IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA **APPELLATE JURISDICTION**	
APPEAL NUMBER:	**22/Suv/ 0001** ***(From Family Division of the Magistrate's Court Case Number: 21/Suv/0186.***
BETWEEN:	***Irma*** ***APPELLANT***
AND:	***Jeremy*** ***RESPONDENT***
Appearances:	*Ms. A. Ali for the Appellant.* *Ms. N. Choo for the Respondent.*
Date/Place of Hearing	*Friday 22 April 2022 at Suva*
Date/Place of judgment:	*Friday 29 April 2022 at Suva..*
Coram:	*Hon. Madam Justice Anjala Wati*
Category:	*All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.*

JUDGMENT

A. Catchwords:

FAMILY LAW *– Does the Court have jurisdiction to continue to hear matters concerning international children when they are not habitually resident in Fiji and the mother on whose visa the children arrived in Fiji are no longer on a valid permit and the mother needs to leave Fiji to return to her place of habitual residence – Does the filing of a matter and obtaining of the interim orders involving international children whose habitual residence is not Fiji give the Court powers to have indefinite jurisdiction to hear the matter - should a Court get involved in mediation or settling a matter involving parties to the litigation and the procedure it should adopt when the matter does not get settled – whether the Court had given due and proper consideration that there was an urgent matter before it which needed to be tried and determined and should it have adopted any approach that may cause an impediment to hearing the application on an urgent basis – whether the conduct of the judicial officer who had allowed himself to*

be involved in the settlement of the issues between the parties appropriate or does it appear that the judicial officer conducted itself unfairly in the settlement giving rise to apparent bias - which Court is the appropriate forum to make an application for transfer of proceedings from Family Division of the Magistrate's Court to Family Division of the High Court- should the father pay costs of the proceedings- appropriate final orders that needs to be issued in the matter.

B. Conventions:

1. *1980 Convention on the Civil Aspects of International Child Abduction: ("1980 Convention").*
2. *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility And Measures for the Protection of Children: ("1996 Convention").*

C. Legislation:

1. *Constitution of Fiji: s. 41(2).*
2. *The Family Law Act 2005 ("FLA"): ss. 17 (3); 28; 129.*
3. *Family Law Rules 2005 ("FLR"): Rule 5. 14.*
4. *The Family Law Regulations 2005 ("FLReg."): Part VI; Reg. 62..*

A. Cause and Background

1. The mother has filed an appeal against the decision of the Resident Magistrate when he dismissed her application to recuse himself from the proceedings before him and to transfer the matter to the High Court.

2. I will briefly outline the background to this matter. The mother is a German citizen. The father is an American citizen. They have two children, both males. They were both born in Cologne Germany. The first child was born in January 2016 and the second child was born in February 2018. They are now 6 and 4 years old. The children are both American and German citizens.

3. The parties have never been married. Before coming to Fiji, the mother was living with the children in Germany and the father was living in Lebanon. The mother's contention is that

the relationship between the parties was over when she was pregnant with the second child and that for the past 4 years, the father has been seeing the children in Germany. He has been travelling from Lebanon to see the children.

4. It is important that I briefly outline when and how the parties and the children came to Fiji. On 1 November 2019, the mother came to Fiji to work for UN- Habitat. She says that she was on a short term renewable contract. Her initial contract was to last until May 2022. However the same was terminated on 31 December 2021.

5. The children have been staying with their mother in Fiji as her dependents. The mother's work permit has now been cancelled as requested by her employer. The UN- Habitat wrote to the Director of Immigration Department on 6 December 2021 and informed that the mother's contract had come to an end and that it was making a request to cancel her work permit. The letter to the immigration department in its material part reads:

   "…Ms. Korte's contract has come to an end as of 31st December 2021 and will not be renewed. We therefore need to request the cancellation of work/resident permits for the following personnel and her dependents as she will no longer be required to stay in Fiji to work for the United Nations after 31 December 2021. Her dependents were issued permits to reside with her for the duration of her contract, and subsequently those have to be cancelled as well.

   We have booked her and her dependents on a flight leaving Fiji on 20th December 2021…."

6. The mother has provided to the Court information from the Immigration Department regarding her permit to stay in Fiji. On 11 April 2022, the Immigration Department has provided information to the effect that the mother and the children's exemption visa which was granted to the mother on 16 October 2019 has been cancelled on 14 January 2022.

7. The mother says that when she arrived in Fiji on 1 November 2019, she rented a 3 bedroom house in her name. Her mother travelled with her and the children to Fiji for several months. The mother also employed a full time nanny to care for the children.

8. According to her, the father came to Fiji for an access visit with the children in or about December 2019 for a short while and again on 22 February 2020. Due to the outbreak of the Covid 19 pandemic and the closure of Lebanon's borders as well as Fiji's, he remained here. He was working remotely for his employer in Beirut for a few months before his contract was terminated. Due to the pandemic, the father stayed in Fiji on a tourist visa.

9. It is the mother's version that the father claimed to have no funds of his own and she therefore permitted him to stay in her spare room until he could make other arrangements. He sought employment in Fiji and was unable to obtain a job and work permit until February 2021. According to the mother, she had to sponsor a special purpose permit for the father to reside in Fiji as the Fiji Immigration Department would not grant him work permit for UNCIEF from a tourist visa.

10. The living arrangements between the parties carried on for some 11 months. The mother says that the arrangement was inconvenient for her but she had no other choice as it was not in the best interest of the children to put the father out on the street. The mother says that during this time, the parties communicated formally with each other by way of social media communication.

11. She says that in January 2021, she informed the father that she was extremely unhappy with the arrangement and that he was to move out. He opposed.

12. The mother says that finally in April 2021, she was compelled to notify him in writing that he had to find alternative accommodation. She says that despite agreeing to move out, his behavior towards her and the children became increasingly concerning to her. She says that she tried to appease the father by suggesting variations to their living conditions. She says that the father would agree but then not follow through with any of the agreed plans.

13. She says that by 9 July 2021, she became sufficiently concerned about his treatment of the children and her. He wanted her to move out of the apartment with the children.

14. The mother says that she repeatedly requested that both of them meet with their respective solicitors to discuss terms whereby the father could spend time with the children and their nanny for the duration of his stay in Fiji.

15. According to her, he would agree to meet and then change his mind. He also refused to have supervised visits with the children and insisted that he would only see them if he could have equal and unsupervised residency of the children.

16. The mother says that she was reluctant to let the children in the care of the father alone. He had no real experience with caring for the children on his own and had engaged in concerning behavior such as giving children melatonin every night to induce sleep and leaving his anti-depression drugs within the reach of the children.

17. The mother then sought legal opinion from her solicitor in Germany, a solicitor in Fiji, and a child psychologist in Fiji. She says that she received advice from the German solicitor that Fiji could exercise jurisdiction to determine the residency and contact issues in relation to the children for the duration that she was residing in Fiji with her children.

18. The mother says that the Fiji psychologist advised that based on the evidence presented to them, the children were at risk and should not have unsupervised access with the father. Out of concern for the welfare of the children and the need to put a formal structure for contact with the children in place, the mother says that she decided to make the applications to the Family Court that she felt could be applied for the duration of the time the children were residing in Fiji.

B. Proceedings in the Magistrate's Court

19. The mother filed her application first in time In July asking for residence of her children. The case was allocated a number 21/Suv/0186. The father then also filed an application seeking

orders for joint residence. His application was unfortunately allocated a different number being 21/Suv/0189. The matters were consolidated in December 2021.

20. On 28 July 2021, the father's application was called ex-parte in Court. The mother, having heard of the matter appeared in Court without notification and handed the children's passport to the Court. She says that she did this as an indication of good faith that she and the children will not leave Fiji without the knowledge of the father.

