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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA545/2022
[2023] NZCA 36

BETWEEN	ROBERTS Appellant
AND	CRESSWELL Respondent

Hearing:	14 February 2023
Court:	Brown, Goddard and Wylie JJ
Counsel:	V A Crawshaw KC and S M Wilson for Appellant S N van Bohemen, A J Summerlee and E S M L B Gawar Kohistani for Respondent J H Wren as counsel for the children
Judgment:	27 February 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court is set aside.

C The judgment of the Family Court, and the order made by the Family Court under s 105(2) of the Care of Children Act 2004, are reinstated.

D The proceeding is referred back to the Family Court at Christchurch to give any directions that may be necessary to implement the order for return of the children.

E There is no order as to costs.

Table of Contents

REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] The parties are the parents of Amelia (aged 7) and Brigitte (aged 5).[1] The father is French. The mother is originally from New Zealand. They met in 2009. They started living together in France in 2013, and married in September 2014. Both children were born in France. Until October 2020 the family lived together in France.

[2] By 2020 the relationship between the parents had broken down, though they were still living under the same roof. In October 2020 the mother came to New Zealand with the children for a holiday. The father had agreed to a visit until February 2021, subsequently extended to April 2021. During this visit to New Zealand the mother and the children were based in Christchurch, which is where the maternal grandmother lives.

[3] In April 2021 the mother and the children embarked on their return journey to France, but were unable to travel because of issues relating to COVID-19 documentation. They returned to Christchurch. The mother did not take any further steps to return to France with the children.

[4] The father sought the return of the children to France under the Convention on the Civil Aspects of International Child Abduction (the Convention). The New Zealand Central Authority applied to the Family Court under the Care of Children Act 2004 (the Act) for an order for the children to be returned to France. The mother opposed the application on the ground that there was a grave risk that return of the children to France would place them in an intolerable situation.[2] On 21 December 2021 Judge Hambleton made an order under s 105(2) of the Act for the return of the children to France.[3]

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1 The names of the parties and the children have been anonymised to protect their privacy.
2 Care of Children Act 2004, s 106(1)(c)(ii).
3 [*Roberts v Cresswell*] [2021] NZFC 12991 [Family Court judgment].

[5] The mother appealed to the High Court. Her appeal was successful.[4] Justice Doogue found that there was a grave risk that return of the children to France would place them in an intolerable situation, for two reasons. First, as a result of interim orders made by the Family Court at Perpignan (the French Court) there was a grave risk that for extended periods the children would not be in the care of their primary parent, the mother. Indeed there was a grave risk of extended periods when they would not be in the care of either parent, due to the father's business commitments. Those outcomes would be intolerable for the children. Second, the Judge found that the mother suffered from post-traumatic stress disorder (PTSD) as a result of physical and psychological abuse. There was a grave risk of her PTSD being triggered if she returned to France, and the mother's parenting being seriously impaired, which would be intolerable for the children.[5] The order for return of the children to France was quashed.[6]

[6] This Court granted leave to the father to appeal.[7]

[7] We have had the benefit of updating evidence, including an updated psychological report in relation to the children prepared under s 133 of the Act. We have also received evidence from a psychologist commenting on the evidence before the Courts below about the mother's psychological condition.

[8] Shortly before the hearing of this appeal, the French Court modified its original interim orders, at the father's request, to provide for shared care between the parents in the event the mother returns with the children to France (modified interim orders).

[9] It was common ground before us that whether there is a grave risk that return of the children to France would place them in an intolerable situation needs to be assessed at the time of the hearing before this Court, with the benefit of the further evidence admitted on appeal. In light of the modified interim orders made by the French Court, and the evidence we have received, we consider that return of the children to France would not give rise to a grave risk of an intolerable situation for the

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4 *Cresswell v Roberts* [2022] NZHC 1265 [High Court judgment].
5 At [205]–[206].
6 At [208].
7 *Roberts v Cresswell* [2022] NZCA 625 [Leave judgment].

children. The modified interim orders remove the risk that the children will be separated for an extended period from their mother, or from both parents. Returning to France will undoubtedly be very difficult and stressful for the mother. But having regard to the protective measures that can be expected to be available, we do not consider that there is a grave risk that her parenting will be impaired to such an extent that the children are placed in an intolerable situation. It follows that the appeal must be allowed, and the order for the children's return to France reinstated.

Background

[10] The following summary of the background to this appeal is drawn largely from the High Court judgment.[8]

[11] As already mentioned, the mother is from New Zealand. The father is French. They chose to settle together in France. Amelia was born in 2015, and Brigitte in 2017. Until October 2020 the family split their time between living in their house in the south of France, and living in a chateau in central France where the father's longstanding family business is based. Amelia and Brigitte generally travelled annually to New Zealand with their mother to see family (without the father).

[12] The mother was a stay-at-home parent and the father ran the business. During the months of September to February this is a very labour-intensive business, which required the father to spend days with clients in their chosen sporting activities and evenings entertaining them.

[13] Amelia and Brigitte were developing bilingually in this environment. They commenced school in France.

[14] The nature and quality of the relationship between the mother and father started to deteriorate. The mother says that in March 2019 the parties undertook marriage counselling, and in October 2019 she decided to seek a divorce.

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8 High Court judgment, above n 4, at [23]–[43].

[15] The circumstances of the breakdown in the parents' relationship are the subject of disagreement between the parties. The mother says the deterioration resulted from her being physically and psychologically abused by the father, and from infidelities on the part of the father. The father denies that there was any abuse of any kind.

[16] It seems clear that, despite their parents' unhappiness, until the point Amelia and Brigitte left France in October 2020, they were happy and enjoyed their lives in France. However, Amelia and Brigitte were not unaware of the marital discord. An example of the impact of this discord as viewed through the eyes of Amelia was what she told Mr Martin Kelly, the court-appointed psychologist, where he reports "[c]omments that [Amelia] made … included 'I miss my papa', 'papa yells at mum' 'mum cries' 'we go to our room'".

[17] In September 2020 the mother wanted to return to New Zealand for a holiday. It was initially agreed between the parties that the holiday would extend from October 2020 to February 2021. In October 2020 the mother travelled to Christchurch with the children.

[18] The father agreed to an extension of the visit to New Zealand until April 2021. On 8 April 2021, the mother tried to return to France with Amelia and Brigitte. However she and the children were prevented from boarding the plane because they did not have a negative COVID-19 test for Amelia. A further attempt to rebook and fly to France on 10 April 2021 failed.

[19] This episode overwhelmed the mother. She was unable to think clearly and was left tearful and scared. She spent some days in a stressed and disorganised state at a friend's house in Auckland. She was advised to seek help for her condition and returned to Christchurch to re-evaluate her position. Once she returned to Christchurch she resolved to stay in New Zealand with Amelia and Brigitte.

[20] Until May 2021 the father provided financial support to the mother and the children. By May 2021, it had become clear the mother did not intend to voluntarily return to France with the children. As a result, the father reduced the amount provided

and by August 2021 he had stopped providing financial support. (He has since recommenced providing financial support, in October 2022.)

[21] On 29 May 2021, the mother commenced counselling with SB, a registered counsellor. (These sessions concluded on 11 September 2021.) Around this time, in May 2021, the mother also commenced sessions with HM, a family/whānau worker with Victim Support.

[22] The father brought proceedings against the mother before the Family Court at Perpignan. The French Family Court held a hearing on 17 June 2021 at which the mother was represented. She advised the French Family Court that she intended to remain in New Zealand, and asked the French Family Court to award her primary care of the children in New Zealand.

[23] On 23 July 2021, the French Family Court issued a provisional or interim judgment. It recorded that the mother and the father agreed that the marital home was the property of the father. The parties also agreed on the delivery of other personal property and on joint exercise of parental authority (guardianship). The Court declined the mother's application for maintenance from the father.

[24] The French Family Court found that the children's habitual residence was France. The father was awarded primary care of the children in France, with the mother to receive the children over certain holiday periods.

[25] The effect of the decision (which was predicated on the children living in France, and the mother in New Zealand) was to grant the father care of the children for 44 weeks of the year and the mother the balance.

[26] In September 2021, the father filed an application in the Family Court in Christchurch seeking an order that Amelia and Brigitte be returned to France.

[27] On 21 January 2022, the appellate court at Montpellier dismissed an appeal by the mother against the interim judgment of the French Family Court, and confirmed the interim orders of that court.

