FAMILY COURT OF AUSTRALIA

WALPOLE & SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE *[2020] FamCAFC 65*

FAMILY LAW – APPEAL – CHILD ABDUCTION – Hague Convention – Appeal against order for the return of children removed from their country of habitual residence – Where the appellant is the children's primary carer – Grave risk – Family violence – Where requesting parent has significant criminal history – Requesting parent permanently banned from Australia – Application to adduce further evidence pertaining to requesting parent's criminal history and family violence allowed by consent – Appellant given leave to raise new defence on appeal – Grave risk of intolerable situation – Risk not manageable through conditions – Discretion of the Central Authority to refuse to act on a request made by a left behind parent – Model Litigant Guidelines – State or Agency should not require a person to prove something that the State/Agency knows to be true – Appeal allowed – Application by Central Authority dismissed – No order as to costs.

Crimes Act 1900 (NSW) s 10
Family Law Act 1975 (Cth) s 68L(3) and s 93A(2)

Family Law (Child Abduction) Regulations 1986 (Cth) reg 14 and 16(3)
Family Law Rules 2004 (Cth) r 8.02(5)

Hague Convention on the Civil Aspects of International Child Abduction

Agee v Agee (2000) FLC 93-055; [2000] FamCA 1251
De L v Director General NSW Dept of Community Services (1996) CLR 640; [1996] HCA 5
DP v Commonwealth Central Authority (2001) 206 CLR 401; [2001] HCA 39
Gsponer v Director-General, Department of Community Services (VIC) (1989) FLC 92-001; [1988] FamCA 21
Harris v Harris (2010) FLC 93-454; [2010] FamCAFC 221
In Re E (Children) (Abduction: Custody Appeal) [2011] 4 All ER 517
Metwally v University of Wollongong (1985) 60 ALR 68; [1985] HCA 28
State Central Authority v M [2003] FamCA 1128
TB v JB (Abduction: grave risk of harm) [2001] 2 FLR 515
Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492; [1947] HCA 21
Wolford & Attorney-General's Department (Cth) [2014] FamCAFC 197

Australian Law Reform Commission, *Equality before the Law: Justice for Women* Report No. 69 (1994)
Perez-Vera, Elisa, *Explanatory Report on the 1980 Hague Child Abduction*

Convention (Hague Conference on Private International Law, 1982)

APPELLANT:	Ms Walpole
RESPONDENT:	Secretary, Department of Communities and Justice
FILE NUMBER:	SYC 5925 of 2019
APPEAL NUMBER:	EAA 2 of 2020
DATE DELIVERED:	25 March 2020
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Ryan, Aldridge & Watts JJ
HEARING DATE:	5 March 2020
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	29 November 2019
LOWER COURT MNC:	[2019] FamCA 904

REPRESENTATION

COUNSEL FOR THE APPELLANT:	Ms Christie SC
SOLICITOR FOR THE APPELLANT:	Hague Convention Legal Practice
COUNSEL FOR THE RESPONDENT:	Dr Barnett
SOLICITOR FOR THE RESPONDENT:	Department of Communities and Justice

ORDERS

(1) The appellant be granted leave to file the Application in an Appeal to adduce further evidence in the appeal dated 19 February 2020.

(2) By consent, the Application in an Appeal to adduce further evidence in the appeal dated 19 February 2020 be granted.

(3) The appeal be allowed.

(4) Orders 1, 2 and 3 dated 29 November 2019 be set aside.

(5) The Application by the Secretary, Department of Communities and Justice filed on 5 September 2019 be dismissed.

(6) That there be no order as to costs.

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 *Walpole & Secretary, Department of Communities and Justice* 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 SYDNEY

Appeal Number: EAA 2 of 2020
File Number: SYC 5925 of 2019

Ms Walpole
Appellant

And

Secretary, Department of Communities and Justice
Respondent

REASONS FOR JUDGMENT

RYAN & ALDRIDGE JJ

INTRODUCTION

1. With the assistance of New Zealand Police, on 10 May 2019, Ms Walpole ("the mother") left New Zealand with her two children, X who was born in 2016 (in Australia) and Y who was born in 2017 (in New Zealand) ("the children"). The children's father is Mr G ("the father"). The father lives in New Zealand and is permanently banned from entering Australia. The mother believes that the father poses a real risk to her and the children and she returned to her family in Australia, knowing that he could not follow them. The father invoked the *Hague Convention on the Civil Aspects of International Child Abduction* ("the Abduction Convention") to secure the children's return. The application for a return order was granted on 29 November 2019. It is against that order which the mother now appeals.

2. The proceedings before the primary judge were brought by the Secretary of the Department of Communities and Justice (NSW) as the "Central Authority" under the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations"). The Regulations give effect to Australia's obligations under the Abduction Convention. The Abduction Convention provides a mechanism for the prompt return of wrongfully removed or retained children between contracting states; the aim being to serve the interests of all children by deterring their wrongful abduction or retention and restoring them to their

place of habitual residence, but also to serve the interests of the individual child by making certain assumptions about what will be in that child's best interest. The assumptions can be rebutted by the establishment of one or more of the defences contained in the Regulations (*Wolford & Attorney-General's Department (Cth)* [2014] FamCAFC 197 ("*Wolford*") at [2]).