21. On 5 August 2021, the parties were granted interim consent orders. The mother was given the residency of the children and the father had contact of the children for 7 hours a day in the accompaniment of their nanny.

22. The mother subsequently obtained a Domestic Violence Restraining Order ***("DVRO")*** against the father vide action number DVRO No. 161 of 2021. The order for contact was then cancelled. The father was only granted video calls with the children.

23. Further applications were then filed in Court including the application for return of the children's passport so that they can leave Fiji as their exemption visa was coming to an end. The other applications are child abuse applications, contempt proceedings, and domestic violence restraining orders applications along with the parenting order applications.

24. The application for the return of the children's passport was set down for hearing on 13 November 2021. On the day of the hearing, the father and his counsel made it clear to the court that all that they wanted was an unimpeded contact of the children. The father through his counsel informed the Court on this day as his initial proposal that he knew that the children need to leave Fiji but that he will only agree to the application to leave Fiji if he was given unimpeded contact without supervision. The father and his counsel wanted the mother and his counsel to hear the proposal and see whether the matter could be settled.

25. Initially the parties started discussing the settlement on their own but then when a settlement could not be reached, the Court took active part in their discussion. Arising out of the

Magistrate' involvement in the settlement and what happened on 13 December 2021, an application for recusal was filed amongst other applications.

C. The Subject Applications before the MC:

Recusal/Transfer to High Court and Stay of Proceedings for Want of Jurisdiction.

26. The application for recusal and transfer was filed on 7 January 2022. The application sought the following orders:

1. *An urgent, expedited and emergency hearing of the application to determine the orders sought herein.*

2. *A stay of all proceedings in the matter pending the determination of the application.*

3. *The recusal of the Resident Magistrate from all the proceedings.*

4. *The transfer of all the proceedings in its entirety to the High Court – Family Division.*

5. *In the alternative, a transfer of the mother's application by Form 12 and Forms 23 filed on 17 November 2021 and 30 November 2021 respectively and this application to the High Court Family Division for emergency hearing due to the importance and urgency of cross-jurisdictional issues in the matter as the mother and the two children are state-less in Fiji and that one child's German Passport was going to expire on 1 February 2022 leaving him without any valid passport.*

6. *An order that the father takes all immediate steps for the renewal of the passport of the child.*

7. *An order that the mother be permitted to withdraw all of the proceedings.*

8. *An order that the applications filed by the father in the Family Division be struck out on the grounds that it is an abuse of the process of the court, is frivolous and vexatious pursuant to s. 207(1)(a) of the Family Law Act.*

9. *An order that the father may not, without leave of the court institute any further proceedings under the Family Law Act.*

10. *An order that the appropriate forum for the parties in which to pursue their applications with regards residency, access, custody and financial child support of the children is Germany.*

D. Findings of the Magistrate's Court

27. The Court stated that it was with consent of the parties that it had decided to first hear the application for recusal and transfer followed by the application to stay the proceedings on the ground that it does not have jurisdiction to hear the case or is clearly an inappropriate forum to hear the matter.

28. The application for recusal and transfer was heard on 14 January 2022 and the ruling on the application was delivered on 17 January 2022. The ruling on jurisdiction and forum conveniens was delivered on 31 January 2022.

29. I will first summarise the findings of the Magistrate's Court on the issue of jurisdiction. Since the application in the Court involved the children, the Court below looked at s. 129 of the FLA to determine whether it had jurisdiction to hear the proceedings. It found that when filing the applications in Court, the mother had submitted that both parties were present in Fiji Island and were ordinarily resident in Fiji too.

30. The Court commented that it was not able to understand the rationale when the mother's counsel agreed that the Court had jurisdiction however Germany was the appropriate forum to hear the matter regarding the children. The Court stated that the mother had filed the applications and obtained interim orders. The mother's counsel did not caution the Court that it was not appropriate for the Court to make those orders as the appropriate forum was Germany. The Court then rhetorically commented *"how is it that for interim orders the Fijian court was appropriate but to finalize the issues the parties should be subject to the German Courts".*

31. The Court also found jurisdiction to hear the matter and found Fiji to be the appropriate forum on the basis that there are child abuse applications before the Court which involves social welfare department to prepare reports. The Court found that the issue of child abuse relates to happenings in Fiji. It said that it was beyond comprehension how the parties can take these issues and get the German Courts to adjudicate in these matters.

32. Now to the findings on the recusal application. The Court set out the principles on which the application for recusal was to be considered. It said that:

    1. *The first legitimate ground for disqualification is when a judicial officer has interest in the outcome of the case, unless the rule of necessity applies.*

    2. *The second ground for disqualification is apparent bias. Disqualification under this ground is approached as how things might appear to an observer.*

33. The Court found that the mother did not urge that the judicial officer has an interest in the case. It also stated that it has no interest in the case.

34. In determining the 2nd ground pursuant to which the application was based, the court dealt with various allegations and grounds based upon which the application was founded.

35. The Court found that it did not decide on its own accord to steer settlement. The parties were willing to negotiate settlement. It only assisted the parties when they were negotiating. The Court found that it was in the interest of the parties that they reach the settlement as the mother wanted to leave before the end of the year. It was in her interest to leave before end of December. The father wanted to see his children before they left. The Court found that when they did not reach a settlement, the negotiations stopped and the Court did not force any party to continue with the negotiations.

36. On the ground that the Court placed pressure on the mother and the nanny, it found that none of the parties were under pressure from anyone. The parties had their lawyers representing

them. They were trying to reach a settlement which would have allowed the mother and the children to leave at the end of December 2021.

37. In response to the ground that the Court was unruly and not properly controlled. The Court found that when it noticed that a party or a lawyer made snide remarks, it appropriately dealt with them. It found that at certain times, the behavior of certain lawyers was not professional. They were reminded of their duties to the Court. It did not at any point in time tolerate unruly behavior. The Court further stated that when the matter was stood down, a commotion was heard. It intervened to calm the situation. It did not step in to do a favour to anyone. It did so to protect the sanctity of the Court. It will not hesitate to carry out its role and will do so without fear and favour.

38. In its findings on the allegations that the Court did not care about the mother's situation, the Court said that on every occasion each party was given an opportunity to be heard. They had adequate legal representation. The Court hears all the evidence and then makes the decision. The matter involved the parents and the children. They all needed consideration. The Court cares about and hears all the evidence. It stated that each party's circumstances may be different. The Court has to hear all the issues and then make a decision.

39. On the ground that the father, the Family Court and the Magistrate was holding the applicant and the children hostage, the Court found that the parties have come to the Court to seek a resolution to their dispute. The parties had by consent deposited the children's passport in Court until the determination of the matter. The lawyers were at liberty to move the Court in case of medical emergency for the release of the passports. The Court found it mischievous for the mother to allege that the Family Court and the Magistrate was holding the children hostage. There were issues relating to the children that needed to be resolved. The Court said that it had no interest in restricting anyone's movement.

40. On the allegation of comforting the father after the commotion on 13 December 2021, the Court found that at no point in time did it comfort the father. The mother's submission that the Court should not have intervened was rejected by the Court on the basis that it cannot close its ears to commotions by lawyers or parties in Court or its precincts. Upon hearing the

commotion, the Court said that it intervened and the moment it did, there was calm. The lawyers, the Court remarked, would agree to this. The Court found that the situation was properly handled by it and the mother is distorting what happened in Court when she says that the Court mentioned that things will be resolved in the man's favour. No such words, the Court remarked was ever said.

41. In its concluding remarks on the recusal application, the Court said that recusal applications are not to be taken lightly. It is a serious issue to demean the Court and put forward frivolous applications. It is serious that a Court has to defend itself from misleading and false allegations. The Court stated that it liked to remind the counsel for the mother that she makes submissions to the Court that she knows what the outcome will be and that no matter what happens they will appeal the decision. These are not proper and professional remarks of a lawyer. The Court said that this is not the first occasion that it is highlighting this to Ms. Ali. It has done so in previous matters.