[28] Further, the appellate court ordered:

(a) that in the event of the mother's return to France, the parties were to attend mediation at their shared expense;

(b) the mother was to pay the father's costs pursuant to art 700 of the Civil Procedure Code in the sum of €2,000; and

(c) the mother was to pay the full costs of the appeal.

[29] Before the Courts below the father gave assurances that if the mother returned to France with the children, he would support a shared care arrangement on a week about basis. He also undertook to provide financial support to the mother. The mother submitted that these assurances were not enforceable in France, and could not be relied on. The parties' French lawyers disagreed about whether it was possible for the French Court to make hypothetical orders that would apply in the event that the mother returned to France.

[30] Shortly before the hearing before this Court, the father applied to the French Family Court for modification of the interim orders summarised above. On 9 February 2023 the French Family Court made modified interim orders that would apply from the return to France of the mother which, among other things:

(a) provide for shared care of the children. They would reside alternately at the home of each of the parents, on a weekly basis, in the absence of agreement to the contrary;

(b) require the father to pay a monthly contribution to the care and education of the children of €600 per month (inflation indexed); and

(c) require the father to take responsibility for all school and extra-curricular activity costs for the children.

[31] The mother was represented before the French Family Court in connection with the making of these orders, though she says she was not aware of these developments until shortly before that Court's decision and had no input into it. She has a number of concerns about these modified interim orders.

[32] On 13 February 2023, the day before the scheduled hearing before this Court, the mother sought an adjournment on the basis that she needed more time to review the modified interim orders and address their implications for this appeal. We declined that request. If the hearing was adjourned there would have been a delay of some months before the appeal could be heard by this Court. That delay would have been inconsistent with the requirements of the Convention and the Act. Nor did we consider that an adjournment was needed to enable the mother to consider, and address, the implications of the modified interim orders. Those orders gave effect to protective measures that had previously been proposed by the father, which were already addressed in the parties' submissions. If anything, the modified interim orders could be expected to simplify the hearing of the appeal as they removed any uncertainty about whether the French Family Court would be willing to make such orders. The appeal proceeded as scheduled.

The Convention and the New Zealand implementing legislation

[33] The Convention was adopted by the Hague Conference on Private International Law on 25 October 1980. New Zealand became a party to the Convention with effect from 1 August 1991. France is also a party to the Convention. The Convention is widely ratified.

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

> The States signatory to the present Convention,
>
> > *Firmly convinced* that the interests of children are of paramount importance in matters relating to their custody,
> >
> > *Desiring* to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to

ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

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

ARTICLE 1

The objects of the present Convention are—

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

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

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

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

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

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

> ARTICLE 12
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.
>
> ARTICLE 13
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

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

is made under s 105 to give priority to the proceedings so far as practicable, to ensure they are dealt with speedily.[9]

[41] In this case it is common ground that the requirements set out in s 105 are met. The children are present in New Zealand. They were retained here in breach of the father's rights of custody. The children were habitually resident in France prior to their removal. So the focus of the New Zealand proceedings has been on whether any ground for refusal of a return order set out in s 106 is made out. Section 106 provides, so far as relevant:

> **106 Grounds for refusal of order for return of child**
>
> (1) If an application under section 105(1) is made to a court in relation to the removal of a child from a Contracting State to New Zealand, the court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the court—
>
> (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or
>
> (b) that the person by whom or on whose behalf the application is made—
>
> (i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or
>
> (ii) consented to, or later acquiesced in, the removal; or
>
> (c) that there is a grave risk that the child's return—
>
> (i) would expose the child to physical or psychological harm; or
>
> (ii) would otherwise place the child in an intolerable situation; or
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> (d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or

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9 Care of Children Act, s 107(1).

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

…

[42] Before the Courts below, and in this Court, the mother relied on s 106(1)(c)(ii). She says there is a grave risk that returning the children to France would place them in an intolerable situation.

[43] This Court gave detailed consideration to s 106(1)(c)(ii) in *LRR v COL*.[10] This Court made eight observations about the grave risk exception:

> [87] First, as noted above, there is no need for any gloss on the language of the provision. It is narrowly framed. The terms "grave risk" and "intolerable situation" set a high threshold. It adds nothing but confusion to say that the exception should be "narrowly construed". As this Court said in *HJ v Secretary for Justice*, "there is no requirement to approach in a presumptive way the interpretative, fact finding and evaluative exercises involved when one or more of the exceptions is invoked".
>
> [88] Second, the court must be satisfied that return would expose the child to a *grave risk*. This language was deliberately adopted by the framers of the Convention to require something more than a substantial risk. A grave risk is a risk that deserves to be taken very seriously. That assessment turns on both the likelihood of the risk eventuating, and the seriousness of the harm if it does eventuate. As the United Kingdom Supreme Court said in *Re E*:
>
> > … Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.
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> [89] Third, consistent with the focus of the exception on the circumstances of the particular child, a situation is intolerable if it is a situation "which this particular child in these particular circumstances should not be expected to tolerate".
>
> [90] Fourth, the inquiry contemplated by this provision looks to the future: to the situation as it would be if the child were to be returned immediately to their State of habitual residence. The court is required to make a prediction, based on the evidence, about what may happen if the child is returned. There will seldom be any certainty about the prediction. But certainty is not required; what is required is that the court is satisfied that there is a risk which warrants the qualitative description "grave". …

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10 *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610.

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

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

[92] Sixth, the burden is on the person asserting the grave risk to establish that risk, as the language of art 13 and s 106 of the Act makes plain. But the process for determining an application under the Convention is intended to be prompt, and the court should apply the burden having regard to the timeframes involved and the ability of each party to provide proof of relevant matters. …

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

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

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

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

> [95] However, the focus remains on the situation of the child. It is necessary for the person opposing return of the child to the requesting State to articulate why return would give rise to a grave risk of an intolerable situation for the child. Is it because there is a grave risk that the child will be exposed to incidents of violence directed at the child's mother? Is it because there is a grave risk that actual or feared violence will seriously impair the mother's mental health and parenting capacity? The person opposing return needs to establish to the court's satisfaction the factual foundation for the specific concerns they advance.
>
> [96] Eighth, s 106(1) confers a discretion on the court to decline to make an order for the return of the child if one of the specified exceptions is made out. However, as Baroness Hale observed in *Re S*, if a grave risk of an intolerable situation is made out, "it is impossible to conceive of circumstances in which … it would be a legitimate exercise of the discretion nevertheless to order the child's return".
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> (Footnotes omitted.)

[44] In *LRR v COL* this Court held that return of the child to his habitual residence, Australia, would give rise to a grave risk of the child being placed in an intolerable situation.[11] The mother and child would be in a precarious and stressful financial and housing situation. There was no concrete proposal for the father to provide for financial support of the child.[12] The mother held justifiable fears for her safety in Australia: the father had been convicted of assaulting the mother and of breaching family violence orders and bail conditions. Orders made by the Australian courts had been ineffective to protect her in the past, as the father had not complied with those orders.[13] The mother would be isolated in Australia where she had no family, close friends or other personal support mechanisms. She would be likely to receive some support, but at best that would alleviate the suffering and practical difficulties to which she would be exposed.[14] The mother's mental health was frail. She had a well-documented history of depression and substance abuse, in particular alcohol abuse. This Court was satisfied that the risk that return of the mother and the child to Australia would cause a relapse in terms of her mental health and substance abuse was very high. Return to Australia would place not only the mother's mental well-being at risk, but also her sobriety.[15] There was a genuine concern about the risk of suicide

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11 At [145].
12 At [131]–[132].
13 At [135], [140] and [145].
14 At [136]–[137].
15 At [138] and [141].

(there had been previous suicide attempts while living in Australia).[16] Evidence before the Court explained how these factors would in turn affect the child. This Court went on to say:

> [141] It is possible that the mother and H could return to Australia without any of these concerns materialising. She may receive sufficient support, social and financial, to continue to provide a home for H and care for him. There may be no relapse in terms of her mental health or substance abuse that affects her capacity to parent H effectively. But we consider there is a very significant risk that these concerns will materialise, and that they will have a very serious adverse effect on H. Our overall assessment is that the risk is sufficiently high, and the consequences sufficiently serious, that the risk can properly be characterised as grave.
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> [142] If these concerns do materialise, we consider that the situation would be intolerable for H. This young child cannot be expected to tolerate the loss of effective parental care from his mother if her mental health deteriorates and she returns to alcohol abuse.
>
> [143] The High Court Judge considered that if the mother could not care for H, he could be cared for by his father. The father says in his evidence that he would be willing to take primary responsibility for the care of H. It appears he is currently caring for three children from his previous relationship. The paternal grandparents have also given evidence that they are more than willing to have H come to live with them. We accept that there are other possible arrangements for care of H in Tasmania. But we are satisfied that the scenario in which the mother is incapable of functioning as an effective parent, as a result of a deterioration in her mental health and/or recurrence of alcohol abuse, would be intolerable for H. She has been his primary carer throughout his life. In this scenario she would be incapable of properly caring for him — either as a primary caregiver or, quite possibly, at all. That is not a situation that H can be expected to tolerate.

