FAMILY COURT OF AUSTRALIA

SIEGER & DEPARTMENT OF COMMUNITIES AND JUSTICE *[2020] FamCAFC 172*

FAMILY LAW – APPEAL – CHILD ABDUCTION – Where the primary judge ordered the mother to return the subject child to France – Where some of the grounds were abandoned prior to the commencement of the appeal – Application of regulation 16(3) – Where the grounds of appeal contending that the primary judge made multiple errors are misconceived – Where the primary judge did not dismiss allegations made by the appellant, but assessed the quality of the evidence concerning the allegations – Where the primary judge considered evidence and found that it did not amount to an intolerable situation for the child to return to France – Where certain grounds of appeal are prosecuted on a false premise – Where there is no mistake of fact – Where findings were open to the primary judge – Material error of law.

FAMILY LAW – APPLICATIONS IN AN APPEAL – Adduce further evidence – Where the respondent Central Authority did not seek to adduce evidence in the appeal, but the evidence was available for the mother to adduce in the appeal if so inclined – Where much of the documentary evidence the mother sought to rely on fails to satisfy the admissibility criteria in *CDJ v VAJ* (1998) 197 CLR 172 – Leave granted to allow the appellant to adduce certain further evidence in the appeal.

FAMILY LAW – APPEAL – RE-EXERCISE – Where the mother fails to establish there is a grave risk that the child's return to France would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation – Orders made for the child's prompt return to France were properly made – Appeal dismissed – No order as to costs.

Evidence Act 1995 (Cth) s 79
Family Law Act 1975 (Cth) ss 4AB, 93A(2)

Family Law (Child Abduction Convention) Regulations 1986 (Cth) reg 16(3)
Family Law Rules 2004 (Cth) Pt 15.5, rr 15.41, 22.39(1)

Allesch v Maunz (2000) 203 CLR 172; [2000] HCA 40
Australian Olympic Committee Inc v Telstra Corporation Ltd (2017) 258 FCR 104; [2017] FCAFC 165
CDJ v VAJ (1998) 197 CLR 172; [1998] HCA 67
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588; [2011] HCA 21
DP v Commonwealth Central Authority (2001) 206 CLR 401; [2001] HCA 39
Gronow v Gronow (1979) 144 CLR 513; [1979] HCA 63
House v The King (1936) 55 CLR 499; [1936] HCA 40
Liverpool City Counsel v Turano (2008) 164 LGERA 16; [2008] NSWCA 270

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305
Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 103
Stoltenberg v Bolton; Loder v Bolton [2020] NSWCA 45
Tame v New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317; [2002] HCA 35
Thorne v Kennedy (2017) 263 CLR 85; [2017] HCA 49
Trahn & Long (No. 2) [2008] FamCAFC 194
Wunscher & Licha [2008] FamCAFC 155

APPELLANT:	Ms Sieger
RESPONDENT:	Department of Communities and Justice
FILE NUMBER:	SYC 5216 of 2019
APPEAL NUMBER:	EAA 28 of 2020
DATE DELIVERED:	20 July 2020
PLACE DELIVERED:	Newcastle
PLACE HEARD:	Sydney (via video link)
JUDGMENT OF:	Ainslie-Wallace, Austin & Tree JJ
HEARING DATE:	9 July 2020
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	20 February 2020
LOWER COURT MNC:	[2020] FamCA 88

REPRESENTATION

COUNSEL FOR THE APPELLANT:	Ms McMahon
SOLICITOR FOR THE APPELLANT:	Aubrey Brown Lawyers

COUNSEL FOR THE RESPONDENT: Ms Hartstein

SOLICITOR FOR THE RESPONDENT: Department of Communities and Justice

ORDERS

(1) Pursuant to s 93A(2) of the *Family Law Act 1975* (Cth), leave is granted to the appellant to adduce as further evidence in the appeal:

(a) Annexures A, C and L to the affidavit of Ms C filed on 4 June 2020;

(b) Annexures C, D, E, F, G, P, T, U, V, Y and CC to the affidavit of the appellant filed on 22 June 2020; and

(c) An email sent by the respondent to the appellant on 6 July 2020 at 5.51 pm (comprising part of Annexure C to the affidavit of the appellant affirmed on 7 July 2020).

(2) The appeal is dismissed.

(3) 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 *Sieger & 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 28 of 2020
File Number: SYC 5216 of 2019

Ms Sieger
Appellant

And

Department of Communities and Justice
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. In late December 2018, the appellant ("the mother") wrongfully removed the subject child from France and retained her in Australia thereafter.

2. At the time of the child's removal from France, civil litigation commenced by the mother against the father two years before, in late 2016, was well under way in a French court and a series of interim orders had been made to regulate the child's care.

3. In August 2019, at the father's request, the Central Authority ("the respondent") commenced proceedings in the Family Court of Australia under the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations"), seeking orders which would ensure the child's return to France.

4. The mother contested the application. While she accepted the conditions for the child's return to France were fulfilled under reg 16(1) of the Regulations, she maintained the Court should exercise discretionary power to refrain from ordering the child's return because of the grave risk the child would thereby be exposed to physical or psychological harm or otherwise placed in an intolerable situation, invoking reg 16(3)(b) of the Regulations.

5. The dispute was heard by the primary judge in November 2019, with the appealed orders pronounced and the reasons for judgment published on 20 February 2020. In effect, consequent upon rejection of the mother's defence, the orders required the child's prompt return to France.

6. The mother appeals from those orders by way of a Notice of Appeal filed on 3 March 2020. Shortly after the appeal was lodged, the primary judge stayed the operation of the return orders pending determination of this appeal, the hearing of which was expedited.

7. For the reasons which follow, an error of law is apparent, but the same result is reached by the re-exercise of discretion and so the appeal is dismissed.

APPLICATIONS IN THE APPEAL

8. Two applications were filed seeking to adduce further evidence in the appeal pursuant to s 93A(2) of the *Family Law Act 1975* (Cth) ("the Act"). The respondent filed an Application in an Appeal on 4 June 2020 and the mother filed an Application in an Appeal on 22 June 2020.

9. The respondent's application was supported by an affidavit filed by a solicitor on 4 June 2020, which did no more than annex documents which the mother asked the respondent to procure and produce once the appeal was filed. Despite the terms of the application, the respondent informed the Court it did not seek to adduce the evidence in the appeal, but rather only made the evidence available to the mother to adduce in the appeal if she was so inclined. In the appeal hearing, counsel for the mother then sought to tender three particular documents annexed to that affidavit (Annexures A, C and L).

10. The mother's application was supported by her affidavit filed on 22 June 2020, which annexed a series of documents – some obtained from France after the appeal was filed, which could not be obtained before the trial; some recently prepared by the lawyer she has now engaged in France, containing his commentary on some aspects of the French proceedings; and some which she gave to her former lawyers in Australia, but which were inexplicably not used by those lawyers at trial.

11. Section 93A(2) of the Act is not to be used in such a way as to obliterate the distinction between appellate and original jurisdiction, nor to permit further evidence in the appeal merely because it might be perceived as being useful (*CDJ v VAJ* (1998) 197 CLR 172 at 202-203). When challenged with that reality, the mother abandoned her application to rely upon some parts of the supporting affidavit material and annexures. Her counsel made submissions in relation to the acceptance of the residual material upon which she did seek to rely, to which the respondent's counsel was able to respond with submissions concerning its rejection, and both were then content to leave the adjudication of the applications to be considered with the appeal.

12. Much of the documentary material upon which the mother still wanted to rely should be rejected because it fails to satisfy the criteria for admissibility discussed in *CDJ v VAJ*. However, the following documents should be accepted as further evidence in the appeal because they bear directly upon the

correctness of some of the findings made by the primary judge which are challenged under numerous grounds of appeal:

a) these documents annexed to the affidavit of the respondent's solicitor, filed on 4 June 2020:

   i) Annexure A (Exhibit 1) – orders made by the French court in family law proceedings on 31 January 2020, rescinding orders made on 7 February 2019, which document relates to Ground 28.

   ii) Annexure C (Exhibit 2) – judgment of the French court in criminal proceedings relating to an incident between members of the maternal and paternal families in June 2017, which document relates to Ground 13.

   iii) Annexure L (Exhibit 3) – an application made by the father to the French court in the family law proceedings on 14 November 2019, which document relates to Grounds 25 and 27.

b) these documents annexed to the affidavit of the mother filed on 22 June 2020:

   i) Annexure C (Exhibit 4) – record of the child's medical examination on 31 January 2017, which relates to Grounds 7 and 10.

   ii) Annexure D (Exhibit 5) – record of the French prosecution authority dated 8 February 2017 confirming possession of Exhibit 4 in the criminal investigation, which relates to Ground 7.