3. The primary judge found the conditions for return prescribed in the Regulations were satisfied. Thus, unless one of the defences contained in the Regulations was established, the primary judge was obliged to make orders for the children's return. In her defence, the mother argued that the father consented to the children being removed to Australia (reg 16(3)(a)(ii)) and if they were returned to New Zealand, that the children would be exposed to a grave risk of physical or psychological harm (reg 16(3)(b)). Although in her material filed in opposition to the application, the mother contended that a return order would place the children in an intolerable situation, nothing more was said about this and the case was run on the dual bases of consent and the risk of physical or psychological harm.

4. The primary judge was satisfied that there is a "great need to protect these children from exposure to the abuse and violence that mars their parent's relationship" [70] and that if the children returned to New Zealand and their parents resumed their relationship there was "an extremely serious, perhaps grave risk that the children would be exposed to harm" [73]. However, the mother's emphatic evidence that she would not resume a relationship with the father was accepted, as a consequence of which there was no immediate prospect that the risk would eventuate. The gravamen of this latter finding being that there were sufficient protections in place that the New Zealand courts, who were seised of the parenting dispute, would be able to determine the children's future living arrangements without there being a grave risk to the children in the meantime.

5. Central to the mother's appeal is the manner in which the primary judge considered the "grave risk" defence. For many reasons, this is a most unusual case and irrespective of the outcome of this appeal, the children's wellbeing demands close attention from child welfare agencies; whether the children remain in Australia or return to New Zealand. For, without third party intervention, there is a very serious prospect that the children's needs will be unmet and they will be exposed to drug abuse and violence. Although there was considerable evidence adduced below of violence between the children's parents and by the father towards others, before us it was common ground that the evidence was incomplete and that further evidence from NSW Police was required (pursuant to s 93A(2) of the *Family Law Act 1975* (Cth) ("the Act")) for a fuller picture to emerge. This evidence was admitted unopposed and prompted an application by the mother to agitate the "intolerable situation" defence.

6. The Central Authority opposes the appeal. The father is not a party to the appeal and did not participate.

7. An Independent Children's Lawyer ("ICL") was appointed to represent the children's best interests. Although the ICL argued below that there is a grave risk to the children of physical or psychological harm if a return order was made, the ICL filed a Submitting Notice and did not participate in the appeal.

8. An order for the appointment of an ICL ceases when the order is discharged, the application is determined or withdrawn or, if there is an appeal, when the appeal is determined or withdrawn (r 8.02(5) Family Law Rules 2004 (Cth)). Thus, the order for the ICL was on foot for the appeal. The gravity of the issues for the children in this appeal are such that we cannot allow the failure of the ICL to participate in the appeal pass without comment. The funding pressures under which Legal Aid Commissions operate are notorious and it is accepted that difficult decisions must be made about which cases to fund. However, the mere fact that an order for an ICL was made in an Abduction Convention case demonstrates that a judge was satisfied that the circumstances are exceptional (s 68L(3) of the Act). This had not changed and we think that the decision which resulted in the ICL's failure to represent the children's interests in this appeal was regrettable.

9. This hearing took place in the shadow of the current global COVID-19 pandemic. This is a dynamic time for the international movement of people and we take judicial notice that there are now strict international travel restrictions in place. The Australian Government has issued a 'do not travel' ban, and Australians are presently prohibited from leaving the country for non-essential reasons. As Australia has, New Zealand has imposed border closures, restricting anyone who is not a citizen or resident of New Zealand from entering. As Australia has acted on a request by New Zealand to return the children, we have proceeded on the basis that the children and the mother are still able to leave Australia and enter New Zealand. As it transpires, for reasons unrelated to the COVID-19 pandemic, the appeal will be allowed and the application by the Central Authority will be dismissed. Had this not been the case, we would have required further submissions concerning the effect on the children and the mother of being ordered to return to New Zealand in the present crisis.

Further evidence and a new defence

10. It is a fundamental principle of law that a party is bound by the conduct of the case below. This principle creates a powerful threshold limitation on the ability to raise a new issue on appeal; irrespective of whether that issue is raised before an intermediate court of appeal or an ultimate court of appeal. A departure from this principle may be tolerated in the most exceptional circumstances (*Metwally v University of Wollongong* (1985) 60 ALR 68 at 71).

The circumstances in this case are truly exceptional. Firstly, the issue concerns children who are the subject of the proceedings but are not parties in a strict sense. Secondly, further evidence has been admitted. Thirdly, the new issue does not create the need to gather further evidence. Fourthly, the Family Consultant, who gave evidence in the hearing before the primary judge, said that the violence about which the mother gave evidence was "'potentially the most dangerous in terms of possible lethality and physical harm'" [60]. In other words, there is evidence that the father poses a potentially lethal threat to the mother upon whom the children depend for support and nurture. Finally, to admit the further evidence but to not address the issue which arises, has the potential to prolong the proceedings and thus defeat the very purpose of the Abduction Convention.

11. These factors all weigh in favour of the mother being granted leave to raise the grave risk of an intolerable situation defence for the first time before us.

Factual overview

12. To give context to this appeal, it is necessary to provide some brief background facts.

13. The father was born in New Zealand in 1973.

14. The mother was born in Australia in 1987.

15. Between March 1991 and February 1997, the father was convicted in New Zealand of:

- common assault (March 1991);
- assault against a Police officer (November 1991);
- drink driving (June 1992);
- possession of cannabis (July 1992);
- common assault (June 1995);
- assault three people (August 1996); and
- cannabis possession, drink driving and resisting Police, all of which occurred whilst on bail (February 1997).