[45] It was common ground before us, as it had been in the Courts below, that the approach set out in *LRR v COL* should be applied. But the parties differed on the implications of that approach on the facts of the present case.

Family Court judgment

The issues before the Family Court

[46] As already mentioned, it was common ground that the requirements set out in s 105 of the Act were met. The issue was whether any of the exceptions set out in

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16 At [138].

s 106 was established. Before the Family Court, the mother contended that the grave risk exception was made out based on three grounds:[17]

(a) The children's separation from her, pursuant to the French Court's interim orders. The mother said she is the children's primary carer and attachment figure, and she would be separated from them if they are cared for according to those orders.

(b) The children would be impacted by the decline of the mother's well-being which would arise because of the situation to which she would be returning, the negative impact this would have on her mental well-being, the consequential impact this would have on both the children directly, and because of her impaired ability to parent.

(c) The father would be unable to care for the children by reason of his work commitments for five months of the year which would see the children cared for by their extended family, rather than either parent.

[47] The mother filed evidence from herself, her mother and a number of other witnesses in support of those grounds. The mother said in her evidence that she had been subjected to physical and psychological violence by the father. The mother's evidence included an affidavit from Dr Elizabeth Macdonald, an experienced clinical psychiatrist employed by the Canterbury District Health Board, in relation to the mother's mental health and the likely impact on her of a return to France.

[48] The father filed evidence from himself, from a number of relatives and friends in France, and from a number of other witnesses. The father denied that there had been any incidents of family violence.

[49] The Family Court appointed Mr Martin Kelly, an experienced psychologist, to prepare a psychological report on the children under s 133 of the Act. Mr Kelly met with the children, and provided a report to the Family Court.

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17 Family Court judgment, above n 3, at [34].

[50] The Family Court appointed Mr Wren as counsel for the child. Mr Wren met with the children, and conveyed their views to the Court. He also made submissions in relation to the return application.

[51] The hearing before the Family Court took place on 2 December 2021. A judgment was delivered by Judge Hambleton on 21 December 2021.

First ground — separation from the mother

[52] In relation to the first ground, the Judge accepted that the mother was the children's primary caregiver, with the support and involvement of the father while the family lived in France. She was satisfied that the children have a primary attachment to both parents. The Judge considered it was likely that the mother would return to France if she ordered the children's return. The father's evidence was that he would prefer a shared care arrangement and did not wish to see the children separated from either parent. If the mother chose not to return, the French Court had assessed the father as being able to care for the children.[18] Taking all matters into account, the Judge was not persuaded that the mother had established a grave risk on the first ground.[19]

Second ground — impact on the mother's mental health and parenting

[53] The Judge reviewed the evidence filed by the parties in relation to the allegations made by the mother about emotional and physical abuse by the father. There was no suggestion that he was abusive in relation to the children. But the mother referred in her evidence to a number of occasions on which she said that the father was physically violent to her. She also referred to emotional abuse and controlling behaviour.[20]

[54] The Judge considered that the alleged abuse was not at the serious end of the scale. She accepted that if the children were to witness further verbal arguments between their parents, that would be likely to cause them psychological harm.

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18 Family Court judgment, above n 3, at [49].
19 At [50].
20 At [58]–[89].

However she found that the verbal arguments and any disagreements that occurred were within the context of the deterioration of their relationship, when they were living in the same home. If the children returned to France, and the mother followed, the parents would not be living in the same home together. There would be protective mechanisms available in the French jurisdiction, should those be required.[21]

[55] The Judge considered the concerns raised by Dr Macdonald about the impact on the mother of a return to France. She did not make a finding as to whether the mother suffered from PTSD. However she accepted that the mother's psychological well-being was adversely affected by the deterioration of her relationship with the father and she may experience similar symptoms if she returns to France. The Judge referred to Dr Macdonald's opinion that there was a high risk of recurrence and that this may place the mother at a high risk of developing other mental illness such as depression.[22]

[56] The Judge also reviewed the mother's evidence and submissions in relation to isolation and absence of support, inability to find employment, and other difficulties she would face if she returned to France.[23]

[57] After considering the evidence, the Judge made the following observations:[24]

> (a) Care is needed before too readily transferring a parent's unhappiness and even desperation over the situation to a conclusion that a child faces an intolerable situation.
>
> (b) Short of evidence of suicide risk or psychosis, considerable care must be exercised before finding that a parent's mental health is such as to expose a child to the grave risk of physical or psychological harm on return, as the evidence on which such a defence is based is likely to be self-serving.
>
> (c) There is no evidence that [the mother] has experienced that degree of mental illness.

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21 At [90].
22 At [99].
23 At [91]–[98].
24 At [100] (footnotes omitted).

(d) Wariness is necessary in respect of defences based on psychological fragility:

> Is a parent to create the psychological situation, and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother [of] a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the convention, at least in respect of applications relating to young children.

(e) Despite the impact of previous stressors, [the mother] continued to care for the children in France who, were by all accounts thriving. [The mother] has continued to parent the children in New Zealand. [The mother] sought therapeutic support after she had been in New Zealand for approximately 7 months, and after [the father] began proceedings in France. Dr Macdonald's opinion notes that [the mother's] symptoms have improved and does not suggest the need for either further counselling or medication.

(f) Martin Kelly notes that a deterioration in [the mother's] mental health may be anticipated but it is not a given, and that she may be more resilient than she credits herself.

[58] The Judge reminded herself that "grave risk" and "intolerable" set a high threshold. She was not satisfied that the risk of a decline in the mother's well-being was such that there was a grave risk that the children's return would expose them to psychological harm or place them in an intolerable situation.[25]

Third ground — separation from both parents

[59] The third ground was, as noted above, based on the father's business commitments for five months of each year. This, the mother said, coupled with the French Family Court's interim orders, would result in the children being cared for by neither parent for extended periods. The Judge summarised the background to this issue as follows:

> [103] [The father] is a director of a hunting business … This is based near his paternal family home at … The busiest season for the business is between September and February. It is not in dispute that previously, the family lived at [the paternal family home] for those months. In addition, [the mother] has given evidence that the annual marketing plan for the business included attendance at a trade fair in the United States.

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25 At [101].

> [104] [The mother's] concern is that those business commitments preclude [the father] from caring for the children for 5 months of the year, and so if [Amelia] and [Brigitte] return to France, then for that period of time they will be deprived of both parents, which would be intolerable for them.
>
> [105] [The father's] response is that he has altered his business arrangements so he does not need to go to … as often, that he has provided evidence of this to the French Family Court, and should he need to go to the estate for a day or two, then his brother and sister-in-law would care for the children.
>
> [106] The French Family Court accepted that evidence:
>
> > Moreover, it emerges from the testimonies produced that notwithstanding the professional constraints, the father has organised himself to make himself available for his daughters.
> >
> > (Footnote omitted.)

[60] The Judge considered that this argument presupposed that the mother would not return to France if the children returned. However the Judge considered the evidence was that she would follow them, so would be available to care for them on occasions when the father could not. If she did not return to France, then the French Family Court had assessed the father as having made suitable arrangements to care for the children. The Judge did not accept that the return of the children to France meant that they would be deprived of both parents.[26]

Order for return

[61] The Judge was not satisfied on any of the three grounds advanced by the mother that there was a grave risk that return of the children to France would place them in an intolerable situation. She made orders for their return to France.[27]

High Court judgment

[62] The mother's appeal to the High Court was heard by Doogue J on 16 and 17 May 2022.

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26 At [108]–[110].
27 At [111]–[112].

