[2006] FamCA 59

JFJMBRWS

FAMILY LAW ACT 1975

IN THE FULL COURT OF

THE FAMILY COURT OF AUSTRALIA

AT MELBOURNE

Appeal No. SA 64 of 2005
File No. HBF 1186 of 2005

IN THE MATTER OF:

JMB, RWS & MMS

Appellants

- and -

SECRETARY, ATTORNEY GENERAL'S DEPARTMENT

Respondent

REASONS FOR JUDGMENT

BEFORE: **Coleman, Boland and Mushin JJ**
DATE OF HEARING: **31st day of January 2006**
DATE OF JUDGMENT: **16th day of February 2006**

APPEARANCES: **Mr North of Senior Counsel, (instructed by Temple-Smith Partners, 100 Best Street, Devonport TAS 7310) appeared on behalf of the appellants.**

Ms Stoikovska of Counsel, (instructed by Middletons Lawyers, Level 29, 200 Queen Street, Melbourne VIC 3000) appeared on behalf of the respondent.

Mr Fitzgerald of Counsel, (instructed by Legal Aid Commission of Tasmania, 158 Liverpool Street, Hobart TAS 7000) appeared on behalf of the child.

Name of Appeal	**JMB, RWS, MMS & Secretary, Attorney General's Department**
Appeal Number	**SA 64/2005**
Date of Appeal hearing	**31st day of January 2006**
Date of Judgment	**16th day of February 2006**
Coram	**Coleman, Boland & Mushin JJ**

Catchwords: ***Appeal against orders made for return of child to New Zealand in proceedings pursuant to Family Law (Child Abduction Convention) Regulations 1986 (Cth).***

Assertion that trial Judge misdirected himself in determining the gravity of the risks of psychological harm and/or the child being put in an intolerable situation in the event of the child being returned to New Zealand – discussion of gravity of the risk of psychological harm, rather than physical harm and interpretation of Regulation 16(3) and (5) – DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services (2001) FLC ¶93-081 considered.

Assertion that trial Judge failed to have regard to expert evidence which was submitted to establish that the child was at grave risk of psychological harm and/or being put in an intolerable situation in the event of the child being returned to New Zealand – his Honour was obliged to consider the expert evidence before him in reaching his conclusion with respect to gravity of risk.

No re-exercise of trial Judge's discretion by Full Court – parties to be afforded rights to adduce further evidence as described in Allesch v Maunz (2000) 203 CLR 172 – finding of grave risk not only conclusion consistent with expert evidence – re-hearing ordered.

Appeal allowed

Costs certificates

1. By Amended Notice of Appeal filed 17 January 2006, the appellants appealed against orders made by Benjamin J on 4 November 2005 in proceedings pursuant to *Family Law (Child Abduction Convention) Regulations* 1986 (Cth) ("the Regulations"). The Secretary of the Attorney General's Department as the Commonwealth Central Authority pursuant to the said Regulations ("the Central Authority") resisted the appeal and sought to maintain the trial Judge's orders. The orders of the trial Judge directed the Central Authority to:

   > … make such arrangements as are necessary to ensure the return to New Zealand of the child, born in 1997 … forthwith in the company of such persons as the Secretary nominates.

2. The proceedings which the trial Judge heard on 21 October 2005 had been commenced by the Central Authority pursuant to the Regulations in the Hobart Registry of the Court by application filed on 12 September 2005. On 23 September

2005 the trial judge made orders, by consent, appointing a Child Representative and for the appointment of a single expert, Ms S, to provide a psychological report.

MATERIAL FACTS

3. A number of facts which are not controversial, and find expression in the trial Judge's reasons for judgment, provide a background to the appeal. The child the subject of the proceedings, was born in 1997 and was thus almost 9 years of age at the time of the proceedings. The child is the child of his late the father and his mother, who were married for a number of years prior to their separation, in New Zealand, sometime prior to March 2000.

4. On 28 March 2000 an order was made in a District Court in New Zealand, the effect of which was that the child reside with his mother and have regular contact with his father. The orders provided that neither parent would remove the child from New Zealand without the agreement of the other.

5. In 2001 the parents agreed that the child would live with his father and have regular contact with his mother. The mother asserted regular contact occurred thereafter, although during 2005 the child's contact with his mother was largely limited to telephone contact.

6. On or about 26 June 2005 the father informed the mother that he had contracted a major disease and wished to return to Australia, his country of origin, which he did.