   iii) Annexure E (Exhibit 6) – French police officer's statement dated 22 February 2017 confirming the content of an interview between the officer and the child, which document relates to Grounds 7 and 10.

   iv) Annexure F (Exhibit 7) – French police officer's statement dated 27 February 2017 confirming the content of an interview between the officer and the principal of the child's school, which document relates to Ground 8.

   v) Annexure G (Exhibit 8) – French police officer's statement dated 6 March 2017 confirming the content of an interview between the officer and the principal of the child's school, which document relates to Ground 8.

   vi) Annexure P (Exhibit 9) – a letter to the mother from her French lawyer dated 26 March 2020 explaining the criminal penalties to

which the mother is potentially exposed if prosecuted on her return to France, which document relates to Ground 25.

vii) Annexure T (Exhibit 10) – a letter to the mother from her French lawyer dated 12 June 2020 opining that the orders made by the French court in the family law proceedings on 22 February 2019 have expired, which document relates to Ground 25 and should be accepted even though the mother withdrew her application to adduce it in evidence.

viii) Annexure U (Exhibit 11) – document confirming the child was medically examined on 29 May 2017, which document relates to Ground 11.

ix) Annexure V (Exhibit 12) – an email from the principal of the child's school to the mother on 30 May 2017 confirming the child disclosed information at school, which information was passed on to police, which document relates to Grounds 11 and 12.

x) Annexure Y (Exhibit 13) – French police officer's statement dated 10 June 2017 confirming the content of an interview between the officer and the mother, which document relates to Ground 11.

xi) Annexure CC (Exhibit 14) – psychiatric report prepared in the French family law proceedings on 30 April 2018, which relates to Ground 20.

13. On 2 July 2020 and 7 July 2020, the mother attempted to file two more Applications in an Appeal seeking to adduce even more evidence in the appeal, but the applications were correctly rejected by the Appeals Registry pursuant to the provisions of r 22.39(1) of the Family Law Rules 2004 (Cth) ("the Rules"), which requires such applications to be filed not less than 14 days before the appeal sittings. The mother sought leave at the appeal hearing to file and prosecute the second Application (which she confirmed subsumed the first in its entirety) but, save for one document, leave should be refused.

14. Aside from the application being grossly late, for which no satisfactory explanation was advanced, the purpose of the application was essentially twofold: to adduce expert opinion evidence from the mother's treating psychologist in the form of a very recent report dated 30 June 2020; and secondly, to adduce in evidence an email, dated 6 July 2020, and attachments she received from the respondent (being Annexure C to the mother's affidavit affirmed on 7 July 2020). As we understood it, the mother expressly abandoned her application to adduce in evidence Annexure A, Annexure B, and the evidence-in-chief comprising the text of her affidavit.

15. As for the psychological report, in effect, it simply confirms that the mother feels stressed and anxious about this litigation and her prospective return to France. Such evidence is inadmissible for two reasons.

16. First, as the mother's treating therapist, the psychologist's opinions must be confined to diagnosis, treatment and prognosis in order to be admissible under rule 15.41(1)(a) of the Rules and thereby avoid the need for the use of a single expert witness under Part 15.5 of the Rules. The psychologist only reported upon the mother's symptoms, not her diagnosis, and said her symptoms were "difficult to treat psychologically". He said the only treatment he had so far discussed with the mother was "sleep hygiene, deep breathing, vigorous exercise and other cognitive behaviour therapy strategies". He did not opine any prognosis and said he had asked the mother to visit her doctor.

17. Secondly, aside from some history provided to the psychologist by the mother, according to her perception of events, the facts and assumptions upon which the psychologist's opinions are based were not proven and his expert reasoning is not exposed, which therefore deprives his evidence of admissibility under s 79 of the *Evidence Act 1995* (Cth), not merely of weight (*Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [42], [91]-[101], [120]-[124], [128]-[130]; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705).

18. As for the email dated 6 July 2020 which the mother received from the respondent, its contents only relevantly tend to confirm the contents of another document adduced in the appeal (Exhibit 1). The email, excluding its attachments, can be received in evidence because it also relates to Grounds 25 and 28 (Exhibit 15).

THE APPEAL

19. The appeal initially comprised 29 grounds; many with multiple sub-grounds.

20. When an appeal asserts many different errors in a relatively short first-instance judgment, as this one is, the Court is entitled to be circumspect about the merit of *all* the grounds (*Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [70]; *Stoltenberg v Bolton; Loder v Bolton* [2020] NSWCA 45 at [52]; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [8]). Even if appealable error does exist, an unnecessary multiplication of grounds tends to conceal it (*Thorne v Kennedy* (2017) 263 CLR 85 at [49]).

21. Aside from the sheer number of grounds of appeal, many of them amount to no more than the intricate dissection of individual paragraphs in the reasons for judgment. This parsing approach has been rightly criticised by other intermediate appellate courts, which criticism we adopt.

22. The Full Court of the Federal Court of Australia said this in *Australian Olympic Committee Inc v Telstra Corporation Ltd* (2017) 258 FCR 104 at [115]),

endorsing what was earlier said by the New South Wales Court of Appeal in *Liverpool City Council v Turano* (2008) LGERA 16 at [160]:

> …the role of this Court on appeal should not be misunderstood. The analysis of a judgment for appellate purposes does not require a fine parsing exercise and does not require overzealous analysis…

23. The following evaluation of the grounds of appeal is contextualised by the application of those principles.

24. Some grounds of appeal are not considered. Shortly before the appeal hearing, the mother gave notice of her abandonment of several grounds (Grounds 1, 3, 4, 5, 19 and 21) and, as the appeal hearing commenced, the mother's counsel announced that two further grounds were also abandoned (Grounds 18 and 26).

Ground 2 – error of law

25. This ground contended the primary judge misapplied the test for the defence prescribed by reg 16(3)(b) of the Regulations, upon which the mother relied, though her submissions in the appeal did not help elucidate the error.

26. Regulation 16(3) of the Regulations relevantly provides:

> (3) A court may refuse to make an order under sub-regulation (1) or (2) if a person opposing return establishes that:
>
> (a) the person, institution or other body seeking the child's return:
>
> (i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or
>
> (ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or
>
> (b) there is a grave risk that the return of the child under the [Convention on the Civil Aspects of International Child Abduction] would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or
>
> (c) each of the following applies:
>
> (i) the child objects to being returned;
>
> (ii) the child's objection shows strength of feeling beyond the mere expression of a preference or of ordinary wishes;
>
> (iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

27. In the reasons for judgment, the primary judge correctly recited the formulation of the test under reg 16(3)(b) of the Regulations (at [39]-[40]).

28. The mother's assertion of the primary judge's error of law springs from the potted summary of the mother's reliance upon reg 16(3)(b) of the Regulations when her Honour explained the live issues between the parties in these terms:

> 30. The [mother] asserts the facts will establish an exception to the regulations for the return of the child, under the *Family Law (Child Abduction Convention) Regulations 1986 (Cth)*, which exception is provided for under section 111B of the *Family Law Act 1975 (Cth)* in that to return the child would expose her to a **grave risk of physical or psychological harm** or otherwise place the child in an intolerable situation being a defence to a return under regulation 16(3)(b) of the [Convention on the Civil Aspects of International Child Abduction].
>
> (Bold emphasis added)

29. That summary did not correctly correlate with the legislative test because it referred to the grave risk of the child suffering harm, as distinct from the grave risk of the child's exposure to harm, if returned to France.

30. In respect of the defence available under reg 16(3)(b) of the Regulations, the High Court of Australia has said that the difference between a grave risk of exposure to harm and a grave risk of suffering harm may be important, because the former test is an extension of the latter (*DP v Commonwealth Central Authority* (2001) 206 CLR 401 ("*DP*") at 418, 422). But in situations where, as is the case here, upon the child's return to the country of habitual residence, there will be a judicial determination of questions concerning the child's care, it will often be the case that assertions of risk of exposure to harm will not be established, though the Australian court is not relieved of its obligation to give proper effect to the provisions of the Regulations (*DP* at 423, 441-444).

31. In this case, before the trial commenced, the mother contended her defence under reg 16(3)(b) of the Regulations would be made out because she could establish the child would be emotionally harmed upon returning to France by her removal from the mother's primary care and exposed to the risk of harm in the father's care by reason of her sexual abuse, physical abuse, and exposure to other aspects of the paternal family's lifestyle. Then, in her final submissions, the mother contended the defence was made out because the evidence established the grave risk of the child suffering harm in France in multiple different ways, including: sexual abuse by the father; exposure to the father's aberrant lifestyle; and the mother's "mental and emotional stability".

32. The mother's case was that the child's enforced return to France would mean she was at grave risk of suffering harm in any of those ways. Her case was *not* carefully constructed to coincide with the literal test of reg 16(3)(b) of the Regulations: namely, there is a grave risk that the child's return to France would expose her to physical or psychological harm. Instead, the mother ran her case conflating the questions of the grave risk of *exposure* to harm and the grave risk of *suffering* harm. The respondent certainly understood the mother to have pitched her case that way and so it is understandable how the primary judge addressed the evidence and submissions as they were presented.