[63] Both parties obtained leave to adduce further evidence before the High Court relating to developments in France since the Family Court hearing. That evidence included:

(a) the decision of the French appellate court at Montpellier on the mother's appeal from the interim orders made by the French Family Court;

(b) the submissions made by the mother's French lawyer to the appellate court;

(c) a letter received by the mother from her French lawyer, from which it appeared the father was seeking damages against her in the sum of €20,000 for the unlawful abduction of the children; and

(d) a letter from the father's lawyer in France to the mother's lawyer in France, in which the father offered a form of shared care of the children should the mother return with them to France voluntarily.[28]

[64] Because further evidence had been admitted on appeal, the Judge proceeded on the basis that a de novo assessment of that evidence and its effect was required.[29]

[65] The mother argued that the Family Court Judge erred in finding that the grave risk exception was not made out on the three grounds she had advanced. She contended that the children would be at grave risk if returned to France because:

(a) they would be removed from their primary carer;

(b) they would be adversely affected by a decline in their mother's mental well-being; and

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28 High Court judgment, above n 4, at [9].
29 At [14], referring to *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].

(c) if placed in the father's care in accordance with the French court orders he would be unavailable to care for them for extended periods of time due to his unique business commitments.[30]

First and third grounds — separation from the mother for extended periods

[66] The Judge considered grounds (a) and (c) together because they relied on the same point, namely that the children would be placed in an intolerable situation if on return they were not placed in the care of their primary carer (the mother). Ground (c) was, the Judge observed, an exploration of how that intolerable situation may be exacerbated by the father's business commitments.[31]

[67] Doogue J considered that the Family Court Judge had not undertaken a complete analysis of the evidence in relation to the risk that the children would be separated from their primary carer. She considered the Family Court Judge had placed insufficient weight on the importance of the children's likely distress in being separated from their primary carer. There was a vast difference between intimations that protective measures may be put in place and the elimination of risk by protective measures actually being put in place. The evidence was clear that the father had not, to date, put in place any protective measures to ensure the children would be in the mother's primary care on return to France pending further orders of the Court. It also appeared the Family Court Judge had misunderstood the lawyer for the child's position: he was strongly of the view that their return to France would place them in an intolerable situation if they would be separated from their primary carer.[32]

[68] The Judge considered that it would be distressing for the children to be separated from their mother for significant periods of time, particularly given their ages and life experience to date.[33]

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30 At [80].
31 At [81].
32 At [106]–[107].
33 At [108].

[69] Turning to ground (c), the Judge was not persuaded that the father would not be absent from the children's primary home for extended periods. She considered the father's assertions that he would employ a manager to help with the business, and make himself available to care for the children, inherently improbable. If the Family Court Judge had reviewed the evidence herself, rather than relying on the French Family Court decision on its face, the Judge considered she would have identified the inherent improbability of the father's narrative.[34]

[70] The father's recent intimations that he would co-operatively call on the mother to care for the children when he needed to deal with his business commitments were only intimations of protective measures, and not protective measures in actuality.[35]

[71] The Judge considered that leaving the children at times without the care of either of their two primary attachment figures would leave them in an intolerable situation. That intolerable situation could be obviated if the father acknowledged the mother's primary carer status and agreed to her having primary care of the children for any period pending further order of the French courts.[36]

[72] On the evidence before her, the Judge was satisfied that:[37]

(a) there was a grave risk of Amelia and Brigitte being placed in an intolerable situation if returned to France because of the impact of not being in their mother's primary care; and

(b) there was also a grave risk Amelia and Brigitte may find themselves in the care of third parties and not with either of their primary attachment figures unless appropriate protective measures are put in place in France to mitigate these risks.

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34 At [117].
35 At [119].
36 High Court judgment, above n 4, at [120]–[121].
37 At [122].

[73] The Judge went on to observe that if these were the only grounds before the Court she might have considered an adjournment to provide the father with the opportunity to initiate a variation of the interim orders, in order to give legal status to the children being in the mother's primary care and providing for him to have regular time with them pending the final hearing in the Family Court in France (together with related support and accommodation measures). That would, absent any other successful ground of defence, ensure the children's return to France could be secured safely. However there was a further ground to consider.[38]

Second ground — impact on the mother's mental health and parenting

[74] The Judge then went on to consider ground (b), based on the mother's evidence to the effect that she had suffered physical and psychological abuse by the father and Dr Macdonald's evidence that as a result, the mother suffers from PTSD.

[75] The mother submitted that the Family Court Judge erred in finding that the alleged abuse was not at the serious end of the scale. She said that a chain of errors followed from this incorrect finding:[39]

(a) the Court failed to accept the unchallenged expert evidence that the mother was suffering from PTSD as a result of family violence perpetrated by the father against the mother;

(b) the Court failed to address properly the factors that the psychiatrist identified as likely to cause a deterioration in the mother's psychological well-being;

(c) the Judge erred in failing to find there was a risk of breakdown in the mother's ability to care for the children; and

(d) the Judge reached the wrong conclusion that there was no risk to the children if they remained in the mother's care in France.

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38 At [124].
39 At [137]–[138].

[76] The Judge noted that the relevance of the inquiry into the mother's allegations of family violence was to establish the foundation for the mother's diagnosis of PTSD. It was not alleged that the children were at risk of violence at the hands of their father or that the mother would be at risk of physical violence by the father if they were not living in the same household.[40]

[77] The Judge considered that it was highly plausible that one of the incidents, for which there was contemporaneous evidence, occurred. She did not need to venture into other episodes of violence alleged by the mother for current purposes. She was satisfied there was adequate evidence on which to find the mother more likely than not suffered physical violence by the father. The Judge also considered that there was sufficient evidence before the Court to establish that the father engaged in a pattern of conduct that was belittling and undermining of the mother's psychological well-being.[41]

[78] The Judge then turned to consider whether the mother had established that these circumstances caused her to suffer from PTSD. She considered that Dr Macdonald's report was the most reliable source of independent expert opinion on this issue. The Judge recorded that Mr Jefferson, who appeared for the father in the High Court, was highly critical of Dr Macdonald's report.[42] He raised concerns about the sources of information Dr Macdonald relied on, some of which he submitted was demonstrably wrong (for example, the involvement of the French Police).[43] He submitted that the reliability of Dr Macdonald's evidence was doubtful, and the Family Court Judge was correct not to elevate it to the level sought by the mother. He submitted that the report bordered on advocacy rather than objective expert evidence, and the Family Court Judge was right to treat it with caution.[44]

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40 At [151].
41 At [154]–[158].
42 High Court judgment, above n 4, at [167].
43 At [168].
44 At [169].

[79] The Judge did not accept these criticisms of Dr Macdonald's evidence. She said:

> [170] I do not consider there is any effective challenge to the evidence of Dr Macdonald. Had there been one I would have expected an application to adduce evidence from another expert witness to provide an evidential basis for the challenge to Dr Macdonald's expertise, methodology or conclusions, or in the alternative an application to cross-examine her to have been made — which applications, having regard to the statements of the Court of Appeal in *LRR v COL* … would most likely have been granted.
>
> [171] I find, relying on Dr Macdonald's independent evidence, that the mother has suffered from PTSD and is susceptible to it being triggered again.
>
> (Footnote omitted.)

[80] The Judge addressed the criticism that the report was based largely on self-reporting by noting that Dr Macdonald had vast experience in diagnosing the mental health of mothers and would be alert that there are those who access her services who may be feigning illness for collateral purposes. The Judge considered that it was part of the psychiatrist's discipline to ensure that is not the case.[45] She noted that Dr Macdonald said in her report:

> It is my view that [the mother] presented an accurate account, and that this report has validity. Her history and presentation were internally consistent, as well as consistent with the various sources of collateral information.

[81] The Judge also noted the following observations by Mr Kelly on the likely deterioration in the mother's well-being if she were to return to France with the children:[46]

> If [the mother] is in France, I believe she will also expect to maintain some parental authority, consequently, there would be potential for overt conflict between [the mother] and [the father] in the presence of the children. How [the mother] might manage a return to France [is a] matter of some speculation. A deterioration in [the mother's] mental health may be anticipated, but it is not a given. [The mother] may be more resilient than she credits herself. I also note that [the mother] may have perceived the support [the father] had received from many friends and family members attesting to the quality of his relationship with the girls as rejection or criticism of her when that was not the intent. She may not be as ostracized as she believes she might be. [The father] and his family may be more supportive than [the mother] believes. I note that she has indicated she was able to care for

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45 At [179].

