Neill Valentine Culpan (Passport number LH954802), hereafter in the contract known as Neill

And

Anna Cecilia Adele Olsson (Passport number 90177881), hereafter in the contract known as Anna

This contract is drawn up to bind both parties to the set of terms within this document in relation to their join children;

1) [Joe] (Passport number LN707433), hereafter in the contact known as [Joe].

2) [Abby] (Passport number LK614166), hereafter in the contract known as [Abby].

Contract Clauses:

**1. Residence**

1.1 Place of permanent residence: The permanent residence of [Joe] & [Abby] is Villa 46, Al Mushrif Garden Compound, Abu Dhabi, United Arab Emirates.

1.2 Place of permanent residence: The permanent resident of Neill & Anna is Villa 46, Al Mushrif Garden Compound, Abu Dhabi, United Arab Emirates.

**2. Schooling**

2.1 [Joe] is enrolled and is attending year 4 at Brighton College, Abu Dhabi, United Arab Emirates. Brighton College has been notified and is expecting [Joe] to start Spring Term, 8th January 2017.

2.2 [Abby] is enrolled and is attending year KG1 Amity International School Abu Dhabi, United Arab Emirates. Amity International School has been notified and is expected to start Term 2, 8th January 2017.

**3. Christmas Holidays**

3.1 It has been decided and mutually agreed that [Joe] and [Abby] will travel to Christchurch to celebrate Christmas with Neill in New Zealand on 15th December 2016.

3.2 It has been decided and mutually agreed that [Joe] and [Abby] will return by flight to Abu Dhabi, United Arab Emirates on 31st December 2016.

3.3 Upon their return to Abu Dhabi International Airport on 1st January 2017, they will be taken to their permanent residence as per point 1, 1.1 and 1.2.

**4. Easter Holidays**

4.1 It has been decided and mutually agreed that [Joe] and [Abby] will travel with Anna to celebrate Easter to a location outside the United Arab Emirates to be advised by Anna (before 15 February 2017), on 24th March 2017.

4.2 It has been decided and mutually agreed that [Joe] and [Abby] will return to Abu Dhabi, United Arab Emirates on 8th April 2017.

4.3 Upon their return to Abu Dhabi, they will be taken to their permanent residence as per point 1, 1.1 and 1.2.

Should either party, Neill or Anna break the terms set out in this contract, it will be automatically taken as;

1) The parent has unlawfully abducted [Joe] or [Abby] against the other parent will.

2) The parent is using unlawful detention of [Joe] and [Abby] against the other parent will.

I hereby understand and agree to all the Contract Clauses in this contract and any disputed will be govern by The Hague Convention regulations and the laws of Sweden or New Zealand.

| | |
|---|---|
| Signature | Signature |
| Anna Olsson | Neill Culpan |

[31] There is no dispute with Ms Olsson's evidence that they had both intended this document would be signed before a notary public at the New Zealand Embassy on 14 December 2016 but the relevant person was not there. Mr Culpan does not contradict Ms Olsson's evidence:

> 6. When we were unable to, I said I would not let him go with the children until the document was "legalised". He said his mother was not well and had to go into hospital on 16 December, and "how can I live with myself if the children did not see their grandmother again". He started to cry and told me, "I only want to go home to see my new born niece and spend the holidays in New Zealand. I promise to return. My lawyers in New Zealand have advised me that if I sign the document I am not able to remain in New Zealand".

[32] I do not accept the assertion made by Mr Culpan that he signed the agreement only under duress. I note and accept the submission that was made for Ms Olsson that, if there was duress at the time it was signed, it was duress on Ms Olsson.

[33] Mr Culpan did not return the children to Abu Dhabi as he had agreed to on 1 January 2017. There is no dispute that initially he told Ms Olsson he was extending their holiday in Christchurch but on 27 January 2017 he advised Ms Olsson through a telephone call that he was not going to return the children to Abu Dhabi. On 29 January 2017, without any further consultation with their mother, Mr Culpan wrote to the children's schools in Abu Dhabi advising that they would not be returning.