33. Nowhere was the mother's conflation of the statutory test so pronounced as it was in her Summary of Argument filed in the appeal, where she stated (albeit in relation to another ground):

> …Risk of harm **or** risk of exposure to harm to a child **must have the same meaning** no matter what its statutory context.
>
> (Emphasis added)

34. It is useful to pause here to emphasise the inconsistency between that submission and the gravamen of this ground of appeal. The ground asserts an error of law because the primary judge wrongly confused the risk of exposure to harm with the risk of suffering harm, yet the mother's Summary of Argument contends there is no difference. The mother could not rationally explain the anomaly in oral submissions.

35. The primary judge's essential findings were expressed in these terms:

> 109. On the evidence I do not find the child is **at risk of grave harm** from any conduct of her father or the paternal family in her returning to France due to the inability of the authorities to protect the child or act to protect her.
>
> …
>
> 142. I do not see, on this evidence, that there is a **grave risk of harm**, psychologically or physically, to the child or any other circumstance upon her return that would warrant me not enforcing the clear intent of the regulations which is that a child's care and welfare and determination of where she should live is to be determined in the child's place of habitual residence prior to the wrongful removal. Given that the mother has conceded she wrongfully removed the child from France, the child must be returned to France forthwith and as soon as is possible and I will so order.
>
> (Emphasis added)

36. The findings did not follow the construct of the test within reg 16(3)(b) of the Regulations, even though the findings did determine the factual controversy as developed by the mother. Regardless, her Honour's failure to actually apply the

test stipulated by reg 16(3)(b) of the Regulations was an error of law, which impugns the decision.

37. Neither this, nor any other, ground of appeal complained about the manner in which the primary judge dealt with the alternate defence under reg 16(3)(b) of an "intolerable situation". In the appeal hearing, the mother's counsel confirmed that the omission of any such complaint in the appeal about that aspect of the statutory test was intentional and we need not concern ourselves with the question of whether the primary judge correctly dealt with that limb of the mother's defence.

38. Despite the error of law identified by the mother in this ground, the appeal is still dismissed because, for the reasons explained below, we independently reach the same decision as the primary judge upon re-exercise of the discretion in accordance with the correct legal tests (*Trahn & Long (No. 2)* [2008] FamCAFC 194 at [48]; *Wunscher & Licha* [2008] FamCAFC 155 at [50]).

39. During the appeal hearing, the mother sought leave to amend and argue this ground of appeal in a quite different way, by supplementing it with a complaint about the primary judge's failure to consider all of the evidence cumulatively when applying the statutory tests. The respondent, understandably, contended it could not meet such an unforeseen argument and so leave to amend was refused.

Ground 6 – multiple errors (at [51])

40. This ground comprises six sub-grounds and takes one-half of a page to articulate, even though it only relates to a single paragraph in the reasons for judgment.

41. The subject paragraph in the reasons for judgment (at [51]) refers to an allegation of sexual abuse made by the child against the father to a psychologist about five weeks after the alleged event. In summary, the child alleged the father forced her to use a spoon to either penetrate, or at least manipulate, her vagina, causing her genitals to bleed. She alleged the paternal grandmother was present and directly involved in the incident by wiping away the blood and scolding the father. The child alleged she was then immediately taken by members of the paternal family to a doctor for physical examination.

42. It is useful to point out that the allegation was reported to the French authorities who investigated, but was not substantiated and no further action was taken against either the father or the paternal grandmother. The mother admits that is so, even though she alleged in the proceedings before the primary judge that "the child had impact trauma and bruising in her vulva area".

43. In the reasons for judgment (at [51]), the primary judge observes that the complaint was made to the French authorities by the psychologist rather than by the child directly, the child made the disclosure to the psychologist about

five to six weeks after the alleged event, and the alleged abusers took the child for medical examination immediately after the event. Those observations were entirely consistent with the evidence adduced by the mother.

44. The primary judge went on to observe that it seemed inconceivable that the persons who had just engaged in the child's sexual abuse, thereby occasioning actual genital injury to her, would expose themselves to discovery by taking the child to have her genital injury examined and recorded. On any objective appraisal, that observation is completely logical and unremarkable.

45. Significantly, this ground is prosecuted on a false premise. It alleges her Honour made findings (at [51]), but her Honour did not make any finding about whether or not the incident occurred. Her Honour recited evidence adduced by the mother and commented upon why the evidence tended to lack probative value.

46. The particulars of this ground of appeal are impossible to understand, even if parts of it do reflect a ground of appeal which is properly available from a discretionary judgment (*House v The King* (1936) 55 CLR 499 at 504-505). It is a compilation of allegations about the failure to take certain facts into account, the incorrect recitation of evidence, and "unreasonably setting aside" findings.

47. The mother submitted in her Summary of Argument:

> 9. …Ultimately it is contended that [her Honour's] dismissal of this allegation was manifestly unreasonable as it lacked an evident or intelligible justification…
>
> (Citation omitted)

48. Of course, not only did the primary judge not make any finding at all, her Honour did not purport to "set aside" the findings of any other court or authority. The only relevant lack of "intelligibility" is manifest from the articulation of the ground and the submissions made in support of it.

49. In oral submissions, the mother's counsel pivoted and submitted this ground was really a "weight" argument about the evidence, but we reject the submission. It would take a powerful dose of imagination to discern any weight argument from this ground of appeal and its particulars.

Ground 7 – mistake of fact (at [53])

50. This ground alleged the primary judge made a mistake of fact (at [53]) in relation to the sequence of events concerning the child's disclosure of the father's sexual abuse to her psychologist and the steps subsequently taken by the mother.

51. The primary judge said:

> 53. I accept that the child was examined by a doctor some weeks after the event but the child made disclosures five weeks after the event and the mother's claim that the child had impact trauma and bruising, was not taken to the authorities by her at all at the time the mother allegedly observed these injuries on her child. Further no such observation was made by the doctor who examined the child at the very time.

52. The mother deposed that it took police "almost [two] months" to have the child physically examined but, despite the delay, "impact trauma and bruising" to the child was still confirmed by the doctor. The mother deposed she was unable to obtain the French reports to verify the doctor's findings on physical examination, but she did confirm the French authorities decided not to prosecute the father "due to a lack of evidence".

53. The primary judge acknowledged the mother adduced such evidence about the child's injury (at [50], [53]), but her Honour was understandably perplexed by the apparent inconsistency of the mother's uncorroborated evidence. If the French authorities indeed had physical evidence of the child's injury, why would they decide not to prosecute the father for "lack of evidence"? The primary judge's puzzlement was understandable, especially when it is uncontroversial that the child said she was promptly taken for medical examination by members of the paternal family and no evidence was adduced to verify the child was then suffering from any physical injury. The mother certainly did not depose to her having seen any injury to the child's genitals, even though the child was in her continuous care between the time of the child's alleged sexual assault and her physical examination approximately two months later.

54. The further evidence adduced in the appeal proves the child was medically examined on 31 January 2017 (Exhibit 4). In that examination, it was noted she had a "[r]eddish ecchymotic semi-recent lesion on the interior left side of her labia majora" which "may" be compatible with the child's report of interference with her genitals by a spoon about eight weeks before. The lesion was not, however, "impact trauma and bruising" as reported by the mother. It is also clear from the further evidence that the French police were in possession of those medical records when the decision was made not to prosecute the father for lack of evidence (Exhibit 5). When the child was interviewed by the police in February 2017, she repeated her account of abuse with the spoon, but this time she inconsistently said the father (not her) used the spoon on her genitals and that the paternal grandmother said nothing at all to the father when she saw the child's bleeding genitals (Exhibit 6).

55. The ultimate submission made by the mother under this ground is that the primary judge's "dismissal" of the sexual allegation was "not sound", which reveals the mother's misapprehension. The primary judge did not dismiss the

allegation. No finding was made either that the abuse did or did not occur. Her Honour only explained why the evidence surrounding this particular allegation lacked probative weight and did not strengthen the defence under reg 16(3)(b) of the Regulations for which the mother advocated.

56. It emerged during oral submissions in the appeal hearing that the mother hoped, or even expected, the primary judge would make a positive finding that the father sexually abused the child, but of course that was not her Honour's remit. The primary judge was only required to evaluate the evidence to determine whether, given the facts and circumstances revealed by the evidence, there was a grave risk the child would be exposed to harm or otherwise placed in an intolerable situation if returned to France. Although the primary judge's attention was wrongly diverted to the (grave) risk of harm and away from the (grave) risk of exposure to harm, her Honour nonetheless correctly concentrated on the question of risk rather than proof of allegations according to the civil standard of proof.