46 At [184] (footnote omitted).

> the girls while in close proximity of [the father] for a substantial time. However, …
>
> Assuming there is a significant deterioration in [the mother's] physical and mental wellbeing the girls are likely to experience significant distress. Such a deterioration could be brought about by a reduction in [the mother's] access to material wealth, reduced access to supportive relationships, more overt conflict between [the mother] and [the father] potentially brought about by closer proximity the requirement of coparenting and an increase in substance abuse or other harmful coping strategies. In general children in the presence of a parent experiencing a crisis of mental health are at increased risk of physical injury, emotional distress, reduced academic attainment, behaviour in school can become problematic. They may experience regression in confidence and self-help skills. They may experience embarrassment and shame and blame themselves for their parents' conflict. Their social interactions may be affected. They are more likely to be in conflict with others. Older children may take on too much responsibility for themselves, their parents and younger siblings.

[82] The Judge considered that in both diagnosing PTSD and its triggers for a subject, and in predicting its potential return, importance must be placed on the subject's perception, even if objectively others may have a different point of view.[47] Although Mr Kelly might be more optimistic than the mother about some of the triggers, he was not prepared to rule out or entirely discount the possibility of the mother succumbing again to those triggers in the event of a return to France.[48]

[83] In these circumstances, the Judge accepted that the mother was likely suffering from PTSD in France.[49]

[84] The Judge then went on to review the evidence to assess, looking forward, whether the mother's return to France with the children would trigger her PTSD and so negatively affect her psychological state as to affect her ability to adequately parent the children, thereby placing them in an intolerable situation.

[85] The Judge considered that that was the position, having regard to the mother's limited ability to find employment other than cleaning or waitressing work on return to France.[50] She was satisfied on the balance of probabilities that the mother was cut off from any form of support from the father. He had taken no steps to reinstate it

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47 At [187].
48 High Court judgment, above n 4, at [188].
49 At [191].
50 At [194].

or indicated he would agree to any form of order reinstating it on return.[51] The Judge considered the mother no longer has a social network in France and it would be a challenge to establish one, given her relatively poor fluency in French.[52] Another psychosocial stressor for the mother was that if she returns to France she would of necessity have direct interactions with the father.[53]

[86] The Judge found that the evidence, particularly that of Dr Macdonald and Mr Kelly, established on the balance of probabilities that a return to France by the mother and the children in the face of these psychosocial stressors would trigger the mother's PTSD. Her parenting would more likely than not be impaired. The consequences for the children would be significant. They would pose a grave risk of placing the children in an intolerable situation.[54]

High Court outcome

[87] The Judge concluded that:

(a) there was a grave risk the children would be placed in an intolerable situation in the event they are not in the care of their primary parent, the mother;[55] and

(b) the children would be at grave risk of being placed in an intolerable situation because of the likelihood of the mother's PTSD being triggered, her parenting being impaired and the deleterious consequences that would follow for the children.[56]

[88] The appeal was allowed. The order for return of the children to France was quashed.[57]

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51 At [195].
52 At [196].
53 At [199].
54 At [200].
55 At [205].
56 At [206].
57 At [207]–[208].

The appeal to this Court

[89] The father sought leave to bring a second appeal to this Court. Leave was granted on 12 December 2022.[58] A fixture was allocated for 14 February 2023.

[90] The father sought leave to adduce updating evidence from himself and his French lawyer, Maître Quiles. He also sought leave to adduce evidence from a clinical psychologist, Dr Blackwell, reviewing the methodology used by Dr Macdonald in her report and providing an opinion about the accuracy and reliability of the diagnosis of PTSD.

[91] Applying the principles relating to further evidence set out in *LRR v COL*,[59] leave was granted to receive this further evidence from the father, and for the mother to file evidence in response.[60]

[92] Timetable orders were made which (among other matters) provided for any evidence for the mother in response to be filed and served by 10 January 2023. Submissions were then to be filed by the father on 31 January 2023, and by the mother and Mr Wren on behalf of the children on 7 February 2023.

[93] The mother gave notice under r 33 of the Court of Appeal (Civil) Rules 2005 that she intended to support the High Court decision on the additional ground that there is a grave risk that an order for the children's return to France would expose them to psychological harm, or otherwise place them in an intolerable situation, because:

(a) they have been in New Zealand since October 2020;

(b) they are settled in New Zealand; and

(c) they wish to remain in New Zealand.

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58 Leave judgment, above n 7.
59 *LRR v COL*, above n 10, at [122]–[124].
60 Leave judgment, above n 7, at [9].

[94] The mother filed updating evidence in response to the evidence filed by the father, and an affidavit from Dr Macdonald. She sought leave to adduce further evidence in support of her additional ground. She also requested that the Court commission an updated psychological report on the children under s 133 of the Act to address the additional ground.

[95] The father opposed the application for a further psychological report in relation to the children. The father also opposed the application for leave to adduce some of the mother's further evidence. The father did not oppose leave to file the affidavit from Dr Macdonald, but sought leave to file an affidavit from Dr Blackwell in reply by 2 February 2023. Similarly, the father did not oppose leave for the mother to file an updating affidavit from the mother's French lawyer, Maître Baumhauer, but sought leave for Maître Quiles to reply to that affidavit by 2 February 2023.

[96] This Court directed that the admissibility of all disputed evidence would be determined at the substantive hearing on 14 February 2023, to avoid further delays. This Court also directed that an updated s 133 psychological report be prepared, on the basis that its admissibility would be determined at the substantive hearing. Mr Kelly, who had provided the initial s 133 report, was commissioned to prepare an updated report.

[97] Mr Kelly provided his updated report on 13 February 2023. In order to prepare that report he obtained information from each parent, and met briefly with each of the children. At the hearing of the appeal Ms Crawshaw KC, counsel for the father, advised that the father did not oppose receipt of Mr Kelly's updated s 133 report.

[98] On 7 February 2023, the on which the mother's submissions were due to be filed in this Court, the father filed three affidavits:

(a) a reply affidavit from Dr Blackwell. An unsworn version had been provided on 3 February 2023;

(b) a reply affidavit from Maître Quiles; and

(c) a substantial reply affidavit from the father with extensive annexures.

[99] At the hearing of the appeal Mr van Bohemen, counsel for the mother, advised that no issue was taken in relation to the reply affidavit from Dr Blackwell. But the mother objected to leave being granted to file the affidavits from Maître Quiles, and from the father insofar as it went beyond responding to the mother's evidence. Reply evidence was not contemplated by the Court's original timetable and this material was filed too late to enable the mother to address it in her written submissions.

[100] The issues this Court was ultimately required to resolve at the hearing on 14 February 2023 were:

(a) a number of disputed admissibility issues in relation to fact evidence sought to be filed by both parties;

(b) challenges to the reliability of the expert evidence filed by the mother. The father says that the High Court erred in accepting the evidence of Dr Macdonald that the mother's account of events while she was living with the father was reliable, and her evidence that the mother suffered from PTSD; and

(c) whether the grave risk exception was made out on the basis of the three grounds raised in the Courts below and/or the mother's additional ground.

[101] We address each of these issues in turn.

Applications to adduce further evidence

[102] As already mentioned, at the time this Court granted leave to appeal it also granted leave for the father to file updating evidence from himself and his French lawyer, Maître Quiles, and an affidavit from Dr Blackwell. No admissibility issues arise in relation to that tranche of evidence.

[103] The mother filed evidence in response, as contemplated by the timetable that accompanied the leave decision. That evidence included updating affidavits from the mother, the maternal grandmother, one of the children's teachers, the mother's French lawyer Maître Baumhauer, and a reply affidavit from Dr Macdonald. Recognising that some of this evidence went beyond merely responding to the evidence filed by the father, the mother sought leave to adduce that material on appeal on the basis that it supported her additional ground.

[104] At the hearing of the appeal the father's position was that he objected to evidence filed by the mother which merely reiterated previous evidence, and did not respond to his evidence on appeal. However Ms Crawshaw accepted that the admission of this additional material did not give rise to any significant difficulties, and that it would be inefficient to challenge admissibility of the mother's evidence on a paragraph by paragraph basis, preferring to focus on the substance of the appeal. We think that was a sensible approach. We grant leave to adduce all of the mother's evidence, to the extent that it goes beyond responding to the father's evidence.

[105] As already mentioned, the father had sought leave to file reply evidence from Dr Blackwell and Maître Quiles. Eventually, just before the mother's submissions were due, he provided an affidavit from Dr Blackwell, an affidavit from Maître Quiles, and a substantial affidavit of his own.

[106] For the mother, Mr van Bohemen took a pragmatic approach to this material. He did not oppose receipt of the affidavit of Dr Blackwell. He did oppose receipt of the affidavit of Maître Quiles, on the basis that the timetable set by the Court did not contemplate the filing of reply evidence, and the provision of further evidence at such a late stage, when it could not be addressed in the mother's written submissions, was unfair.