42. The Court then found that the real question is whether the fair and informed observer having considered the facts would conclude that there was a real possibility that the Court was biased. It found that a fair minded and informed person observing the proceedings would have noted impartiality and proper handling of the matters. Therefore the application for recusal was to be dismissed.

43. The issue of transfer of the matter to the High Court was also dealt with by the court. The court found that the law allowed for transfer of proceedings to another Court in the interest of justice or of convenience to parties. The Court cited s. 28(2) (b) of the FLA and said that it states that ***" if it appears to the court that it is in the interest of justice, or of convenience to the parties, that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer proceedings to the other Court".***

44. It also applied Rule 5.1 4 of the FLR which provided for transfer of proceedings between courts. It identified the factors that the Rules required consideration and said that none of the parties had addressed these the factors. It then went to make a determination on each factor.

45. The Court stated that the mother wishes to have the matter tried in the High Court and the father wishes to have it heard in the Magistrate's Court. It said that there was no information that there are proceedings of an associate matter pending in the High Court. Whether the matter was going to be resolved in the High Court at a lesser cost, the Court found that there was no submission to this effect but it understood that higher fees are charged to appear in the High Court. Since no submission was made on convenience to the parties, the Court said that it could not speculate on the issue.

46. Further, the Court found that it was not in a position to speculate on the dates of the High Court to make a finding on whether the matter is likely to be heard earlier in the High Court. The Court said that speaking for its own Court, it can say that it deals with issues in a timely and prompt matter. It said that all along, this case was dealt with promptly and that it has been mindful of the urgency of the situation. The counsel not having suitable dates is beyond the control of the Court.

47. The Court also found that all procedures are available to the parties for the proceedings if the matter was to be heard in the Magistrates Court. The Court said that it had dealt with Domestic Violence and such similar applications. They do not involve complex issues which the Court cannot deal with. It said that it was not in the interest of administration of justice that the application for transfer be granted.

E. Grounds of Appeal

48. Aggrieved at the decision the mother filed an appeal from the decision on recusal and transfer and stated that the Court below has erred in many ways, in that it erred:

1. *In law and in fact when it combined the ruling on recusal of two files, DVRO File No. 161 of 2021 with Family Court Action 21/Suv/0186 without calling the DVRO file as a separate matter, thereby denying counsel for the father the opportunity to reply and denying both parties the right to be heard on the matter.*

2. *In law and in fact by ruling that the Court is permitted to assist with the parties while they were negotiating a settlement. The Family Law Act, Rules and Regulations expressly*

empower the Family Court Counsellor and the Family Court Registrar to assist the parties with settlements and mediation; not the Court itself. In particular the Court may not vacate a hearing date to mediate a compromise between the parties.

3. *In fact by stating that the Court "only assisted the parties while they were negotiating and that the Court did not force any party to continue with the negotiations"; the copy of the record will show that the Learned Magistrate's behavior went far beyond assisting and overstepped into judicial interference and placing duress on the parties.*

4. *In fact and in law when the Court stated that none of the parties were under any pressure from anyone; the copy of the record will show that the Court had the children's nanny brought to Court and attempted to cajole her into forfeiting the Christmas holidays with her own family and to spend it with the father and the children itself. The record will show that this resulted in the mother's counsel strenuously objecting that an employee, a Christian Fijian woman, could not be forced to give up a "Christian holiday with her family".*

5. *In fact when it stated that whenever the Court noticed that a party or lawyer made snide remarks the Court appropriately dealt with them. In fact, the Learned Magistrate ignored at least two requests from the mother's counsel to have the father cease making outbursts in Court and to remain silent, as the latter was sitting behind the mother's counsel, addressing her by her first name and insulting her. On a further compliant by the mother's counsel, the Learned Magistrate simply told the solicitor to ignore it.*

6. *In law and in fact when the Court stated that on every occasion each party was given an opportunity and heard. The Magistrate vacated a hearing date to mediate a compromise between the parties and thus neither of the parties was heard on the issue scheduled for hearing and still have not.*

7. *In fact when it stated that the Court finds it mischievous for the mother to allege that the Family Court and the Magistrate are holding the mother and the children hostage. On each occasion, including but not limited to 20 October 2021, the mother raised the issue*

of the impending termination of her work contract on 31 December 2021 and that she and the children will be in Fiji without a valid permit, the Learned Magistrate replied that it was not the Court's problem. It was her problem and the parties should not come to the Court with their timelines and deadlines. On each occasion that the Appellant raised that she would be left in Fiji without a source of income if the issue were not resolved before 31 December 2021, the Learned Magistrate stated that it was not the Court's problem. The Court has not dealt with the applications before it, particularly for the release of the children's passports, in an expeditious manner and the urgency of matters before the Court is a factor that the Court must consider in a due and proper manner, which the Court failed to do.

8. *In law and in fact when the Court refutes that he comforted the father and not the mother and that at no point the Court comforted the father. The Court had adjourned for the day on 13th December 2021 when the Learned Magistrate re-entered the Courtroom from the back of the room after hearing a discussion between the parties, and he placed his hand on the father's shoulder and stated "don't be stressed. It'll all work out. We're almost there". This was witnessed by all parties including the mother and her solicitor and the mother's solicitor raised these facts in Court on the 14 December 2021 in an in chambers application and objected to the Learned Magistrate's actions, and he admitted that he had comforted the father.*

9. *In law and fact when he held that a fair minded and informed observer having considered the facts would not conclude that there was a real possibility that the Court was biased and that "things were distorted and frivolous allegations made against the Magistrate". The record will show that the mother's allegations against the Magistrate are factually correct and that the same was brought to the Magistrate's attention in an in-chambers application on 14 December 2021 and as such a fair minded and informed or objective observer could only conclude that the Magistrate was biased in favour of the father. That the Magistrate then dispensed with calling or hearing the application for his recusal in DVRO Application 161 of 2021 and rules out his recusal, further reiterates the allegation of bias.*

10. *In law and in fact when he ruled on the mother's application for an order to transfer of proceedings to the High Court without notifying the parties that it was being heard at the same time as the recusal application. When setting the date for the hearing of the application for an order of recusal, the Court stipulated that it has to hear the recusal before considering any other orders, hence nether party made submissions on the transfer issue, except for a single statement by the mother's solicitor, that the matter was so complex and involved questions of international law thus in the interest of administration of justice, the matter should be transferred to the High Court.*

F. Issues on Appeal

49. It is important that the issues on appeal be identified. I find that the grounds of appeal gives rise to the following questions to be determined:

1. ***Does this Court have Jurisdiction to continue to hear the matters involving the Children who are foreign nationals?***

2. ***Is Jurisdiction Infinite upon filing of the application and/or granting of the interim orders?***

3. ***Did the Court err in not urgently hearing the mother's application for return of the children's passport and for them to leave Fiji on an urgent basis on the grounds that the children will not have any valid permit to stay in Fiji after 31 December 2021?***

4. ***Should a Court in the Family Division get involved in mediation or assisting parties in settling a dispute?***

5. ***Does the facts of the case in this matter indicate any breach of principles of impartiality?***

6. ***What is the forum where an application for transfer of the matter or proceedings from the Magistrates Court to the High Court should be made?***

7. ***Did the Court below give the parties an opportunity be heard on the transfer application? If not, is there any prejudice faced by the parties in the matter?***

8. ***Should any party pay costs of the proceedings?***

50. Before I deal with the issues on appeal I must deal with the preliminary issues raised by Ms. Choo in the matter. She raised 2 matters.

G. First Preliminary Objection on Appeal.

51. Ms. Choo argued that the appeal before me relates to the judgment on the issue of recusal and transfer. She says that when the judgment was delivered, the mother appealed the decision. The judgment on the issue of jurisdiction and forum conveniens was delivered by the Court post filing of the appeal. It is therefore improper to cover the issue of jurisdiction and forum conveniens in this appeal.