16. None of these convictions were disclosed by the father or the Central Authority in the application for the return order.

17. The father arrived in Australia in about 1999/2000.

18. In November 2001, the father was convicted of "fail/refuse to comply with direction" and "use offensive language in/near a public place/school", in relation to which he was fined. In December 2001, the father was convicted of driving uninsured and unlicensed in an unregistered vehicle, in relation to which he was fined. In relation to offences which occurred between 8

December 2001 and 14 December 2001, the father was convicted of "assault officer in execution of duty", "common assault", "drive conveyance taken [without] consent of owner", unlicensed driving, "goods in personal custody reasonably suspected of being stolen" and "drive while under the influence of alcohol or other drugs". He was variously fined, placed on a two year bond and sentenced to 10 months periodic detention with a six month non-parole period.

19. On 31 May 2002, the father was convicted of various driving offences for which he was fined and disqualified from holding a licence. He was also convicted of obtaining property by false pretences, for which he received an additional two year bond subject to supervision.

20. The father was convicted of assault and break and enter offences on 31 May 2002 which resulted in a six month periodic detention order commencing 7 June 2002 and another two year bond subject to supervision. On the same day, he was convicted of offences in relation to destroying or damaging property for which he received periodic detention of 10 months' duration to commence on 6 December 2002; that is at the expiration of the other periodic detention order made the same day.

21. A shoplifting conviction in November 2002 resulted in the father being placed on a three month bond.

22. In December 2003, the father was convicted of custody of a knife in a public place for which he was fined $200 plus court costs.

23. The parties met in about 2004. They commenced a relationship in 2007 and began to live together a few years later. By this time, the father had six children to various women.

24. The mother's daughter from a previous relationship was born in 2005.

25. On 7 February 2006, the father was convicted of "use intimidation/violence to unlawfully influence person", in relation to which he was sentenced to eight months imprisonment with a six months non-parole period. He was also convicted of "drive while disqualified", for which he was sentenced to four months imprisonment, suspended upon his entering into a bond subject to supervision "for as long as considered necessary". He was disqualified from driving for two years commencing 31 May 2006.

26. On 8 June 2006, the father was convicted of:

- "use offensive language in/near public place/school";
- "incite to assault police officer in execution of duty";
- "assault police officer in execution of duty"; and
- "fail/refuse to comply with direction".

27. He was variously fined and placed upon a bond of 12 months' duration subject to supervision, including in particular in relation to his use of drugs and alcohol.

28. By order of the Local Court, on 14 September 2006 the father was called up to serve the term of imprisonment imposed in February 2006.

29. In the interest of brevity, it is unnecessary to record the full extent of the father's ongoing charges and convictions. Suffice to say that the father's Criminal History – Bail Report is 21 pages long, 10 pages of which relate from this time to when he left Australia. These records demonstrate a pattern of increasingly serious charges against the father (not all of which resulted in convictions), domestic violence offences and breaches of bail and parole. They confirm the mother's evidence that for most of their years together, the father spent some time in prison.

30. It is necessary to record that on 8 December 2010 the father was convicted of "assault occasioning actual bodily harm (DV)" and of contravening an Apprehended Domestic Violence Order ("ADVO"). He was sentenced to 14 months' imprisonment (with a non-parole period of seven months) on the first matter and six months' imprisonment on the second. The father was convicted of contravening an ADVO on 22 October 2012 for which he was sentenced to 36 days in prison.

31. On 1 March 2013, the mother was convicted of, relevantly, refusing to undergo a breath test and driving with a child aged between four and seven years not restrained as prescribed. Fines were imposed in relation to each charge and the mother was disqualified from driving for 12 months. The mother was convicted on 1 July 2013 of assaulting a Police officer and failing to leave premises when required. Both convictions resulted in a fine.

32. The mother attended City B Police Station on 21 October 2013 and made a complaint to Police that she had been assaulted by the father. The details recorded in the NSW Police Force Computerised Operational Policing System ("COPS") records provide a useful overview of the type of violence that the mother said was a feature of her life with the father, both in New Zealand and Australia. The primary judge had the benefit of hearing cross-examination and came to the view that the mother's evidence concerning family violence should be accepted. No issue is taken with that finding in the appeal.

33. It is useful to observe at this juncture that although the ICL sought production of all records, NSW Police restricted the documents produced to those dating from 22 September 2012. The effect of this is that records of only 46 of 89 events were provided. One report was given for each event. We do not know whether NSW Police were asked to provide records of the other 43 events but the fact that they were not presented to the primary judge, or in the appeal, suggests that production was not followed up. It should have been.