Arrangements were made for the child who was unwell when the father left New Zealand, travel to Australia shortly thereafter as an unaccompanied minor. The father and the child were residing in Tasmania when, on 11 July 2005, the father died. Subsequent to that time the child has been cared for by RWS and MMS, who are the paternal grandparents, and with whom he and his father had lived prior to the latter's death, and JMB, the child's paternal aunt with whom he was living at the date of the hearing.

7. The child's mother has at all material times lived in New Zealand, the country to which the Central Authority sought the child's repatriation pursuant to the Regulations.

THE TRIAL JUDGE'S JUDGMENT

8. The trial Judge, having referred to the historic matters to which we have earlier referred and a number of concessions made in the proceedings before him, identified "THE ISSUES" requiring his determination. A number of those issues do not assume significance in this appeal and we accordingly do not refer to those portions of the reasons for judgment.

9. What was in issue, and clearly identified as so by the trial Judge, was whether there was "a grave risk that the return of the child to New Zealand would expose him to psychological harm or otherwise place him in an intolerable situation?" (judgment, paragraph 12). Another relevant issue was whether the child objects "to being

returned to New Zealand?" and if so, whether his objections showed "strength of feeling beyond mere expression of a preference of ordinary wishes?". A further, and related, issue was whether the child had "attained an age, and degree of maturity at which it is appropriate … to take into account his views?" (judgment, paragraph 13). The trial Judge, no doubt correctly, thus identified as an issue whether, in the event that the present appellants established any of the matters to which he had earlier referred, he should exercise his discretion pursuant to Regulation 16(5) of the Regulations to make an order for the return of the child to New Zealand (judgment, paragraph 14).

10. The evidence before his Honour was identified, there being no suggestion that any inaccuracy was there entailed, or that such analysis was in any way erroneous.

11. Under the heading "BACKGROUND FACTS", his Honour referred to a number of the matters to which we have earlier referred by way of background to this appeal. Given that a number of the matters therein discussed do not assume significance in this appeal, it is unnecessary for us to refer in detail to those matters.

12. Reference was made to the report of a Ms S, whose "qualifications as an expert psychologist" were not in issue (judgment, paragraph 41). The trial Judge noted that Ms S's report was directed to some five matters relevant under the Regulations, which matters he identified.

13. His Honour recorded that Ms S had, in addition to the affidavits of a number of

people, spoken with the mother, with the child and with the present appellants. He further recorded that Ms S had expressed the opinion that to return the child to his mother in New Zealand "would expose the child to a risk of psychological harm and place him potentially in a [sic] intolerable situation" (judgment, paragraph 43).

14. Reference was made to Ms S's further opinion (judgment, paragraph 44) that:

> *"it would constitute unacceptable risk of psychological harm and potentially place him [the child] in a situation of isolation, severing him from those supports who, both in New Zealand and Australia, have been part of his coping with his father's terminal illness and death and with a mother who has, by her own account, not seen him for the totality of 2005".*

15. The trial Judge referred to the decisions of the High Court in the two cases of *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* (2001) FLC ¶93-081 (hereinafter referred to as "*DP & JLM*"), the judgments in which cases he then proceeded to "paraphrase".

16. After referring to the evidence, none of which was controversial, his Honour concluded that "there is a risk that the return of the child under the Convention would expose the child to psychological harm" and that "on the evidence … there is a risk that he would be put in an intolerable situation" (judgment, paragraph 53).

17. His Honour then addressed the issue of whether such risks were "grave" within the meaning of the Regulation. He concluded that:

> 53. … there could not be a grave risk of physical or psychological harm to the child unless:-
>
> 1. There is no procedure by which the respondents could seek

appropriate orders from New Zealand to guard against that risk; or

2. The respondents are unable to seek those orders in New Zealand, perhaps, the respondents will not seek those orders; or
3. The mother is unlikely to abide by those orders which might be made.

18. The trial Judge found none of those conditions to have been established on the evidence before him but, in the event that he was "incorrect in determining that the risk exposed and the evidence before [him was] not 'grave risk' and the risk should have been determined as 'grave risk'" proceeded to consider the discretion under Regulation 16(5) which would thus be enlivened (judgment, paragraph 56). His Honour concluded in that regard:

> 57. In those circumstances I would, taking into account all of the facts, inferences and determinations made by me and referred to in these reasons, exercise my discretion under both Regulation 16(3) and 16(5) and order the return of the child to New Zealand.