52. I find that this Court, the father, and his counsel were put on notice that this is an urgent appeal as the mother and the children had no lawful status in Fiji. As a result of the urgency in the matter the mother did not wait for the ruling on jurisdiction to be delivered but appealed the first decision that was delivered, that is, the decision on the recusal and transfer application. She realistically could not be expected to wait for the decision on the jurisdiction issue.

53. Understandably, she then sought the orders that she did which are as follows:

1. ***The appeal be allowed.***

2. ***That all proceedings in the matter 21/Suv/0186 in the Magistrate's Court be immediately stayed and the mother's Form 12 and Form 23 application filed on 7 January 2022 be transferred from the Magistrate's Court to the High Court for an urgent hearing on the issue of jurisdiction and forum, and all remaining matters be***

allocated to another Magistrate or to the High Court as the High Court deems expedient.

3. ***That the DVRO Application 161 of 2021 in the Magistrate's Court be immediately stayed and transferred from the Magistrate's Court to the High Court for hearing in due course.***

4. ***Costs to be summarily assessed by the Court and paid by the father.***

54. 3 days after filing of the appeal, the judgment on jurisdiction was delivered. When the matter was first called in the High Court before me on 29 March 2022, I immediately fixed the matter for hearing on 13 April 2022. I had clearly indicated to the parties that the issue of jurisdiction and forum conveniens will be argued on the appeal.

55. It was only in the interest of justice and fairness to the mother that the issue of jurisdiction be heard although another appeal was not filed after the decision. The mother has not only appealed the decision on recusal and transfer, she has also sought from this Court an order that the matter be transferred to the High Court for me to hear the issue on jurisdiction.

56. By the time the appeal was called before me, the application for transfer became redundant as the ruling on the issue of jurisdiction was already delivered and as such it was only proper that in this appeal, the issue of jurisdiction and forum conveniens be examined on appeal with reference to the judgment of the Court below. There was no prejudice to the father and his counsel. They were told in advance and no objections were raised then. If an objection was raised, I would have dealt with the issue and given proper directions without causing prejudice to the mother's appeal.

57. I see no prejudice that the father has suffered in being asked to address the Court on whether Fiji has continued jurisdiction to hear the case. The father's counsel has also filed written submissions on the issue and has addressed me orally too.

58. If I heard the transfer application, I would in any way want to hear from the parties why I ought to transfer the matter and in doing so I would have heard what the legal complexities are. The parties would then have had to address me on the issue of jurisdiction anyway.

59. One must not lose sight of the fact that in this case the children are foreign nationals. They are now in this country without a valid permit to stay here. Their mother who had brought them to Fiji on her visa as her dependents wants to leave Fiji as soon as possible. The very core issue in her case is whether she should be allowed to leave the country given the pending applications in Court because this Court has jurisdiction and should continue with the proceedings. That is the urgent issue which overrides all other issues before this Court. It would be against the principles of the best interest of children if I were to subject the mother to file another appeal on the ruling on jurisdiction before I consider the issue. Little purpose will be served as the same issue can be heard in this appeal.

H. Second Preliminary Objection on Appeal

60. The second preliminary issue was that the counsel for the mother has supplied certain documents on appeal in a bound volume marked "annexures". Ms. Choo says that providing these documents amounts to giving evidence from the bar table and that the documents should be struck off the records.

61. Most of the documents in the annexures are already part of the records. I have seen that. However, I have only had regard to one document which is not in the records and that is the information from the immigration department on the legal status of the mother and the children in Fiji. This is an important information that I had asked the parties to provide to me when the matter was set down for hearing first. I had even asked the father to provide to me information on his legal status in Fiji. At the hearing I had obtained information from him as well.

62. In the Court below both the parties had been constantly saying that there is no current evidence on each other's permit to stay. They each were eager to know whether there was valid permit to stay and the basis on which each one was staying in the country. The current information was missing from the records and I therefore had called for the same.

63. The above information is very crucial in determining the issue of the best interest of the children. The information that the Court obtained through each counsel is information from the official records and it does not require any explanation and verification. The information is self- explanatory and both parties were given an opportunity to update the Court. The father cannot say to have been prejudiced when such information was obtained from the immigration Department by the mother and tendered in Court.

64. I have not taken regard of other documents that do not form part of the records. Those documents can be expunged from the records if the parties require. The exercise can be undertaken by the Registry in the presence of both counsel.

I. Law and Analysis

65. I will deal with the appeal under separate heads. I will start off with the issue of jurisdiction.

A. Jurisdiction and Forum Conveniens

66. In the beginning, I must make it clear that the issue of forum conveniens will only arise if it is found that both countries have jurisdiction in relation to the matter. If I find that Fiji does not have jurisdiction in the matter, the question of forum coveniens will not arise.

67. I must also say that the Court and the counsel for the father have worked on the basis that once the Court has jurisdiction in family matters concerning international children, it retains jurisdiction on the same until the proceedings are complete. That is not the correct position and my decision will in due course explain why.

68. Before I go to the relevant law, it is important that I mention at the outset that when proceedings concern children in international situations, jurisdiction becomes a finite concept. At one moment the Court can have the jurisdiction and the other moment it cannot have the jurisdiction to continue with the proceedings.

69. In such cases, when confronted with the issue of jurisdiction, the Court has to look at all the relevant laws in reference to the facts. The relevant laws are the Family Law Act, Rules and Regulations, the International Conventions that Fiji has acceded to and/or ratified and the Constitution of Fiji.

70. In this case, the Court below only relied on s. 129 of the FLA. It was informed by Ms. Ali several times, as the Court Records will reflect, to take into consideration the applicable International Conventions but it refused to. The counsel for the father also asked the Court to disregard the Conventions. The basis on which both the Court and the counsel for the father did not wish to cast their mind to the applicable Conventions will be identified shortly. Therein, the Court fell in error of law.

71. Ms. Ali's position always was that whilst Fiji had the interim jurisdiction to deal with the matter, it did not have the jurisdiction to continue with the matter or that it did not have the ultimate jurisdiction to hear the case when the mother's work permit was cancelled and she was no longer required to be in Fiji but to return to her country of habitual residence.

72. S. 129 is not the inappropriate law to look at in determining whether the Court had jurisdiction to continue with the proceedings. However, it is not the only provision which could or should have been relied on.

73. S. 129 of the FLA states:

"129(1) Proceedings may be instituted under this Act in relation to a child only if-

(a) the child is present in the Fiji Islands on the relevant day;

(b) the child is a citizen of the Fiji Islands, or is ordinarily resident in the Fiji Islands, on the relevant day;

(c) a parent of the child is a citizen of the Fiji Islands, is ordinarily resident in the Fiji Islands, or is present in the Fiji Islands, on the relevant day;

(d) a party to the proceedings is a citizen of the Fiji Islands, is ordinarily resident in the Fiji Islands, or is present in the Fiji Islands, on the relevant day; or

(e) it would be in accordance with a treaty or arrangement in force between the State and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.

(2) In this section "relevant day", in relation to proceedings, means the day on which the application instituting the proceedings is filed in a court.

74. The Magistrates Court had before it proceedings concerning children who were, at the time proceedings were instituted, lawfully present in the country. The mother who had brought them to Fiji on her visa as her dependents was also in Fiji. Both the parents had filed the proceedings asking for parental orders. That gave the Court powers to deal with the matter on a provisional basis and only to the extent it was necessary to address the issues regarding the children whilst they were in Fiji. That however did not mean that the Court was seized of the matter indefinitely.