34. The COPS records also reveal that the mother repeatedly refused to cooperate with Police and courts in having the father charged and in securing domestic violence orders for her protection. The Police notes record on 21 October 2013:

> … The [mother] & the [father] are well known on COP's in relation to DV incidents, where the [mother] continually refuses to supply a version of the incident to police &… police are constantly called by neighbours at the location. The last incident was reported on the 10th September, 2013 resulted in a verbal disagreement about property. The [mother] has a child at the location, who is not related to the [father]. There are serious concerns for the safety of the [mother] and… child. On the 24/01/13 City B Local Court made an interim order to protect the [mother] in terms 1, 3, 7. i.e. the [father] must not enter the location or approach or contact the [mother] by any means whatsoever. The order was strongly opposed by the [mother] &… the [father] who still wished for contact to occur, however due to the DV history of the parties the order was made by the court.
>
> (COPS Record for the mother, p.13) (As per the original)

35. As to the incident on 21 October 2013, the Police recorded the following:

> … About 6am Monday the 21st October 2013, [the mother] was at home… The [mother] awoke to here rustling sounds coming from outside her unit. The [mother] drew open the blinds inside the lounge room which lead to a glass sliding door. The [mother] has immediately sighted [the father] standing on her balcony. [The father] said, "Open the fucken door". The [mother] replied, "[the father's name] you're not coming in this house I've had enough and if you don't go ill call the cops"… The [mother] continued to draw close the lounge room blinds. Several minutes later the [father] entered into building complex through entrance door on the ground floor. The [mother] attempted to secure the front door, placing objects up against the door to prevent the [father] from entering. The [mother] started walking back towards her bedroom when she heard a loud bang. The [mother] turned around facing the front door and noticed that the front door had been kicked in. The [father] began walking towards the [mother], grabbing at the [mother's] throat and began squeezing it preventing the [mother] from breathing and screaming out for help. The [mother] made several attempts at reaching out get to hear hand bag that was sitting on the lounge sofa so that she could get to her mobile phone and call emergency services. After a short struggle the [mother] was able to get her mobile phone that was located on the side pocket of her hand bag. The [father] could see that the [mother] was holding the phone in right hand and the [father] snatched it out. The [father] continued with his violent outburst by physically Assaulting the [mother] by pulling her hair and has began punching her in the head using both hands. The [mother] began screaming out, "Let go of me, stop it your hurting me" The [mother] repeated this several times. The [mother] could feel immense pain to the bridge of her nose and to both checks below her eyes… The mother] could not make sense as to what the

> [father] was saying. The [mother] explained that the [father's] voice was loud and he was just screaming out [obscenities]. The [mother] made several attempts to cover her face by raising both arms above her head to prevent being injured. The [mother] stated that the [father] was to strong and was able to over powered her during the Assault. The [mother] further stated that after the [father] Assaulted her he has walked back towards the front door and said, "I'm sorry babe". At the completion of the Assault the [mother] explained to Police that she laid on the floor and continued to cry…
>
> (COPS Record for the mother, p.14) (As per the original)

36. Police observed injuries to the mother's face, throat, arms and bruising to her leg. As a result of the mother's complaint, the father was charged with offences, including aggravated break and enter, commit serious indictable offence, contravene an apprehended violence order, assault occasioning actual bodily harm (DV) and common assault. The father was refused bail which was then granted by the Supreme Court on 4 December 2013. Although the mother provided a statement to Police, their records show that in the following months the mother was "hostile and evasive" with them and she hung up when they called her (COPS Record for the mother, p.11–p.12). According to the mother, the father persuaded her to withdraw her statement, which she did. On 8 September 2014, these charges were dismissed.

37. Along with various driving convictions, the father was convicted on 16 May 2014 of not stopping in Police pursuit for which he was sentenced to 12 months' imprisonment commencing on 1 February 2014 (with a non-parole period of nine months) and subject to release on conditions.

38. The father was incarcerated between 28 October 2015 and 27 March 2016 for driving whilst disqualified, at which time the mother was pregnant with their eldest son. This is the father's only offence or conviction disclosed in the application relied on by the Central Authority.

39. On 22 December 2016, the mother was convicted of larceny and goods in custody suspected of being stolen, in relation to which she was fined on each matter. A charge of possession of a prohibited drug was dismissed pursuant to s 10 of the *Crimes Act 1900* (NSW) ("Crimes Act") and an order was made for the drug to be destroyed.

40. Upon the father's release from prison, he was detained in immigration detention before he was deported to New Zealand in April 2017.

41. On 25 April 2017, the mother, who was pregnant with Y, travelled to New Zealand to join the father. They lived together in rented accommodation until early 2019, when they moved to City D to live with the father's mother.

42. The mother and X returned to Australia on 7 June 2017. The father remained in New Zealand and on 28 June 2017, the mother returned with X to be with the father.

43. The mother returned to Australia with X on 15 July 2017, where they remained, until the mother took him back to New Zealand and the father on 27 August 2017.

44. Y was born in August 2017.

45. On 15 June 2018, the mother returned to Australia with both children. They remained in Australia until, on 9 July 2018, the mother returned with both children to live with the father in New Zealand.

46. New Zealand Police records evidence numerous Police interventions concerning violence by the father against the mother. For example, the police records of 8 February 2019 record:

> … Today, the neighbour has arrived home and heard [the mother and father] arguing. [The neighbour] has walked to the open front door and seen [the father] standing over [the mother] holding her down. When spoken to, [the father] has let [the mother] go and come to the front door. [The mother] has run down the back of the property. The two children have gone to the neighbours… [The mother] is unwilling to give any statement as she is scared of his family and retribution. She did state to police that he had slapped and punched her while she was on the ground. She would not state how she came to be on the ground… Police took photos of her face, showing bruising to both eyes and the left temple. There is grazing/swelling and bruising to her forehead. There is a bruise to her right arm. The right corner of her lips is showing bruising and the lower lip in swollen. [The father] was unable to be located as when he was told by the neighbour that police were called he entered the neighbour's home, collected both children and left in his vehicle.
>
> (As per the original)

47. On 4 April 2019, while the mother, father and children were living with the paternal grandmother, there was a violent argument between the children's parents and, when the mother threw a shoe through a closed window, the glass shattered and the elder child was badly cut by flying glass. The mother left the house taking the younger child with her. The father retained the other child. After several days, the mother and the younger child were provided with emergency housing. The accommodation was a single room in a motel and is where the mother and youngest child lived until they left New Zealand more than one month later.