19. The "other discretionary issue under the Regulations", being the defence "contained in Reg 16(3)(c)", namely whether the child objected to being returned to New Zealand, and if so the significance to be attached to such objection, was considered. His Honour concluded that "the child's expressions represent an objection to be returned to New Zealand within the meaning of the Regulation" (judgment, paragraph 60). His Honour concluded that he was "unable to find that his objection shows strength beyond the mere expression of preference or of ordinary wishes" (judgment, paragraph 64).

20. The trial Judge considered "whether the child has attained an age and a degree of

maturity at which it is appropriate to take into account his views" (judgment, paragraph 65) concluding in that regard that "the child has not attained an age and degree of maturity at which it is appropriate to take into account his views" (judgment, paragraph 68).

21. The balance of his Honour's reasons were directed to matters which assume no significance in this appeal and it is accordingly unnecessary and unproductive to refer in detail to those matters.

22. Under the heading "CONCLUSIONS", his Honour reiterated that the appellants had not established any of the defences under the Regulations raised by them, the "onus" in that regard resting upon them, but that even if they had established such defences, he would have "exercised [his] discretion to order the return of the child to New Zealand … on the basis that [he] took into account all aspects of his welfare as were available to [him]" (judgment, paragraph 88).

THE AMENDMENT OF THE GROUNDS OF APPEAL AFTER THE COMMENCEMENT OF THE HEARING OF THE APPEAL

23. Approximately 45 minutes after the commencement of the appeal, Senior Counsel for the appellants sought leave to amend his client's grounds of appeal by adding a ground asserting that the trial Judge "erred in curtailing the cross-examination of Ms S with respect to what was the psychological harm to which the child would be exposed and its gravity".

24. Counsel for the Child Representative consented to leave to amend being granted. Counsel for the Central Authority opposed the granting of leave. The Court granted leave to amend the grounds of appeal in the terms sought by Senior Counsel for the appellants notwithstanding such opposition, albeit the granting of such leave was without prejudice to the rights of the Central Authority to make such application(s) as Counsel deemed appropriate. No application for an adjournment of the appeal, or for the opportunity to make supplementary or additional submissions, was made by Counsel for the Central Authority who, with respect to her, comprehensively addressed all matters relevant to the additional ground of appeal in the course of her oral submissions during the hearing of the appeal.

25. In granting leave, the Court was influenced by the nature of the issue the additional ground sought to raise, the fact that the additional ground to some extent overlapped at least one of the existing grounds of appeal, the fact that allowing the additional ground to be raised was unlikely to prolong the appeal, as it involved a consideration of the same evidence as was relevant to at least one other ground raised in the Notice of Appeal, and the fact that such prejudice to the Central Authority as may have resulted in allowing the late amendment of the grounds of appeal was able to be addressed in a number of ways, none of which was ultimately sought.

26. Whilst events subsequent to the granting of leave to amend the grounds of appeal might not be strictly relevant to the correctness of the earlier decision to grant leave to amend, the ability of Counsel for the Central Authority to deal with the additional

ground to her satisfaction, without an adjournment or supplementary submissions, provides further support for the decision to allow the grounds to be amended in the manner indicated.

THE GROUNDS OF APPEAL

27. The first ground of appeal which was agitated on behalf of the appellants (ground 2) provided:

> The learned Judge erred in fact and in exercise of discretion in holding that the evidence did not support a finding of "grave risk" of psychological harm or intolerable situation to the child in returning the child to New Zealand.

28. In the course of his detailed written submissions in support of this ground, Senior Counsel raised a number of issues, the broad thrust of which was that the trial Judge had misdirected himself in determining the "gravity" of the risks of psychological harm and/or the child being put in an intolerable situation in the event of him being returned to New Zealand.

29. It was submitted that, in light of the decision of the High Court in *DP & JLM*, the trial Judge was not entitled, when determining the "gravity" of the risk for the child in being returned to New Zealand, to have regard to any of the three matters to which the trial Judge referred (paragraph 53) in his judgment. His Honour had there said that there "could not be a grave risk of physical or psychological harm" or it seems, an "intolerable situation" for the child unless:

    1. There is no procedure by which the respondents could seek

appropriate orders from New Zealand to guard against that risk; or

2. The respondents are unable to seek those orders in New Zealand, perhaps, the respondents will not seek those orders; or
3. The mother is unlikely to abide by those orders which might be made.

