FAMILY COURT OF AUSTRALIA

COMAR & COMAR ***[2020] FamCAFC 99***

FAMILY LAW – APPEAL – HAGUE CONVENTION PROCEEDINGS – Where the Central Authority brought an application for the return of the children to Colombia – Where the father was not a party at first instance – Where the mother sought to enliven the grave risk exception – Where the mother is the children's primary carer – Where the mother's mental health issues preclude her from returning with the children – Whether the primary judge failed to take account of material considerations in determining the question of grave risk – Where the father's unchallenged evidence identified the care he would provide and organise to be provided for the children – Where the primary judge failed to adequately consider that unchallenged evidence – Where the expert report and opinion relied upon by the primary judge did not take account of that evidence – Where that failure to consider relevant material is central to the primary judge's exercise of discretion – Appeal allowed – Where the matter is remitted.

FAMILY LAW – APPEAL – HAGUE CONVENTION PROCEEDINGS – LEAVE TO APPEAL – Consideration of whether leave to appeal is required – Affirmation of the principles in *Panayotides v Panayotides* (1997) FLC 92-733 – *A (by her next friend) and GS* (2004) FLC 93-199 distinguished given relevant amendments to the regulations – Where the father is a person substantially, if not technically, a party – Where the father is a person whose rights of custody are affected by the orders made – Where any contested question of leave to appeal is confined to cases where issue is joined between the parties to the appeal as to the appellant's standing to bring an appeal or where the appeal is contended as vexatious or frivolous.

FAMILY LAW – APPEAL – HAGUE CONVENTION PROCEEDINGS – COSTS – Where the father seeks costs – Where the mother contends s 117AA of the *Family Law Act 1975* (Cth) precludes an order for costs being made in the father's favour – Where it is unnecessary to determine that issue given that the appeal is allowed by reason of errors of law – Where the father's financial situation is substantially superior to the mother's – Where there ought be no order as to costs – Costs certificates under the *Federal Proceedings Costs Act 1981* (Cth) granted.

Family Law Act 1975 (Cth) Pt X, ss 111B, 117, 117AA
Federal Proceedings (Costs) Act 1981 (Cth) ss 6, 8, 9

Family Law (Child Abduction Convention) Regulations 1986 (Cth) reg 14
Family Law Regulations 1984 (Cth) reg 15A

A (by her next friend) and GS (2004) FLC 93-199; [2004] FamCA 967
Boensch v Pascoe (2019) 94 ALJR 112; [2019] HCA 49
Cuthbertson v Hobart Corporation (1921) 30 CLR 16; [1921] HCA 51

DP v Commonwealth Central Authority; JLM v Director-General New South Wales Department of Community Services (2001) 206 CLR 401; [2001] HCA 39
Handbury & State Central Authority [2020] FamCAFC 5
House v The King (1936) 55 CLR 499; [1936] HCA 40
Panayotides v Panayotides (1997) FLC 92-733; [1996] FamCA 135

APPELLANT:	Mr Comar
RESPONDENT:	Ms Comar
FILE NUMBER:	BRC 6714 of 2019
APPEAL NUMBER:	NOA 119 of 2019
DATE DELIVERED:	24 April 2020
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane
JUDGMENT OF:	Strickland, Kent & Watts (by telephone) JJ
HEARING DATE:	17 March 2020
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	6 December 2019
LOWER COURT MNC:	[2019] FamCA 909
REPRESENTATION	
COUNSEL FOR THE APPELLANT:	Mr North SC
SOLICITOR FOR THE APPELLANT:	Barry Nilsson
COUNSEL FOR THE RESPONDENT:	Mr Green
SOLICITOR FOR THE RESPONDENT:	Frampton Legal

ORDERS

(1) The appeal from the orders made on 6 December 2019 is allowed.

(2) The proceedings be remitted for rehearing by a trial judge other than the primary judge.