48. On 10 May 2019, the mother filed an application for protection orders in the Family Court of New Zealand and obtained ex parte orders for custody of the children and a warrant to take X into her care as well as a protection order in

favour of herself and the children. The order allowed the father to have supervised time with the children.

49. The mother and children departed New Zealand later that day.

THE NOTICE OF APPEAL

50. By her Notice of Appeal filed 30 December 2019, the mother presented three grounds of appeal. At the outset it is appropriate to point out that the grounds either misstate the trial reasons or complain that the primary judge erred by accepting the mother's evidence to the effect that she had no intention of resuming her relationship with the children's father.

51. The gravamen of Ground 1 is that the primary judge erred in the application of the grave risk of physical or psychological harm defence by limiting the analysis of that risk to the period immediately following the children's return to New Zealand. We agree with the submission by counsel for the Central Authority that it is necessary to have regard to the trial reasons as a whole. As has already been explained, the reference to there being no immediate prospect that the assessed risk would eventuate, is to the fact that there were sufficient protections in place so that the New Zealand courts could determine the children's future living arrangements without the children being exposed to a grave risk of physical or psychological harm in the meantime. Central to that conclusion is her Honour's acceptance of the mother's evidence that she had permanently separated from the father and taken necessary steps to keep him away from her and the children.

52. To the extent that the mother contends that the primary judge should have taken into account her history of separation and reconciliation with the father and thus it was unsafe to assume she would cooperate with New Zealand courts, Police and other agencies' attempts to keep her and the children safe, that argument is inconsistent with the mother's case at trial. We agree with the submission for the Central Authority that "her Honour was not taken to either of these documents by any party. Mr Hill, who represented the [a]ppellant at the hearing, did not make any submission regarding the history of the parents separating and reconciling" (Respondent's Summary of Argument filed 21 February 2020, paragraph 11).

53. Although the primary judge did not have the benefit of the evidence now available to us, it should be observed that the documents that were provided were presented in a fashion which was almost incomprehensible. The mother's primary affidavit is a case in point. The documents annexed are variously incomplete, reference other documents which were not in evidence and make little sense. No attempt was made to establish links between the documents or present a narrative account of this family's complicated history. The Full Court has said more than once that a judge cannot be expected to rummage through a

large volume of documents on the off chance that the facts might emerge. It is particularly unacceptable for this to occur in a case where there are serious safety issues. Although more will be said concerning the parents' pattern of separation and reconciliation when we consider the intolerable situation defence, given the manner in which the case was run at trial, this ground cannot succeed. In our view, had this issue been raised at trial, it is highly unlikely that the return order would have been made.

54. Ground 2 in effect replicates Ground 1 and seems to suggest that the primary judge erred in finding that there is no immediate prospect of a resumption of the parental relationship [73]. For the reasons given in relation to Ground 1, this ground must also fail.

55. By Ground 3, the mother contends that the primary judge erred by assuming that the current protection orders in New Zealand would remain in place. Although the primary judge did not explicitly make this finding, it is implicit. However, although it was understood that an application had been made by the father to discharge the recently made protection order in New Zealand, it was no part of the mother's case that she would agree that his application should be granted. Nor was there any evidence that his application had even the remotest prospect of success. The ground itself postulates an outcome entirely at odds with the mother's case at trial and is not made good.

56. By now, it would be apparent, that the complexion of the mother's case at trial and on appeal is quite different. Also, that the evidence adduced at trial in relation to very serious issues of risk and the children's position in the family, is much better presented on appeal than it was below. That said, we struggle to understand why the intolerable situation defence was not pressed. There is no doubt it should have been.

Intolerable situation

57. By reg 16(3):

> A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:
>
> …
>
> (b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation…

58. The leading authority on these issues is *DP v Commonwealth Central Authority* (2001) 206 CLR 401. There, Gaudron, Gummow and Hayne JJ explained at [40] that:

> 40. So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that "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". If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.

59. The three categories in reg 16(3) are to be read disjunctively (*Gsponer v Director-General, Department of Community Services (VIC)* (1989) FLC 92-001). The predicted risk must have reached such a level of seriousness as to be characterised as grave. Although the word "grave" characterises the risk rather than the harm, "there is in ordinary language a link between the two" (*Wolford* at [57] and [62] citing *In Re E (Children) (Abduction: Custody Appeal)* [2011] 4 All ER 517 at [33]).