30. The effect of having regard to these matters was submitted to be that the trial Judge had "effectively treated the Regulations under the Convention as mandatory in that the reality of His Honours [sic] Judgment is that there would be no conceivable circumstances which would raise a defence" and that the trial Judge had effectively "delegated the proper responsibility of the Australian Courts to the New Zealand Courts" (Submissions of the Appellants, paragraph 14.h).

31. It was further submitted that the trial Judge had misdirected himself in that he had, having "delegated" the assessment of the gravity of risks which he found to exist to a New Zealand Court, failed to have regard to the evidence of Ms S which, it was submitted, established that the child was "at grave risk of potentially suffering psychological harm and/or being put in an intolerable situation" and was "the best evidence available to His Honour" in relation to that issue (Submissions of the Appellants, paragraph 10).

32. It was submitted in support of the submission that the term used by Ms S, "unacceptable", was:

> an adjective synonymous with the term "grave" in that the risk anticipated by Ms S is "exceptional" and over and above the expected anxiety and/or distress that would normally be associated with the removal of a child from one country to another. (Submissions of the Appellants, paragraph

10)

33. Counsel for the Child Representative adopted the submissions of Senior Counsel for the appellants, and, in the course of his written submissions, raised a number of further matters. For reasons which will become apparent, we do not need to refer to such submissions in detail. Our not doing so does not reflect adversely on the submissions.

34. On behalf of the Central Authority, it was submitted that the trial Judge had not misdirected himself in relation to the issue of the gravity of the potential risk which he found to exist in the event of the child being returned to New Zealand. It was submitted that the trial Judge's finding that "while there was a risk, it was not a 'grave risk' within the requisite legislative meaning, was a finding well open to His Honour on the totality of the evidence" (Amended Submissions of the Respondent, paragraph 6).

35. It was further submitted that the trial Judge was "entitled to give such weight" to the evidence of Ms S "as he determines" and that it was clear that the trial Judge "has relied upon Ms S's statements of fact and opinion as to potential risks" and then "correctly" stated that it was "up to his Honour to determine whether that statement of those facts and opinions fall within the meaning of the section or not" (Amended Submissions of the Respondent, paragraph 7).

36. A number of factors were submitted (Amended Submissions of the Respondent,

paragraph 8) to have rendered available to the trial Judge the conclusion that:

> … the evidence did not support a finding of "grave risk" in that:
>
> a. The evidence was of a positive relationship with the grandparents and of a bond of attachment which the child was "starting to form" with his grandparents (evidence of Ms S see Transcript page 35 at paragraphs 5-6).
>
> b. The relationship with his mother had been interrupted.
>
> c. There was a possibility of a re-forming of the attachment bond with his mother if reunited with her (Transcript page 44 at paragraphs 5-10).
>
> d. The child has retained a strong desire to love and be loved by his mother … (page 12 of Ms S's report, page 110 of the Transcript)
>
> e. Whilst there is no evidence before the Court that the Appellants intend to return to the place of habitual residence with the child, there is no evidence to the contrary and the history of the 2nd and 3rd Appellants [the grandparents] residing in New Zealand was part of the totality of the evidence before his Honour.

37. The decision of the High Court in *DP & JLM* was submitted to provide authority for the proposition that "what is to be established for there to be a 'grave' risk of exposure to harm" was "some clear and compelling evidence" and that "the facts disclosed in this case do not disclose the requisite clear and compelling evidence". As such, it was submitted the trial Judge did not err in finding as he did with respect to grave risk (Amended Submissions of the Respondent, paragraphs 11.b & c).

38. It was further submitted that the "assessment of the gravity of the risk potentially involves an assessment of available remedies in other jurisdictions being jurisdictions which are signatories to the Convention" and that the trial Judge did not "delegate that task to a New Zealand Court" (Amended Submissions of the Respondent,

paragraph 13).

39. After referring to the decision of the Full Court in *Murray v Director of Family Services (ACT)* (1993) FLC ¶92-416, decided some years prior to *DP & JLM,* and to the earlier decision of *Gsponer v Director General, Department of Community Services VIC* (1989) FLC ¶92-001, it was "submitted therefore there is no distinction in the case law between a physical and a psychological harm" and that, in order to make out a defence under the Regulations, it was necessary to establish "why the legal system of the habitual residence country would fail to protect the child against that risk pending the outcome of custody and access issues there on their merits" (quoted from *S v S* [1999] NZFLR 625 at 635, Amended Submissions of the Respondent, paragraph 14).

