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

**NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILD REMAINS IN FORCE.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA743/2018**
**[2020] NZCA 209**

| | | |
|---|---|---|
| BETWEEN | LRR<br>Appellant |
| AND | COL<br>Respondent |

| | |
|---|---|
| Hearing: | 6 March 2020 |
| Court: | Kós P, Brown and Goddard JJ |
| Counsel: | B J R Keith and D D Vincent for Appellant<br>J C Gwilliam and H Joubert for Respondent<br>M M Casey QC and D Sothieson for Central Authority as Intervener |
| Judgment: | 3 April 2020 at 2.00 pm |
| Reasons: | 3 June 2020 |

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B The application to have the child returned to Australia is declined.**

**C The orders made by the High Court at [4] and [6] of the Minute dated 29 November 2018 are set aside.**

**D** **Leave is reserved to either party to apply to this Court for any consequential orders that may be required.**

**E** **There is no order as to costs.**

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## REASONS OF THE COURT

(Given by Goddard J)

[1] In August 2017 the mother returned from Australia to New Zealand, with her son H who was then two and a half years old. H was born in Australia and was habitually resident in that country. H was wrongfully removed from Australia for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention). The Convention is implemented in New Zealand law by sub-pt 4 of pt 2 of the Care of Children Act 2004 (the Act). The father, who lives in Australia, sought the return of H to Australia under the Convention. The New Zealand Central Authority applied to the Family Court under the Act for an order for H to be returned to Australia. The Family Court declined to order H's return on the basis that one of the exceptions in the Convention applied: the Judge considered that there was a grave risk that the child's return to Australia would place him in an intolerable situation.[1]

[2] The father appealed to the High Court. The High Court held that the exception did not apply and made an order for H's return to Australia.[2]

[3] The mother now appeals to this Court. The central issue is whether there is a grave risk that the return of H to Australia would place him in an intolerable situation: a situation which he cannot, in all the relevant circumstances, be expected to tolerate.

[4] The relationship between the mother and the father was dysfunctional and volatile. Family violence orders had been made against the father by the Australian courts on a number of occasions. At the time the mother and H left Australia, the father was facing charges of assaulting the mother, and breach of family violence orders. He has since been convicted on a number of those charges.

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1 *[COL] v [LRR]* [2018] NZFC 4040 [Family Court judgment].
2 *COL v LRR* [2018] NZHC 2902 [High Court judgment].

[5] The mother's mental health is frail. She has a history of depression and substance abuse. In mid-2017 the mother was suffering from depression, severe anxiety, and stress. Unsurprisingly, these were all either caused or exacerbated by the dysfunctional relationship and the family violence she was experiencing. She was drinking to excess. These factors combined to seriously impair her parenting capacity.

[6] In these circumstances H's situation in mid-2017 was, as the father's counsel rightly conceded, intolerable.

[7] If H is now required to return to Australia, his mother — who is, and has always been, his primary carer — would return with him. The mother is currently coping well in New Zealand: she is caring for H, she has significant family support, and she has part-time employment. If she returns to Australia she would be living in proximity to the father, whom she fears (a fear that has been shown to be well-founded). She would be isolated, with no family or close friends to provide emotional and practical support. Her financial and housing situation would be precarious: a further source of stress. The expert psychological evidence before us (which was not before the Family Court or the High Court) confirms that there is a grave risk that return of the mother and H to Tasmania would cause a relapse in terms of the mother's mental health and substance abuse, and that this would significantly impair her parenting capacity. That outcome would be intolerable for H. It is possible that H could be cared for by his father and/or his paternal grandparents if his mother became incapable of caring for him. But the loss of his mother (his primary caregiver throughout his life) as a functional parent and caregiver, because she has been rendered incapable of caring for him by mental illness and/or substance abuse, is not a situation that this young child can be expected to tolerate.

[8] On 3 April 2020, we allowed the mother's appeal.[3] Our reasons are set out in this judgment.

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[3] *LRR v COL* [2020] NZCA 89.

**Background**

[9] The mother is a New Zealander. She was born in New Zealand and grew up in New Zealand. She moved to Sydney after finishing high school and lived in Australia for the next 10 years, apart from a three-year period spent in New Zealand while completing a degree at Victoria University. She moved to Darwin in 2013. There she met the father, an Australian citizen. In Darwin she was working in a casino. She was also working as an escort. She says the father, who used methamphetamine and dealt in drugs to support his habit, introduced her to that drug. Methamphetamine became a part of their lives.

[10] The couple lived together for a time, and the mother became pregnant with H. He was born on 15 February 2015.

[11] It seems that the relationship between the mother and the father was volatile and dysfunctional from an early stage, well before the birth of H. Social services in Darwin were involved with the family and were concerned about H's welfare. The mother says there were many incidents of domestic violence on the part of the father while they lived in Darwin.

[12] As noted above, the mother has a history of depression and frail mental health. She has for many years struggled with alcohol abuse. In Darwin their lifestyle involved use of drugs, drug dealing on the father's part, and difficulties with their finances and housing. That included a period of homelessness and living in a car while the mother was pregnant with H. This appears, unsurprisingly, to have exacerbated the mother's mental health and alcohol issues. The mother says she experienced regular incidents of psychological and physical abuse during this period.

[13] In April 2015 the mother and H relocated from Darwin to Hobart, Tasmania. The mother says she had had enough of the life they had been leading in Darwin. She moved out of the hotel room she had been living in with the father but had nowhere else to live. She sought help from her parents (H's maternal grandparents). The mother's parents went to Darwin to try to assist the mother. The maternal grandmother says in her affidavit that they were not able to bring the mother and H back to New Zealand as the mother did not have passports for herself and H.

The mother may also have been reluctant to move back to New Zealand at that time. The mother then decided to relocate to Hobart. In Hobart they would have the benefit of support from the father's mother and stepfather (the paternal grandparents), who lived nearby. The maternal grandfather accompanied the mother and H to Hobart.

[14] It seems the father and the mother resolved the issues that had led to this separation. The father joined the mother and H in Hobart a month or so later.

[15] Following the relocation to Tasmania there was further conflict and family violence. On numerous occasions the police were involved. The Tasmania Child Protection Service (TCPS) had an extensive involvement with the family: the file which was in evidence before us runs to several hundred pages. Harm assessments by Child Protection Services in 2016 and in mid-2017 expressed significant concern about H's welfare, placing the family as "about an 8" on a scale of 0 to 10.

[16] The mother's mental health remained frail, and she continued to drink heavily. This significantly affected her parenting capacity. She received some support to manage these issues from public and social sector agencies, including counselling and parenting support. She also received considerable support from the paternal grandparents, who had a close and loving relationship with H and were very supportive of the father and the mother.

[17] On 16 June 2016, following an incident on the night of 15 June, a police family violence order was issued against the father. (It appears a similar order had also been issued on 8 June 2016, following another incident.) The father returned to the house on the afternoon of 16 June and verbally abused the mother. Following this further incident, a family violence order was made by the Magistrates Court on 17 June 2016, on the application of the police. The order required the father to stay away from the apartment occupied by the mother.

[18] Around this time the mother attempted suicide on two occasions. On the second occasion she was admitted to hospital. In her evidence she describes this as "something of a half-hearted attempt … and in hindsight it was more a cry for

help and an attempt to get into the system, rather than a serious suicide attempt". The maternal grandmother came over to Australia for a time to help with H.

[19] In July 2016 the mother was convicted of driving with excess blood alcohol, fined and disqualified from driving for 12 months.

[20] It appears the family violence order made in June 2016 was varied at some stage to permit contact between the father and mother between specified hours, but the material before us is not clear on this point. The relationship continued despite the restrictions in the applicable family violence orders. The mother frequently permitted the father to be present at her home outside the specified hours, including spending nights there. There were multiple occasions on which police were called to the mother's address.

[21] At some point in 2016 the police issued a family violence order against the mother in relation to the father. An incident in October 2016 led to charges against the mother of assault and breach of that order. She pleaded guilty and was convicted.

[22] In December 2016 the father was convicted of assault, multiple breaches of family violence orders, and breach of bail conditions arising out of incidents in July, September, October and November 2016. The Court made a family violence order for a period of 12 months, backdated to 17 June 2016. This order removed the restrictions on the father being present at the mother's home. It seems he lived with the mother and H from late 2016 until July 2017.

[23] The mother says that the father's violence towards her escalated in 2017. In her evidence she describes particular incidents that occurred on 4 June 2017 and 13 July 2017. (As noted below, the father was subsequently convicted of assault and other charges in connection with the 4 June incident. The charges brought in relation to the 13 July incident were not proven and were dismissed.)