60. The mother carries the onus of proof in establishing the defence.

61. As we consider this issue, it needs to be remembered that the focus must be on the children (*Harris v Harris* (2010) FLC 93-454 ("*Harris*")). But the children's primary carer's circumstances are highly relevant. In *Harris* the Full Court adopted remarks by Hale LJ (as her Ladyship then was) in her dissenting judgment in *TB v JB (Abduction: grave risk of harm)* [2001] 2 FLR 515, who explained the situation thus:

> 43. It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it…
>
> …
>
> 56. But it cannot be the policy of the Convention that children should be returned to a country where, for whatever reason, they are at grave

> risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems…
>
> …
>
> 58. … It would require more than a simple protection order in New Zealand to guard the children against the risks involved here…

62. In support of the intolerable situation defence, senior counsel who appeared for the mother in the appeal advanced three key propositions:

- the pattern of parental separation and reconciliation made it unsafe to proceed on the basis that the current separation would persist and the children would not be brought back into a violent home;
- the father's frequent breach of orders and conditions concerning bail, domestic violence orders and parole, made it unsafe to proceed on the basis that child welfare agencies, Police and orders would achieve their desired intent of keeping the father away from the mother and the children; and
- the totality of the circumstances in which the children would find themselves if returned to New Zealand was unsafe and intolerable.

63. Turning then to the pattern of separation and reconciliation. Reference need only be made to the facts recorded at [33]–[36] and [40]–[45] of these reasons to establish that the parental relationship was volatile and marked by numerous separations and reconciliations. Although, as counsel for the Central Authority pointed out, the mother deposed that she would not resume her relationship with the father, we consider that there have been too many separations and reconciliations, to accept that this one is permanent. Much more time would need to pass with the children's parents still separated before it could be inferred that a resumption of cohabitation was unlikely. In our view, there is an appreciable risk that if the children return to New Zealand with the mother, she may rekindle her relationship with the father and the family would once again, live together.

64. The Family Consultant evaluated the risks to the children qua physical or psychological harm or being placed in an intolerable situation through exposure to family violence as follows:

> 54. … [W]ithout in any way discounting the risks to [the children] as a consequence of parental drug and alcohol use and other associated anti-social and criminal behaviour, it is assessed that the risks posed

to the children by family violence are of particular significance. Therefore, analysis of the family violence allegations from the children's perspective only will be provided. Having said that, it is acknowledged that, in addition to the family violence risks, the other identified risks, including those pertaining to drug and alcohol use and criminal behaviour, may all also have a profound impact on the children and the parental capacity of both parents, and, therefore, it is respectfully acknowledged that such a broader, and more comprehensive assessment, will be a matter for the New Zealand authorities in the event that the children are returned to New Zealand. In the event that the children are not required to return to New Zealand, such risks, as they pertain to [the mother], will require further assessment by the Australian authorities.

55. From the children's perspective, the family violence, as alleged in this matter, is a form of child abuse, with associated potentially grave consequences for the children's physical and emotional safety, plus to their overall development.

56. The information obtained for this assessment is suggestive of family violence of potentially the most dangerous in terms of possible lethality and physical harm. Of particular concern in terms of potential lethality, or serious harm, are [the mother's] allegations of choking, also known as non-lethal strangulation, about which there would seem to be some corroboration from the police records. [The father's] allegation of [the mother] attacking him in the chest with a knife is also of significant concern. Of particular significance in relation to parents' allegations of physical abuse by the other, especially in terms of what current or future risk such concerns may present to the children, is the date and pattern of such allegations. It is noted that [the father's] account of physical abuse dates back to one alleged incident in 2013, while [the mother's] account is of multiple incidents of physical abuse causing injuries, including just prior to her leaving New Zealand. [The mother's] account of a long standing pattern of ongoing physical violence by [the father] would seem to be supported via the collateral information.

…

58. From the children's perspectives, exposure to physical violence, particularly of the very serious type alleged in this matter, is not only frightening to children, but it is dangerous due to the high risk of children also being physically hurt. Of significant concern are [the mother's] allegations, if correct, of physical abuse of her by [the father] while the children were present, including when in her arms. Also of significant concern is [the father's] allegation, if correct, of [the elder child] having been injured by broken glass as a consequence of [the mother's] behaviour during an argument with [the father].

…

60. From the history provided by both parents, and also as obtained in the collateral information, [the children] have lived with, and been exposed to, family violence for all of their lives. Given their young and vulnerable ages, [the children] are not of an age where they are able to articulate such experiences and, therefore, they are totally dependent on adults for their protection and safety. For children, the experience of chronic exposure to family violence is the experience of living in a situation of toxic stress. Such an experience of toxic stress, which is also known as complex trauma as it represents children's exposure to multiple traumatic events, is known to impact on the developing brain of young children, particularly for children as young as [the children], and with potentially immediate and long term consequences for all areas of a young child's development.

…

62. In relation to the prediction of current and future family violence risk, the events of the past are more usually the most reliable indicator and, therefore, it is assessed that such risks are extremely high in this matter. Further, also given the reported history, the risks to the children of future experiences of, and exposure to, family violence is assessed to be extremely high if their parents were to live in close geographical proximity.

(Hague Report of the Family Consultant dated 18 November 2019, p.16–p.18) (As per the original)

65. This is compelling evidence which demonstrates that it would be intolerable and unsafe for the children to face the prospect of living with both their parents. It is evident that notwithstanding the violence which the mother says the father inflicted on her and, to which the children were exposed, she repeatedly returned to him. Even where extensive Police and other resources were deployed in an attempt to protect her and her family tried to help. There will be complex dynamics which could explain this pattern but the salient point is that the mother has not stayed separated from the father for long.

66. The COPS records identify five instances of family violence in which the mother is named as the victim and where a child/young person is identified as at risk. They all coincide with the mother's relationship with the father and occurred before these children were born. It is inferred that the child/young person at risk is the mother's daughter, who then went to live with the mother's sister.