Ground 8 – mistake of fact (at [54])

57. Another reason why the quality of the evidence concerning the child's alleged sexual abuse by the father was found wanting was the child's subsequent admission to an independent person that she lied about the allegations (at [54]).

58. This ground of appeal contended the primary judge mistakenly found the child admitted her fabrication, but the submission is rejected. For a report prepared by a social scientist for the family law proceedings in France in January 2018, the child was independently interviewed and the interviewer reported to the French court:

> … [The child] says she lied when she accused her father of "stories of Danette and spoon", without being able to say more.

59. The separate references to "Danette" (which is apparently a French brand of chocolate custard or yoghurt the child knows) and the "spoon" are obvious references to the separate allegations of sexual activity made by the child against the father – the first in October 2016 involving the application of Danette to the father's genitals and the second in December 2016 involving the use of a spoon to manipulate her genitals. On the available evidence, when linked to both Danette and the spoon, there were no other incidents to which the child's admission of fabrication could have sensibly related.

60. The French report goes on to say the child admitted that her disclosure to the maternal grandmother about the sexual abuse was a fabrication. The child even told the mother, in the interviewer's presence, she had lied.

61. In the reasons for judgment (at [54]), aside from correctly reciting the evidence of the child's admission of fabrication, the primary judge also refers to the

child's association with a girl in her class at school who had recounted some sexualised comments. That too, according to the evidence, was correct.

62. The same report prepared for use in the French family law proceedings revealed how, some six months before, the child recounted hearing the sexualised comments of a girl in her class and the child was then seen by the maternal grandmother to be masturbating with a toothbrush. The paternal grandmother separately told the interviewer she thinks the child "easily passes from reality to imaginary scenarios that could have been suggested by a girl in her class, with a raw and sexuali[s]ed discourse".

63. Although her Honour ran together, in the same paragraph, the evidence related to the two separate reports made by the child about the father's sexual impropriety in late 2016 to both the maternal grandmother and her psychologist, the child's sexualised behaviour some months beforehand, the child's exposure to sexualised conversation with a school friend, and the child's admission of fabricating allegations of her sexual abuse by the father, all of that evidence had obvious thematic commonality. It bore upon the reliability of the child's representations and, hence, the strength of the mother's defence raised under reg 16(3)(b) of the Regulations in so far as it was founded on the child's allegations.

64. The further evidence in the appeal tends to endorse the evidence before the primary judge and strengthen her Honour's conclusions. The child's school principal reported to the police in February 2017 that the child is "still in her imaginary world" (Exhibit 7) and that, sometime beforehand, the child and two other young friends were found "touching each other on the bottom or looking at each other's vaginas". In early March 2017, the school principal reported to the police that, after being delivered to school by the mother, the child immediately told a teacher about the incident with the spoon, which had allegedly occurred months before, "like a recitation" (Exhibit 8).

65. Contrary to the contention of this ground of appeal, even taking into account the further evidence, the primary judge made no factual mistake about the evidence to which her Honour referred.

Ground 9 – multiple errors (at [56])

66. This ground contended the primary judge's finding at [56] of the reasons for judgment was infected by her Honour's failure to take other matters into account, being: alternate explanations advanced for the child's disclosures in the French family law report; other disclosures made by the child, referred to in a different report; and the mother's theory that the child's disclosures led to the parental conflict, rather than the parental conflict inducing the child's disclosures.

67. The first point to make is that the failure to take material considerations into account in a discretionary judgment is an error of law which relates to the exercise of discretion in reaching the ultimate judgment; not to the intermediate step of making individual factual findings which influence the overall exercise of discretion. It also needs to be made clear that the exercise of discretion is motivated by the application of the law to the evidence; not by the embrace or rejection of case theories posited by the parties. There can be no failure by a judge to take account of material considerations by the failure to accept, or to even discuss in the reasons for judgment, one party's belief about how certain parts of the evidence should be construed.

68. Those observations are sufficient to scupper this ground of appeal, because that is the genesis of this complaint.

69. The paragraph in the reasons attacked by the mother states:

> 56. [A French psychologist] gives the most cogent explanation of this behaviour when she came to the conclusion that the child is a victim of psychological abuse due to the parental conflict. It is clear that this was a correct position she took and could be the, or part of the basis for the child's alleged disclosures.

70. As can be seen, the primary judge recites opinion evidence given by a psychologist in the French family law proceedings, the effect of which is that the child was under intense psychological pressure due to her cognisance of the acute conflict between her parents. Her Honour then comments how such evidence *might* explain, even in part, the child's disclosures of sexual abuse against the father. The mother's complaint here is that other facts or circumstances *might* just as easily suggest the child's disclosures were truthful, which is not to the point. The primary judge made no finding of fact at [56] and this ground is falsely premised on the assertion her Honour did make a finding.

Ground 10 – multiple errors (at [57])

71. Like Ground 6, this ground comprises multiple sub-grounds and takes one-half of a page to articulate, even though it only relates to a single paragraph in the reasons for judgment.

72. The impugned paragraph in the reasons for judgment provides:

> 57. The matters have been properly investigated by competent police authorities, competent psychologists, no disclosure was made to the mother directly, the first series of disclosures was made to the maternal grandmother who has a clear negative view of the father, as is apparent from her Affidavit. The second complaint was made five/six weeks after the event to a psychologist and was not in the child's words.

73. As can be seen, the paragraph only comprises a series of observations. The primary judge makes no finding of fact, even though this ground falsely

contends her Honour did so. Not only was no finding made, save in one respect which is discussed below, the recitation of the evidence was factually correct.

74. The primary judge correctly recited that the child's allegations against the father were investigated by "competent [French] police authorities". That is true. The mother may doubt the competence of the French authorities, but there was no reason at all for her Honour to do so.

75. The primary judge correctly recited that the child's allegations against the father were also canvassed by social scientists in the French family law proceedings and, before the mother abducted the child from France, the French court had made interim orders for the child to live with the mother and spend substantial time with the father. That is also true.

76. The primary judge also correctly recited that the child's disclosures of her sexual abuse by the father were made to the maternal grandmother and to a psychologist to whom she was taken; not to the mother. That is true.

77. It was also true that the psychologist reported the child's disclosure to the French authorities in the manner the psychologist understood the complaint was made, rather than in "the child's [actual] words". The mother submitted that a document adduced in evidence in the appeal (Exhibit 4) does contain the child's complaint in her own words. Indeed it does, but it only tends to highlight the inconsistency of the child's allegations. The child told her psychologist that she manipulated her own genitals with the spoon at the father's direction, but she inconsistently told the maternal grandmother, the medical staff (Exhibit 4), and the police (Exhibit 6) that it was the father who used the spoon to do so. Her story also varied between the quite different propositions of her vagina being penetrated and her vulva being "stroked" or "whacked".

78. The primary judge commented that the maternal grandmother held a "clear negative view of the father", the accuracy of which the mother disputed, though it could hardly be doubted, since it was common ground the parties and the members of their respective families were in deep conflict. Regardless, even if that inference was unavailable and the assumption made by the primary judge was wrong, it made no difference. Her Honour did not doubt that the child reported to the maternal grandmother in October 2016 that she was engaged by the father in sexualised activity. The primary judge's decision was made on the basis that the child did indeed make the disclosure to the maternal grandmother but, overall, the evidence did not make out the defence under reg 16(3)(b) of the Regulations.

79. The ground of appeal is misconceived. The primary judge did not "unreasonably dismiss" the various other considerations to which the mother referred in this ground of appeal, because no finding was being made by her

Honour. The entirety of the reasons for judgment – not just a single paragraph – explains why that decision was reached.

Ground 11 – failure to take material consideration into account (at [59])

80. According to the mother's evidence, including the further evidence adduced in the appeal:

a) the parties ceased living together in October 2016 (Exhibit 13), which correlates with the respondent's contention in the application before the primary judge;

b) in October 2016, the mother commenced family law proceedings in France concerning the child, though the respondent contended it was in December 2016;

c) in October 2016, the child told the maternal grandmother of the father's engagement of her in sexual activity, which allegation was reported to the French authorities and, upon investigation, not substantiated;

d) in January 2017, the child told her psychologist of her sexual abuse by the father some weeks before in December 2016, which allegation was reported to the French authorities and, upon investigation, not substantiated;

e) in March 2017, the parties' lawyers negotiated arrangements for the child to spend time with the father;

f) in May 2017, the child told school staff of her sexual abuse by the father, which allegation the child repeated to "medical staff" when the mother took the child for medical examination. Independent records now prove the child was medically examined on 29 May 2017, but there is no corroborative evidence of the child repeating her allegations to the medical staff (Exhibit 11) and, besides the mother telling police that the doctor then told her the child's genitals were inflamed (Exhibit 13), there is no corroborative evidence that the medical staff found any physical sign in the examination which was consistent with the child's account of abuse. The child's school principal reported the child's disclosures to the French police (Exhibit 12) so, allowing for that report and the child's subsequent medical examination, the police were aware of the allegation;

g) in June 2017 and December 2017, the French court made interim orders for the child to live with the mother and to spend substantial time with the father;

h) in April 2018, the child told the mother and the child's psychologist that she was physically abused by the paternal grandmother, in response to

which the French court made interim orders for the child to spend only supervised time with the father;

i) in May 2018, the mother's lawyers "commenced an appeal" to re-open the former investigations concerning the father's alleged sexual abuse of the child, but the appeal "did not succeed";

j) in July 2018, the police did not substantiate the allegations of the paternal grandmother's physical abuse of the child and so the French court discharged the requirement for the child to be supervised with the father; and

k) in October 2018, a report was prepared for use in the French family law proceedings which the mother perceived to "side" with the father, leaving her to feel as though she and the child were not being believed.