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

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

(5) The Court grants to each of the parties a costs certificate pursuant to s 8 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to each of the parties in respect of the costs incurred by them in relation to the rehearing ordered.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Comar & Comar* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal Number: NOA 119 of 2019
File Number: BRC 6714 of 2019

Mr Comar
Appellant

And

Ms Comar
Respondent

REASONS FOR JUDGMENT

1. On 6 December 2019, the primary judge refused an application made by the Department of Child Safety, Youth and Women ("the Central Authority") pursuant to the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations") seeking an order for the return of the children, X (born in 2009), Y (born in 2012) and Z (born in 2017) to Colombia.

2. By an Amended Notice of Appeal filed on 14 February 2020, the father of the subject children, Mr Comar ("the father") seeks leave to appeal and, if leave is granted, to appeal from that order.

3. The children's mother, Ms Comar ("the mother") opposed the Central Authority's application and now opposes the father's application for leave to appeal and the appeal if leave is granted.

4. We heard the arguments of both parties on both the application for leave to appeal and the appeal itself in conjunction.

Is leave to appeal required?

5. Senior counsel for the father relied upon *Panayotides v Panayotides* (1997) FLC 92-733 ("*Panayotides*") for the contention that the father has a right to apply for and be granted leave to appeal. However, prior to the 2004 amendment of reg 14 of the Regulations, another Full Court held that an application under reg 14(1) could be made only by the Central Authority: *A (by her next friend) and GS & Ors* (2004) FLC 93-199 ("*A and GS*"), overruling *Panayotides* in this respect. Importantly, the 2004 amendment to reg 14(1) makes it clear that a person with rights of custody can apply, consistent with

the previous understanding of the law as discussed in *Panayotides*. Thus, the principles discussed in *Panayotides* as regards the right of a person, whose rights of custody are affected, to be heard on appeal are apposite.

6. In *Panayotides*, Fogarty & Baker JJ (with whom Finn J agreed on this question at 83,898) considered whether the father, who had not been a party before the primary judge, had a right to seek leave to appeal from his Honour's refusal to make a return order. In the course of that extensive consideration (commencing at 83,878), their Honours said (at 83,888):

> Turning to the circumstances in this matter, it appears to us that the husband has an interest of such a character that he is entitled to appeal. The proceedings were brought in the name of the Authority but on behalf of the husband. The decision adverse to him has a most significant effect upon his position as a parent of the child. He was "**substantially, if not technically, a party**". There is also the interests of the child to be considered.
>
> It seems to us that a litigant who is not a party to proceedings at trial, but has a clear interest in the orders which were made, has either a right of appeal or is able to make an application to the Full Court for leave to appeal. Natural justice would seem to require that any person who is directly affected by an order should have some right of appeal from that order.
>
> On balance, we think the preferred course is that … adopted by the High Court in *Cuthbertson v Hobart Corporation* [(1921) 30 CLR 16] which is that whilst there may be no appeal as of right by a party in those circumstances the leave of the Full Court may be sought by such a party to appeal. There may be cases where the appeal which a litigant seeks to bring contains no proper grounds or is vexatious or frivolous, and, on the face of it, discloses no basis for appeal. In such cases, the Court may, if an application for leave to appeal is considered to be the appropriate course, refuse leave without being required to consider the substantive appeal.
>
> …
>
> Natural justice would require that …the husband must have the right to be heard in relation to the hearing of this appeal.
>
> (Emphasis added)

7. The expression "substantially, if not technically, a party" is adopted as an expression used by the High Court in *Cuthbertson v Hobart Corporation* (1921) 30 CLR 16 where the High Court also said at [25] "[l]eave to appeal is given **as a rule** if the person applying though not a party to the proceedings, might properly have been one" (emphasis added).

8. The Full Court in *A and GS* at 79,282, seemingly referred, with approval, to the statements made in *Panayotides* in respect to the father's standing to seek leave to bring an appeal, whilst expressly overruling the majority's view that the father had standing under an earlier, and differently worded version of the Regulations, to commence an application for a return order at first instance.