67. The unfortunate reality of the mother and the children's lives is sadly reinforced by the fact that when the father was deported, the mother followed him to New Zealand. Then, with the father unable to follow her back to

Australia, and her having returned to Australia on a number of occasions, the mother went back to him. The children were with her and there can be no doubt that their safety and wellbeing were greatly compromised by her decision to take them back to the father. On the evidence available to us, the father's family is aligned with him and it would be unsafe to proceed on the basis that they could or would intervene on behalf of the children if the parents resumed their relationship.

68. Lest it be misunderstood, it needs to be said that the only person responsible for the father's violence is the father himself. We recognise that there is compelling evidence that the mother is a victim of prolonged and pervasive intimate partner violence and do not doubt her struggle to remove herself from this abusive relationship.

69. The circumstances as would pertain (excluding for one moment the risk of exposure to violence) if the mother and the children returned to New Zealand, are encapsulated in the following exchange with counsel for the Central Authority:

> RYAN J: Is it an intolerable situation for the mother and one, perhaps eventually two children to be living in a single room in a motel with no family support, no friendship support, emergency income, and for the children to be entirely reliant on their mother to keep herself away from their father and not expose them to persistent and extreme violence, as she has in the past? Is that an intolerable situation for the children? And hopefully not use drugs – the mother, I mean. Their mother.

70. The position adopted by the Central Authority is encapsulated in the answer given by counsel:

> MS BARNETT: I suppose my answer would be it really depends on how long we're looking at. If we're looking at a very short period of time, then possibly not, but certainly, as the period gets longer in length, the tolerability of that becomes less tolerable. The only factual matter in that proposition that your Honour put that I would cavil with is that I accept that the mother was put in short-term accommodation in that hotel room, but appears from her material that that was short-term in that [C Group] was looking for more appropriate accommodation.
>
> And so part of that – it may be ameliorated to some extent. The other thing that may ameliorate such a situation would be what sort of support services are available. Is the mother alone without any support to be able to deal with those issues, being the father and her history of drug use?
>
> RYAN J: So that history of drug use, her poverty, her social poverty, complete absence of family support, the children aren't old enough to pick up the phone and ring the police themselves or to recognise, perhaps, how dangerous the situation is…

(Transcript 5 March 2020, p.59 lines 16–38)

71. Although counsel for the Central Authority rejected the proposition that this case resonates with *Harris*, we think it does. The situation faced by the child in that case was:

> 149. [The primary judge] set out her conclusions on intolerable situation at paragraph 195 of her reasons as follows:
>
> > I am persuaded that the child and the mother if the child were to be ordered to be returned to Norway, would be placed in an intolerable situation. That is, from the child's perspective, not only without provision of basic essentials but reliant upon the mother as his primary carer who would almost certainly be isolated and terrified. In short, there is compelling evidence the mother genuinely and reasonably believes her life is at risk from the father if she returns to Norway. The seriousness of the past domestic violence and abuse discussed above when combined with his threat to kill her would place her in an intolerable situation. Because of the child's reliance upon her for the entirety of his physical and psychological needs, these factors add to my satisfaction that a return order would also place him in an intolerable situation.

72. For a similar outcome, see *State Central Authority v M* [2003] FamCA 1128.

73. Irrespective of whether the children's parents reconcile or the current separation holds, there is a serious risk that in New Zealand the children would be exposed to dangerous family violence. The mother's fear of the father is rational and, in New Zealand, she would rightly fear for her life. The children's reliance on her makes such a situation intolerable for them. This would be made worse by the effect of poverty and, in all probability, living in something akin to the single motel room the mother used before she fled.

Discretion

74. Even where a defence is established, the court may still return the child to the child's place of habitual residence. As to the parameters of the discretion, in *De L v Director General NSW Department of Community Services* (1996) CLR 640 at 661, the High Court, quoting Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 explained that the discretion is unconfined, '"except in so far as the subject matter and the scope and purpose of the [Regulations]' enable it to be said that a particular consideration is extraneous". In *Agee v Agee* (2000) FLC 93-055 the Full Court held that the underlying purpose and intent of the Abduction Convention must be afforded significant weight as should "specific consideration of the welfare of the particular child" [64].

75. New Zealand has sophisticated systems in place to protect victims of family violence. However, it is established that the children's parents have persistently thwarted attempts by similar agencies in Australia to keep the mother and children safe. The father has no respect for the rule of law and even repeat terms of imprisonment have not tempered his determination to do what he wants, even when this involves violence and breaching an order. To attach conditions to a return order and then assume such conditions would be honoured, would see hope triumph over experience. There is simply no evidence which suggests that any conditions would be effective. Indeed, the findings which establish the intolerable situation defence point entirely against the children being returned to New Zealand.

76. It follows that the appeal will be allowed. Not only has the mother established the intolerable situation defence, but the totality of the evidence demonstrates that all three limbs of reg 16(3)(b) have been established.

77. The application of the Central Authority will be dismissed. It is common ground that there be no order as to costs.

OTHER MATTERS

78. We have been troubled by what occurred in this case and it is timely to mention the importance of adherence to Model Litigant guidelines. The NSW Guidelines, which apply to the Central Authority, requires more than merely acting honestly and in accordance with the law and court rules. Essentially, the guidelines require that the Central Authority acts with complete propriety and in accordance with the highest professional standards. Relevantly, this includes not requiring the other party to prove a matter which the state or an agency knows to be true.