40. It was thus submitted on behalf of the Central Authority that:

> No case law is relied upon by the Appellants to support the proposition that the subtleties of psychological harm are such as to allow for some form of differentiation in treatment by the Courts from those cases involving physical harm. It is submitted by the Appellants that such a potential harm cannot be attended to by the normal injunctive and/or proscriptive powers of the Court. To the contrary, one can readily conceive of a New Zealand Court perhaps ordering counselling or, granting interim residence to any of the Appellants in the event that any of the Appellants chose to so apply. (Amended Submissions of the Respondent, paragraph 17)

DISCUSSION

41. To give a context to our consideration of the competing submissions made on behalf

of the parties, it is appropriate to set out part of the terms of Regulation 16. The Regulation relevant for present purposes provides:

> (3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:
>
> (a) the person, institution or other body seeking the child's return:
>
> (i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or
>
> (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia ; or
>
> (b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or
>
> (c) each of the following applies:
>
> (i) the child objects to being returned;
>
> (ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
>
> (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or
>
> (d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.
>
> …
>
> (5) The court to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return.

42. It is also helpful to refer to the judgment of the majority (Gaudron, Gummow and Hayne JJ) in *DP & JLM*, to which the trial Judge in fact referred extensively in his reasons for judgment (paragraph 47). Their Honours there said:

> 41. In the judgment of the Full Court of the Family Court which gives rise

to the first of the matters now under consideration (*DP v Commonwealth Central Authority*) it was said that there is a ``strong line of authority both within and out of Australia, that the reg 16(3)(b) and (d) exceptions are to be narrowly construed''. Exactly what is meant by saying that reg 16(3)(b) is to be *narrowly* construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in ``an intolerable situation''. That requires some prediction, based on the evidence, of what *may* happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

42. Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description ``grave''. Leaving aside the reference to ``intolerable situation'', and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would *expose* the child to harm.

43. Because what is to be established is a *grave* risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.

44. These considerations, however, do not warrant a conclusion that reg 16(3)(b) is to be given a ``narrow'' rather than a ``broad'' construction. There is, in these circumstances, no evident choice to be made between a ``narrow'' and ``broad'' construction of the regulation. If that is what is meant by saying that it is to be given a ``narrow construction'' it must be rejected. The exception is to be given the meaning its words require.

45. That is not to say, however, that reg 16(3)(b) will find frequent application. It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and

> anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return. (footnotes omitted)

43. It will be readily apparent that the majority in *DP & JLM* did not refer to the three matters to which the trial Judge referred as relevant to the assessment of the gravity of the relevant risks. To give the exception provided by the Regulations "the meaning its words require" would seem, in cases involving risk of psychological harm, to focus attention on the evidence relative to the risk itself, or, in this case, the existence of psychological risk having been found, the gravity of the risk. That would appear to involve an assessment of the evidence, with particular reference to the child, of the risk itself. It is difficult to see how any of the matters referred to by the trial Judge (in paragraph 53) would reduce, or impact upon, the gravity of the risk in this case.

44. In our view there is some force in the submission of Senior Counsel for the appellants that, on the test applied by the trial Judge, it is difficult to see how the defence could ever be made out in a case involving psychological (but not physical) risk of harm, at least in a case involving a return to New Zealand, given that, as was undeniably the case before him, none of the three elements identified by the trial Judge had been satisfied. Moreover, the gravity of the risk appears potentially irrelevant to the determination of that issue.

45. For the purpose of the exercise of discretion under Regulation 16(5), the three matters to which his Honour referred are clearly relevant. They may well be relevant to the

issue of "grave risk" in cases involving the risk of physical harm, for reasons that are obvious given that orders under the Regulations involve repatriation to a jurisdiction, not to a particular person or arrangement. We have doubts as to whether those matters could properly impact upon the trial Judge's determination of the gravity of the psychological risk which he found to be inherent in the child returning to New Zealand. To impose on the present appellants the onus of establishing the three matters to which his Honour referred, or any of them, may have been to adopt an impermissibly narrow interpretation of the Regulation and to fail to "give the meaning its words require" to the exception. For reasons which will become apparent, we do not need to express a concluded view on this issue.