9. Relevantly, reg 14(1)(b) of the Regulations now provides that "a person…that has rights of custody in relation to a child for the purposes of the Convention may apply to the court" for a return order.

10. Here, the appellant father establishes standing as a person substantially, if not technically, a party and/or though not a party to the proceedings, as a person who might properly have been one. The father is a person affected by the order, being a person with requisite rights of custody. The appeal is brought on proper grounds and cannot be characterised as vexatious or frivolous. The grant of leave to appeal is axiomatic given that natural justice requires the appellant to have the right to be heard on appeal.

11. In our view, any contested question of leave to appeal is confined to cases where issue is joined between the parties to the appeal as to the appellant's standing to bring an appeal (for example where the appellant has no rights of custody which have been breached) or where it is contended by a respondent that the appeal ought be characterised as vexatious or frivolous or without proper grounds.

12. We also note that, in relation to the subject matter of the appeal, reg 15A of the Family Law Regulations 1984 (Cth) ("the Family Law Regulations") identifies "prescribed decrees" in respect of which leave to appeal is required. It is readily apparent that an order determining an application under the Regulations does not fit the description of "prescribed decrees" as set out in reg 15A save for the observation that such an order may well fit within the definition of "child welfare matter" under subsection (2) of reg 15A in respect of which leave to appeal is not required.

Central findings of the primary judge

13. Before the primary judge, the evidence relied upon by the Central Authority included the affidavit evidence of the father. In opposing the return order, the mother relied upon, *inter alia*, her affidavit evidence. Moreover, each party was cross-examined in the hearing of the application, in the case of the father by telephone, he being in Colombia.

14. Also in evidence before the primary judge was a Family Report dated 19 July 2019 prepared by Ms U, a Family Consultant attached to Child Dispute Services in the Brisbane Registry of the Family Court of Australia. When the application was heard by the primary judge in September 2019, Ms U was not

available to be cross-examined by either party and thus she provided no oral evidence in addition to that contained in her written report.

15. The primary judge found, in summary:

a) That the children were habitually resident in Colombia prior to their removal on 17 December 2018 by their mother, with their father's consent (at [36]);

b) At the time the father was exercising rights of custody in Colombia which rights were breached when the mother failed to return the children to Colombia on 15 January 2019 as the parents had agreed (at [41] and [42]);

c) The primary judge rejected the mother's contention that the children never became habitually resident in Colombia (the family having relocated to Colombia in July 2018) and rejected her alternative contention that the children had "lost" habitual residence in Colombia (at [28]). The primary judge also rejected the mother's contention that the children acquired habitual residence in Australia (at [41]) and her contentions to the effect that the father had consented to, or acquiesced in, the children remaining in Australia (at [43]-[48]).

16. The primary judge also rejected the proposition that the two older children objected to being returned to Colombia within the meaning of reg 16(3)(c) (at [74]-[81]).

17. There is no challenge on appeal to any of these central findings of the primary judge.

18. The primary judge concluded that there was a grave risk of harm that the return of the children to Colombia would expose them to psychological harm. At [72], the primary judge recorded:

> 72. However, I have reached a conclusion that if the children are returned to Colombia, there is a grave risk they would be exposed to psychological harm because:
>
> a) the father works full-time and it seems from the text messages, at times away from the home. He would, I infer, be able to find support for the children in the home and before and after school if he were not available. However, such support has not been identified by the father as being provided by anyone well known to [X, Y or Z];
>
> b) if the father was not working and more available, I do not share the mother's fears that the father would not cope with the care of the three children although it is likely he has a different parenting style;

c) the father does not assert, if the children return to Columbia and the mother does not, that he will terminate his employment and choose to remain as their full-time carer in Columbia. Even if that were his intention, there is no evidence of his ability to continue to remain in Columbia and not work for the company as he does now;

d) for the children, but for [Z] in particular, adjustment to the, at best, primary care of the father or, at worst, care by a stranger until the father returns from work (even if childcare for [Z] commences), does pose in my view grave risks that children will be exposed to psychological harm and that could have long-term consequences for them. In this regard, the opinions of the Report writer, [Ms U] are also relevant and apt.