81. That was the state of the French proceedings when she departed France with the child in late December 2018. The mother explained her decision to do so in these terms:

> …
>
> … The only option left if we stayed in France would be [the child] being removed and put into the care of strangers.
>
> … I left France shortly thereafter with [the child] and my parents. I know this was not the right thing to do but I did not feel like I had an option…

82. The paragraph of the reasons for judgment which the mother attacks under this ground of appeal is as follows:

> 59. Looking at the chronology and from a reading of the mother's Affidavit, it is clear she was very unhappy with the interim outcome of the Family Court giving the father unsupervised time after his time had been supervised following the mother's allegation of the paternal grandmother causing bruising to the child and very upset with the decision by police not to prosecute the father on two occasions or the paternal grandmother for abuse of the child.

83. As can be seen, the finding that the mother was "very unhappy" with the turn of events in France was entirely consistent with the mother's evidence. The primary judge could hardly have concluded otherwise on the evidence.

84. The contention under this ground, that the primary judge failed to take into account that the child told her psychologist of her physical abuse by the paternal grandmother, is simply false. The primary judge mentions the allegation of that abuse several times at other points in the reasons for judgment (at [18], [41(b)], [64], [101] and [102]).

85. The mother's contention of the error at [59] is also misconceived because the primary judge makes no finding, aside from the mother's unhappiness with the

situation in France immediately before she fled with the child to Australia, which is consistent with her evidence.

Ground 12 – failure to take material consideration into account (at [63])

86. This ground alleges the primary judge erred at [63] by failing to acknowledge the mother's evidence about the child's disclosure of her sexual abuse to school staff, which allegation was subsequently reported by the school staff to her.

87. The contention is rejected. The primary judge makes explicit mention of such evidence in that and other paragraphs of the reasons (at [18], [64]-[67]). This flaw exemplifies how parsing individual paragraphs in reasons for judgment is a misguided approach.

88. In support of this ground, the mother submitted:

> …The child has self-reported issues of abuse, which have been dismissed without any or adequate reason.

89. The primary judge did not "dismiss" the allegations. Her Honour only assessed the quality of the evidence concerning the allegations in the course of determining whether the mother was able to make out her defence case.

90. The French authorities rejected the allegations which were reported to them because they were unconvinced there was sufficient evidence to prosecute the father or the paternal grandmother. The mother knows that to be true because she gave evidence of being told.

Ground 13 – failure to take material considerations into account (at [87])

91. This ground alleges the finding of the primary judge at [87] was made without taking into account various aspects of the evidence emphasised by the mother.

92. At [87], the primary judge was discussing a physical altercation in June 2017, which involved both parties and members of their respective families. There was no dispute about the occurrence of a physical altercation. The contest was over who bore responsibility for it and the extent of the injury suffered by the mother, about which the parties had very different versions.

93. The mother attributed the violent conduct on that occasion to the father, paternal grandfather, paternal uncle and paternal aunt. The police arrested the paternal uncle, whom the father admitted in cross-examination before the primary judge was fined for the incident. The father's evidence is confirmed by the further evidence in the appeal (Exhibit 2). Only the paternal uncle was convicted of any offence and he was fined.

94. Even if the primary judge's scepticism about the reliability of the mother's account of her injury was unjustified, it was immaterial to the outcome. The primary judge found the altercation was a "nasty" incident, all adults involved should be ashamed of their behaviour, and it was "unacceptable" that the mother was injured in the incident (at [87]-[88]). Establishing the precise facts

of the incident in June 2017 would have been difficult when not all of the participants gave evidence about it but, besides, it was quite unnecessary to do so. The salient question was whether the evidence of that incident in June 2017 supported the mother's contention, made more than two years later before the primary judge, in November 2019, that the child's return to France would engender a grave risk of her exposure to harm or place her in an intolerable situation.

95. Leaving to one side any question about the behaviour of the mother and the maternal grandmother, it was a stretch to contend that such appalling behaviour by members of the paternal family on one occasion in June 2017 meant there was a grave risk of the child's exposure to harm or that the child was placed in an intolerable situation (by the perpetuation of such behaviour by members of the paternal family) if she returned to France years later in accordance with the appealed orders. The French court had already dismissed such risk because it made interim parenting orders after June 2017 (in December 2017 and July 2018), apparently in the knowledge of that incident, for the child to spend substantial time with the father. That proved not to be an intolerable situation for the child, even though it did not suit the mother.

Ground 14 – failure to take material consideration into account (at [101])

96. This ground alleges the finding of the primary judge at [101] was made without taking into account two aspects of the evidence emphasised by the mother.

97. At [101], the primary judge was discussing the evidence concerning bruising observed to the child's body in April 2018, which the child alleged resulted from her physical abuse by the paternal grandmother.

98. The primary judge made no finding at that point. Her Honour only summarised the evidence given by the mother about that issue, which summary was undoubtedly correct. The evidence on the issue was also discussed by the primary judge at other points in the reasons for judgment (at [18], [41(b)], [64] and [102]). Accordingly, this ground was prosecuted on a false premise.

Ground 15 – mistake of fact (at [105])

99. This ground contended the finding at [105] is erroneous because the mother did not assert in the proceedings that the father perpetrated "significant physical violence" against her in the child's presence.

100. At [105], the primary judge remarks upon the apparent inconsistency between, on the one hand, the mother's admission to French authorities that the father was *not* physically violent towards her, and on the other, her contrary contention in the proceedings before her Honour. The observation of such inconsistency, even if it is capable of being construed as a finding, was incontrovertible.

101. Despite the mother's disavowal under this ground of appeal of the nature of the case she conducted at first instance, the internal inconsistency of her case at trial, upon which the primary judge commented, was patent. At trial, the mother:

a) deposed to many incidents of the father's physical violence which occurred, inferentially if not expressly, in the child's presence;

b) deposed to one particularly violent episode in June 2017, when she alleged the child witnessed the father lift her from the ground and push her back down;

c) deposed to her agreement with the opinion of the French psychologist that the child was in danger of psychological harm due to the violence she had witnessed;

d) set out in her final written submissions that "[f]amily [v]iolence perpetrated by the father" was an integral component of her defence; and

e) contended in her final written submissions that the primary judge would be satisfied the child had been exposed to family violence by witnessing a member of her family being assaulted by another.

102. In the face of such evidence, this ground of appeal is prosecuted on a false premise and is rejected.

103. If it was otherwise, and the mother really did *not* contend she was liable to be physically assaulted by the father, to which violence the child would be exposed and thereby psychologically harmed, then she failed to make clear at trial how the issue of past "family violence" between the parties had any current bearing upon the grave risk of the child's exposure to harm if she returned to France.

Ground 16 – mistake of fact (at [107])

104. This ground contended the finding at [107] is erroneous because the mother did not allege the father had physically abused the child.

105. Before considering the impugned paragraph in the reasons for judgment, the inaccuracy of this ground of appeal warrants attention. While it contends the mother did not assert the father had physically abused the child, she adduced evidence to the contrary. Annexed to her affidavit was a letter from her French psychiatrist, in which the psychiatrist reported:

> The separation is related, according to [the mother], to acts of violence committed by [the father] towards her **and towards her daughter**…
>
> (Emphasis added)

106. Nevertheless, returning to the ground of appeal, the primary judge did not find the mother had alleged the father physically abused the child. The reasons merely state:

> 107. However, the mother must accept that she has never told police prior to separation or around the time of separation that the father was a [sic] violent to her or the child and the evidence is to the contrary.

107. It seems reasonably apparent that, at that point in the reasons, her Honour was attempting to incorporate into the judgment an admission made by the mother in cross-examination of her having told the French police in October 2016:

> [The father] was never violent towards me physically, nor towards our daughter.
>
> (Transcript 20 November 2019, p.80 line 17)

108. In support of this ground, the mother submitted in her Summary of Argument that the primary judge made "adverse credit findings" about her at [107]. The submission is rejected. The primary judge made no finding about the mother's credit in that paragraph.