46. It is clear, as learned Counsel for the Central Authority was obliged to concede, that in his discussion of the gravity of the risks which he found to be associated with the child's return to New Zealand, the trial Judge omitted to refer to the evidence of Ms S in that regard, notwithstanding that such evidence was unchallenged, was the only evidence relating to the issue and, as other passages in his reasons make clear, had properly been relied upon by the trial Judge as the basis of a number of his other findings.

47. Given that the trial Judge did not refer to the evidence of Ms S with respect to the "gravity" of the relevant risks, and having regard to the extensive references to such evidence provided to us by Counsel for the Central Authority, it is desirable that we refer to Ms S's written and oral evidence. The thrust of the submissions of Counsel

for the Central Authority were in essence that, notwithstanding his Honour's failure to expressly refer to Ms S's evidence, that failure was not of significance given the equivocal nature of the evidence of Ms S in that regard.

48. In her report Ms S said:

> This report has been prepared with a specific focus on the question of issues relating to the return of the child to New Zealand and his wishes in relation to this action as defined by the Order of 23rd September 2005. It is my understanding that the wording of this Order is derived particularly from the provisions of Para 16.3 of the Family Law (Child Abduction Convention) Regulations 1986:
>
> …
>
> **a. Whether there is grave risk that the return of the child to New Zealand would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation**
>
> …
>
> It is therefore my concern that, were the child to be returned to New Zealand, he would be returned to a house that is unknown, in a new city, without the support of his friends or friends and associates of his father and to a mother who he does not know very well and who does not know him as a person. This would be taking place at a time when he was recovering from the loss of his primary attachment and of his home in [New Zealand city] that he shared with his father. In these circumstances I consider that to return him to his mother in [New Zealand suburb] would expose the child to risk of psychological harm and place him potentially in an intolerable situation.
>
> …
>
> From having observed the child in the company of his extended family, listened to his mature and measured reflections on his family and situation, hearing him speak with love about the mother he says he does not really know and also listened to members of his extended family describe from their own observations the nature of the child's life with his father in New Zealand; in my opinion, in the terms requested in this Report, it would constitute unacceptable risk of psychological harm and potentially place him in a situation of isolation, severing him from those supports who, both in New Zealand and Australia have been part of his coping with his father's terminal illness and death and with a mother who has, by her own

account, not seen him for at least the totality of 2005 and who appears not to have that special knowledge of her child which would allow for flexible response to the needs of a still grieving little boy, to return him to New Zealand. This situation of isolation, in my opinion, could be considered "an intolerable situation".

49. During the course of the oral evidence of Ms S the following exchanges occurred:

a. [cross-examination by Mr Fitzgerald] The importance of that is, in the context of the terms of reference which is the grave risk and that adjectival description of risk being grave, you interpreted the grave to be real?---Yes.

That there was a realness and a nexus with the psychological harm was what?

---The nexus is that if he returned to somebody who didn't know him and - well, who didn't know him, well, then he is not likely to have, in a situation where he has lost so much, not likely to have that loving focus on his needs that a child who needs to reconfigure his life.

But psychological harm. Harm has to have a qualitative term rather than distress. What is the psychological harm?---The harm is that he would not form - any child needs a primary attachment bond, if we think about attachment as being the nature particularly of bonds of affection and of love. (transcript, page 27, lines 16-29)

b. Whether returning to the forum is there a real risk, if I can use the word "real risk" of psychological harm with that occurring?---I guess that was a precursor to opinion that in this little boy's case, yes. (transcript, page 28, lines 39-41)

c. In that context, what is the psychological harm for the child of the return to in effect the mother?---I think it's this whole issue of being with someone who, from what I can understand, is unlikely to be able to perceive subtle forms of distress and therefore respond to them significantly, to see behavioural changes. I know I use the word "distress" and you were asking me that I need to talk about harm. That harm is in the disruption of attachment bonds.

Does that go beyond just simple distress?---I think it has - - -

Or anxiety?---It has the potential to do so, yes.