75. Subsequently, the mother's circumstances changed. She was no longer required to be in Fiji. She was going to be left without work, an income and a proper permit to stay in Fiji. She then requested that she be allowed to return with the children to the country of her habitual residence and that the proceedings in relation to the children be tried there. She no longer wanted the Fiji Courts to continue to hear the matters concerning the children. There was therefore no consensus for the Court in Fiji to have continued jurisdiction in the matter.

76. The Court was then confronted with the question of whether it had jurisdiction to continue with the proceedings and not to bind the parties in this Court on the basis that they had filed the proceedings here indicating that they were ordinarily resident in Fiji Islands, and that the children and the parties were present in Fiji at the time of filing the case. That is a very narrow approach in making a finding on the issue of jurisdiction.

77. S. 129(1) (e) of the FLA very clearly states that the Court has to look at whether it would be in accordance with a treaty or arrangement in force between the State and an overseas jurisdiction, or the common law rules of private international law, for the Court to exercise jurisdiction in the matter. If s. 129 was looked at holistically, the Court would not have erred but given regard to the International Conventions too.

78. I reiterate that children before the Court are foreign nationals. They have lived in Germany almost all their lives. They may be citizens of America but they have never lived there. There was clear indication to the Court that the children's exemption visa was ending on 31 December 2021. The Court then ought to have looked at the question of whether the children would be lawfully present in Fiji for it to continue to exercise jurisdiction in the matter. With that the Court could not disregard the ***Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.***

79. Fiji is a contracting party to the above Convention. It has acceded to the Convention on 5-VI-2018. The Convention came in force in Fiji on 1- IV-2019. This Convention, amongst other matters, prescribes the state which has jurisdiction to hear proceedings concerning children in international situations.

80. Fiji, having acceded to this Convention must apply and observe the rights and obligations that arises under the Convention. For Fiji to be able to enforce its obligations, the Courts in Fiji must not refuse, neglect or ignore to apply the provisions of this Convention.

81. When this Convention was brought to the attention of the Resident Magistrate he conveniently dismissed it by saying that this Convention is within the purview of the High Court. It echoed the sentiments of the counsel for the father. I am highly disturbed at this comment. It is not only the duty of the High Court to apply Conventions that Fiji has become a party to and fulfill the obligations of the State. All the Courts in Fiji are under an obligation

to ensure that it gives the codification to the international law which applies to the country. It is a very draconian approach to refuse to do so.

82. Ms. Ali was asking the Court to look at the provisions of the Convention and apply the same in determining the issue of jurisdiction. On what basis then did the Resident Magistrate say that the Convention does not apply? I believe that the Court confused itself with the right to hear proceedings under the 1***980 Convention on the Civil Aspects of International Child Abduction***.

83. If proceedings for return of children or for access of children are brought under the 1980 Convention then it is the High Court in Fiji which has exclusive jurisdiction to hear the case: ***s. 17(3) of the FLA.*** This Convention concerns children who are wrongfully removed or retained in the country. The proceedings before the Court below did not concern issues of wrongful removal and retention. It was not a proceeding brought under the 1980 Convention. There was no basis therefore to refuse to apply the 1996 Convention in holistically looking at the issue of whether Fiji had jurisdiction to continue to hear the proceedings.

84. The preamble of the 1996 Convention clearly sets out the purpose of the Convention. It states that the state parties have considered the need to improve the protection of children in international situations. It goes onto state that the state parties were ***"wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children, recalling the importance of international co-operation for the protection of children, confirming that the best interest of the child are to be a primary consideration,…"***

Underlining is Mine

85. Article 1 (1) (a) of the 1996 Convention states that one of the objects of the Convention is to "***To determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child".***

86. Ms. Choo had dismissed the 1996 Convention on the basis that it has not become part of the domestic law. She has a total disregard for s. 129(1) (e) which requires the Court to have

regard to the treaty and the international law on the question of jurisdiction. She also has total disregard for the 1980 Convention which expresses similar sentiments on jurisdiction involving children in international situations. The 1980 Convention is very much part of the domestic legislation: ***Part VI of the FLReg.*** Ms. Choo's argument also disregards that in every matter concerning the children, their best interests are the primary consideration: ***s. 41(2) of the Constitution of Fiji.*** It also disregards that where children are foreign national, international co-operation is very necessary.

87. Further, the 1996 Convention is a self-operating treaty when it comes to the question of applying its provisions in determining the issue of jurisdiction. It need not become part of the domestic law as the treaty and our Constitution and the Family Law Act all operate on one harmonious principle of ***"best interest of children"***. The Convention echoes how a child in an international situation should be dealt with for his or her best interest.

88. If I were to have regard to Ms. Choo's submission to dismiss the 1996 Convention, I would be acting in contravention of the Fiji's Constitution and the domestic law to have regard to the best interest of the children. In determining the issue of jurisdiction, the Court ought to have applied the best interest principles. It has not. Nowhere in the judgment has the issue of the ***"best interests of the children"*** been addressed. That again was an error on the part of the Court.

89. Let me get specifically go to the 1996 Convention. I will identify some relevant articles which are essential in determining how the Court ought to have approached the question of jurisdiction.

90. Article 5 states:

Article 5

"(1). The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, <u>in case of the change of the child's habitual residence</u> to another Contracting State, the authorities of the <u>State of the new habitual residence have jurisdiction".</u>

91. Two matters are made very clear by Article 5. The first is that the judicial authorities of the country of the child's habitual residence have jurisdiction to deal with matters concerning the children. The second aspect that is made very clear is that the concept of jurisdiction is not infinite. It can cease at one point in time if the child's habitual residence changes. The question of jurisdiction can even become an issue in the middle of the proceedings.

92. The Family Law here and internationally recognizes that the children's circumstances change and upon that change the question of which State has the jurisdiction to continue or try the matter can become an issue.

93. Let me now go back to the first point which states that the country of child's habitual residence has jurisdiction to hear the matters regarding the children. In this case where is the children's habitual residence?

94. This issue of habitual residence is to be decided in reference to all the circumstances of the case. For a person to be cease to be habitually resident in one country and become habitually resident in another, it needs to be shown that he or she has stayed in a particular country for an appreciable period of time and has settled intention to stay there. In this case, the children have been in the sole custody of their mother for all their lives. They have arrived in Fiji on the mother's visa as her dependents and not on the father's visa as his dependents. The father has not always lived with them.

95. There is no evidence before me to refute that the mother came to Fiji in 2019 on short term renewable contracts for work purpose for which she brought her children. She did not come here to settle in Fiji nor has she ever intended to make this country her home and the home for her children. She has lived in Germany. She is a German citizen. She intends to live there with her children and that his her habitual residence. She is a temporary sojourner in this country. I do not think that the father has established that there was a degree of permanence

here. Even for him, he tells this Court that he certainly does not wish to stay in Fiji beyond 6 months.

96. The information by the Immigration Department of Fiji indicates that the father is authorized to stay in Fiji on a special purpose as permit was granted for covid-19 situation. He is unable to return to his country because of the pandemic and so he is allowed to stay in this country. The permit was granted to him on 19 April 2022 until 19 October 2022.

97. The children were in Fiji for a particular purpose and that purpose was to allow their mother to work for a particular period of time. That period is now over and they need to leave this country. If the mother intended to stay here for long she would have at least made arrangements with the Immigration Department of Fiji to stay here. She has no intention of making this her home and Fiji therefore is not the habitual residence of the mother and the children for it to continue to exercise jurisdiction in the matter.

98. The Court below wants to retain jurisdiction in the matter because the mother filed the proceedings here for arrangements regarding the children. She was entitled to file proceedings whilst she was present in the country. She can always ask for orders for the protection of the children and provisional orders to address the parenting issues regarding the children and the Court here in Fiji can exercise jurisdiction when the children are present to issue orders for protection of the children. It can issue provisional orders as well but that does not mean that the court will retain jurisdiction to hear the final orders or that there is continued jurisdiction.