109. The additional submissions in the mother's Summary of Argument about the primary judge failing to take other matters into account at that point in the reasons is not addressed because it strays beyond the ambit of the ground of appeal.

Ground 17 – finding contrary to weight of evidence (at [108])

110. This ground of appeal contends the finding at [108] was against the weight of evidence, which contention was particularised by reference to numerous other aspects of the evidence emphasised by the mother.

111. The primary judge said:

> 108. I have no doubt the father has behaved poorly at times, that he has smashed his phone and that this is inappropriate behaviour by an adult. This is the height the mother's evidence reached in relation to the father's violent behaviour in the past from a reading of her Affidavit, her oral cross-examination and the documents tendered by the authority and at times herself. This behaviour does not constitute a grave risk of harm to [the] child upon her return to France.

112. As can be seen, the only finding made in that paragraph of the reasons is that the evidence of the father's past violent conduct "does not constitute a grave risk of harm to [the] child upon her return to France". The finding was confined to the contested factual issue of "family violence".

113. The mother does not contend the finding was not open to the primary judge on the available evidence; only that it was a finding made against the weight of evidence. The contention is rejected. Notwithstanding past instances of the father's violent conduct, there were countervailing considerations: numerous allegations made by the mother against the father had been investigated and found wanting by the French police; social scientists who prepared reports for use in the French family law proceedings were supportive of the child spending time with the father; and the French court made numerous interim decisions requiring the child to spend time with the father. All of that evidence was also before the primary judge.

114. On balance, the mother failed to demonstrate the weight of evidence at trial impelled the primary judge to find (at [109]) that the child was at grave risk of exposure to harm by reason of the father's violent tendencies if she was returned to France. An appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight (*Gronow v Gronow* (1979) 144 CLR 513 at 519-520).

Ground 20 – failure to take material consideration into account (at [112])

115. This ground alleges the primary judge erred at [112] by dismissing, as relevant factors in establishing the defence under reg 16(3)(b) of the Regulations, two features of the evidence: the father's use of illicit drugs and his exposure of the child to "inappropriate materials".

116. The stark inconsistency between this ground and Ground 5 is immediately apparent, even though Ground 5 was abandoned. One of the mother's complaints under Ground 5 was that the primary judge erred by incorrectly referring to the father's use of illicit drugs as a limb of her "grave risk" defence when she did not rely upon it, but she runs the contradictory contention under this ground that the primary judge erred by wrongly dismissing its relevance as a feature of the evidence upon which she did actually rely. The mother could not have it both ways, which might explain her abandonment of Ground 5, but the institution and temporary maintenance of two inconsistent grounds of appeal is indicative of the imprecision which attends this appeal.

117. The issue of the father's illicit drug use was confined to the solitary admission he made in cross-examination that, many years before in March 2014, the mother found a small piece of his compressed cannabis on the floor of their dwelling which could have been found and eaten by the child, who was then an infant. Curiously, the mother did not depose to the incident at all in her affidavit and the questions put to the father about the incident in cross-examination were not consistent with the evidence-in-chief given by the maternal grandmother, who alleged the child had actually tried to eat it.

118. The further evidence adduced in the appeal confirmed the father's admission, in April 2018, to a psychiatrist appointed in the French family law proceedings that he smoked cannabis heavily from age 17, but he asserted he had by then "stopped entirely" (Exhibit 14). Even though that document was not in the mother's possession at the time of trial, the mother's counsel did not challenge the father in cross-examination about his alleged continuing illicit drug use.

119. The issue of the father's exposure of the child to "inappropriate material" related to the child being allowed to see glimpses of graphic videos, apparently some years before the mother's separation from the father when the child must have been an infant, which the father partially admitted.

120. In respect of those issues, the primary judge said:

> 112. I do not accept the mother's allegations of risk to the child from exposure to inappropriate materials and the father's drug-taking. It is not a proper basis for a defence. It would be a relevant matter in a parenting matter but does not constitute a grave risk of harm.

121. The mother could not explain why the primary judge was in error to say so, particularly when she conceded the relative unimportance of those issues in these terms in her Summary of Argument:

> 38. …Whilst the drug issue and the exposure to inappropriate materials may not of themselves individually constitute the grave risk of exposure required, when added to the other issues raised in the mother's defence they help form a picture of the conduct of the father and the risk that the child may be placed in should she be returned…

Ground 22 – multiple errors (at [114])

122. This ground asserts the finding made at [114] was infected by several errors.

123. The primary judge said:

> 114. The [maternal] grandmother's and grandfather's [a]ffidavits are of no assistance to me in this matter at all given their clear bias against the father and naturally wishing to support [the mother's] case.

124. The mother's essential submission in support of this ground is that the maternal grandparents' evidence should not have been disregarded for bias when, despite their availability for cross-examination at trial, they were not challenged. As a generalisation that is correct, but not all evidence carries strong probative weight, even if unchallenged. One does not start from the unconditional premise that all evidence is definitively probative, unless it is challenged.

125. Close scrutiny of the maternal grandparents' evidence reveals their evidence was not rejected out of hand, as the terminology of [114] suggests. Advertence to the affidavits of the maternal grandparents demonstrates, as the respondent correctly contended in the appeal, that tranches of their evidence were

irrelevant to the solitary live issue of the mother's ability to make out the statutory defence. To the extent that their evidence was relevant to and probative of that issue, it did not expand or improve the mother's case. It tended to corroborate the mother about past episodes of the father's aggression and, in the maternal grandmother's case, confirmed the child's report to her of the father's sexual abuse and the paternal grandmother's physical abuse. But those facts were all accepted by the primary judge.

126. In the mother's final submissions at trial, she set out the evidence upon which she relied to make out her defence under reg 16(3)(b) of the Regulations. She pointed out the maternal grandparents were not cross-examined on their evidence, but the evidence upon which she relied in the submissions which followed was accepted by the primary judge as being factually correct. In the appeal, the mother did not identify any piece of evidence given by either maternal grandparent which was rejected by the primary judge as false. Analysed in that way, it can be seen that the primary judge's off-handed disregard of the maternal grandparents' evidence was inaccurate. No material underlying fact emphasised by the mother was rejected by the primary judge.

127. The real point of contention was the distinct perceptions of the mother and the primary judge about whether the evidence satisfied the statutory test. While the mother submitted the evidence given by her and the maternal grandparents collectively made out her defence under reg 16(3)(b) of the Regulations, the primary judge concluded it did not.

128. The particulars of this ground of appeal were: the father admitted portions of the maternal grandparents' evidence; the maternal grandparents were available for cross-examination; the respondent did not allege the maternal grandparents were biased; and the allegation of bias was never put to them. That is all true, but it made no difference to the primary judge's finding that the evidence collectively relied upon by the mother failed to sustain her defence.

Ground 23 – failure to take material consideration into account (at [119])

129. This ground alleges the finding at [119] failed to take into account a medical certificate confirming that the mother suffers from severe post-traumatic stress syndrome.

130. The impugned finding of the primary judge was expressed in these terms:

> 119. The mother's alleged incapacity to mediate with the father cannot be a grave risk of harm to the child. The report the mother relies upon to support this allegation is brief in the extreme. It merely says she is not [in] a clinical state to attend this type of interview with [the father]. There is no basis for how that diagnosis has been arrived at, the facts recounted to the author of the report to support their diagnosis, their expert training and experience to arrive at such a diagnosis, whether there is a way by which the mother can retrieve

> her functioning and the length of time any retrieval will take. I could not rely upon this report to make a finding that the mother cannot mediate with the father.

131. The mother did not, because she could not, contend that any sentence of that paragraph was incorrect. It was accurate commentary about her evidence.

132. The only evidence of the mother suffering from post-traumatic stress syndrome was a letter prepared by a psychiatrist in June 2017, not long after a violent confrontation between the two families. Without trivialising such opinion evidence, it was based on only one consultation and is now three years old. The psychiatrist simply accepted the mother's self-serving report that the incident some weeks before, in June 2017, was the cause of such severe psychological upset, which was a tenuous basis upon which the expert could rely to draw the causal nexus.

133. A subsequent short report prepared by the same psychiatrist, in May 2018, merely recites the mother was being given "psychological support". The report does not confirm any diagnosis, form of treatment, or prognosis. It was evidently written simply to confirm the mother lacked the fortitude to mediate the family law dispute with the father.

134. While the psychiatrist's letter confirmed the mother was not up to family law mediation with the father in May 2018, the primary judge was correct to observe such evidence said nothing about the mother's capacity to mediate with the father in France in February 2020, when the appealed orders were made. There was no evidence at all about the mother's psychological condition at that point in time.