Is that a theoretical potential?---I don't have a crystal ball and in fact all I can do is use attachment theory and my perceptions of this child from my

interviews with him to express that as a possibility of a probability. (transcript, page 29, lines 25-38)

d. In the relevance of again the nature of these proceedings, is that important in any way?---I guess, you asked me about return to New Zealand. The other half of that is removal from the situation in which he is now placed. I think that would go beyond distress because it would be removing him from people he knows well and who he identifies with as part of his family and sees himself with. (transcript, page 30, lines 1-7)

50. In cross-examination by Counsel for the present appellants, the following exchanges occurred:

a. [cross-examination by Mr McGuire] I'm perhaps not as eloquent as my learned friend, but I wanted to just go through a couple of the same issues. You say that there's an unacceptable psychological risk. Is that right?---Yes.

Could you just tell: risk of what?---Risk of disruption of the bonds of attachment that he is just starting to form. That, I think, is the greatest risk.

I'm not a psychologist or a doctor or anything like that, but what are the symptoms? If this child goes to mum, you've used the term, which is a bit of a generic term "unacceptable psychological risk of harm", what are the symptoms; what's going to happen to him?---The potential is that he could become very angry. He could become quite withdrawn. He could become, like, acting out in his behaviour. His level of trust in forming human relationships could be interfered with. I'm giving you the general understanding of - - -

I want to be [the child]-specific. Yes?---Right. Well, if I'm telling you that I'm concerned about the disruption of attachment bonds, what we know of children's response is that they can become quite angry. They can act out their anger and manifest behavioural problems which, as you know, can lead to a vicious cycle of the child being seen as a naughty child when they're not.

Behavioural problems?---Behavioural problems is what I'm trying to say, yes.

What about emotional problems?---And also, or, the child could become very quiet, very withdrawn, and the potential for losing trust in human relationships exists as well.

Let me summarise that. There's a potential for behavioural problems with the child?---Yes.

Would they be accentuated if this child is already going through a grieving process?---That's certainly a possibility given that he's lost his primary attachment figure anyway.

So [the child] -specific. I suppose we've got to be fair here. If the child, as the mother says, has had contact on a regular basis both face to face and by telephone over the last four years or so that he's lived with dad, then if his Honour finds that that's the case, then these potential psychological difficulties, harmful things, would be alleviated, at least to a degree?---Yes.

However, if his Honour was to find that the child has had no real or positive or indeed, virtually no contact with the woman who is his mother, then that's an element that could add to the psychological danger; going to the unknown?

---That's my concern, yes. (transcript, page 35 lines 1-43, to page 36 line 1)

b. You understand, Ms S, that the legislation uses the term "grave risk"?---Yes.

My reading of your report is that you use the term "unacceptable risk". Is that right?---Yes.

Unacceptable to whom?---In relation to the child.

But to whom? This court?---I would assume so. I use the word "unacceptable" in the same way in which it is used in sexual abuse cases about contact and unacceptable risk. (transcript, page 39, lines 30-40)

c. The concept. Okay, well, to you - because you're the one that used the word - what does "unacceptable" mean for you because it's your word?

HIS HONOUR: Mr McGuire, where does this lead me? Isn't it my task to look at the evidence that is before me - whether this witness has a view - I mean, this witness applies her expertise and says, "These are the risks," and she set them out in some detail. It's up to me then to determine whether that falls into the level of grave within the meaning of the section or not. I mean, what value is it to me as to what her opinion is of unacceptable in a case such as this?

MR McGUIRE: I accept that your Honour ultimately has to make that finding but your Honour has to be guided by the expert witness that comes before the court and she does use an adjective. Now, I don't want to be

> met with, at the end of the day, your Honour saying, "Well, I've heard Ms S and she clearly says this is an unacceptable risk. No one cross-examined her about it, I don't agree that unacceptable equals grave, end of story," I don't want to be met with that argument.
>
> HIS HONOUR: She's made her statement in the evidence, that's a conclusion based upon all the evidence she's given, I don't see that that helps me. If you want to press - - -
>
> MR McGUIRE: Can I put it this way, your Honour, would your Honour have been helped - perhaps I shouldn't do that - if Ms S had written in her report, "Yes, here are all the factors, I've listed them all here, I think that's a grave risk"?
>
> HIS HONOUR: No.
>
> MR McGUIRE: It wouldn't have been?
>
> HIS HONOUR: No, because I think my duty is to look at what the factors are and then I have to come to the conclusion as to whether that's a grave risk. In fact - - -
>
> MR McGUIRE: Well, it might be a matter for submissions by me then.
>
> HIS HONOUR: It's a matter for me to make that determination not for the witness, and that's not being critical of the witness. (transcript, page 40 lines 6-44, to page 41 line 1)

51. Whilst the question of the gravity of the relevant risks was undoubtedly a matter for the trial Judge ultimately to determine, his Honour was obliged to do so having regard to the evidence before him in relation to the issue. This, with great respect, his Honour did not do. We acknowledge that the distinction between conclusions which may be drawn or rejected without reliance upon expert evidence, and those requiring such evidence for their foundation, is not always easily drawn. In our view, in the circumstances, this case fell into the latter category.