99. The Resident Magistrate had expressed concerns on why the parties had sought interim orders in Fiji if they were to afterwards raise the issue of jurisdiction. His decision insinuates that once he has jurisdiction to issue interim orders, he jurisdiction to issue final orders too. I am unable to endorse his findings as it is legally flawed.

100. Articles 11 and 12 of the 1996 Convention allows for the state in which the child is present to take measures for the protection of the children and also to make provisional orders in respect of them. Even in this case, the Court below is by all means permitted to

issue protection orders for the children and also provisional or interim orders about their residence and contact. That does not mean that the Court should hear what should be the final orders in that case.

101. The seeking of the interim orders, as it is made clear by Articles 11 and 12 does not confound jurisdiction on the Court to continue to hear the matter. The jurisdiction ceases upon the grant of the protection and provisional orders.

102. At the time the interim orders were made the children were in Fiji. They were lawfully in Fiji. Now, their stay in Fiji has become unlawful. If s. 129(1) (a) is to be looked at it must be interpreted in the best interest of the children and their best interest requires that they not be asked to stay back in a country where their status has become unlawful. This will affect the children in so many ways including medical issues, schooling issues and so many more. They must immediately leave and have their issues determined in the country of their habitual residence. The interim orders should have effectively taken care of their situation until they lawfully lived in this country.

103. The Court below was also concerned that there are child abuse applications which involves social welfare department and requires investigation and report. The Court found that since the allegations relate to happenings in Fiji, how would the issue be determined in German Court?

104. I do not see a reason why and how the issue of child abuse cannot be determined in German Courts. If the parties are interested in pursuing the issues, they can always engage appropriate institutions in Germany to investigate the issues. The children will be present there. The allegations have been made in Fiji but it does not have to be Fiji which investigates and makes a determination of the issues. The alleged victims are the ones who will give evidence and not the country. In this modern day and era, Courts can always hear evidence virtually in the interest of the children. If people form Fiji are required to give evidence, arrangements can be made.

105. I now turn to the 1980 Convention. I reiterate that this Convention is part of our domestic law. Our domestic law requires that the children's issues must be determined by the Court of their habitual residence.

106. Reg. 62 of the FLReg. states:

" 62 – (1) The purpose of this Part is to give effect to section 200 of the Act.

(2) This Part is intended to be construed –

(a) having regard to the principles and objects mentioned in the preamble to, and Article 1 of the Convention.

(b) recognizing, in accordance with the Convention, that the appropriate forum for resolving disputes between parents relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and

(c) recognizing that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries

107. If Ms. Choo's argument is to be accepted that the 1996 Convention must be disregarded because it has not become part of the domestic legislation, the Court still has to deal with the objects of the 1980 Convention and the obligation it has after ratifying the same. This is not the same as hearing a matter under the 1980 Convention. It requires applications of the principles and objects of the Act to fulfill the obligations this country has.

108. On the principle of judicial comity, I must say that it is the duty of contracting parties to the 1996 Convention that it observes its obligations and has mutual respect for each other's laws. Since the children's habitual residence is Germany, the law that will apply to them is the law of Germany and not Fiji. For that the children's matter must be heard in German Courts. .

B. Recusal

109. I now turn to the appeal from the decision on recusal of the Magistrate from the proceedings. I have earlier identified the issues that arise from the appeal grounds:

1. ***Did the Court err in not urgently hearing the mother's application for return of the children's passport and for them to leave Fiji on an urgent basis on the grounds that the children will not have any valid permit to stay in Fiji after 31 December 2021?***

2. ***Should a Court in the Family Division get involved in mediation or assisting parties in settling a dispute?***

3. ***Does the facts of the case in this matter indicate any breach of the principles of impartiality?***

110. The mother had filed an application for return of the children's passport on 17 November 2021. That application was fixed for hearing on 13 December 2021. The urgent basis for her to do that was that her contract of employment was going to end on 31 December 2021 and with that her work permit was to be cancelled. She would be left with no choice but to leave Fiji with her children as they came on her visa as her dependents. The Court and the father was made clearly aware of that. The Court and the father were also made aware that the mother had booked her tickets to fly out on 20 December 2022.

111. Given the urgency of the situation, I would have expected that the matter was listed for hearing within a week. Applications of this nature should be treated with the same urgency as applications for stop departure orders. There are so many reasons why a person will urgently bring an application to leave the country. In this situation the need was greater as the children's permit to stay in Fiji was going to end. Be that as it may, that application was not treated with any urgency but given a hearing date on 13 December.

112. On 13 December 2021, the Court was repeatedly told by Ms. Ali that the mother had booked the flight to return on 20 December 2021. She repeatedly told the Court that the

matter was urgent and that she required it to be heard. The Court record is very clear on that aspect.

113. On 13 December 2021, when the matter was called, the Court asked Ms. Ali whether she was ready for the hearing and she said that she was. When he asked the counsel for the father Mr. D. Sharma whether he was ready, he said that he wanted to see whether the matter can be settled. He said that his client had a proposal and he wanted to put that to the Court. Mr. Sharma then said that it was for Ms. Ali to either accept or reject the proposal. The Court then asked what the proposal was. Ms. Ali then said whether the parties can have 5 minutes outside before *"we continue"*. The Court allowed both the parties to go out and discuss the issue.

114. To my mind there was a reason why Ms. Ali wanted to go outside the Court. She was very much aware that the Court must not become privy to settlement talks.

115. When the parties came back inside, the father and his counsel clearly told the Court that they knew that it was inevitable that the mother has to leave the country with the children and that the reasons were obvious. All that the father wanted was some contact with the children until 27 December 2021 as he wanted to spend some time with the children on Christmas day. The father also wanted overnight access with the children without the nanny.

116. Ms. Ali on behalf of the mother said that her client was agreeable for 7 hours a day access, and overnight access in weekends as long as the nanny was present. Ms. Ali said that Christmas was not included as the plan was to leave before that time, that is, on 20 December 2021. She made it very clear that her client has once paid $3,000 to change the ticket *(from 6 December to 20 December)* and that she was not willing to pay it again to change it to 27 December 2021 to cover the Christmas contact unless the father was willing to pay for the change which the father out rightly refused. His denial was explained by his counsel. It was said that the mother should not have paid for the fare without first having her application for the release of the passport being determined.

117. The parties could not come to terms about the contact although it was clear that they were in agreement and of the understanding that the mother has to leave the country with the children before 31 December 2021. The Resident Magistrate then got involved with the parties to see whether an agreement could be reached. In the process he made suggestions, remarks and comments which I will deal with later in the judgment. These comments, remarks and suggestions became the subject of the application for recusal.

118. What is important at this stage is to note that the Resident Magistrate had the parties in Court and was discussing whether the matter could be settled. There was difference in views and opinions about whether there should be supervised contact and if there was to be supervised contact which nanny was to be present, the one who was looking after the children "Didi", or a new one, "Maggie". The father did not prefer the nanny who was looking after the children.

119. The Court records reveal that the Resident Magistrate got so involved in the discussion and negotiation with the parties that it he put behind the urgency of the matter and then conducted himself in a manner which imposed on the parties that it was better to settle the case then not because if the parties were to go for a hearing, the issue of urgency might not be of importance to him. I will highlight from the records why I say this.

120. When the parties could not resolve whether up till which period the contact should be worked out, whether it should be until the flight was booked, that is, 20 December or up till Christmas, Ms. Ali then insisted that the matter be heard. She, on her part knew that the issue was urgent and for her to accommodate until Christmas meant more expenditure for her client.