[24] On 13 July 2017 the father was arrested and charged with assault and breach of the then current family violence order. He was remanded in custody. He was

released on bail on 10 August 2017. An interim family violence order containing more extensive restrictions was made by the Court.

[25] The parties separated during this period. While the father was remanded in custody the mother moved out of the apartment they were renting and went to the Hobart Women's Shelter. She feared for her safety if the father was released. She sought assistance with obtaining financial support and obtaining legal aid for relocation proceedings to enable her to move with H to New Zealand. She encountered difficulties in obtaining financial support through the Australian welfare system, because she was a New Zealand citizen on a 444 visa.[4] She also encountered difficulty in obtaining legal aid for relocation proceedings.

[26] An approach was made to the father, while he was in custody, for consent to the mother moving to New Zealand with H. This appears to have been initiated by the maternal grandmother. The request was made through the paternal grandmother. The father did not agree to this request.

[27] Shortly after the father was released on bail, the mother returned to New Zealand and brought H with her. She did not have the father's consent to taking H to New Zealand. She did not advise the father she had left Australia with H.

[28] The Hobart Women's Shelter report summarises the circumstances leading to the mother's departure as follows:

> [The mother] struggled to make a decision, and appeared to agonise around the possible ramifications. [The mother] conceded that due to having no housing, no income to support any housing options, no family support and due to the high level of safety risk from [the father] that she would return to her family in New Zealand for support.
>
> …
>
> In summary, throughout [the mother's] stay with HWS, she was met consistently with barriers preventing her from remaining in Australia. [The mother's] visa restrictions, lack of income, lack of housing options with no income, no friends or family support and the significant safety risk for her

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4 A 444 visa is a special category visa for New Zealand citizens, which permits them to enter, stay and work in Australia. It is classified as a temporary visa, and does not entitle the holder to remain permanently in Australia.

> and [H] drove her to the decision to leave the country to attempt to resolve the parenting issues from the safety of New Zealand.
>
> My professional assessment of [the mother's] Mental Health was that it was increasingly declining with each day, and I was highly concerned that [the mother] lacked the support required to manage this in the short term or until the crisis was resolved. With no end in sight to [the mother's] complex needs, I was satisfied that she was returning to her family setting for much needed support.

[29] In New Zealand the mother is living with her parents. She has family support. She is receiving medical treatment and counselling, she is attending Alcoholics Anonymous, and she is not using alcohol. She is working part-time in a child care centre. By all accounts, she is coping well and taking good care of H.

[30] H has not had any contact with his father since 13 July 2017.

[31] On 16 August 2017 the mother applied without notice to the Family Court of New Zealand and obtained an interim parenting order granting her the day-to-day care of H. She also obtained a temporary protection order under the Domestic Violence Act 1995 for the protection of herself and H. The protection order became final by operation of law on 17 November 2017.

[32] The mother says that the father subjected her to psychological and physical abuse throughout the relationship, culminating in the incident on 13 July 2017. She says he was also psychologically violent to H, and physically and psychologically violent to C, his child from a previous relationship, who lived with the parties for a period in Tasmania.

[33] In his evidence in the New Zealand courts the father denies all of these allegations. He says that the mother has a serious drinking problem and is violent when intoxicated: it is she who is the violent one in the relationship. He says that either the mother is inventing the allegations she makes against him about violence targeted at her and others, or if she believes them then that casts doubt on her mental health and her fitness to take care of H. We address below the allegations each makes against the other, and the issues of credibility to which they give rise.

[34] To complete this chronology of key events, however, we note that on 15 January 2020 the Tasmanian Magistrates Court delivered a decision on the charges against the father relating to incidents on 4 June 2017 and 13 July 2017, and alleged breaches of the interim family violence orders and bail conditions in November 2017 by contacting the mother via Facebook. The father was convicted of common assault and breach of a family violence order by punching the mother in the eye on 4 June 2017. He was convicted of breaching family violence orders and bail conditions by his conduct in November 2017. He was acquitted of the charges relating to the 13 July 2017 incident. On 17 March 2020 he was sentenced to 77 hours of community service and 12 months of probation, including completing a men's behavioural change programme.

**The Convention and the New Zealand implementing legislation**

[35] The Convention was adopted by the Hague Conference on Private International Law on 25 October 1980. New Zealand became a party to the Convention with effect from 1 August 1991. Australia is also a party to the Convention. The Convention is widely ratified: as at May 2020 it had some 101 parties.

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

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

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

> ARTICLE 1
>
> The objects of the present Convention are—
>
> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

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

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

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

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

ARTICLE 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in

> the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.
>
> ARTICLE 13
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[42] Articles 12 and 13 are implemented in New Zealand by ss 105 and 106 of the Act. If the requirements set out in s 105 are satisfied, a New Zealand court must make an order for the return of a child to that child's State of habitual residence unless one of the exceptions in s 106 applies.

[43] In this case it is common ground that the requirements set out in s 105 are met. H is present in New Zealand. He was removed from Australia in breach of the father's rights of custody. The father was exercising his rights of custody at the time of removal. H was habitually resident in Australia prior to his removal. So the focus of the New Zealand proceedings has been on whether any of the grounds for refusal of a return order set out in s 106 is made out. Section 106 provides, so far as relevant:

**106 Grounds for refusal of order for return of child**

(1) If an application under section 105(1) is made to a court in relation to the removal of a child from a Contracting State to New Zealand, the court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the court—

(a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) that the person by whom or on whose behalf the application is made—

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or

(ii) consented to, or later acquiesced in, the removal; or

(c) that there is a grave risk that the child's return—

(i) would expose the child to physical or psychological harm; or

(ii) would otherwise place the child in an intolerable situation; or

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

…

[44] In the Family Court the mother sought to rely on s 106(1)(c)(i) and (ii). In the High Court and in this Court, the only ground relied on by the mother is s 106(1)(c)(ii). She says there is a grave risk that returning H to Australia would place H in an intolerable situation.

[45] The Act requires a court to which an application is made under s 105 to give priority to the proceedings so far as practicable, to ensure they are dealt with speedily.[5]

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5 Care of Children Act 2004, s 107(1).

**Family Court judgment**

[46] In the Family Court each party filed affidavits making a range of allegations against the other about inadequacy as a parent, misuse of alcohol and drugs, and propensity to violence. As is frequently the case in Convention proceedings, there was no cross-examination despite the conflicting evidence from the deponents, in particular in the affidavits made by the mother and father. However, the Court did have before it an extensive file from the TCPS, and material prepared by the Hobart Women's Shelter and the Wellington Women's Refuge.

[47] The Family Court judgment sets out in some detail the evidence before the Court about the history of the parents' relationship, and its impact on H. Judge Walsh was satisfied the parents' relationship was volatile and dysfunctional. It appeared that volatility and dysfunction had escalated in 2017.[6] The Judge had particular regard to the documentation from the TCPS, and reports prepared by the Hobart Women's Shelter and the Wellington Women's Refuge. The Judge considered there were significant issues relating to the credibility of the father's evidence. Although that evidence had not been tested in cross-examination, the Judge considered that the father's evidence appeared to be unreliable when assessed by reference to the matters recorded in the TCPS documentation. That documentation tended to corroborate the mother's account of the history and nature of the family violence.[7]

[48] The Judge found that it was likely that H had been exposed to family violence between the parties involving both psychological and physical abuse. As noted above, the mother also alleged there had been occasions when the father had physically or psychologically abused H and his daughter C from a previous relationship. The father denied these allegations. The Judge said that despite his reservations about the father's evidence, he was unable to resolve these contested issues of fact on the basis of the affidavit evidence.[8]

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6 Family Court judgment, above n 1, at [74].
7 At [82].
8 At [83].

[49] The Judge considered that if the mother and H returned to Australia there was potential for further conflict with the father. But he was satisfied that Court orders relating to contact between the father and H could be made which would incorporate specific conditions to address safety issues, in addition to the existing family violence order which protected both the mother and H.[9]

[50] The Judge said he could not discount the risk of H experiencing further psychological harm in the future if returned to Tasmania. He considered, however, that there was no evidential foundation for a finding that such a risk would be a "grave risk" in the sense that it would be substantial and more than transitory. For those reasons, he found that the exception in s 106(1)(c)(i) had not been established.[10]

[51] The Judge then turned to consider whether the exception in s 106(1)(c)(ii) had been made out: was there a grave risk that H's return would place him in an intolerable situation? The Judge focussed on the following factors:[11]

> (a) What are the implications for [H] if the mother's ability to parent him is compromised because of psychological issues affecting her wellbeing and her lack of entitlement to benefits if she does return with [H] to Australia?
>
> (b) What benefits are available to the mother in New Zealand and in Australia to support her and [H]?