[107] Despite the lateness of its filing, Mr van Bohemen did not oppose receipt of the father's affidavit insofar as it responded to matters addressed in evidence filed by the mother. He opposed receipt of the father's affidavit beyond that limited scope.

[108] We agree that it would be unfair to receive the affidavit of Maître Quiles having regard to the lateness of its provision to the mother, except to the extent that it refers to the hearing that took place before the Family Court at Perpignan on 6 February 2023. As already mentioned, ultimately neither party opposed this Court receiving evidence as to the orders made by the French Family Court on 9 February 2023. We admit the background evidence of Maître Quiles explaining that:

(a) the hearing resulted from an application made by the father;

(b) the mother was represented by Maître Auset who is working with Maître Baumhauer; and

(c) the mother's lawyer sought to adjourn the hearing, but the Judge declined on the basis that it ought to be heard before this Court heard the appeal in New Zealand. The Judge gave counsel for the mother the opportunity to provide a note indicating whether or not the mother agreed to share care of the children in case of a return to France. A brief note was provided.

[109] The submissions filed by Maître Quiles on behalf of the father, which were attached to her affidavit and which set out the orders sought by the father and his reasons for seeking them, are also admitted.

[110] We also decline to accept the affidavit of the father sworn on 7 February 2023. To the extent that it responds to the evidence filed by the mother it is more in the nature of submissions than evidence. To the extent that it goes further, it should have been filed much earlier. It would be unfair to the mother to be expected to address this evidence, which was of marginal relevance, at such a late stage. If a concise, relevant affidavit that did not include extensive commentary and argument had been filed by 2 February 2023, the date originally proposed in the memorandum from counsel for the father, it might have been admitted. But we decline leave to admit the affidavit that was eventually provided on 7 February 2023.

[111] We add that similar concerns about inadmissible material arise in relation to the evidence filed by the mother and the maternal grandmother: significant portions of their affidavits set out inadmissible opinion evidence and comments in the nature of submissions. The inclusion of irrelevant material of this kind in affidavits results in additional costs for all parties, and inefficient use of the courts' time. Solicitors should be astute to ensure that only admissible material is included in affidavits, especially where those affidavits are filed on appeal with the leave of this Court: only material that is genuinely relevant, admissible and squarely within the scope of the leave granted (or sought) should be included.

Challenges to the reliability of the mother's expert evidence

The challenges to Dr Macdonald's evidence

[112] In support of her grave risk defence in the Family Court, the mother filed the affidavit from Dr Macdonald referred to above.[61]

[113] Before us, Ms Crawshaw mounted a two-pronged attack on the evidence of Dr Macdonald. She submitted that it should not have been uncritically accepted by the High Court Judge. The Court should act as a gatekeeper in relation to expert evidence. Dr Macdonald's affidavit was dependent on the accuracy of the information provided by the mother, but did not expressly record that limit. To the contrary, Dr Macdonald purported to express an opinion about the accuracy of the information provided to her: this was outside her expertise, and was not a matter on which evidence could properly be given. Ms Crawshaw also submitted that the report lacked the objectivity and balance that the courts expect from an expert witness. The criteria for a diagnosis of PTSD were not expressly set out and analysed: it was not possible for the court to understand how she had arrived at her diagnosis. Dr Macdonald did not identify any limits or qualifications on the views she expressed. Alternative explanations for observed symptoms were not identified and considered.

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61 At [47] above.

[114] Second, Ms Crawshaw submitted that Dr Macdonald's diagnosis of PTSD could not safely be relied on, in light of the expert evidence of Dr Suzanne Blackwell. It is necessary to describe that evidence in some detail.

Dr Blackwell's criticisms of Dr Macdonald's report

[115] Dr Blackwell is a very senior and experienced psychologist, with long experience in forensic psychology and the provision of reports to New Zealand courts. She was asked to review Dr Macdonald's report. We will not go through all the aspects of Dr Macdonald's report discussed by Dr Blackwell, but focus on those that are material to our conclusion.

[116] Dr Blackwell considered that Dr Macdonald had made a number of errors in her report, including:

(a) failing to report the required DSM-5 diagnostic indicia for PTSD in a systematic way that would permit logical understanding of how she arrived at the diagnosis;

(b) failing to consider whether the symptoms reported by the mother could have occurred for other reasons, for example, recent marital breakdown or discovery of infidelity, or could occur as a result of other life stressors in the absence of physical violence or other similar traumatic events;

(c) incorrectly suggesting Dr Macdonald could discern whether the mother was being accurate and honest in the information reported at the assessment without reporting any use of symptom validity tests (SVTs) in her assessment. Dr Blackwell considered that use of SVTs would be consistent with protocol in the forensic context, and superior to clinical interviews in detecting feigning or symptom exaggeration;

(d) failing to report on how she assessed whether the mother had clinically significant distress or impairment in her social, occupational and other

important areas of functioning, in circumstances when the mother had continued to care for the children while resident in France; and

(e) failing to appear alert to the potential for symptom fabrication for "secondary gain", and not acknowledging that "PTSD is particularly difficult to accurately assess in the context of forensic referrals because of the potential for secondary gain effects" and because it is "an easy disorder to simulate successfully".

[117] Before the High Court, counsel for the father had been critical of the fact that Dr Macdonald had not seen the mother in a therapeutic context. Dr Blackwell said that this was not, in her opinion, a valid or reasonable criticism. To the contrary, it will generally be undesirable for a mental health professional providing therapy for a party to proceedings to provide reports, because if a strong therapeutic alliance has been achieved it may be difficult for a clinician to regard a client totally objectively, and this may affect their expert opinion and report to the court. The provision of an objective report, including information or opinion adverse to the case of the party to proceedings, could have the capacity to negatively affect the future therapeutic relationship. We agree with Dr Blackwell that this criticism was not well-founded.

[118] Dr Blackwell then went on to set out the eight criteria required by DSM-5 for a diagnosis of PTSD.[62] Dr Macdonald's report referred to DSM-5, but did not set out these criteria. They were described by Dr Blackwell in summary form as follows:

(a) exposure to actual or threatened death, serious injury, or sexual violence;

(b) presence of intrusion symptoms associated with the traumatic event(s);

(c) persistent avoidance of stimuli associated with the traumatic event(s);

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62 *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, American Psychiatric Association, Washington, 2013).

(d) negative alterations in cognitions and mood associated with the traumatic event(s);

(e) marked alterations in arousal and reactivity associated with the traumatic event(s);

(f) symptoms last more than one month;

(g) symptoms create functional impairment;

(h) symptoms are not due to medication, substance abuse, or other illness.

[119] Dr Blackwell expressed doubt about whether the first criterion, relating to exposure to a traumatic event, was met. She said:

> [27] A diagnosis of PTSD is, in the first instance, wholly dependent on the fulfilment of Criterion A. **Exposure to actual or threatened death, serious injury**, or sexual violence in one (or more) of the following ways (I will include only the first two that are relevant to this case). (1). Directly experiencing the traumatic event(s). (2). Witnessing, in person, the event(s) as it occurred to others. If this first criterion is not fulfilled, then all other reported symptoms become irrelevant and the diagnosis cannot be made.
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> [28] The instances of violence reported by the [the mother] to Dr Macdonald were as follows; (1) in 2016 she was hit by [the father] while breastfeeding; (2) she was pushed to the ground; (3) she was grabbed by the shoulder and shaken; (4) [the father] was verbally abusive; and; (5) she felt fearful for her safety and hid at the neighbours' residence. While no act of physical or emotional violence is ever acceptable, the test here is whether these acts, if they occurred, could be seen to constitute "**exposure to actual or threatened death, serious injury …**" If they do not, then as noted above, the first tranche of a PTSD diagnosis fails.
>
> (Footnotes omitted.)

[120] Dr Blackwell sought to match sections in Dr Macdonald's report to the other DSM-5 criteria. Some appeared to be met. In relation to others, Dr Blackwell identified uncertainty about whether the symptoms were related to a relevant traumatic event, rather than more generalised psychological distress resulting from recent marital breakdown, especially in the context of the discovery of infidelity, of a nature that could arise in the absence of a history of physical violence or other similar traumatic events.

[121] Dr Blackwell also identified uncertainty in relation to whether criterion (g) was met, i.e. that the symptoms cause clinically significant distress or impairment in social, occupational and other important areas of functioning.