[34] The emails produced by Ms Olsson indicate that Mr Culpan was taking advice from his father in Christchurch as to how to progress his intentions over a separation. In an email to his parents of 8 November 2016, Mr Culpan said he had three options. Option one was to prepare and present a proposal to Ms Olsson which would keep him in Abu Dhabi in the short term with the children. Option two was to seek the assistance of Abu Dhabi courts in the hope of obtaining support for his

move back to New Zealand with the children. Option three was to go to New Zealand with the children and not come back. In that regard, he noted there was no Hague Convention agreement with the UAE and that there were obvious negatives with this option but it could be used as a last resort.

[35] The advice from his father was to:

1. make it difficult for Ms Olsson to find his emails;

2. conceal from Ms Olsson the fact he was approaching a lawyer; and

3. make sure she had no idea of his three options.

[36] The terms of the agreement the parents signed were clear. Both parties were acknowledging that their then residence in Abu Dhabi was the permanent home of both them and their children. That is consistent with the way Ms Olsson has said the children refer to their place in Abu Dhabi as "home".

[37] It is clear that both parties were committing to the terms of that agreement, agreed they were to be bound by it and accepted there would be serious legal consequences if either of them breached it. There could be some argument as to what was meant with their reference to the Hague Convention, given the Hague Convention imposes obligations on party states rather than individuals. The Hague Convention is also intended, subject to certain exceptions, to ensure that disputes over the care of the children are determined by the courts and in accordance with the jurisdiction in which the children were living before an abduction occurred. The parties here agreed that any dispute arising out of a breach of the agreement should be determined according to the law of Sweden or New Zealand.

[38] The agreement has to be interpreted having regard to the intention of the parties and the context in which it was entered into. I am satisfied that both parties would have understood that it meant, in the event of either party not returning with the children to Abu Dhabi after taking them from Abu Dhabi for a holiday, they would be obliged to bring the children back to Abu Dhabi and to have any dispute over their non-return determined while the children continued to reside in Abu Dhabi.

[39] In his affidavit, Mr Culpan has provided information as to why he considers it would be better for the children in the future to be in his care in Christchurch. Whether or not that is so, is not an issue which I must determine. By this agreement, both parents recognised that Abu Dhabi was their home and, in the event of a dispute because of a breach of the agreement, it would be appropriate for the children to be living in Abu Dhabi, at least for the immediate future.

[40] In his affidavit of 16 February 2017, Mr Culpan says he had no intention in November 2016 of staying in New Zealand. This is despite what the emails between him and his parents might have indicated.

[41] Given the agreement which these parents entered into, there can be no suggestion that the children would be at risk if they have to return immediately to Abu Dhabi and there is no evidence of any such risk.

[42] Mr Culpan has clearly breached an agreement which these parents entered into to deal with important issues concerning their children. If I were to refuse the current application on the basis the breach of this agreement should more appropriately be considered through proceedings in the Family Court, I would effectively be doing nothing in response to Mr Culpan's breach of the agreement he has entered into.

[43] In the context of a separation, which is inevitably going to cause sadness to the children, one of the best things parents can do is to agree between themselves as to the arrangements which are put in place for the children. These parents did reach such an agreement to deal with some initial issues. It is also of vital importance to children that parents be able to trust each other to abide by and respect the agreements which they have entered into. That will be particularly important where the parents may be living far apart or in different countries.

[44] In this instance, sitting in the High Court, I should recognise the parens patriae jurisdiction in which this Court has to look after the welfare of a child.[7] The

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[7] The *parens patriae* jurisdiction, was described by Heath J in *Chief Executive, Ministry of Social Development v S* (2009) 28 FRNZ 236 at [32] as the "wardship jurisdiction", derives from the right and duty of the Court "to take care of those who are not able to take care themselves", and

Court also has that jurisdiction available to it through the powers which I can exercise, the powers conferred on a Family Court by the Care of Children Act 2004.[8] I thus can and do consider the welfare of the children as a paramount consideration, but that is only to the limited extent necessary to deal with the breach of the agreement.

[45] Sitting in this Court, I should ensure that the children's relationship with their mother is not prejudiced through the Court permitting the father to continue with a state of affairs which results from a deliberate breach of the agreement. That is particularly so when there is evidence that he has been, using the words of his father, "canny and strategic" in the way he has chosen to deal with the situation.