[52] The Judge reviewed the evidence relating to the history of the relationship, and the mother's vulnerability. He considered that the following factors highlighted her vulnerability:[12]

> - The history and nature of her depression.
> - Her addiction issues relating to the use of alcohol and methamphetamine.
> - The adverse impact on her wellbeing resulting from her involvement in a volatile and dysfunctional relationship with the father characterised by ongoing family violence comprising physical and psychological abuse over a number of years.

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9 At [86].
10 At [88].
11 At [90].
12 At [96].

- Her ongoing fear of the father.
- Concerns about her suicidal ideation and self-harming with overdoses of drugs.
- The lack of family support for the mother in Tasmania.

[53] The Judge examined in some detail the financial support that would be available to the mother if she and H were to return to Australia. It appeared that some support would be available from the New Zealand government while she was caring for H and was in Australia because of a Convention application, until such time as any custody dispute was finally resolved. She might also be entitled to some financial support from the Australian government because she would be caring for H, who is an Australian citizen. The Judge also examined in some detail the prospect of the mother receiving legal aid in relation to a relocation application. The Judge said:

> [113] When I review the position regarding benefit entitlements I find there is uncertainty given the areas where discretion is used in determining whether to grant the special benefit in Australia. The mother did not receive the special benefit previously when she applied. The reality is there is uncertainty about whether the discretion would be exercised in favour of the mother.
>
> [114] The mother's eligibility for legal aid in Australia is also problematic because of uncertainty. If the mother was successful in applying for legal aid to contest relocation in Australia on the basis the New Zealand Family Court ordered [H] to return to Australia then she would be eligible to get the ICDP pending the outcome of the relocation case. The Commission advised, however, relocation cases are "*low priority*". In this case if the mother applied for legal aid for the relocation case and it was declined then as I understand the position her entitlement to the ICDP would come to an end.
>
> [115] It can be argued taking all factors into account and given the history of the alleged family violence in this case the Commission in Tasmania may be favourably disposed to grant legal aid for a relocation hearing but the fact remains the position is uncertain. As Mr Vincent noted in his submissions at a time of "*extreme crisis*" the Commission did not consider a relocation case necessary and was prepared to fund only an application for domestic violence orders. When I weigh these considerations I am not persuaded it can be assumed the mother will qualify for legal aid.

[54] The Judge then proceeded to assess whether there was a grave risk of an intolerable situation having regard to all the factors he had reviewed. He summarised his findings as follows:

> [117] In this case, I find on the evidence the psychological wellbeing of the mother has been adversely affected as a consequence of the abusive relationship with the father. The evidence indicated the mother attempted

> suicide on two occasions in Australia. Although the mother referred to these attempts as being "*half-hearted*" the suicide attempts reflected the depth of distress the mother was experiencing. As noted in the report from the Refuge, the mother was displaying signs of post-traumatic stress disorder. The concerns about the mother's wellbeing were recorded over a number of years in the documentation provided by TCPS.
>
> [118] When I weigh the totality of the factors relating to the mother's vulnerability I seriously doubt her ability to cope and provide appropriate care for [H] if an order was made for the return of [H] to Australia. These concerns would be compounded, if it transpired the mother was unable to get legal aid for the relocation proceedings that would follow and even more so if difficulties arose over her entitlement to benefits. In my view assumptions about entitlement to legal aid and benefits cannot be justified – there is too much uncertainty.
>
> [119] In *Armstrong v Evans* at [61] Judge Doogue made the following observation:
>
> > … I am satisfied the legal system could regulate the contact between the parties and the parties and their child. The difference here is that the risk I am concerned about is not capable of being legislated against. Court orders do not regulate against a person's inability to cope and potential suicidality. Mental Health systems and the regulation of mental illness by compulsory order similarly cannot eliminate such risk. They may relieve it but no health professional would make assurances that it could be eliminated. …
>
> I respectfully endorse this observation. I find these considerations apply in this case.
>
> [120] Given the concerns I have set out relating to the mother's vulnerability and issues associated with her mental health and her entitlement to benefits and legal aid in Australia, it is inevitable, in my view, this would place [H] in an intolerable situation if it was ordered he is to return to Australia.

[55] The Judge declined the application to make a return order.

[56] The application to the Family Court was made on 17 October 2017 and was heard on 21 February 2018. Further submissions were made in writing on 20 April 2018. Judgment was delivered on 1 June 2018. The Judge noted that "[r]egrettably delays have arisen in completing the judgment in this matter as I was on medical leave for some weeks".[13] We address the length of time it has taken the New Zealand courts to determine this application under the Convention at [148]–[149] below.

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13 At [8].

**High Court judgment**

[57] The father appealed to the High Court.

[58] Simon France J emphasised the need to focus on the situation that is likely to exist upon return, and which it is said will be intolerable.[14] He said it was important to recognise the home country in question is Australia, which has a Family Court system and structure similar to ours and which is governed by the same principles. "It is a short distance away and its systems afford no basis for any hesitation by a New Zealand court about ordering return".[15]

[59] The Judge considered that it was clear that if the mother returned with H, she would not be living with the father. So, he said:[16]

> … The core situation which lies behind the bulk of the previous misconduct by both parties will not exist. There is no history of how matters will work out once they are separate.

[60] The Judge expressed caution about some of the assumptions underpinning the Family Court Judge's concern about the mother's medium-term ability to care financially for H. The Family Court judgment assumed that in Australia the mother would be the primary caregiver. However, the Judge said:[17]

> … [The father] presently has care of three children from another relationship. All signs point to him wanting at least equal custody of H. His interest is demonstrated both by the appeal and the steps he has taken to be a party in the New Zealand Family Court proceedings. It should not be assumed [the mother] will be the sole caregiver, and any analysis of an intolerable situation must have regard to the different care options.

[61] The second assumption about which the Judge expressed caution was that if the mother were awarded custody, the father would not be required to contribute funds. The Judge noted that all the financial analysis in the Family Court focussed only on State support without having regard to other funds.[18]

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14 High Court judgment, above n 2, at [23].
15 At [24].
16 At [25].
17 At [26].
18 At [27].

[62] The Judge did not accept that the mother would not obtain financial assistance in Family Court proceedings in Australia.[19] The Judge considered one could expect the Australian Family Court to be seized of the matter in a relatively short time.[20]

[63] The Judge summarised his findings on the likely situation if a return order was made as follows:

> [30] Overall, therefore, I assess the factual context if H's return was ordered as being:
>
> (a) [The mother] and [father] will live apart, with Australian protection orders already in place;
>
> (b) [The mother] will probably, de facto if nothing else, have initial care of H; and
>
> (c) the Australian Family Court will be seized of the matter in a relatively short-time frame. If that occurs, [the mother] will likely receive New Zealand sourced assistance.
>
> Any assessment of intolerable situation needs to have this context in mind.
>
> [31] Without minimising the stresses on [the mother], and recognising her perception of the situation and the risk [the father] presents, I consider the circumstances fall well short of establishing an intolerable situation for H. Care is needed before too readily transferring [the mother's] unhappiness and even desperation over the situation to a conclusion that the child faces an intolerable situation. Although that may seem harsh, it is the Convention and the Act's focus as it seeks to deter child abductions.
>
> …
>
> [35] As it stands here:
>
> (a) if [the mother] cannot herself tolerate the situation, there is no evidence to say [the father] cannot care for the child. The primary risks are to her, not H. That is not to ignore disputed claims by [the mother] about [the father's] actions regarding H. However, in that regard the next point is relevant;
>
> (b) despite intensive intervention and supervision, Tasmanian Child Protection Services did not see sufficient risk to H when the couple were living together to require his removal. The risks to H now the couple will be living apart must be correspondingly reduced;

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19 At [27]–[28].
20 At [29].

> (c) [the mother] will not be required to live with [the father] and there is a non-violence order applicable (recognising of course the limits of that); and
>
> (d) H's long-term situation is likely to be before the Family Court in Australia in a relatively short timeframe.
>
> [36] In these circumstances, I consider the Family Court erred in assessing the evidence as discharging [the mother's] onus to establish that there is a grave risk H would be in an intolerable situation if having to return to Australia. The appeal is therefore allowed.

[64] On 29 November 2018, after receiving memoranda from counsel, the Judge made detailed orders providing for the return of H to Australia. Those orders were stayed pending an application for leave to appeal to this Court.

## Appeal to this Court

[65] On 30 November 2018 the mother applied for leave to appeal to this Court. The application was heard on 13 May 2019. On 24 June 2019 this Court delivered a decision granting leave to appeal.[21] The question on which leave was granted was:

> Did the High Court err in fact and law when it held there was not a grave risk that the child would be placed in an intolerable situation upon being returned to Australia?