79. In this case, the application disclosed the father's final term of imprisonment in NSW. Even though the Requesting Authority knew that the father was permanently banned from Australia, had effectively been deported and had lived in New Zealand for many years, it would seem that no attempt was made to establish his criminal antecedents or the involvement (if any) of child protection agencies in New Zealand in relation to his other children. The same applies in NSW. To be fair, the Requesting Authority and the Central Authority disclosed the mother's application for a protection order and thereby flagged that, on the mother's case, serious risk issues arose.

80. It is our understanding that systems are in place in NSW which enable the Central Authority to access/request information from the NSW Police. We assume New Zealand operates in the same fashion. Thus, the Requesting Authority and Central Authority were able to examine and present the father's complete criminal history and an entire set of COPS records. Instead, it was left to the mother and the ICL to gather records from New Zealand and

domestically. It is no small thing to obtain records from abroad, particularly when time constraints are tight. Fortunately, the mother was granted legal aid, but, what we ask, if she was not? How would this young mother on social security benefits have managed to place this vitally important evidence before the court? The prospect that she would not have been able to do so is obvious.

81. This raises an allied issue, namely whether requesting and central authorities have a discretion to refuse to act on a request from a left behind parent for a return order. Regulation 14 states that a Central Authority "may" apply to the court. This is the language of discretion and carries with it the implication that a Central Authority may decide against presenting an application for a return order. We did not hear argument on the point but we encourage the Commonwealth and Special Commissions who oversee the Abduction Convention to give this matter further consideration.

82. Finally, as long ago as 1994, the Australian Law Reform Commission in its report on *Equality Before the Law: Justice for Women* (Report No. 69, Part IV – Violence Against Women, Violence and Family Law (1994)) recommended that the Regulations "should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child" (Recommendation 9.5). It seems to us, that an amendment to the Regulations along those lines coupled with an effective discretion reposed in the Requesting and Central Authorities, could only enhance the operation of the Abduction Convention and ensure that it operates as initially intended.

WATTS J

83. I have had the advantage of reading the Reasons for Judgment of Ryan and Aldridge JJ and agree generally with what their Honours have said at [1] to [77] and with the proposed orders. In particular, I agree that on the totality of the evidence before this court, all three limbs of Regulation 16(3)(b) Family Law (Child Abduction) Regulation 1986 (Cth) ("the Abduction Regulations") have been established and that the court should exercise a discretion not to make a return order.

84. In relation to [78] to [80] of their Honours' Reasons, absent the matter being raised with counsel for the Central Authority, I do not join any criticism as to any lack of complete propriety and professionalism of the Central Authority. Having said that, it is regrettable in this case that neither the primary judge nor this court was provided with an entire set of NSW COPS records. Both the parties were legally represented and the ICL represented the children. It would be speculative to comment on who, if anybody, is to blame for that lacuna in the evidence.

85. In relation to [81], I do not criticise the Central Authority for bringing this application, which after all was successful before the primary judge. Whilst the

discretion exists, I understand why the Central Authority may be reticent to second guess a request from a member state, in circumstances where any defence raised by an abducting parent is not known or tested.

86. The plurality's call for reform in [82] is one for the test of "grave risk" to be changed to include "reasonable risk" and from "to the child" to include "to the (abducting) parent". That is a change to the Abduction Regulations of considerable significance; does not arise from any argument or submission in this case nor from the outcome of this case and some might argue has the potential to "drive a coach and four" through Australia's participation in the Convention, absent the agreement of all other member states.

87. The initial purpose of the *Hague Convention on the Civil Aspect of Child Abduction* ("the Convention") , which is in force between Australia and 83 other countries, had as its dual objectives, the promotion of the return of the child to the state of habitual residence and taking measures necessary to avoid child abductions. The Convention proposes that defences to a return order following the wrongful removal of a child be narrow.

88. The 1982 Explanatory Report on the 1980 Hague Child Abduction Convention ("Explanatory Report") by Elisa Pérez-Vera says of the grave risk exception that it:

> 34. …must be applied only so far as [it goes] and no further. This implies above all that [it is] to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests on the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

89. At [116], the Explanatory Report comments in respect of Article 13(b) (the grave risk defence):

> Each of the terms used in this provision ["grave risk"; "expose the child to physical harm"; "expose the child to psychological harm" and "otherwise place the child in an intolerable situation"] is the result of fragile

compromise reached during the deliberations of the Special Commission and has been kept unaltered.

90. In Australia, the Convention is not attached to ratifying legislation but embodied in the Abduction Regulations. The Regulations are interpreted according to Australian legal standards and the High Court in *DP v Commonwealth Central Authority* (2001) 206 CLR 401 (a decision which postdates the Australian Law Reform Commission's Report No 69 on *Equality Before the Law: Justice for Women*) has moved away from the Convention in that it has not given the restrictive meaning to grave risk defence envisaged in the Convention. Rather the words of Regulation 16(3)(b) are to be given the "natural meaning of the words used" and not a narrow construction. That construction has made easier the outcome to which we all agree in this exceptional case. The result in this case demonstrates the effective operation of Regulation 16(3)(b) of the Abduction Regulations, in circumstances where the grave risk to the children arises from the likelihood of future family violence perpetrated by their father against their mother, including potential lethality.

I certify that the preceding ninety (90) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Ryan, Aldridge & Watts JJ) delivered on 25 March 2020.

Associate:

Date: 25 March 2020