52. Although we also acknowledge that Ms S's evidence was less than entirely clear, we do not accept that it was so equivocal as to be incapable of providing an expert

evidentiary foundation for a finding of "grave" risk either with respect to psychological harm or an intolerable situation. In our view, his Honour's failure to have regard to such evidence, given that it was unchallenged and the only admissible evidence on the topic before him, vitiated the determination of the issue of "grave risk".

53. We are not persuaded that his Honour would necessarily have come to the same conclusion with respect to "grave risk" had he directed his attention to the evidence of Ms S when determining that issue. Nor are we persuaded that, had he directed his mind to such evidence, his Honour would have necessarily concluded, or been able to conclude, as he did with respect to the discretion reposed in him by Regulation 16(5). To the extent therefore that it is submitted, at least inferentially, on behalf of the Central Authority that success with respect to ground 2 would not entitle the appellants to succeed with their appeal, having regard to the trial Judge's conclusions with respect to Regulation 16(5) (judgment, paragraph 56), we disagree.

the remaining grounds of appeal

54. It is unnecessary in the circumstances we have outlined to consider any of the remaining grounds of appeal raised by the appellants.

conclusion

55. For the reasons we have given, the appellants are entitled to succeed with their

appeal. It was submitted initially, but with diminishing enthusiasm during the course of the hearing of the appeal, that, if minded to allow the appeal, this Court should substitute its own conclusion, one finding grave risk, for that of the trial Judge. We are not persuaded to that course.

56. There are a number of reasons why we are not so persuaded. In our view, before this Court could attempt to re-exercise the discretion of the trial Judge, the parties would have to be afforded the rights described by the High Court in *Allesch v Maunz* (2000) 203 CLR 172. It is inconceivable in the circumstances that the appellants would not wish the opportunity to adduce further evidence from Ms S in case this Court was not clearly persuaded on the evidence before the trial Judge, that the return of the child to New Zealand involved "grave risk" within the meaning of that term in the Regulations.

57. The evidence to which we have referred, though not incapable of supporting a finding of grave risk, was not consistent only with such a conclusion. Indeed, on one view of the course of her cross-examination, Ms S did not have the opportunity to suggest how "grave" or otherwise she ultimately considered the relevant risks to be, or her reasons for such opinions.

58. In the circumstances, as was ultimately at least tacitly acknowledged by Counsel for all parties, a re-hearing of the Central Authority's application by a judge other than the trial Judge is appropriate and we will so order.

costs

59. It was submitted by Counsel for each of the parties that, if the appeal were successful, costs certificates should issue to each party. We are satisfied that the circumstances surrounding the allowing of the appeal render the granting of costs certificates with respect to the appeal and the re-hearing appropriate.

orders

1. That the appeal be allowed.

2. That the order of the trial Judge be set aside.

3. That the application of the Central Authority filed 12 September 2005 be remitted for re-hearing by a judge other than the trial Judge.

4. That the Court grants to the Appellants a costs certificate pursuant to the provisions of s 9 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the Appellants in respect of the costs incurred by the Appellants in relation to the appeal.

5. That the Court grants to the Respondent a costs certificate pursuant to the provisions of s 6 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the

Attorney-General to authorise a payment under that Act to the Respondent in respect of the costs incurred by the Respondent in relation to the appeal.

6. That the Court grants to the Child Representative a costs certificate pursuant to the provisions of s 6 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the Child Representative in respect of the costs incurred by the Child Representative in relation to the appeal.

7. That the Court grants to all the parties a costs certificate pursuant to the provisions of s 8 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to all parties in respect of such part as the Attorney-General considers appropriate of any costs incurred by all parties in relation to the new trial granted by these orders.

I certify that the preceding
59 paragraphs
are a true copy of the reasons
for judgment delivered by this
Honourable Court.
A.C.
Associate
Date: 16/02/2006