[46] There is evidence from Ms Olsson as to how each of the children has indicated to her that they are upset by the situation they are in. There is evidence from Mr Culpan which indicates Joe is sensitive to the conflict that now exists between the parents as a result of the breach of the agreement. According to his father, Joe has not been opening emails from his mother.

[47] Mr Wilding noted the way the parents, and inevitably that means the children, may be prejudiced in tolerating delays in dealing with a particular situation where an immediate and short term change may be justified. He cited an observation from the authors of the Lexis Nexis Family Law Service:[9]

> Inevitably, the passage of time will result in a defacto determination of the matter for better or worse. First, delaying matters allows a party to establish a status quo. Secondly, the longer a child is influenced by one parent against another and nothing is done about it the more entrenched the problem becomes and the more difficult to fix it. The lawyer on the other side, the lawyer for the child (if appointed) and the Court should be wary to the tactic.

[48] In January 2017, Mr Culpan filed an on notice application with the Family Court for an order preventing the removal of the children from New Zealand. Ms Kearns has pointed out, without contradiction, that Mr Culpan took those steps

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recognises the role of the Court as having "the ultimate right of supervision over all infants" see: *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA) at 272 and *M v M* [1983] NZLR 502 (CA) at [506].

8 Care of Children Act 2004, s 13(1); Habeas Corpus Act 2001.

9 Lexis Nexis Family Law Service 6.104A.03.

without the solicitors for Ms Olsson being informed, despite their having advised Mr Culpan's solicitors of their involvement. He also put a CAPPS listing in place and a temporary border alert in relation to the children. Though I do acknowledge that the application filed in the Court was to be on notice.

[49] In the form which Mr Culpan had to complete in making that application, he was required to list "all relevant facts", to tell the Court why the orders he was seeking should be made and, all details of how things would change for the children if the Court made the orders sought and all details of why the orders would be of benefit to the welfare and best interests of the children. Although he said in that document that, before he left Abu Dhabi, Ms Olsson had made him sign a document stating that he would return the children to Abu Dhabi, he did not produce that document with his application.

[50] In his affidavit, Mr Culpan makes a number of assertions as to how the children would be better off living with him in Christchurch. In dealing with the habeas corpus application, I am not required to make any assessment as to whether there is merit in what he says, except to the extent I have a discretion to consider whether the writ should be refused on the basis his breach of the agreement should be more appropriately considered in proceedings in the Family Court. The issue for me is whether a habeas corpus writ should be issued to obtain the return of the children to Abu Dhabi so that issues as to their future care can be sorted out between the parties, with or without the assistance of a court while they are living there.

[51] Mr Culpan argues that a compelling reason for not requiring their return is that any dispute between the parents over arrangements for the children would be determined in Abu Dhabi in accordance with the Sharia Law system when neither parent is Muslim. He also suggested that the idea of the male being a primary caregiver of children is a foreign concept in the UAE. Even if that is so, I do not accept that would justify my refusing the current application.

[52] It is far from inevitable that, with the children returning to Abu Dhabi in the UAE, issues over the future care of the children would have to be determined by a court in the UAE. Mr Culpan is now resident in New Zealand. The Family Court

thus has jurisdiction to deal with the proceedings over care arrangements although it would have a discretion to decline jurisdiction if it considered no useful purpose would be served by making orders in New Zealand or that making an order in New Zealand would be undesirable.[10] In January 2016, Mr Culpan filed an application for an order preventing the removal of the children from New Zealand. While it is not for me to predetermine what decision the Family Court should make in relation to the continuation or commencement of any proceedings there, it would be relevant that the parents agreed that any dispute in relation to the agreement they entered into would be governed by the Hague Convention regulations and "the laws of Sweden or New Zealand".

[53] It is also Mr Culpan's evidence that, throughout their lives, the children have made regular visits to New Zealand. Ms Olsson supported Mr Culpan in his wish to have the children with him in New Zealand for a holiday over this latest Christmas period. There is no evidence before me to suggest that, if she were to become involved in proceedings in the Family Court in New Zealand, Ms Olsson would simply refuse to respect any orders that might be made here and would actively ensure the children were never in a situation where the orders of a New Zealand Court could be enforced.