[66] The six-month delay before hearing the leave application was unfortunate, and was inconsistent with the priority that this Court normally accords to applications under the Convention in accordance with s 107 of the Act. We return to this at [149] below.

[67] Following the grant of leave to appeal, the Secretary for Justice, acting in his capacity as the Central Authority for New Zealand under the Convention, sought leave to intervene in the appeal. The Court granted leave to the Central Authority to intervene.

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21 *LRR v COL* [2019] NZCA 248.

[68] There were then some further delays in bringing the appeal on for hearing as a result of a number of factors, including:

(a) An application by the mother to adduce further evidence on appeal: an updating affidavit from herself; an affidavit from Ms Cehtel, the Chief Executive Officer of the Tasmanian Women's Legal Service; and an affidavit from Dr Ruth Gammon, a clinical psychologist practising in Wellington. The Court directed that this application would be determined at the hearing of the substantive appeal.[22]

(b) An application by the mother for orders for production by the father of certain Australian records relating to the father's claim made in the High Court that he had care of three children from a previous relationship, and his current prosecution and criminal history. The Court directed that certain records be produced by each party.[23] There were unsatisfactory delays in the production of this material by the father, who sought additional time to obtain and produce various Australian records. Indeed, even at the hearing before us on 6 March 2020 the Court had not received all the material that the father had been directed to provide.

*Submissions of mother on appeal*

[69] Mr Keith, counsel for the mother, submitted that the decision of the High Court in this case, and certain observations of this Court and of the High Court in other cases, are inconsistent with the Convention, properly understood. He submitted that the approach adopted in the High Court was also inconsistent with the rights of the mother and her child recognised under international human rights instruments and under the New Zealand Bill of Rights Act 1990. There had been significant developments in the international case law in relation to the operation of the Convention in cases where the Article 13 exceptions are invoked. In light of those

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22 *LRR v COL* [2019] NZCA 620 at [17].
23 At [23]–[25].

developments, he said, there were three main objections to the decision reached in the High Court:

(a) The High Court was wrong to rely on disputes about evidence, or perceived gaps in the evidence, without making further inquiries or taking other steps to obtain additional information. It was inconsistent with the rights of the child, and also of the mother, to make these determinations without seeking further information.

(b) The High Court was wrong to hold that the evidence before it did not establish a grave risk to the child. The welfare of a small child cannot be addressed in isolation from the risk of abuse to his mother, and the consequences of that abuse.

(c) The High Court erred in presuming that the legal and social service systems in Tasmania were capable of protecting the child from the risks identified by the mother. A systematic presumption of that kind is inconsistent with the Convention and relevant human rights instruments. The Court needed to address what specific protections were available that would in fact be accessible and would consistently protect against the relevant risk. The assessment must be specific, not systemic.

[70] As noted above, the mother sought to adduce further affidavit evidence on appeal to support these submissions.

*Submissions of father on appeal*

[71] The father sought to uphold the High Court judgment. Mr Gwilliam, counsel for the father, emphasised the summary nature of the process required by the Convention for dealing with applications for return of children who have been abducted. He acknowledged that there were clear conflicts in the parties' evidence, and submitted that these are best dealt with by the Tasmanian Court in the context of custody proceedings, rather than by the New Zealand Courts in the context of the more limited timeframe and focus that is appropriate for proceedings under the Convention.

[72] The father opposed the application to adduce further evidence on appeal, apart from relevant updating evidence from each party.

[73] The father submitted that even if the Court considered that a grave risk of an intolerable situation was made out, the Court might be satisfied that any such risk can be ameliorated by appropriate undertakings and other conditions placed on an order for return. The father suggested that appropriate undertakings could include:

(a) the father instituting immediately appropriate proceedings through the Family Court in Australia for the substantive care of H;

(b) the father agreeing to provide some financial assistance in regard to the care of H pending the determination of the substantive issue by the Family Court in Australia; and

(c) standard conditions being imposed in regard to the provision of H's travel documents, and assistance by the New Zealand Central Authority in relation to the return of H to Australia.

*Submissions of Central Authority*

[74] The Central Authority neither supported nor opposed the appeal. Ms Casey QC, counsel for the Central Authority, sought to assist the Court with submissions on the operation of the Convention, and developments in relation to Convention jurisprudence.

[75] In particular, the Central Authority wished to address the relevance of undertakings and conditions to the making of a return order. The decision of this Court in *A v Central Authority*[24] has been interpreted in the Family Court and High Court as meaning that conditions cannot be imposed on a return order unless an exception has been made out, and can only be imposed when the court is exercising its discretion as to whether to order return.[25] The Central Authority submitted that this interpretation

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[24] *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA) at 524.

[25] See for example *Secretary for Justice v B* HC Christchurch CIV-2006-409-2578, 9 March 2007 at [65].

is problematic for two reasons. First, protective measures are relevant at the point the grave risk is being assessed, not at the exercise of discretion stage. Second, in cases where grave risk has been established, it is very unlikely that the discretion will be exercised in favour of a return. The Central Authority submitted that it would be helpful for this Court to clarify these matters.

**The Convention — general principles**

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

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

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

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

the Convention is designed to ensure that the outcome does serve the interests of the particular child. As Baroness Hale said in *Re D*:[26]

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

[80] The relationship between the Convention and international human rights instruments, including the United Nations Convention on the Rights of the Child (UNCRC),[27] was considered by the United Kingdom Supreme Court in *Re E*. Delivering the judgment of the Court, Baroness Hale and Lord Wilson said:[28]

> 14 … the fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean that they are not at the forefront of the whole exercise. The Preamble to the Convention declares that the signatory states are "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention …" This objective is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this: see the Explanatory Report of Professor Pérez-Vera, at para 25.
>
> 15 Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right. As our own Children Act 1989 makes clear, in section 1(3)(c), the likely effect upon a child of any change in her circumstances is always a relevant factor in deciding what will be best. But it is also seen as likely to promote the best resolution for her of

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

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

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

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

[81] As the Supreme Court went on to say, the exceptions to the obligation to return are by their very nature restricted in scope. They do not need any extra interpretation or gloss.[29] Similarly, the High Court of Australia has rejected the proposition that the exceptions should be "narrowly construed".[30]

[82] These observations are equally relevant to the New Zealand Act. Their relevance is underscored by s 4 of the Act, which as relevant provides:

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

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29 At [52].

30 *DP v Commonwealth Central Authority* [2001] HCA 39, 206 CLR 401.

(4) This section does not—

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

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

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

[84] For essentially the same reasons there is no inconsistency between the Convention and the Act, properly understood and applied, and the UNCRC requirement that:[31]

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

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

**The relevant exception in this case: a grave risk of an intolerable situation**

[86] This case turns on the application of s 106(1)(c)(ii) of the Act: the court may refuse to make an order for the return of the child if the person who opposes the making of the order establishes to the satisfaction of the court that there is a grave risk that

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31 United Nations Convention on the Rights of the Child, art 3(1).

the child's return would place the child in an intolerable situation. We make eight observations about this exception.

[87] First, as noted above, there is no need for any gloss on the language of the provision. It is narrowly framed. The terms "grave risk" and "intolerable situation" set a high threshold. It adds nothing but confusion to say that the exception should be "narrowly construed". As this Court said in *HJ v Secretary for Justice*, "there is no requirement to approach in a presumptive way the interpretative, fact finding and evaluative exercises involved when one or more of the exceptions is invoked".[32]

[88] Second, the court must be satisfied that return would expose the child to a *grave risk*. This language was deliberately adopted by the framers of the Convention to require something more than a substantial risk.[33] A grave risk is a risk that deserves to be taken very seriously. That assessment turns on both the likelihood of the risk eventuating, and the seriousness of the harm if it does eventuate. As the United Kingdom Supreme Court said in *Re E*:[34]

> … Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

[89] Third, consistent with the focus of the exception on the circumstances of the particular child, a situation is intolerable if it is a situation "which this particular child in these particular circumstances should not be expected to tolerate".[35]

[90] Fourth, the inquiry contemplated by this provision looks to the future: to the situation as it would be if the child were to be returned immediately to their State of habitual residence. The court is required to make a prediction, based on the evidence, about what may happen if the child is returned. There will seldom be any certainty about the prediction. But certainty is not required; what is required is

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32 *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) at [32].

33 Paul Beaumont and Peter McEleavy *The Hague Convention on International Child Abduction* (Oxford University Press, Oxford, 1999) at 137.

34 *In Re E*, above n 28, at [33].

35 *In Re D*, above n 26, at [52]; and *In Re E*, above n 28, at [34].

that the court is satisfied that there is a risk which warrants the qualitative description "grave".[36] This inquiry, and the relevance of protective measures to reduce a risk that might otherwise exist on return, is discussed in more detail at [111]–[119] below.