e) I am aware that the mother cannot succeed by being the "*originator*" of the grave risk she now seeks to rely upon. Clearly, if the mother's mental health challenges were of recent origin or in particular found to be "*invented*" to assist in this case, that would be a telling finding likely not to support the exercise of the discretion not to require the three children to return to their habitual residence of Colombia. However the long history of the mother's mental health challenges, well known to the father and at times empathetically supported, satisfy me that the mother's alleged vulnerabilities are genuine and that, despite her best endeavours, the move by her to Colombia was at the time a "*bridge too far*";

f) I find that, if the mother did return to live in Columbia, there would be a likely adverse effect on her parenting where she has separated from the father and would not have the familiar support of her family and Australian mental health practitioners. The only evidence of an identified and qualified therapist/psychiatrist is in [K Town] which is some travel distance away from the gated community the family were living in;

g) although the father, I acknowledge, has provided some financial support for the mother and the children in Australia whilst these proceedings have been on foot, the minute of orders contended for by the Applicant SCA do not seek any orders as to what should occur when the children, if accompanied by the mother, are ordered to return. The father could have set out, in his self-prepared Affidavit, arrangements that could be made (and funded) for the children and the mother to reside in Columbia. No undertakings as to such matters are offered by the father

similar, for example, to those contemplated by Butler Sloss LJ observed in *C v C* (supra) at [470], for example:

i) allowing the children to remain in the primary care of the mother pending any determination of a Columbian Court;

ii) providing the mother with access to safe transport;

iii) provide or facilitate the mother and children having secure furnished accommodation within convenient distance of the school they were attending;

iv) provide financial support for reasonable living expenses, education expenses and medical expenses; and

v) ensure the current level of private health insurance is maintained.

There is no evidence that these types of "*conditions*", if imposed and sustainable, would in any event alleviate the grave risk I have found would exist.

h) considering that the father asserted his income in Columbia was so stretched (no doubt exacerbated by the ongoing costs of renovating the holiday homes) that he was not able to afford return airline tickets until his next pay was received, there is an uncertainty as to the father's capacity to meet the expenses of two separate households in Columbia. In my assessment, such uncertainties are only likely to exacerbate the mother's underlying medical vulnerability should she return to Columbia with the children;

i) the father's evidence gives no indication that he believes the marriage as an intact couple in Columbia, after the events of the last 12 months, is achievable. The mother's evidence is that the marriage is at an end; and

j) [Ms U], at paragraph 59 of her report, opined that:

> *"[Ms Comar] is concerned [X] and [Y] would not cope emotionally with returning to Columbia. She believes the children would be impacted significantly. In the writer's opinion even with appropriate support the children would experience adjustment issues and their ability to emotionally cope is a high risk factor. The mitigation of this risk would be dependent on the quality of their relationships and supports in Columbia to assist [X] and [Y] process their emotions and experiences."*

I accept her opinion.

(As per the original)

19. The primary judge also expressed a conclusion that the children's return to Colombia would place them in an intolerable situation. At [73], the primary judge recorded:

> 73. On the basis of these findings I am satisfied that the mother has established the exception to the return of all three children to Columbia prescribed by Regulation 16(3)(b). That is, I am satisfied:
>
> a) that the mother suffers from incapacity due to her mental health and there are legitimate and compelling reasons relating to her mental health for her to refuse to return to Columbia with the children. In short, she is not constructing the intolerable situation upon which she relies;
>
> b) that if the children are returned to Columbia without the mother, the father will do all in his power to care for them adequately but:
>
> i) the children will be separated from the parent who has, as between herself and the father, been their primary carer; and
>
> ii) there is no detail or indication of by whom and how the children's day-to-day needs will be met, for example, by what constellation of hired help. There is no suggestion that the father will cease to be employed to become a stay at home parent
>
> and that there a grave risk that children will be exposed to psychological harm, and their return would place the children in an intolerable situation.