121. When Ms. Ali insisted for a hearing, the Court then made very improper remarks which shows that not only it was imposing on the mother to agree to contact up till the time period of 27 December 2021 but that it did not have regard to the fact that the matter was of urgency. The Court, and I am shocked, remarks as follows:

"Even if we went for hearing Ms. Ali and if I give my ruling after Christmas. What would happen if I give my ruling after Christmas? Ms. Ali have you given thought. Setting your own timeline and if I say okay 29th December for my ruling then what will you do then. You won't be able to go…Even for me if we go for hearing now. I don't know when the timeline is so again she could be stuck here on 20th. She could be stuck here on 27th. You can't just force me to give a ruling very quickly".

122. The application definitely was urgent as the mother had booked the flight. The Court had at least 6 clear days to rule on the matter before the date of the flight. However, it started indicating to the mother that it will give ruling beyond Christmas period. What was that remark for? To my mind and I find that to any fair minded person, that meant that the mother should consider contact up till Christmas as wished by the father and if she did not, she will be punished as the Court was not going to give the ruling before Christmas.

123. The Court also asked Ms. Ali not to set her timelines. Ms. Ali was bound by her client's instructions and she knew and realized the urgency of the matter. She wanted the hearing to proceed and she was entitled to have the matter heard as the matter was fixed for hearing. The Court should have heard the matter and attempted at least to give a ruling without saying to the parties that no one can force him to give a ruling quickly. The mother required an urgent ruling and the Court is duty bound to deal with the matter expeditiously. The issue concerned the children and for the Court to take its own time to deal with the issue of return of passport is neither in support of the principles of access to justice nor in the best interest of the children.

124. I am not by any means saying that the Court should have answered the mother's application favourably but at least she and the children were entitled to be given a clear indication as to whether they could leave or not. This would then have allowed the mother to exercise her right to appeal the matter.

125. When the application was not heard the mother had to file a quick application to transfer the matter to the High Court to hear the application for return of the passport. That was declined and I will not make any comments about that as the issue is now subject to appeal.

She could not file an appeal as her right was impeded. The application was not dealt with for an appeal to be filed.

126. Further down the proceedings, Ms. Ali tried to get hold of a travel agent to see if the tickets could be changed to 27 December 2021 to accommodate the father's request. The issue then was which nanny was going to supervise the child. The mother was clearly opposed to the new nanny by the name of Maggie. She wanted the same nanny that the children were being looked after by and her name was "Didi". There were certain reasons why each wanted their own nanny. I will not go into that.

127. The Court should not have lost sight of the fact that the matter was urgent and simply, in a situation like this, the matter should have been proceeded to hearing instead of requiring the parties to settle the same.

128. When the issue got stuck at who the nanny should be, the Court said that the hearing on the Domestic Violence Restraining Order Application was already fixed for 7 January 2022. Ms. Ali then questioned the Court as to what the Court was going to tell the immigration to do between 31 December 2021 and 7 January 2021 when the DVRO matter was fixed for hearing. The Court's response yet again was dismissive of the need to hear the matter urgently to cater for the interest of the children. In the situation created by the Court, it was the responsibility of the Court to put in place a scheme that was going to protect the children. The court said:

"It's not my job to tell anybody. I am not answerable to anybody. I am answerable to the parties. I will give my ruling. I am not here to answer anybody.

129. When Ms. Ali asked the court what her client's position was after 31 December the court responded "you can represent her".

130. I am very surprised at the comments of the bench. I am also disturbed. We are dealing with children in a Court which says that it is not answerable to anyone. If the Court was of the view that the children will not have a permit beyond 31 December 2021 as that is what

the employer had written and told the Immigration, it was the duty of the Court to at least inform the Immigration Department that the children be allowed to stay in Fiji until the issue of return of the passports was heard. Leaving the mother and the children without any order from the Court to cater for the situation would place the mother and the children in a very difficult situation.

131. They would have had no valid permit to live in Fiji at one point in time and the immigration could take any action against them because the Court was not prepared to communicate with the Immigration Department to assist. If the Court was not prepared to communicate with the Immigration then it ought to have heard the application on an urgent basis.

132. Back to the proceedings again, upon the father further discussing the issue with his counsel, he agreed to the nanny "Didi" staying with the children overnight. Whilst the mother agreed that to, the difficulty that faced the mother was that for Christmas the nanny should, as a Christian, be with her family. She wanted the nanny to be informed of that position and for her to make a decision. The Court then commented as follows:

"Probably she will be happier. If she is looking after them and those are the last moments for the kids in Fiji. She will be spending more time with her children on other days. And if she really loves this kids she will spend this Christmas with this kids. Because she won't be seeing them again. I know you can find different excuses…Because if she is not available we will find another nanny".

133. At the thought of another nanny Ms. Ali's valid concern was that that is not how things work in Family Court that if an agreed nanny cannot be found a stranger can be put to look after the children. Ms. Ali then questioned the Court why the Court made a suggestion about a stranger. The Court's response was:

"Court: I have not said stranger. You are adding those words. We may have to find somebody suitable if she is not available. What's the alternative?

Ms. Ali: ***Who is going to spend Christmas with Jason and the children when they should be with their own families?***

Court: ***You have to find out and let us know. Nanny was the problem. Now nanny's timing will be the problem. So what will be next? What else is the next problem?....***

Ms. Ali: ***You are saying that if nanny can't do it on Christmas day. Some stranger should come and look after them.***

Court: ***Who said that? You are saying that. The stranger word is coming from you. Not from us.***

134. The above conversation with the Court indicates that the Court wanted the nanny to spend time with the children instead of her family. I can feel the frustration the Court went through when no agreement was reached.

135. It is not the Court's duty to ensure settlement although it is preferred that the parties try and resolve the dispute. By saying to Ms. Ali what other excuse she will come up insinuates that the Court wished a settlement without any further do and that it was not very keen in hearing further from Ms. Ali on other issues that might confront her clients. I find the comments non-judicious and improper. Ms. Ali was entitled to discuss her concerns as the parties were settling the case. She was and ought not to have been remarked upon like the way the Court did to discourage her from expressing further concerns.

136. To a reasonable and fair minded person, it will appear that the Court is having issues with the mother and her counsel when they are raising their concerns and not agreeing to the terms proposed. In that situation it is hard to accept that the Court was still clam and controlled to hear the issue in dispute fairly and without prejudice to the mother and his counsel.

137. By getting involved in the negotiation, the Court forgot its role and started making suggestions about what should happen if the nanny did not agree to spending Christmas with the father and the children. When the mother's counsel got aggrieved at the suggestion made by the Court, the Court started getting involved in a commotion with the counsel for the mother to defend itself.

138. It is not for the Court to make suggestions for parties to agree to. It is for the parties to facilitate the settlement. I can see that when the Courts suggestion is objected and questioned it is left to defend itself. It forgot to concentrate on the main issue which was whether it was urgent that the matter be heard and the children's passport be returned to them for them to leave Fiji.

139. There was a rift between the parties on the issue of nanny "Didi" spending Christmas with the father and the children. Ms. Ali's position was that the nanny should agree to that and if not the matter should go for a hearing. The Court then refused to start the hearing saying that the settlement is close and that Ms. Ali should not give up.

140. I am of the view that the Court should have set a time limit for the parties to settle the matter and in absence of any settlement forthcoming, the matter ought to have proceeded to hearing. In that way both the parties would have had their chance to discover settlement and be heard if it was not settled. Since the Court got involved in the settlement and allowed the parties to consume the hearing time, it was reluctant to hear the matter hoping that a settlement would come up.

141. The nanny was then brought to the Court to indicate whether she can spend nights with the father and the children including Christmas nights. The nanny told the Court that there she needed to seek her husband's permission. She was asked to consult her husband and indicate the next morning whether she could assist in the way requested.

142. The matter was adjourned to the next day for settlement again. A whole day was consumed in settling the matter and it was not settled. The next day again the matter was not settled as the nanny's sister had died and she could not assist the Court. At least on this day

the matter should have been heard. It was on this day that the Court said that it has given enough time to the parties to settle the case and that the matter needs to be heard. It also remarked that there was no pressure on anyone to settle the matter and that it tried to assist. It indicated that in absence of any settlement the matter ought to be heard.