[91] Fifth, it is not the court's role to judge the morality of the abductor's actions. It is not in a position to do so, and this is in any event irrelevant to the forward-looking inquiry contemplated by the Convention. As Baroness Hale said in *Re D*:[37]

> … By definition, one does not get to article 13 unless the abductor has acted in wrongful breach of the other party's rights of custody. Further moral condemnation is both unnecessary and superfluous. The court has heard none of the evidence which would enable it to make a moral evaluation of the abductor's actions. They will always have been legally wrong. Sometimes they will have been morally wicked as well. Sometimes, particularly when the abductor is fleeing from violence, abuse or oppression in the home country, they will not. The court is simply not in a position to judge and in my view should refrain from doing so.

[92] Sixth, the burden is on the person asserting the grave risk to establish that risk, as the language of art 13 and s 106 of the Act makes plain. But the process for determining an application under the Convention is intended to be prompt, and the court should apply the burden having regard to the timeframes involved and the ability of each party to provide proof of relevant matters.[38] We discuss the practical implications of this burden in more detail at [101]–[110] below.

[93] Seventh, although the question is whether there is a grave risk that return will place the child in an intolerable situation, the impact of return on the abducting parent may be relevant to an assessment of the impact of return on the child. In *Re S* the United Kingdom Supreme Court allowed an appeal by a mother who opposed the return to Australia of her son on the basis that there was a grave risk of her son being placed in an intolerable situation because of the impact that return would have

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36 *In Re D*, above n 26, at [52]; and *DP v Commonwealth Central Authority*, above n 30, at [41], [42].
37 *In Re D*, above n 26, at [56].
38 See *DP v Commonwealth Central Authority*, above n 30, at [187].

on the mother's mental health, and (as a result) on her son.[39] The critical question, the Court said:[40]

> … is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.

[94] We do not accept Mr Keith's submission that if the Court is satisfied that return will expose a mother to family violence, it is not necessary to establish a specific link between that abuse and the risk of a serious adverse effect on the child. We accept, of course, that intimate partner violence can cause significant direct and indirect harm to children. As Baroness Hale said, writing extrajudicially:[41]

> Nowadays, we also understand that domestic violence directed towards a parent can be seriously harmful to the children who witness it or who depend upon the psychological health and strength of their primary carer for their health and well-being.

[95] However, the focus remains on the situation of the child. It is necessary for the person opposing return of the child to the requesting State to articulate why return would give rise to a grave risk of an intolerable situation for the child. Is it because there is a grave risk that the child will be exposed to incidents of violence directed at the child's mother? Is it because there is a grave risk that actual or feared violence will seriously impair the mother's mental health and parenting capacity? The person opposing return needs to establish to the court's satisfaction the factual foundation for the specific concerns they advance.

[96] Eighth, s 106(1) confers a discretion on the court to decline to make an order for the return of the child if one of the specified exceptions is made out. However, as Baroness Hale observed in *Re S*, if a grave risk of an intolerable situation is made out,

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39 *In Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257.

40 At [34].

41 Brenda Hale "Taking Flight — Domestic Violence and Child Abduction" (2017) 70 Current Legal Problems 3 at 7.

"it is impossible to conceive of circumstances in which … it would be a legitimate exercise of the discretion nevertheless to order the child's return".[42]

[97] In *Secretary for Justice v HJ* the New Zealand Supreme Court dismissed an appeal from a decision of the Court of Appeal finding that an order for return should not be made in relation to a child in circumstances where the application was made more than 12 months after the removal of the children, and the children were settled in New Zealand: the scenario contemplated by art 12(2) of the Convention and s 106(1)(a) of the Act. The judgment of Blanchard, Tipping and Anderson JJ suggested that where an exception is made out, it may nonetheless be appropriate to exercise the s 106 discretion in favour of an order for return of the child, in order to deter future abductions:[43]

> [50] Hence, what is in the best interests of the particular child in terms of s 4(1) cannot be the only or indeed the dominant factor in the exercise of the s 106 discretion. To take that view would be to "limit" the discretion contrary to s 4(7). In particular, the best interests of the particular child must be capable of being outweighed by the interests of other children in Hague Convention terms, if to decline return would send the wrong message to potential abductors. As we will develop below, striking the right balance between the best interests of the child or children on the one hand, and the deterrent policy of the Convention on the other, lies at the heart of the exercise of the s 106(1)(a) discretion. Waite J put the point well in *W v W (Child Abduction: Acquiescence)* when he said that it was implicit in the general operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases.
>
> (Footnote omitted).

[98] This observation about the exercise of the s 106 discretion to order return where an exception applies, even though return is not in the best interests of the child, was obiter as in that case the Court unanimously declined to order the return of the child. It should also be read in light of the warning given by those Judges earlier in their judgment:

> [39] It is desirable to enter a caveat at this point about the various grounds upon which an order for return may be refused. Statements in judgments or other writings about one ground should not be applied automatically or uncritically to another. General statements about these grounds, or exceptions

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42 *In Re S*, above n 39, at [5]; see also *In Re D*, above n 26, at [55].

43 *Secretary for Justice (New Zealand Central Authority) v HJ* [2006] NZSC 97, [2007] 2 NZLR 289.

> as it may be convenient to call them, should be treated carefully, recognising their generality. They may not apply to all grounds and may need to be modified when a particular ground is being considered. When examining judgments and other publications it is important to be clear which particular exception is being addressed. Each exception has its own features and the court's approach must be tailored to the particular purpose and requirements of that exception.

[99] *Secretary for Justice v HJ* was a s 106(1)(a) case. Nothing in that decision should be understood as contemplating the possibility that the discretion to order return of a child might be exercised in circumstances where the grave risk ground in s 106(1)(c) is made out. More generally, we have some reservations about the suggestion that where an exception is made out under s 106, the interests of the particular child may nonetheless give way to the goal of deterring potential abductors in the future.[44] That suggestion is in our view difficult to reconcile with the scheme of the Convention, with the UNCRC, and with s 4 of the Act. We are attracted to the view expressed by Elias CJ in *Secretary for Justice v HJ* that where the summary process contemplated by the Convention has been followed, and the Court finds that an exception is made out, the discretion must be exercised in the best interests of the child having regard to the circumstances that establish the exception.[45] Applying s 4(1) in those circumstances would not limit the operation of the Convention. So s 4(4) does not preclude the application of s 4(1).

[100] For present purposes, however, what matters is that if the return of a child to that child's State of habitual residence would expose the child to a grave risk of an intolerable situation, it would not be appropriate to make an order for the return of the child. The interests of the child in not being exposed to that risk cannot be outweighed by the goal of deterring future would-be abductors.

**Applying the exception in practice**

*Ensuring the inquiry is prompt and that relevant evidence is before the court*

[101] The Convention requires a court in a requested State to walk a delicate line between ensuring that the application is determined promptly, and ensuring that proper

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44 See the observations of this Court in *Smith v Adam* [2007] NZFLR 447 (CA) at [12]–[14].

45 *Secretary for Justice (New Zealand Central Authority) v HJ*, above n 43, at [27].

attention is paid to the important and often strongly contested issues that can arise in the context of Convention applications. The temptation to conduct a full inquiry into the welfare and interests of the child must be resisted. A lengthy and wide-ranging inquiry of that kind would defeat one of the Convention's central objectives: ensuring the prompt return of children who have been wrongfully removed or retained, where none of the exceptions applies. On the other hand, the Convention and the Act require the court to conduct a proper inquiry, based on evidence rather than speculation, into the facts relevant to any exception that is invoked.

[102] In cases where it is not argued that one of the exceptions applies, the Family Court can and does manage Convention cases to ensure that prompt return is achieved. Ideally that return will be voluntary, as contemplated by art 10 of the Convention and s 103(3)(c) of the Act. But in the absence of agreement on a voluntary return, appropriate orders will be made very promptly indeed.[46]

[103] Where the art 13 "grave risk" exception is invoked, helpful guidance for a court seeking to give effect to the Convention is provided by the Guide to Good Practice recently published by the Hague Conference on Private International Law (Good Practice Guide).[47] We endorse the observation in the Good Practice Guide that the duty to act expeditiously does not mean that the court should neglect the proper evaluation of the issues:[48]

> … It does require, however, that the court only gather information and / or take evidence that is sufficiently relevant to the issues, and examine such information and evidence, including sometimes dealing with expert opinion or evidence, in a highly focused and expeditious manner.