(As per the original)

20. Based upon those conclusions, the primary judge exercised the discretion under the Regulations to refuse to order a return of the children to Colombia (at [85]).

Challenges on appeal

21. Before dealing with the father's challenges on appeal we ought record that very shortly prior to the hearing of the appeal on 17 March 2020 we caused notice to be given to the parties, in the face of rapid developments including travel restrictions being brought about by the global COVID-19 pandemic, that we would require submissions about travel to Colombia in the event a return order were to be made; an order the father sought on appeal.

22. We recognise that the parties obviously had only a limited opportunity to investigate and deal with this aspect and of course there have been significant varying changes worldwide brought by the pandemic since 17 March 2020. Senior counsel for the father rightly submitted that what may apply today may be different in a week. It was submitted to us on behalf of the father, in summary, that the children, whilst not citizens of Colombia, have visa entitlements to reside in Colombia. We will revisit this topic in dealing with the disposition of the appeal.

23. The gravamen of the father's challenges on appeal, embraced by each of his grounds of appeal (relied upon also for the grant of leave), is that the primary judge's findings that there is a grave risk that the return of each child to Colombia would expose each child to psychological harm or otherwise place the children in an intolerable situation, are attended by errors. On the father's contention, it follows that the primary judge's exercise of discretion miscarried.

Establishing grave risk

24. In *DP v Commonwealth Central Authority*; *JLM v Director-General New South Wales Department of Community Services* (2001) 206 CLR 401 ("*DP; JLM*"), the plurality of the High Court stated at 417 and 418:

> 41. … The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in "an intolerable situation". That requires some prediction, based on the evidence, of what *may* happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.
>
> 42. Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description "grave". Leaving aside the reference to "intolerable situation", and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would *expose* the child to harm.
>
> 43. Because what is to be established is a *grave* risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence…
>
> (Footnotes omitted)

25. Self-evidently, the proper application of that test required that the primary judge consider all of the evidence relevant to the inquiry and prediction involved.

26. Moreover, it is trite that proper consideration of all material matters relevant to the exercise of a subject discretion is necessary to ensure that there has been no miscarriage of the exercise of discretion (*House v The King* (1936) 55 CLR 499).

27. In the manner in which argument of the appeal developed, a focal point became whether the primary judge had properly considered all evidence relevant to the inquiry and prediction necessary for a finding of grave risk. Specifically, whether the primary judge had taken proper account of the father's evidence addressed to the question of the care arrangements and support of the children he himself would provide, and arrange to be provided to the children, if the children were in his care in Colombia.

28. For the reasons which follow, this is the dispositive issue in this appeal.

Relevant evidence before the primary judge

29. It can be seen from the conclusion as to grave risk expressed by the primary judge at [72], which we have quoted in full above, that an important foundation for that conclusion was his Honour's assessment of the father's availability to care for the children and the support that he would arrange to be available to the children. To repeat, the following subparagraphs of [72] of the reasons are specific to this topic:

> …
>
> a) the father works full-time and it seems from the text messages, at times away from the home. He would, I infer, be able to find support for the children in the home and before and after school if he were not available. However, such support has not been identified by the father as being provided by anyone well known to [X, Y or Z];
>
> b) if the father was not working and more available, I do not share the mother's fears that the father would not cope with the care of the three children although it is likely he has a different parenting style;
>
> c) the father does not assert, if the children return to Columbia and the mother does not, that he will terminate his employment and choose to remain as their full-time carer in Columbia. Even if that were his intention, there is no evidence of his ability to continue to remain in Columbia and not work for the company as he does now;
>
> …

(As per the original)