[122] Dr Blackwell noted that Dr Macdonald did not consider any alternative possible explanations for the symptoms reported by the mother. She observed that emotional distress, panic attacks, numbing, avoidance, exaggerated physiological reactivity, weight loss, and self-medication with alcohol are states/behaviours commonly experienced by persons in the throes of separation caused by infidelity or other traumatic dynamics. These can occur in the absence of any history of violence of the seriousness contemplated by criterion (a) of the DSM-5 diagnosis of PTSD.

[123] Dr Blackwell also addressed the view expressed by Dr Macdonald that the mother "presented [an] accurate account, and this report has validity. Her history and presentation were internally consistent as well as consistent with the various sources of collateral information." Dr Blackwell observed that Dr Macdonald seemed to be suggesting she could discern whether the mother was being accurate and honest in the information reported at the assessment and that, in this regard, the report had validity. Dr Macdonald did not report use of SVTs in her assessment of the mother. Dr Blackwell said that it is becoming increasingly expected that clinicians providing mental health/psychological reports for use in legal proceedings (both criminal and civil) should use SVTs. She explained her view as follows:

> [54] Converging evidence has suggested that the single greatest contributor to diagnostic and predictive accuracy in mental health and law is meticulous adherence to procedures with the strongest scientific underpinnings and scientifically established efficacy. This continues to be the case.
>
> [55] In relation to the ability of clinicians to detect when interviewees are being untruthful, there is no evidence that anyone (including psychiatrists, psychologists, judges, lawyers, police) has much more than chance accuracy in detecting deception on the basis of demeanour.
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> [56] A significant body of research evidence has indicated that, with a few exceptions, most people (including most law enforcement personnel and most mental health professionals) have little ability to detect motivated lying by adults and, furthermore, most people tend to be overconfident about their ability to detect deception.

> [57] When people are asked to discriminate between truth and deception without having physical evidence or information of third parties to rely upon, their performance typically falls into the 45 to 60 percent range. These are low percentages because 50 percent correct decisions can be expected by chance alone (as in flipping a coin). One commonly given explanation for the low accuracy is that there is a mismatch between what appears to be indicative of deception and what people believe is indicative of deception.
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> [58] Therefore, it is important that any assessments undertaken to assist the Court should be conducted by independent practitioners using evidence based methodology. This means that it is expected that such assessments for use in court proceedings or in quasi legal proceedings should utilise SVTs and, if relevant, Effort testing.
>
> [59] SVTs do not tell us whether a person is being truthful about events they report, however, they may be useful in detecting symptom exaggeration or fabrication. This is because even those persons with a history of mental illness may exaggerate their symptoms, and clinical interviews alone cannot be used to detect feigning of psychopathology and cognitive impairments. Although SVTs may not identify all instances of symptom exaggeration, they are superior to clinical interviews in detecting feigning or symptom exaggeration.
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> (Footnotes omitted.)

[124] Dr Blackwell concluded that although it is possible the mother has had PTSD as a result of the reported behaviours of the father, Dr Macdonald had "[not] demonstrated this in any systematic way using methodology of such calibre that would be expected in a legal forum, and in a context that has significant and far-reaching implications for the children …".

Response to Dr Blackwell's criticisms

[125] Mr van Bohemen accepted that it would have been preferable for Dr Macdonald to explicitly identify the relevant criteria for diagnosis for PTSD, and address those criteria. But he emphasised the very tight timeframes within which evidence has to be prepared in the context of Convention applications.

[126] The criticisms of Dr Macdonald's approach were not otherwise accepted. Mr van Bohemen submitted that Dr Blackwell's critique of Dr Macdonald's methodology was based on incomplete data. Dr Blackwell had not acknowledged the limitations of her evidence, and the criteria she applied of what is necessary for a diagnosis of PTSD differed from the criteria applied in this Court in previous cases.

[127] As already mentioned, Dr Macdonald prepared a second affidavit addressing the criticisms of her initial report.

[128] Dr Macdonald considered that it was inappropriate for Dr Blackwell to critique her assessment based solely on her "paper report", in circumstances where Dr Blackwell had not assessed the mother herself. Dr Macdonald also did not accept Dr Blackwell's concerns about the way in which the report gathered information and relied on it. Dr Macdonald said that her assessment "included very careful assessment of [the mother's] mental state on two occasions, careful phrasing of questioning to avoid leading questions, followed by a synthesis of all information by myself as an experienced consultant psychiatrist in the service of developing an accurate formulation and diagnosis".

[129] Dr Macdonald did not accept Dr Blackwell's suggestion that SVTs should have been used. She noted that they are more widely used by psychologists than psychiatrists, that there is debate about their utility, and that in her view clinical judgement is of more assistance.

[130] In relation to the diagnosis of PTSD, Dr Macdonald expressed the view that criterion (a) is not central to a PTSD diagnosis, and that in any event the mother's experience of trauma satisfied criterion (a).

[131] Dr Macdonald said that criterion (a) is the most controversial aspect of the DSM-5 PTSD criteria. Some argue for its removal altogether. She said that Dr Blackwell "conflates a PTSD diagnosis with DSM-V PTSD diagnosis. DSM-V is not the only diagnostic system, therefore it is not true that, as she states, '[a] diagnosis of PTSD is … wholly dependent on the fulfilment of [criterion (a)]'." Dr Macdonald went on to expand on her evidence about the impact on the mother's ability to parent if the symptoms of PTSD presented again. She also discussed in more detail what would be involved in managing the risk of recurrence of PTSD.

[132] Dr Macdonald was asked to specifically address the question whether the PTSD risk to the mother is such that the children will have little or no relationship

with their mother — not out of her choice but because she will be, to some degree, incapacitated. Dr Macdonald said:

> I think this is unlikely. I predict that [the mother] would likely be able to maintain a relationship with — and care for — her children even in extremely difficult circumstances. The more likely outcome if her PTSD deteriorates/worsens is that it would impact on the quality and sensitivity of her parenting as described in Part D, above, and that in turn would impact on the developmental wellbeing [of the] children.

[133] In response to the question whether the PTSD risk, taken together with the loss of her support network, loss of her current employment in Christchurch, limited work opportunities in France, lack of fluency in French, and the like, is such that the mother will or may well be unable to act as a responsible parent in France, Dr Macdonald said:

> As outlined above, [the mother's] mental health would be highly likely to deteriorate in that context, with a relapse of PTSD and high risk for depression. As I noted in my first report, [the mother] impressed me as a committed parent who at times of adversity has done her best to keep her daughters' best interests at heart. She does not have a history of such severe functional impairment that she has been unable to act as a responsible parent. However, as I also noted in that report I consider [the mother] "is unlikely to continue [to preserve her ability in the parenting domain] if she relocates to France."

Dr Blackwell's reply

[134] Dr Blackwell's reply affidavit in turn responded to aspects of Dr Macdonald's second report. Much of that response relates to SVTs, which we need not set out in detail for reasons explained below.

[135] Dr Blackwell said that it was appropriate for her to focus on the report provided by Dr Macdonald, and other documentation, because the purpose of her report was to offer an opinion about the methodology used in Dr Macdonald's report, and its implications for the accuracy and reliability of the assessment in the report in the specific circumstances of this case.

[136] Dr Blackwell provided further information and literature references about the difficulty for clinicians in ascertaining the genuineness of symptoms.

[137] Dr Blackwell also responded to Dr Macdonald's observation that DSM-5 is not the only diagnostic system. Dr Blackwell agreed this is correct, but noted that Dr Macdonald herself referenced DSM-5 in her original report. Neither that report nor Dr Macdonald's second report referred to alternative diagnostic systems. Dr Blackwell expanded on her concern about the absence of express reference to, and analysis of, the relevant diagnostic criteria and in particular criterion (a).

[138] Dr Blackwell was asked to address areas of agreement and disagreement. She said:

> [47] Finally, I turn to areas of agreement and disagreement. Dr Macdonald and I seem to be in agreement that interpersonal violence including physical and emotional abuse, infidelity marital separation, and isolation could all be regarded as being experienced as traumatic and highly distressing. However, there is disagreement as to whether the physical violence (as reported) and the other aspects referenced by Dr Macdonald would fulfil the stringent diagnostic criteria for PTSD. That may be a relevant determination for the Court of Appeal in the context that the PTSD diagnosis seems to have been pivotal to the Judgment of the High Court.
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> [48] I agree that interviewing of collaterals and referencing of available documentation are good and necessary processes in the clinical assessment of a person for Court proceedings and that Dr Macdonald complied with these. However, I disagree that her clinical experience and methods of checking for consistency etc. would suffice in terms of the obligation to use SVTs in a situation where the potential gains to [the mother] and potential losses to other parties including the children may be relevant.