143. The Court took away 2 days to settle the matter when it should have heard the case. It then shifted the case to 7 and 14 January 2022 for hearing of all the causes, a time beyond the date scheduled for the mother and the children to fly out.

144. The Court did indicate that it will put off everything else to accommodate this matter and try and attend to it urgently. However, the Court fixed the time for hearing of the case beyond the 20 December when the mother and the children were scheduled to fly. It ought to have compelled the counsel to attend to the hearing immediately on the issue of return of the passports as they were expected to be ready for the hearing. The Court ought to realize that on hearing dates, if parties want to move the court to settle the matter, it should be cautious not to disturb the hearing schedule. Case management rules do not support that hearing dates be adjourned to accommodate counsel to settle the matter. If settlement is to occur, it should take place before the hearing date or in the short fraction of the day on which the matter is set for hearing.

145. There is no purpose served when the Court actually did not fix an early hearing date but made remarks about understanding the urgency of the matter and that it will be accommodated.

146. The mother was not given audience on time. On 7 January 2022 the mother then filed the application for recusal, transfer and stay of the proceedings which is subject of this appeal. The application for return of the passport has unfortunately not been heard till date.

147. It appears from the proceedings that there were times when everyone was talking and the court decorum was not maintained. The audio recording could not clearly grasp what each one was saying. Everyone including the Court must understand that judicial proceedings are recorded and that there must not be any disruption to the recording so that there is clarity in

the recording. This is not only for the benefit of the Court but the parties and the appellate court when issues are raised. There are several places where the record indicates that due to everyone speaking at the same time, nothing can be clearly heard.

148. Settlement discussions are confidential and they need not be recorded but if it is done in Court as part of the proceedings it gets recorded and then it makes it way to the records. Settlement discussions must not form part of the evidence as it is always confidential. If the discussion forms part of the records, it can be prejudicial to a party. One cannot say how the recording and the discussion has influenced the trial Court. That is why the Court should never conduct negotiations and settlements or be a part of the process. This process should be left to the Family Court Counsellors and/or the Registrars.

149. Once a Court gets involved in negotiating issues between the parties, and the matter is not settled, the Court is duty bound to recuse itself from the proceedings. It becomes too involved in the matter, gets to see and hear the information which otherwise would not be given to it, makes suggestions and remarks which can have tendency of upsetting a party and causing him or her to feel threatened, to feel pressured or obliged or to be made to respond without giving thought to the proposal and so on. It can then be viewed that the Court will not give the issues an unbiased consideration if the matter went for hearing.

150. In this case I have indicated how the judicial process was tainted when the Court allowed itself to get involved in settling issues between the parties. I find that the Court was not correct in not recusing itself from the proceedings.

C. Transfer

151. Ms. Ali's complaint is that she did not get a chance to address the Court on the issue of transfer of the proceedings. Before I attend to her concerns, I should quickly lay out the procedure in making applications for transfer of proceedings.

152. In this case particularly, a transfer could be sought from one magistrate to another because a recusal application was made. The order for transfer will be a consequential order.

There was not much to address in that regard. However, if a party wants the matter to be transferred to the High Court, the proper forum to make that application is the High Court and not the Magistrates Court.

153. S. 28(3) of the FLA states:

"The Judge of the Family Division may of his or her own motion or on the application of a party at any time order that any proceedings be transferred from the Family Division of the High Court to the Family Division of the Magistrate's Court or from the Magistrate's Court to the Family Division of the High Court".

154. A Magistrate only has powers to consider whether it will transfer its case to another magistrate in the same jurisdiction or another jurisdiction. It has no powers to consider an application for transfer to the High Court: ***Rule 5.14 of the FLR.***

155. I find that the Court erred in hearing an application for transfer of the matter to the High Court. It has no such powers. However I do not find that Ms. Ali did not know that she also had to address the Court on the issue on transfer. The Court records at page 124 notes the following:

"Court: Ms. Ali will you only deal with recusal?

Ms. Ali: This is only what I am looking for, recusal and transfer. The reason being as I highlighted earlier the matter is extremely urgent now.

Court: We get it. You just cover recusal and transfer. Because the moment I hear the other things, I am not recused. I am still dealing with it…"

156. The judgment on recusal therefore correctly outlines that the issue that was heard was the issue of recusal and transfer and that the parties had agreed to deal with that first. In that regard it was up to the parties to address the Court on the aspect of transfer. The Court granted them the opportunity.

D. Costs

157. This is one case where the Court must consider the issue of costs against the father. The Court records are clear that he and his counsel knew and appreciated that the Children had to return to Germany. Although the records do not show that they admitted that Germany was the children's habitual residence, it is clear that they knew that the children cannot live in Fiji.

158. The father also does not intend to stay in Fiji beyond 6 months. He still insisted that Fiji deals with the matter. These are children to whom the Fiji Laws do not apply. If orders are made, there will be little point unless it is recognized by the German Courts. The father will still have to go through legal proceedings in Germany to have the orders recognized and registered in Germany. Therefore, his argument that he will have to again go through legal proceedings in Germany if Fiji does not exercise jurisdiction is of no assistance to him. His attempt to keep the children in Fiji knowing that he is not the primary care giver was deliberate to delay the proceeding and not in consideration of the best interests of the children.

159. I find that his applications and responses in the appeal was designed to suit his interest rather than that of the children as the children have almost always lived in Germany. He too has not denied going to see the children in Germany. I therefore fail to see why he cannot defend proceedings in Germany but unfairly insist that he will be adversely affected if the proceedings are held in Germany.

160. I had also allowed costs to the mother and her counsel when the matter was set for hearing once and adjourned because of the application of the father. I had then ruled that I will assess costs in the final appeal.

161. The mother has been put to costs in bringing this appeal which was the only way she could find a resolution to her concerns although the matter could have been resolved given the fact that the father knew and appreciated that they had to leave. I find it fair that she be paid costs in the sum which I summarily assess to be $5,000.

J. Final Orders

162. For the reasons I have identified above I find that the Court in Fiji no longer has jurisdiction to continue with the proceedings between the parties concerning their children. The jurisdiction has lapsed upon grant of protection and provisional orders.

163. I find that the proper jurisdiction in which the children's issues needs to be dealt with is Germany. Consequentially, I order permanent stay of all proceedings in the Magistrate's Court.

164. The parties are also at liberty to withdraw the proceedings they have filed if they so wish in lieu of having the proceeding stayed in the Magistrate's Court.

165. The Family Court Registry is to immediately return to the mother the passports of the children in their custody for them to prepare to leave Fiji. An acknowledgment of receipt of the passports shall be signed and given to the registry in return.

166. I also allow the appeal on the grounds that the Court erred in not recusing itself from the proceedings. If the matter needs any further administrative or judicial attention, it shall be dealt with by another Court to avoid further disturbances.

167. The mother is entitled to costs of the proceedings which I order in her favour in the sum of $5,000 to be paid by the father within 14 days. If the mother leaves Fiji by that date, the payment can be made to the trust account of her lawyers.

168. The Immigration Department ought to be informed that the mother and the children had been in Fiji after 14 January 2022 as they were not able to acquire the Court's permission to leave the country. They did not stay back deliberately in breach of any orders or directions of the Immigration Department but owing to the pending proceedings in Court which could not be determined before their permit to reside in Fiji was cancelled. This order is to ensure safe passage for the mother and the children who are very young and to ensure that they are not adversely affected.

……

Hon. Madam Justice Anjala Wati

Judge

29.04.2022

<u>To:</u>

1. ***InterAlia Consultancy for the Appellant.***
2. ***R Patel Lawyers for the Respondent.***
3. ***File: Appeal Case Number: 22/Suv/0001.***