Ground 24 – failure to take material considerations into account (at [120])

135. This ground contended the finding at [120] failed to take into account a series of facts for which the mother contended, some of which were admitted by the father.

136. The impugned finding of the primary judge was expressed in these terms:

> 120. In a mediation [the mother] will be protected, with her lawyer in a formal setting and this factor coupled with her statement to police in March 2017 that he was only violent to himself, for example, throwing his phone and not in any other fashion towards her or the child it is now difficult for me to accept she has such a fear of him that she cannot mediate.

137. According to the expert opinion evidence adduced by the mother, the only reason she was unable to mediate the family law dispute with the father in France in May 2018 was because she lacked the emotional resilience due to the parties' "hostile separation" and the "acts of violence" she attributed to the

father. Unsurprisingly then, that was the focus of the primary judge's observations at [120].

138. The other pieces of evidence to which the mother adverted under this ground of appeal were addressed by the primary judge at other points in the reasons for judgment.

Ground 25 – findings contrary to weight of evidence (at [122] and [124])

139. This ground contended the findings in [122] and [124] concerning "the status of the [mother's] criminal proceedings" were against the weight of evidence.

140. An issue arose at trial about the prospect of the mother being prosecuted for her international abduction of the child if she returns to France. In that regard, the relevant paragraphs from the reasons for judgment provide:

> 122. I accept the submission by the [respondent] that there is only a remote possibility of this child being removed from her mother or her mother being incarcerated upon her return to France for the following.
>
> 123. The father seeks joint parental authority for the child, that the child's residence be shared between he and the mother and school holidays shared. That is his position. His position was sent to the [French family court] in writing and a similar document in writing was sent to the tribunal [in France] on 14 November 2019, both letters being sent on the same date. He said in that correspondence he does not wish for the mother to be arrested and he said in cross-examination that was the last thing he wanted to happen.
>
> 124. There is no clear evidence that there are criminal proceedings on foot in relation to the mother's arrest, there is no notice of arrest, there is no warrant for arrest or notice she is to be arrested. Merely, the proper commencement of the investigation of facts surrounding the mother's international abduction of this child. The father has taken all appropriate steps to ensure this child is not removed from her mother's care abruptly upon her return to France.

141. The evidence before her Honour established:

a) in April 2019, the father was summoned by French authorities as a witness in the criminal investigation into the child's international abduction;

b) the father's lawyer wrote to the French authorities in November 2019 advising that he did not want the mother arrested; and

c) the father's lawyer wrote to the French court in November 2019 proposing that the parties have joint custody of the child upon her return to France.

142. The primary judge found (at [122]) it was only a "remote possibility" the mother would be incarcerated and the child removed from her care upon their

return to France, which represented the adoption of the respondent's final submission in those terms. The mother inferentially concedes the finding was open; she just asserts it was "against the weight of evidence", which submission cannot be accepted in the face of the evidence we have shortly summarised.

143. The primary judge's observations at [124] were correct. While a French investigation was launched into the child's abduction by the mother, there is no evidence that any criminal prosecution has been commenced against her or that any warrant for her arrest has been issued. It was also correct to find on the evidence that the father had taken all steps available to ensure no prosecution would ensue against the mother upon her return to France with the child and, at that point, both parties should be involved in the child's care.

144. The only relevant further evidence adduced in the appeal is the opinion expressed by the mother's new French lawyer about the prescribed penalties to which the mother is exposed, if indeed she is prosecuted in France (Exhibit 9). The mother's submission in the appeal that the evidence demonstrates it is *likely* she will be arrested and face a custodial sentence is rejected. There is no evidentiary basis to support such a submission.

145. While it is true that the interim parenting orders last made by the French court, on 22 February 2019, provide for the child to live with the father and for him to have exclusive parental responsibility for the child, those orders were made when it was learned the child had been abducted. The orders of the French court provide that they are "deemed null and void" if not served upon the mother within six months. Since the orders were made on 22 February 2019 and there is no evidence of the mother's service with the orders in Australia before 22 August 2019, the interim orders are apparently no longer enforceable. That is the opinion of the mother's new French lawyer (Exhibit 10) and the French Central Authority (Exhibit 15).

146. Regardless, interim orders can be easily changed. The French court already has the father's written proposal for the child's custody to be shared between the parties upon the child's return to France (Exhibit 3).

Ground 27 – mistake of fact (at [141])

147. This ground contended there was no evidence to support the following finding within [141]:

> … [o]rders have been made for [the father] and the mother to share the care of the child and share parental responsibility.

148. The mother is correct. Orders have not yet been made by the French court for the parties to share the child's care and to share parental responsibility, but such orders can be easily made. As noted already, the father has already written to the French court advising that is his proposal (Exhibit 3).

149. The interim parenting orders last made in respect of the child on 22 February 2019 allocate parental responsibility to the father and provide for the child to live with him, but the French court reserved for later decision the questions about the "right of visit and accommodation of the mother". The reservation of a decision about those issues must mean the court intends to return to them.

150. There is no doubt the French court is seized of power to make fresh interim parenting orders in the pending family law proceedings.

Ground 28 – failure to take material consideration into account

151. This ground asserts the primary judge erred in failing to consider "the impact upon the child of being placed into foster care on her return to France".

152. On 7 February 2019, shortly after the mother's abduction of the child, the French court made an order placing the child in the temporary care of the French child welfare authority, but that order was overtaken by the interim orders made several weeks later on 22 February 2019, placing the child in the father's care. In any event, the further evidence adduced in the appeal establishes the orders made on 7 February 2019 were rescinded on 31 January 2020 (Exhibit 1) and no further order for the child's placement into foster care would be made unless an application by either party was made to do so (Exhibit 15).

153. The mother knew at the trial that the orders made on 7 February 2019 were no longer operable, because the maternal grandparents amended their affidavits to expressly recognise they knew the child would not be placed into foster care upon her return. But by now, the mother must know the orders made on 7 February 2019 have been rescinded. Why she persisted in maintaining a ground of appeal which assumes that, upon return to France the child is liable to be placed into foster care pursuant to past orders, was not satisfactorily answered. The mother's submission in the appeal that the evidence demonstrates it is *likely* the child will be placed into foster care for up to 12 months upon her return to France is rejected.

154. The primary judge need not have considered something the evidence suggested would not happen.

Ground 29 – erroneous finding

155. The mother did not make any submission about this ground in her Summary of Argument, so we assume it is abandoned.

RE-EXERCISE OF DISCRETION

156. The material error of law identified under Ground 2 vitiates the primary judge's decision. The mother sought that this Court re-exercise discretion to correct the error, which is both feasible and desirable.

157. On any re-exercise of discretion, the parties are entitled to the opportunity to adduce further evidence (*Allesch v Maunz* (2000) 203 CLR 172 at 183, 191-192). For that purpose, the mother said she sought to rely upon exactly the same evidence she sought to adduce in the appeal for the separate and distinct purpose under s 93A(2) of the Act. The respondent did not object to the receipt of such evidence, disavowed any need to cross-examine the mother, and confirmed this Court could attribute appropriate weight to such evidence.

158. Accordingly, in the re-exercise of discretion, in addition to the evidence before the primary judge, we take into account:

a) exhibits 1 to 15 inclusive;

b) the affidavit of the mother filed on 22 June 2020 (but excluding the parts on which she did not rely: paragraphs 27, 28, 30(b), 30(c), 30(d) and 38 to 44 inclusive; Annexures K to O inclusive; Annexures Q to S inclusive; and Annexure DD); and

c) the affidavit of the mother affirmed on 7 July 2020 (but excluding the parts on which she did not rely: paragraphs 8 to 10 inclusive; and Annexures A and B).

159. For the reasons given earlier, the psychological report of the mother's treating therapist dated 30 June 2020 is not admissible. His affidavit affirmed on 1 July 2020 does no more than attach his report, so nor is it admissible.

160. The mother acknowledges that the conditions for the child's mandatory return to France are made out, subject to her being able to establish the grave risk that the child would thereby be exposed to physical or psychological harm or otherwise placed in an intolerable situation, such as to persuade the Court to desist from making the return order in the exercise of discretion.

161. The mother pointed to an array of factual circumstances which she contended collectively established her defence under reg 16(3)(b) of the Regulations, but she did so indiscriminately rather than selectively. The essential point she sought to make was that the child, by her return to France, would be at grave risk of exposure to either physical or psychological harm or otherwise placed in an intolerable situation because she was liable to be:

a) sexually abused by the father;

b) physically abused by the paternal grandmother;

c) exposed to family violence committed by the father upon the mother; or

d) removed from the mother's primary care – either because the mother will be imprisoned for the child's abduction; because the child would be kept from the mother under parenting orders already made by the French court; or because the mother's emotional condition would collapse if

forced to return with the child, preventing the mother from caring for her.