[54] For that reason too, I do not accept there would be particular risks for these children if, in accordance with the agreement which their parents entered into, the children in the short term have to return to live in Abu Dhabi, even though the UAE is not a party to the United Nations Convention on the Rights of the Child and the Convention on the Civil Aspects of International Child Abduction (the Hague Convention).

[55] In his affidavit, Mr Culpan has referred to difficulties he would face if he has to return to Abu Dhabi. I have been told this morning, through counsel, that certain agreements have been reached which would ensure there were no legal impediments to his going back to Abu Dhabi and obtaining a visa for, as I understand it, three months. Though, I accept with his now being separated from Ms Olsson and with his not being in employment in the UAE, there would be some practical difficulties

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[10] Care of Children Act 2004, s 126(1)(b).

for him if he were wanting to live in Abu Dhabi, whether for the short term or medium term. However, even if such difficulties are going to eventuate, they are not matters which I can take into account in giving effect to s 14(1).

[56] Mr Wilding has advised me that Ms Olsson has the benefit of an order made in Abu Dhabi on 12 February 2017. The translation states:

> Abu Dhabi Court of First Instance – Summary Personal Affairs Department ordered to oblige the respondent to return his two children ([Joe] and [Abby]) to the marital home by his guidance to ensure their residence therein with mother, the claimant, in the case of failure to comply, he is ordered to hand them over to their mother.

[57] The order is not registered or registrable in New Zealand. There is no evidence that the application was considered in terms of New Zealand law, as the parents had agreed should be required if there was a breach of the agreement. Although, in all the circumstances of this case, it is likely that an order to a similar effect would have been made applying the laws of New Zealand, in particular the Care of Children Act. But, in the particular circumstances of this case, it is because of the breach of the agreement that I consider the children have been unlawfully detained in New Zealand. The fact the order was made in Abu Dhabi therefore is not an essential ground for the particular finding I have come to in that regard.

[58] Through the habeas corpus jurisdiction and if it had been required through the exercise of powers under the Care of Children Act, in the High Court I have the ability to ensure that the dispute between these parents over the breach of their agreement is dealt with promptly. I accept that transferring the proceedings to the Family Court would inevitably result in delay that is now avoidable and undesirable having regard to the welfare of the children. In the particular circumstances of this case, sitting in the High Court, I should not be deflected from the duty, pursuant to s 14(1) of the Act, or the responsibility which I have to the children in terms of this Court's parens patriae jurisdiction or the powers available to it under the Care of Children Act.

**Conclusion**

[59] I am satisfied that Mr Culpan's retention of the children in New Zealand was in breach of the agreement the parents entered into. On that basis, Mr Culpan has not satisfied me that his detention of the children in New Zealand is lawful. In the circumstances of this case, I am satisfied the application for a writ of habeas corpus is an appropriate procedure to deal with the situation.

[60] Accordingly, s 14(1) of the Act requires me to make orders which will effectively enable these children to return to Abu Dhabi so they can live there while any ongoing issues between the parents over their care are resolved. Hopefully, despite what has already occurred, this will be achieved through agreement. If not, it will be for those issues to be determined by a court of competent jurisdiction.

[61] In deciding to issue a writ, I am not making any determination as to what arrangements will, in the long term, be in the best interests of the children. I am not making any determination as to the jurisdiction in which issues over the long term care of the children should be determined. I am however clear that it will be in the interests of both these young children for their parents to respect and abide by the agreement which they entered into as to where the children should be living at the end of their Christmas holiday period in New Zealand.

[62] I have accordingly decided that, in this case, it is appropriate for me to give judgment that the writ should issue.

*[63] I then adjourned the hearing until later in the day to give the parties an opportunity to agree on further conditions as to the issuing of the writ or by way of orders under the Care of Children Act to provide for the immediate welfare of the children and to facilitate the continuing involvement of both parents in the lives of the children. This was to be done on the basis Ms Olsson would be returning to the UAE with the children on Tuesday 21 February 2017.*

Solicitors:
Lynda Kearns, Barrister, Auckland
Cuningham Taylor, Christchurch
AJF Wilding, Barrister, Christchurch.