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46 New Zealand's "Country Profile" on the Hague Conference website (which appears to have last been updated in 2012) records that the expected time from the commencement of proceedings to a final order is six to 12 weeks: <www.hcch.net>. That is consistent with the most recent national statistics for New Zealand included in the periodic statistical reviews prepared by the Hague Conference: see Nigel Lowe *A Statistical Analysis Of Applications Made In 2003 Under The Hague Convention Of 25 October 1980 On The Civil Aspects Of International Child Abduction (2007 Update)* (Hague Conference on Public International Law, 2008): https://assets.hcch.net/upload/wop/abd_pd03ef2007.pdf.

47 Hague Conference on Private International Law *1980 Child Abduction Convention Guide to Good Practice Part VI Article 13(1)(b)* (The Hague, The Netherlands, 2020) [Good Practice Guide].

48 At [22]. See also [52].

[104] Appropriate case management is essential to ensure that the issues are identified, and evidence relevant to those issues is provided to the court, in the shortest feasible timeframe.[49] At an early stage the court should consider what evidence the parties propose to provide, and whether additional evidence is needed to enable the court to make an informed decision under s 106. Depending on the issues raised, it may be desirable to appoint an independent psychologist to prepare a report.[50] In some cases it will be desirable to appoint counsel for the child, who can ascertain the views of the child and represent the child's interests in the proceedings.[51] In some cases it may be desirable for the courts in New Zealand and the requesting State to liaise about matters such as mediation, the making of protective orders in the requesting State, or the interplay between the return application under the Convention and a pending or foreshadowed relocation application in the requesting State.[52] All of these matters — and, as we note below, the question of interim access — should be addressed as soon it becomes apparent that an application for return will be contested.

[105] Where issues are not identified at an early stage, and surface late in the piece, the court will face an unsatisfactory dilemma between delaying the proceedings to obtain further relevant information, and seeking to determine those issues without a proper evidential foundation. Neither approach is ideal. Delay risks undermining the objectives of the Convention. But a child should not be exposed to grave risks because the court lacks the evidence it needs to determine whether the exception applies.

[106] We add that it will often be unsatisfactory to determine issues that arise in the context of Convention applications by reference to the burden of proof, or to one party's failure to adduce evidence in a timely way. The burden is, as noted above, on the person opposing return of the child. But as we have already emphasised, the court's focus is on the interests of the child, not the interests of the parents. This is not a context in which a court can properly proceed on the basis that a party who fails to provide relevant evidence to support their case must bear the consequences of that failure. That approach would risk compromising the interests of the child because of

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49 Chapter III.
50 Care of Children Act, s 133.
51 Section 7.
52 See Peter Boshier "Developing Family Relationships" (2010) 16 Canterbury LR 127 at 140–142.

deficiencies in the way in which one or other parent has conducted the litigation. In practice courts tend to prefer to allow necessary evidence to be provided to enable an informed determination to be made, even if that entails some further delay. That is understandable. But the outcome — delay — is problematic. Active case management enables the court to ensure that it has genuinely relevant information before it, and is not making important decisions about a child without an adequate evidential foundation, while avoiding unnecessary delay that would be inconsistent with the scheme of the Convention.

[107] We do not accept Mr Keith's submission that a court is required to make further inquiries to fill any gaps in the evidence. Nor do we accept his submission that art 13 of the Convention confers on the Central Authority the function of carrying out further inquiries and providing further evidence at the request of the court. As the Central Authority submits, it can play a useful role in facilitating requests for information held by relevant agencies in the requesting State — as it did in this case. But neither art 13 nor the Act provides for the Central Authority to undertake the more extensive evidence-gathering role for which Mr Keith contended.

[108] The apparent tension between speed and informed decision-making is mitigated to some extent if one bears in mind that in the context of s 106(1)(c) the Court is concerned with risks, not with certainties or even probabilities.[53] And as noted above, the evidence that is provided by the parties should be evaluated having regard to the timeframes involved, and the ability of each party to offer evidence on the issue.[54]

[109] The prompt process required by the Convention should not be derailed by broad or general allegations of risk to the child. If allegations made by the abducting parent lack sufficient detail and substance to be capable of establishing a grave risk, the court can and should deal with the matter summarily.

[110] However, there will be cases, of which this is one, where the parties give conflicting evidence about issues that go to the heart of the question that the court must

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53 See *DP v Commonwealth Central Authority*, above n 30, at [41]–[42].
54 See [92] above.

answer. Each challenges the credibility of the other. It may be impossible to resolve these conflicts without oral evidence and cross-examination. What is the court to do?

*The importance of protective measures that remove or reduce risk*

[111] There is no simple and universally applicable answer to that difficult question. It seems to us that in such circumstances there is much to be said for the approach adopted by the English courts, which is helpfully summarised by the Supreme Court in *Re E*:[55]

> 36 There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. … Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.

[112] As this approach underscores, an important factor in determining whether return will expose a child to a grave risk of an intolerable situation will often be the protective measures that can be put in place in the requesting State. If there is cogent evidence that return would expose the child to a grave risk of an intolerable situation, the court needs to consider whether protective measures can be put in place in the requesting State to protect the child from that risk. These measures may take the form of orders made (or to be made) by the courts of the requesting State, on the initiative of the left-behind parent or as a result of judicial cooperation in connection with the application. They may take the form of undertakings given by the left-behind parent, if the court is satisfied that those undertakings are enforceable and will be practically effective. (We discuss below at [115]–[119] the circumstances in which protective measures may be the subject of conditions attached to the orders that a New Zealand court makes for the return of a child).

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55 *In Re E*, above n 28.

[113] The court can expect that the legal systems of other Convention countries will generally be designed to protect children from harm.[56] But even where the system is unexceptional, the practical ability of the system to protect the child from the relevant risks is a highly material consideration.[57] This Court's decision in *A v Central Authority* has been read by some as suggesting that the inquiry is confined to systemic factors affecting all cases in the requesting State.[58] But the focus on systemic issues in that decision reflected the matters in issue in that case.[59] The decision should not be read as confining the inquiry to systemic issues, and removing the need to consider whether, although the system in the requesting State is unexceptional — or even admirable — there is a grave risk that the system will not *in practice* be able to protect the child from the relevant harm. The assessment of risk, and of the effectiveness of suggested protections against that risk, should always focus on the specific case. It is not appropriate to make assumptions about the effectiveness of protective measures in the requesting State to protect a child against a grave risk that has otherwise been made out.[60]

[114] So, for example, where a parent has in the past breached court orders designed to protect the child or the other parent from harm it cannot be assumed that such orders will provide effective protection in the future. The fact that such orders are available in the requesting State, and are already in place or likely to be made in the future, provides little comfort if such measures have previously been ineffective.

*Conditions attached to return orders*

[115] In *A v Central Authority* this Court made some observations about the approach that should be adopted in relation to imposition of conditions on return orders:[61]

> … Consideration was given in the course of argument as to whether a Court had power to attach conditions to any order made by it. It seems reasonably

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56 *HJ v Secretary for Justice*, above n 32, at [31]–[33]; *Smith v Adam*, above n 44, at [7]; and *Mikova v Tova* [2016] NZHC 1983 at [38]–[39].

57 *HJ v Secretary for Justice*, above n 32, at [31].

58 *A v Central Authority*, above n 24, at 523.

59 As did the discussion of this issue by this Court in *Smith v Adam*, above n 44, and by the High Court in *Mikova v Tova*, above n 56, at [39].

60 *In Re E*, above n 28, at [52]. See also *In Re D*, above n 26, at [52].

61 *A v Central Authority*, above n 24, at 524. References to the current provisions have been substituted for the original references to the corresponding provisions of the Guardianship Amendment Act 1991.

> clear there can be no power to attach conditions to an order under [s 105] in the absence of a finding in favour of a defence under [s 106]. On the other hand, if such a defence has been made out and the Court is concerned solely with the exercise of its discretion under [s 106] of the Act, then it may be possible that conditions could be attached, unless the statutory provisions dealing with conditions in the Act … imply no authority for the imposition of other conditions: see *H v H* (1995) 13 FRNZ 498. Nevertheless, as has already been stressed in this judgment, it is not the role of a New Zealand Court to interfere with the functions and responsibilities of the relevant Central Authorities and the Courts of another jurisdiction. It would be an unusual case which might give rise to the consideration of conditions. No finding is made on this issue.

[116] We agree that there is no power to impose conditions on an order for return of a child under s 105 in a case where no exception is in issue. Directions may be given to secure the return and "safe landing" of the child: for example, directions about who will accompany the child, payment for plane tickets, custody of the child's passport, and other practical matters.[62] The court has no power to go further.