162. Self-evidently, the mother relied upon the evidence collectively, not individually.

Sexual abuse

163. In October 2016, the child told the maternal grandmother that the father had spread "Danette" over his penis and asked the child to decorate it with smarties, which she refused to do. She said he then "did a pee" on his shoes.

164. The allegation was reported to the police, investigated and rejected.

165. In January 2017, the child told her psychologist the father had sexually abused her weeks before in December 2016 at the paternal grandmother's home. She reported the father made her stroke her genitals with a spoon, which caused her genitals to bleed. She reported that the paternal grandmother wiped up the blood, scolded the father, and then took her to the doctors for physical examination. As an aside, it is feasible the child did use a spoon to touch her genitals, given the maternal grandmother once before found her masturbating with a tooth brush, but that does not mean it occurred due to the father's coercion or encouragement.

166. The allegation was reported to the police, investigated and rejected. That decision is unsurprising because the child's claims were fantastic. It amounted to an allegation of her sexual abuse, by the father and the paternal grandmother acting as accomplices, such as to cause her physical injury. It is incredible that paternal family members would then take her to receive medical attention for the genital injury they caused to be inflicted.

167. The details of the child's allegations varied significantly. The story, which the child repeated several times to her psychologist, the maternal grandmother, medical staff, and the police changed from time to time: sometimes she said her vagina was penetrated and other times she said her vulva was "stroked" or "whacked"; sometimes she said the father held the spoon and other times she said she did; sometimes she said the paternal grandmother scolded the father and other times she said the paternal grandmother said nothing to the father.

168. The mother did not depose that she saw any injury to the child's genitals and the medical examination in late January 2017 was inconclusive. The small "semi-recent looking lesion" on her labia might have been consistent with the child's account, but it was also consistent with many other innocent causes. There was no lesion compatible with any vaginal penetration (Exhibit 4). When the French authorities decided to take no action in relation to the complaint "due to a lack of evidence", the police had interviewed the child (Exhibit 6) and were aware of the results of her medical examination (Exhibit 5).

169. In May 2017, the child told staff members at her school that she had been touched in a sexual way by the father. The staff members reported the disclosure to the mother and the police (Exhibit 13). The mother took the child to be medically examined. She alleges the examination revealed the child had "redness on her genitals" and the child repeated the allegation of abuse to the medical staff. Aside from the mother's uncorroborated reports, there was then and is still now no evidence of: precisely what the child reported about the father to the school staff; no records of the medical examination to verify either the medical findings or the child's disclosure to medical staff; and no indication of why the police, in the knowledge of the allegations, took no further action.

170. In a report prepared in January 2018 by a social scientist for the family law proceedings in France, the child was independently interviewed and she told the interviewer she lied about the sexualised incidents with the "Danette" in October 2016 and the spoon in December 2016. Then, in April 2018, when meeting with her psychologist, the child recanted her admission of fabrication. The child's retraction of the allegations by her admission of fabrication, only to make the allegations again, must create considerable doubt about the reliability of her representations. The child's awareness of the bitter dispute between her parents may explain the allegations, as was the subject of comment by the French social scientists.

171. The first social scientist appointed in the French family law proceedings reported the child was under intense pressure due to the parental conflict. In fact, the child's emotional turmoil was so great that she suffered from encopresis – a rare childhood complaint known to be associated with acute stress in the absence of any physiological cause. The psychologist who prepared the second report concluded the child was locked in a "conflict of loyalty" between the parties. That evidence lays the foundation for an inference to be drawn about why the child was motivated to fabricate allegations against the father and the paternal grandmother.

172. The mother's affidavit affirmed on 7 July 2020 attaches records of the New South Wales child welfare authority, created on 30 June 2020. Those records establish that the authority, that day, was notified by an unidentified person of the child making allegations of her sexual abuse by the father in 2016, her observation of the altercation between members of the paternal and maternal families in 2017, and her physical abuse by the paternal grandmother in 2018. Those recent records do not advance the mother's case. The mother's counsel conceded there was "nothing new" in the notification.

Physical (and verbal) abuse

173. In May 2017, the child told school staff (at the same time as she allegedly reported the father had "touched her in a sexual way") the paternal

grandmother told her she would cut the child's tongue out and lock her in a dungeon.

174. In April 2018, the child separately told the mother and the child's psychologist that she was physically abused by the paternal grandmother, in response to which the French court protectively made interim orders for the child to spend only supervised time with the father.

175. The allegation was also reported to the police and, in July 2018, was rejected following investigation. Curiously, the mother told the police the child had not divulged the identity of the person who had "been violent with her" at that point in time, which admission was inconsistent with the mother's evidence in these proceedings, but the child's psychologist confirmed the child later nominated the paternal grandmother as the culprit. Once the police declined to take any action against the paternal grandmother, the French court discharged the requirement for the child to be supervised when with the father.

Family violence

176. The father undoubtedly committed acts of "family violence" (as defined in s 4AB of the Act) during the parties' relationship and, following their separation, during their bitter dispute over the child.

177. There was a factual dispute over the severity of such violent conduct but, at numerous points in the evidence, it was clear the mother made admissions to the French authorities that the father had not physically assaulted either her or the child.

178. On the evidence adduced by the mother, the last physically aggressive confrontation between the parties occurred in mid-2017 – that is, some 18 months before she surreptitiously departed France with the child. Over that period, the child lived with her and spent time with the father under interim parenting orders made by the French court, apparently without incident.

Removal from the mother's care

179. There is no evidence to substantiate any claim of the mother's liability to emotionally degrade so badly upon her return with the child to France that her parenting capacity will be so severely compromised she could not care for the child. The scant opinion of her past treating psychiatrist, now over two years old, was only that she would find it very difficult to mediate with the father.

180. Given the father's lawyer's correspondence with both the French court and the French authorities in November 2019, even if the mother is eventually prosecuted for abducting the child if she returns to France, it is unlikely she would be incarcerated for the offence. It cannot be ruled out, but it seems an improbable outcome.

181. The child might be temporarily placed in the father's primary care upon her return to France, if the last parenting orders made by the French court on 22 February 2019 are still operable, but it seems they are not (Exhibits 10 and 15), in which event there are no current orders governing the child's care. Even if those interim orders are still operable, they would only prevail until the mother petitions the French court for fresh orders. The father is on record in the French proceedings as wanting to share the child's care with the mother (Exhibit 3).

182. Upon learning of the result in the appeal, if the mother is concerned about the child being removed from her primary care upon their return to France, there is nothing at all to stop her from immediately instructing her new French lawyer to petition the French court now for fresh interim parenting orders to govern arrangements for the child upon their return.

Conclusion

183. In June 2017, December 2017, and July 2018 the French court made interim orders for the child to live with the mother and to spend time with the father. Such orders were made in full knowledge of the allegations made against the father and the paternal grandmother between October 2016 and April 2018.

184. The French court ordered the preparation of social science reports in January 2018 and October 2018. The social scientists reported upon the past allegations of family violence, the child's sexual abuse, and the child's physical abuse. The overall theme of the two reports was that the child was not at risk of harm in the father's care and the social scientists recommended that he play an integral role in the child's continuing care. The mother realised that was the state of the evidence. Her dissatisfaction with it motivated her abduction of the child.

185. The evidence adduced before the primary judge and the further evidence adduced in the appeal is, in large measure, merely repetition of evidence well known to the French court and authorities. It would be surprising indeed if an Australian court, seized of substantially the same evidence, could find that the child's return to France would carry the grave risk of her exposure to harm or otherwise place her in an intolerable situation when the French court has already found the opposite.

186. As the majority said in *DP* (at 423):

> 66. If, as was the case here, upon return of the child there will be a judicial determination of questions of custody and access, it will probably often be the case that assertions of risk of exposure to harm will not be established…

187. So it is here. Upon the child's return to France, not only will there be another judicial determination made about the child's care, as the family law proceedings commenced there by the mother are still pending, the French court has already made numerous interim determinations directly taking into account

the alleged risk of the child's exposure to harm and found them to be unsubstantiated.

188. Nevertheless, this Court must still fulfil the mandate of the Regulations and separately consider the evidence when measured against the statutory tests upon which the mother relies and in relation to which she bears the burden of proof.

189. The mother relied upon the same evidence and the same arguments to make out the alternate tests under reg 16(3)(b) of the Regulations. Applying those tests, the mother fails to establish there is a grave risk that the return of the child to France would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

190. The orders requiring the child's prompt return to France were properly made.

COSTS

191. The appeal is dismissed because the same result at trial is achieved in the appeal through the re-exercise of discretion.

192. The respondent did not seek any order for costs if the appeal failed, so there will be no order.

I certify that the preceding one hundred and ninety-two (192) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Ainslie-Wallace, Austin & Tree JJ) delivered on 20 July 2020.

Associate:

Date: 20 July 2020