30. At [73(b)], in expressing his satisfaction that the mother had established the exception of grave risk, the primary judge recorded:

> …
>
> b) that if the children are returned to Columbia [sic] without the mother, the father will do all in his power to care for them adequately but:
>
> i) the children will be separated from the parent who has, as between herself and the father, been their primary carer; and
>
> ii) there is no detail or indication of by whom and how the children's day-to-day needs will be met, for example, by what constellation of hired help. There is no suggestion that the father will cease to be employed to become a stay at home parent
>
> and that there a grave risk that children [sic] will be exposed to psychological harm, and their return would place the children in an intolerable situation.

31. There is an immediate difficulty with these factual findings in the face of the father's unchallenged evidence as contained in his affidavit filed on 28 August 2019, containing the following:

> 101. Should [Ms Comar] choose not to return to Colombia, I will care for the Children, I would conduct school drop-offs and pick-ups myself and attend to extra-curriular activities as required. In the event that I am required at the same time in 2 venues for extra-curicular activities, our full-time tutor would assist me with the pick-up of either [Y] or [X] as was the arrangement prior to [Ms Comar] leaving Colombia. [X] will not have extra-curricular activities for 2 years as she would go into Nursery grade until the age of 4 when should would the start Pre-kindergarten. I will attend to the Childrens meals and homework requirements with assistance from the Children's tutor as required,
>
> 102. Regarding medical treatment if [Ms Comar] choses to return to Colombia, Item 40 shows several English speaking pyschologists in [K Town] (for example) which [Ms Comar] has been able to choose from. These pyschologists would be able to refer [Ms Comar] for further treatment in any of [K Town's] 20 major hospitals should she require further treatment where I would be able to provide care for the Children during any such event. I have also spoken to [Ms

> W] regarding the potential requirement for sessions with my Children as she has experience with adolescents and infants.
>
> …
>
> 106. If a return order is made, I will consult the school psychologist regarding the situation and seek advice. I have already spoken with both the Head of School and the school pyschologist at [H School] and have informed them about the situation.
>
> (As per the original)

32. Whilst the father was cross-examined at the hearing of the application, he was not challenged on this evidence in cross-examination. Nothing contained in the reasons for judgment indicates that the primary judge took account of this unchallenged evidence of the father in reaching the conclusions his Honour expressed about grave risk.

33. In conjunction with this, it is clear that in expressing his Honour's conclusion about grave risk at [72], the primary judge relied upon the evidence of the Family Consultant, Ms U, with his Honour referring to her opinions at [72(d)] and expressing his acceptance of that expert's opinion at [72(j)] in these terms:

> …
>
> j) [Ms U], at paragraph 59 of her report, opined that:
>
> > *"Ms Comar] is concerned [X] and [Y] would not cope emotionally with returning to Columbia. She believes the children would be impacted significantly. In the writer's opinion even with appropriate support the children would experience adjustment issues and their ability to emotionally cope is a high risk factor. The mitigation of this risk would be dependent on the quality of their relationships and supports in Columbia to assist [X] and [Y] process their emotions and experiences."*
>
> I accept her opinion.
>
> (As per the original)

34. As earlier noted, Ms U was not available to give oral evidence at the hearing to explain or supplement her report. Absent any further particulars contained within her report, it would be speculative to attempt to identify what precisely the expert meant by "appropriate support" and "the quality of their relationships and supports in Columbia [sic]". That is, what kind or level of support would be "appropriate" and what criteria was to be applied to "quality" of relationships and support referred to.