[117] The ability of the court to impose effective conditions may however play an important role in cases where the court considers that an exception may be made out in the absence of such conditions. If the court can impose conditions that will be effective to address a risk to the child that might otherwise be present, for example by accepting enforceable undertakings or by requiring an application for certain orders to be made to the court in the child's habitual residence, those conditions may result in a finding that there is not after all a grave risk of an intolerable situation. That is, the imposition of the conditions removes the risk, and means the exception does not apply. We emphasise that the conditions imposed must be practically effective. If a grave risk would otherwise be made out, it is most unlikely that a court will be satisfied that the risk has been adequately addressed by conditions that are not readily enforceable for the benefit of the child, whether by the abducting parent or by some other person.

[118] We accept the submissions of the Central Authority that the ability of the New Zealand court to impose conditions to address a risk that would otherwise ground one of the exceptions is an option that appears to have been overlooked in the passage from *A v Central Authority* set out above. The potential relevance of

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62 Good Practice Guide, above n 47, at [49].

conditions when assessing whether an exception is made out means that the consideration of conditions may not be as unusual as this Court predicted in *A v Central Authority*.

[119] It is also possible that conditions may be imposed by the court where an exception has been made out, but the court considers that it would be in the best interests of the child to return to the requesting State if certain conditions are satisfied. In this context also the practical effectiveness of the conditions will be a key consideration. As we have already said, however, it is inconceivable that return would be ordered where the s 106(1)(c) exception is made out. So that is not a possibility that could arise in the present case.

[120] We should not leave the topic of conditions designed to protect children on their return to the requesting State without noting that it is regrettable that New Zealand has not yet become a party to the Hague Convention on Parental Responsibility and Measures for the Protection of Children (Child Protection Convention).[63] In a paper delivered in 2010 the then Chief Family Court Judge noted that the Convention had recently undergone the Parliamentary treaty examination process.[64] In 2016 the Government advised the United Nations Committee on the Rights of the Child that work towards New Zealand's accession to the Child Protection Convention was underway, and that "[d]rafting of a Bill that will enable New Zealand to accede to the Convention is underway and progress is being made as other legislative priorities allow".[65] The Child Protection Convention is an important complement to the Child Abduction Convention. It would (among other things) provide New Zealand courts with additional mechanisms for protecting the interests of children returned to a requesting State under the Child Abduction Convention. It would also facilitate the safe return of children to New Zealand from other States.

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63 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 2204 UNTS 95 (opened for signature 19 October 1996, entered into force 1 January 2002).

64 Boshier, above n 52, at 142.

65 New Zealand Government response to questions from the United Nations Committee on the Rights of the Child (Reporting Cycle V, Session 73, 20 September 2016) — accessible at: https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NZL/INT_CRC_AIS_NZL_25497_E.pdf.

We hope that this initiative will be given the priority that it deserves, to secure more effective protection of children caught up in cross-border family disputes.

**Application to adduce further evidence**

[121] As noted above, the mother has sought to adduce further evidence before us to inform our application of the principles outlined above:

(a) an affidavit from the mother, covering a small amount of updated information;

(b) an affidavit from Dr Gammon, a registered clinical psychologist; and

(c) an affidavit from Ms Yvette Cehtel, the Chief Executive Officer of the Tasmanian Women's Legal Service.

[122] The admission of further evidence in a civil appeal in this Court is governed by r 45 of the Court of Appeal (Civil) Rules 2005. Leave is required. Section 145(2)(b) of the Act also provides that this Court may, in its discretion, if it thinks that the interests of justice so require, receive further evidence. We do not consider that there is any material difference in the test for admission of new evidence under r 45 and s 145(2).[66] As a matter of procedure, leave to adduce such evidence should be sought under r 45 to enable the Court to determine whether the application will be dealt with in advance of the substantive hearing, or at that hearing.[67]

[123] The threshold for admission of further evidence on appeal has been described as "very strict".[68] The evidence must be credible, cogent (which in practical terms means it could affect the outcome of the proceeding) and fresh (which means it could not reasonably have been obtained for the first instance hearing). It is exceptional for evidence that is not fresh to be admitted.

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66 See *Barker v Roy* [2016] NZCA 62 at [24]–[28].
67 Court of Appeal (Civil) Rules 2005, r 45(3).
68 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 193.

[124] However, we accept Mr Keith's submission that this Court should admit credible and cogent evidence on an appeal concerning the application of the Convention, where that is necessary to enable the Court to make a decision consistent with the interests of the child. The child should not be prejudiced by the failure of a party to adduce evidence at an earlier stage in the proceedings if it meets the credibility and cogency thresholds: that would be inconsistent with the purpose of the Convention and the purpose of the Act, and with the UNCRC. So the freshness test plays a less significant role in this context.

[125] We consider that the limited updating evidence provided by the mother in relation to the progress of the prosecution of the father, and requests made to Australian authorities for information, is credible and cogent. Because it is updating evidence, it meets the freshness requirement. It should be admitted.

[126] The affidavits filed by the mother and father in response to directions from this Court are also of course admissible.

[127] The affidavit of Dr Gammon provides up-to-date information about the mother's mental health, and risks associated with her return to Australia. It is credible and cogent: we found it of considerable assistance in relation to the issues at the heart of this appeal. We accept the father's submission that evidence from a psychologist about these topics could have been adduced in the Family Court. We consider that such evidence could and should have been provided to the Family Court: it would have been of real assistance to that Court and to the High Court on appeal. Dr Gammon's affidavit is fresh in the sense that it is current: even if there had been similar evidence in the Family Court, it is likely we would have sought an update some two years on. To the extent that it is not fresh, we consider that the interests of H require that we receive it. It would be wrong for us to make a decision about the future of this young child without reference to cogent evidence of this kind, now that it has been made available.

[128] The affidavit of Ms Yvette Cehtel, the Chief Executive Officer of the Tasmanian Women's Legal Service, provides an overview of the operation and practice of family violence prevention legislation in Tasmania, and the extent and

availability of effective support services in Tasmania for women and children who have experienced or are experiencing domestic violence. It meets the credibility threshold. But we do not consider that the evidence provided in this affidavit is of any real assistance in determining this appeal. It is given at a high level of generality. It does little more than confirm the obvious point that no legal system can provide an assurance of protection against family violence, if the perpetrator is not willing to comply with court orders. Nor is it fresh in the sense that it could not have been adduced in the Family Court. If the affidavit had been of any real help in assessing the likely impact of return on H, the fact that the mother could have filed it in the Family Court would not have been decisive: an omission to provide relevant evidence at the earliest opportunity by one of the parties should not be visited on the child, for the reasons explained above. But its lack of relevance means that we do not need to confront that issue. We decline to receive this affidavit.

**Applying the principles to this case**

[129] What does the evidence establish about H's situation if he is returned to Australia? Would return to Australia expose him to a grave risk of an intolerable situation?

[130] It is common ground that if H returns to Tasmania, the mother will return with him. As counsel for the father accepted in the course of argument, the mother would be his primary carer for the foreseeable future in Tasmania, unless and until a court made orders to different effect.

[131] The mother will receive some financial support from the Australian and, probably, New Zealand governments. But she will not be entitled to the same level of financial support as an Australian citizen. Her access to other forms of publicly funded support (such as medical care) will also be limited. The father's submission that any concerns about the financial position of the mother and H could be addressed by this Court imposing a condition requiring the father to provide financial support for H is in our view speculative. He has not made any concrete offers of support, or suggested any practical arrangements for ensuring that this support will be provided. There is no evidence about his ability to provide such support. The limited information we

have seen about his financial position suggests he is most unlikely to be able to provide meaningful financial support. In the absence of concrete proposals by the father for provision of financial support for H, and evidence confirming his ability to provide that support, this possibility should be disregarded.

[132] It is far from clear where H and the mother would live, and what their financial position would be, immediately on their return to Tasmania. Mr Gwilliam suggested a shelter such as the Hobart Women's Shelter would be an option. We do not see that as a satisfactory solution for H. Mr Gwilliam also submitted, and we accept, that realistically the mother's family is likely to provide some practical and financial support to the mother and H to avoid immediate homelessness and destitution while other arrangements are made. However that assistance cannot be expected to continue indefinitely. In the medium term, H and his mother will be in a precarious and stressful financial and housing situation.

[133] The father says he intends to initiate Family Court proceedings in relation to arrangements for the care of H. But he has not done so to date. If he does so, it seems likely the mother would receive legal aid in those proceedings from either the Australian or New Zealand government. But whether she would receive legal aid to initiate and pursue a relocation application is unclear.

[134] There is no evidence before us about how long proceedings before the Family Court concerning care of H, and relocation to New Zealand, are likely to take to be resolved. It seems likely this would take some months, if not longer. The impact of a return to Tasmania needs to be assessed bearing in mind the likelihood of the mother needing to care for H in Tasmania for a substantial period, whatever the eventual outcome of those proceedings might be.