35. Aside from this apparent gulf in the evidence, the important point is that in preparing her report the Family Consultant sets out the information she obtained for that purpose as follows:

> Information for this report has been obtained from the following:
>
> **Court File:**
>
> - Form 2 Application Initiating Proceedings, filed 12 June 2019
> - Affidavit of [Ms BB] on behalf of the Applicant, filed 21 June 2019
>
> **Interviews:**
>
> On 16 July 2019 at Child Dispute Services Registry:
>
> - Brief interview with [Ms Comar] (mother)
> - Interview with [X] (subject child)
> - Interview with [Y] (subject child)
>
> **Limitations of the assessment process:**
>
> This assessment is limited in that information gathered can be relied upon to the extent that the parties are truthful.
>
> (As per the original)

36. Clearly, for her report compiled on 19 July 2019, the Family Consultant did not have the father's affidavit filed on 28 August 2019, nor did she interview the father for the purpose of her report. Thus, the views expressed by this expert could not have taken into account the father's evidence referred to, including that part of her opinion quoted by the primary judge with acceptance at [72(j)] stated above.

37. As the High Court made clear in *DP; JLM*, the onus of proof of establishing the grave risk exception rested with the mother as the party opposing a return order. To the extent that it can be said that the father bore at least some evidentiary onus on the question of support of the children in his care in Colombia, in our judgment the father met that onus by his affidavit evidence referred to. In this respect, reference can also be made to the discussion by Callinan J in *DP; JLM* at 187 and following. In short, the father's evidence was enough to discharge any evidentiary onus borne by the father which, for its displacement, needed to be met by the mother as the person opposing return. It bears repeating that the father was not challenged on this evidence.

38. In our judgment, a material consideration for the primary judge was that the Family Consultant had made no assessment of the father's evidence concerning the support he would himself provide, or would arrange to be provided to the children if they returned to Colombia. There is nothing in the reasons for judgment to indicate that in expressing his unqualified acceptance of the opinion of the Family Consultant, that his Honour took account of this material consideration.

39. Moreover, it was necessary for the primary judge to take account of the father's direct evidence on this topic, unchallenged as it was, in drawing the inferences and conclusions his Honour did about the lack of sufficient support for the children if they are returned to Colombia in the father's care.

40. As the subject evidence of the father went specifically to the question of support of the children in the father's proposed care arrangements in Colombia, it was necessary for the primary judge to deal with this evidence and explain in his Honour's reasons why that evidence was rejected (if it was rejected) or how it was that notwithstanding that evidence the exception of grave risk was established.

41. Neither in expressing his conclusions about grave risk being established (at [72] and [73]) nor in discussing the residual discretion (at [82]-[85]) can it be seen that the primary judge gave specific consideration to these material considerations identified. Indeed, on a reading of his Honour's reasons, particularly at [73], it would appear that his Honour did not pay necessary regard to the specific evidence of the father on this central aspect.

42. It follows that we find merit in Grounds 1 and 2 of the appeal contending, *inter alia*, that the primary judge made errors in reaching the finding of grave risk. We accept the father's complaints that the primary judge's discretion miscarried and that his Honour failed to give adequate reasons for the determination of grave risk and failed to properly evaluate the opinion of the Family Consultant.

Disposition of the appeal

43. Given that the question of grave risk must be considered in the light of all relevant evidence, which is yet to occur for the reasons we have identified, in our judgment the appropriate course is for this Court to remit the proceedings for rehearing. Moreover, as earlier referred to, the onset of the global pandemic has brought significant changes since 6 December 2019 when the application was determined and the parties must have an opportunity to place relevant evidence before the Court as to any relevant effect of such changes.

44. Given that the appeal is to be allowed and the proceedings are to be remitted for rehearing, we consider it unnecessary and potentially unhelpful to a trial judge undertaking that process for this Court to discretely address each and

every aspect raised in the submissions on appeal and the evidence relevant to those aspects more generally. We are satisfied that the errors we have identified are dispositive of this appeal rendering it unnecessary to engage with other aspects of the challenges (*Boensch v Pascoe* (2019) 94 ALJR 112 at [7]-[8]).

Costs

45. In the event the appeal succeeded, the father sought an order that the mother pay his costs of the appeal in the fixed sum of $40,924.40.