[135] The mother fears for her safety in Tasmania, where she will be living in proximity to the father and will probably be forced to interact with him to some extent in connection with arrangements concerning H. This fear is well grounded in fact. The father was recently convicted for assaulting the mother and for breaching family violence orders and bail conditions. His breaches of family violence orders and bail conditions also provide substantial objective support for her concern that the orders

that the Australian courts can make provide no assurance of effective protection. This is not a criticism of the Australian court system. The unfortunate reality is that where a perpetrator of family violence is not willing to respect court orders, there is only so much that any legal system can do to protect the victim. That is true in Australia as it is in New Zealand.

[136] The mother would be isolated in Tasmania, where she has no family, close friends or other personal support mechanisms. Her main sources of support before her departure, other than government agencies and a number of social service providers, were the father's parents. They provided significant support to her and to H. But as counsel for the father realistically accepted, that is unlikely to be an option for the mother on her return, given the events of the last few years.

[137] The mother would be likely to receive some support — for example, advice and counselling — from social sector agencies, as she did before her departure. But as one would expect, and as the mother's experience confirms, this form of support only goes so far. It cannot prevent the mother from experiencing isolation, stress and anxiety. At best, it may alleviate the suffering and practical difficulties to which she is exposed.

[138] It is common ground that the mother's mental health is frail. She has a history of depression and substance abuse, in particular alcohol abuse. She is coping well in New Zealand at present. But we consider that the risk that return of the mother and H to Tasmania would cause a relapse in terms of her mental health and substance abuse is very high. We were assisted by the evidence from Dr Gammon about the likely impact on the mother, and in turn on H. Dr Gammon considered that a return to Tasmania would pose grave risk to the mother's emotional wellbeing. She would be at significant risk of returning to substance abuse and decreased mental wellbeing/functioning due to the loss of psycho-social supports. The mother's return to Tasmania would not only place her mental wellbeing at risk, but also her sobriety. It has long been known that stress increases the risk of alcohol relapse. Dr Gammon expressed significant concern about the risk of suicide should the mother return to Tasmania. She considered that the mother's risk of suicide is currently low, due to

the protective factors in place while she is with her family in Wellington. Without those protective factors, the mother would be at significant risk of suicide.

[139] Dr Gammon also explained how this would in turn affect H. She explains that research shows mental health conditions and parental stress, including depression and anxiety, can have a negative impact on parenting and healthy child development. Many of the risk factors for effective parenting would be present if the mother returned to Tasmania.

[140] If the High Court Judge had had the benefit of this evidence, we doubt he would have concluded that the fact that the parents would be living apart provided much comfort. The position will be different in some material respects. But the key point is that there will still be very serious risks to the mother's mental health, and as a result, to H's wellbeing. The fact that the parents would be living apart will not do anything to address the mother's isolation and lack of support. Indeed, in this respect she would be worse off following a return to Tasmania, since (as noted above) she is unlikely to receive the same level of support and assistance she previously received from the paternal grandparents. Nor would the fact that the parents would be living apart be sufficient to remove the stress and anxiety caused by the mother's fears of further psychological and physical violence. She was exposed to such violence in the past during periods when she and the father were living apart, and family violence orders intended to protect her were in place. We consider that her fear that such orders will not be effective to protect her in practice is both genuine and well-founded: the father has a record of breaching such orders.

[141] It is possible that the mother and H could return to Australia without any of these concerns materialising. She may receive sufficient support, social and financial, to continue to provide a home for H and care for him. There may be no relapse in terms of her mental health or substance abuse that affects her capacity to parent H effectively. But we consider there is a very significant risk that these concerns will materialise, and that they will have a very serious adverse effect on H. Our overall assessment is that the risk is sufficiently high, and the consequences sufficiently serious, that the risk can properly be characterised as grave.

[142] If these concerns do materialise, we consider that the situation would be intolerable for H. This young child cannot be expected to tolerate the loss of effective parental care from his mother, if her mental health deteriorates and she returns to alcohol abuse.

[143] The High Court Judge considered that if the mother could not care for H, he could be cared for by his father. The father says in his evidence that he would be willing to take primary responsibility for the care of H. It appears he is currently caring for three children from his previous relationship. The paternal grandparents have also given evidence that they are more than willing to have H come to live with them. We accept that there are other possible arrangements for care of H in Tasmania. But we are satisfied that the scenario in which the mother is incapable of functioning as an effective parent, as a result of a deterioration in her mental health and/or recurrence of alcohol abuse, would be intolerable for H. She has been his primary carer throughout his life. In this scenario she would be incapable of properly caring for him — either as a primary caregiver or, quite possibly, at all. That is not a situation that H can be expected to tolerate.

[144] Indeed, this scenario could lead to H being deprived of all contact with his mother. If she is not H's primary caregiver, then her housing and financial situation in Australia would be even more precarious. She would lose her entitlement to most if not all of the Australian and New Zealand government financial support described above. It is difficult to see how she could afford to remain in Tasmania without that financial support. There is also the risk of suicide identified by Dr Gammon, which this scenario seems likely to exacerbate. The loss of all parental care from his mother because she is forced to leave Tasmania for financial reasons, or because her mental health deteriorates to the point where she acts on her suicidal ideation, would plainly be intolerable for H. But we need not make a finding about the likelihood of these catastrophic scenarios. Even if they do not eventuate, and the mother is able to remain in Tasmania, H cannot be expected to tolerate his mother becoming incapable of caring for him as a functioning and effective parent.

[145] We therefore reach the same conclusion as the Family Court Judge. There is a grave risk that the return of H to Australia would place H in an intolerable situation.

Our task has, in some ways, been easier than that of the Family Court Judge and High Court Judge, as we have had the benefit of Dr Gammon's evidence. We have also had the benefit of findings by the Tasmanian Courts in relation to the alleged family violence by the father; allegations which have been substantially upheld to the criminal standard of proof. These findings provide further confirmation that there is good cause for the mother's fears in relation to violence on the part of the father, and her fear that orders made by the courts will not be effective to protect her from such violence.

[146] As noted above, it is inconceivable that the discretion to order return would be exercised in circumstances where a grave risk of an intolerable situation has been made out. We therefore allow the appeal and set aside the return orders made in the High Court.

**Concluding remarks**

[147] There are two other matters that we wish to address.

[148] First, the result in this case should not encourage potential abductors to think that removing a child to this country is an attractive option. This decision has restated, and in some minor respects clarified, the principles that govern Convention proceedings in New Zealand. It does not represent a material change in the approach the courts will take to determine Convention applications. Nor will it lead to longer timeframes for resolving the vast majority of such cases. This case has taken a long time to resolve — some two and a half years from the time the application was made in the Family Court until the decision of this Court. But the timeframes in this case were exceptional. They resulted from an unusual and unfortunate combination of factors.

[149] Much of the delay has resulted from the appeal to this Court, and the mother's understandable desire to provide additional evidence to this Court to address some of the matters that were canvassed in the High Court. Second appeals are rare. And the time this appeal has taken to determine (some 18 months) has been much longer than the Court would normally expect for Convention-related appeals. In the future, whenever an application for leave to appeal in a Convention case is filed in this

Court, the practice of the Court will be that the application will immediately be referred to the President. The President will appoint a Judge to case manage the application, and the appeal if leave is granted. This should ensure that similar delays are avoided in the future, and that matters such as the appropriateness of updating evidence are addressed at an early stage.

[150] Second, we were advised that the father has had no contact with H since July 2017. That is most unfortunate. Both parents should have made efforts to ensure that some form of contact was maintained, for example by regular video calls, and (if feasible) periodic visits by the father to see H in New Zealand. There are good reasons why the mother should not be required to be personally involved in making arrangements for such contact. But we would have thought contact could be arranged through the two sets of grandparents, who have in the past had a very constructive relationship and who all plainly care deeply about the interests of their grandchild. The Central Authorities in Australia and New Zealand could also have played a role in facilitating ongoing contact. This is an issue that should routinely be addressed at an early stage in the case management of Convention proceedings in New Zealand. The Court should raise the issue even if the parties do not. Such contact may be of limited significance if the proceedings are swiftly concluded. Even then, it will in most cases be in the interests of the child to maintain regular contact with both parents, especially where the child is very young. If the proceedings do take longer to resolve, as happened here, the maintenance of contact over that period will be of even greater importance.

**Result**

[151] The appeal is allowed.

[152] The application to have the child returned to Australia is declined.

[153] The orders made by the High Court at [4] and [6] of the Minute dated 29 November 2018 are set aside.

[154] Leave is reserved to either party to apply to this Court for any consequential orders that may be required.

[155] Both parties are legally aided, so we make no order as to costs.

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