46. At the outset of the hearing of the appeal, objection was taken by the father to an affidavit sought to be filed and relied upon by the mother addressing, *inter alia*, her current financial circumstances. On the basis that the mother did not press reliance upon some parts of that affidavit (including paragraph 2 dealing with payments received from the father; nor paragraphs dealing with her superannuation or loans she asserted were owing to her parents), the father's objection to our receipt of that affidavit was withdrawn.

47. Section 117 of the Act containing, in subsection (2), the power to order costs, is subject to s 117AA. That section provides:

> **Costs in proceedings relating to overseas enforcement and international Conventions**
>
> (1) In proceedings under regulations made for the purposes of Part XIIIAA, the court can only make an order as to costs (other than orders as to security for costs):
>
> (a) in favour of a party who has been substantially successful in the proceedings; and
>
> (b) against a person or body who holds or held an office or appointment under those regulations and is a party to the proceedings in that capacity.
>
> Note: For another case where the court can also make an order as to costs, see subsection (3).
>
> (2) However, the order can only be made in respect of a part of the proceedings if, during that part, the party against whom the order is to be made asserted a meaning or operation of this Act or those regulations that the court considers:
>
> (a) is not reasonable given the terms of the Act or regulations; or
>
> (b) is not convenient to give effect to Australia's obligations under the Convention concerned, or to obtain for Australia the benefits of that Convention.

(3) In proceedings under regulations made for the purposes of section 111B, the court can also make an order as to costs that is:

(a) against a party who has wrongfully removed or retained a child, or wrongfully prevented the exercise of rights of access (within the meaning of the Convention referred to in that section) to a child; and

(b) in respect of the necessary expenses incurred by the person who made the application, under that Convention, concerning the child.

48. The orders sought by the father on appeal are plainly orders under the Regulations, including orders for return of the children to Colombia and Order 7 seeking

> 7. Such further or other order as to this Honourable Court regards as appropriate to give effect to the Convention on the Civil Aspects of International Child Abduction.

(As per the original)

49. It follows that whilst this is an appeal brought under Part X of the Act, the orders sought are pursuant to the Regulations and thus the appeal proceedings are also "proceedings under regulations made for the purposes of section 111B" within the meaning of s 117AA(3) of the Act.

50. Counsel for the mother sought to emphasise the recent decision of the Full Court in *Handbury & State Central Authority and Anor* [2020] FamCAFC 5 ("*Handbury*") at [71] and following for the proposition that there is no power to order costs in favour of the husband. At [74] of *Handbury*, the Full Court observed that on a proper interpretation of s 117AA(3)(b) that subsection could only apply to the Central Authority in that case.

51. As senior counsel for the father emphasised, an obvious point of distinction between *Handbury* and this case is that in *Handbury* the father was named as respondent to the unsuccessful appeal by the mother. In this case, the Central Authority has chosen not to appeal. The father in the re-hearing before us and in the orders he seeks effectively becomes the person who makes the application for the return order on the appeal.

52. In the end result, it is unnecessary for this Court to determine whether or not there is power to order costs. Assuming such power exists, we would not exercise discretion to order costs. The proceedings are to be remitted for rehearing so their ultimate outcome is not yet known. Critically though, the appeal has been allowed by reason of errors of law on the part of the primary judge and it cannot be said that the mother's conduct in defence of the application contributed to the making of those errors. Moreover, review of the

current respective financial circumstances of the parties reveals that the mother is reliant on Centrelink payments to supplement her modest employment income and she holds no assets of significance. In comparison, the father's financial position appears to be significantly superior.

53. In the event that no order for costs was made under s 117 of the Act, each party sought certificates pursuant to the relevant provisions of the *Federal Proceedings (Costs) Act 1981* (Cth) both for the appeal and the rehearing. We are satisfied, given the errors of law identified, that such certificates should be granted to each party.

I certify that the preceding fifty-three (53) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Strickland, Kent & Watts JJ) delivered on 24 April 2020.

Associate:

Date: 24 April 2020