Discussion

[139] Expert opinion evidence is admissible only if the fact-finder is likely to obtain substantial help from the expert's opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.[63] Where the expert's opinion is based on facts that are outside the general body of knowledge that makes up the expertise of the expert, a court can rely on that opinion only if the fact is or will be proved or judicially noticed in the proceeding.[64]

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63 Evidence Act 2006, s 25(1).
64 Section 25(3).

[140] It is not the function of a psychiatrist providing expert evidence to a court, or for that matter of any other expert witness, to make factual findings or to express opinions about the credibility of a witness of fact. That is not within the generally recognised scope of expertise of mental health professionals, and we are not aware of any evidence to suggest that mental health professionals are able to offer opinions on these topics that can substantially assist a fact-finder. We do not accept the argument advanced on behalf of the mother that it is within the field of expertise of a psychiatrist to determine whether the subject of a psychiatric report is credible and is telling the truth. Plainly a psychiatrist should be alert to inconsistencies in any account provided, and should draw those to the attention of the court in their expert report. But there was no evidence before us, whether from Dr Macdonald or anyone else, to suggest that determining credibility generally, or the accuracy of particular information, is within a psychiatrist's field of expertise. As Dr Blackwell explained, the empirical evidence reported in the literature suggests that clinicians are no better than others (including judges) at making credibility assessments. That concern must in our view be all the more acute where the psychiatrist had access to limited sources of information, and limited mechanisms for testing the accuracy of the information provided.

[141] In any event, s 25(3) of the Evidence Act 2006 would appear to preclude reliance on "factual findings" made by an expert in circumstances where those facts have not been established by other evidence in the relevant proceeding.

[142] Counsel for the mother suggested that evidence that did not meet the Evidence Act threshold for admissibility might nonetheless be received by a court considering an application under the Act by virtue of s 12A of the Family Court Act 1980. In proceedings under certain statutes, including the Care of Children Act, a court may "receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding".[65]

[143] Although s 12A of the Family Court Act sets a lower threshold for receipt of evidence in proceedings of this kind, permitting (for example) the receipt of hearsay

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65 Family Court Act 1980, s 12A(4).

evidence even if the Evidence Act tests for use of such evidence are not made out, it is difficult to envisage circumstances in which a court could place any real weight on expert opinion evidence that does not meet the "substantial help" threshold in s 25 of the Evidence Act. In particular, if the concern raised in relation to a report relates to the methodology used in its preparation, or a lack of balance in its preparation, we doubt that a report that will not provide substantial help in fact-finding could be described as a report that "may assist" the court.[66]

[144] Counsel for the mother also submitted that a realistic threshold should be set for expert reports in the context of Convention applications because of the tight timeframes within which evidence needs to be prepared. We do not accept that submission. If anything, the speed with which Convention applications need to be determined, and the rarity of cross-examination in the context of such applications, means that more care is required in the preparation of expert reports than in the context of trials where those expert reports can be examined and tested at greater length.

[145] In particular, the preparation of an expert report should not be used as a substitute for the provision of fact evidence relevant to the application. The expert should clearly identify the sources of information on which they have relied, and the facts that underpin any opinion they express. That should be done in a manner which enables the court to assess whether those facts have been established by other evidence.

[146] We agree with Dr Blackwell that it is not possible for reliable evidence about the truthfulness of an account supplied by a person who is the subject of a report to be provided by a clinician based on interviews alone. Rather, as explained above, any underlying facts need to be established by admissible evidence. The expert should identify the factual material that they have assumed to be correct for the purposes of providing their opinion, and should assist the court to understand the materiality of those (assumed) facts for the views expressed.

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66 Although note, on its special facts, *M v Ministry of Social Development* [2014] NZHC 3398.

[147] We express no view on the extent to which SVTs may enable an expert to express a view on the genuineness of symptoms reported by the subject of the report, as those tests were not used in the present case.

[148] We also accept Ms Crawshaw's submission that where a formal diagnosis of a specific mental illness is advanced by an expert:

(a) the criteria for that diagnosis should be explicitly set out;

(b) the matters that lead the expert to the conclusion that those criteria are met should be expressly identified; and

(c) any areas of uncertainty or doubt should be expressly identified.

[149] Dr Blackwell was right to focus on the "paper report" prepared by Dr Macdonald: that is what the court has before it, and the court needs to understand the basis of the views expressed including the facts that have been assumed and the transparency of the methodology that has been adopted.

[150] We accept the submission that in the absence of this analysis, the Courts below needed to be cautious about relying on the diagnosis of PTSD in Dr Macdonald's report. If Dr Macdonald was using the DSM-5 criteria, those should have been set out. If she considered those criteria were inappropriate, that should have been expressly addressed, with reasons. If she was using other criteria, from a different diagnostic system, that system should have been identified and the relevant criteria set out. The court is dependent on this information being set out in the expert's report, so that it can understand and assess the reliability of that evidence. Without this information, the court cannot safely rely on the expert's conclusions.

[151] We also accept the submission that Dr Macdonald's report lacked the balance that is an essential feature of a report by an expert who understands that their primary role is to assist the court, and not to act as an advocate for a party. In her first affidavit Dr Macdonald expressed firm and unqualified views about the conclusions she had reached without any indication of the level of confidence with which she was able to

express those views, having regard to the information available to her and the time available to prepare the report. Experts, and the lawyers who instruct them, should bear in mind that a report that is absolute in its terms and does not expressly set out necessary qualifications about the information available, and the confidence with which the expert's opinion can be expressed, is likely to carry *less* weight than an appropriately nuanced report.

[152] We add that all of these are matters which should be addressed by a lawyer who commissions an expert report, and should be considered before any such report is filed. If a clinician prepares a report that is not suitable for use in legal proceedings, it is the responsibility of the lawyer, not the clinician, to ensure that the necessary criteria for admissibility of the report and use of it by a court are addressed. The reservations we have identified above about the extent to which a court can rely on aspects of Dr Macdonald's initial report should not be understood as criticisms of Dr Macdonald, who would appear not to have had the assistance she needed from the mother's legal team to ensure that the requirements for admissible expert evidence were all identified and met.

[153] Dr Macdonald is a highly qualified and experienced psychiatrist. Her initial report was based in large part on facts that were established by other evidence, and on her own clinical observations. We do not consider that the concerns raised about her initial report render it inadmissible in its entirety. The focus of Dr Blackwell's criticisms was on the diagnosis of PTSD. We consider that for the reasons explained above, Dr Macdonald's opinion that the mother suffers from PTSD does not provide substantial help to a court in assessing the risk to the mother's mental health of a return to France. It cannot be relied on. Rather, we accept the view of Dr Blackwell that it is possible the mother has had PTSD as a result of the reported behaviours of the father, but this has not been demonstrated by evidence on which a court can safely rely. But ultimately the Court's focus must be on the overall mental health of the mother, and the likely impact on her mental health of a return to France. In that context, the specific diagnosis of PTSD assumes less importance.

[154] We add that we were substantially assisted by the more balanced approach adopted by Dr Macdonald in her second report, and in particular her views on

the likely consequences of a return to France for the mother's parenting set out at [132]–[133] above (treating the references to PTSD as references to mental health generally).

Removal from the primary carer: first and third grounds

[155] We will address the grounds that the mother relies on as establishing the grave risk defence in the same order as the High Court. We begin with the issues relating to the risk that the children will be removed from the mother as primary carer: the first and third grounds. We will then consider the second ground: the risk of the mother's mental health deteriorating to a point that significantly affects her parenting capacity. Finally, we will consider the additional ground relied on by the mother: that the children are now settled in New Zealand and it would be extremely disruptive for them to return to France. We will then stand back and consider those concerns cumulatively, to ensure that the overall risk to the children is addressed.

Submissions for the father

[156] The father submitted that the High Court Judge erred in finding that the interim orders made by the French Family Court gave rise to a grave risk of the children being placed in an intolerable situation if returned to France, because they would not be in their mother's care and might find themselves in the care of third parties during periods in which the father was absent attending to business affairs. He submitted that he had formally offered a shared care arrangement: in the event the mother returned to France she could seek variations of the interim orders that were made by the French Family Court to reflect that offer. And he had offered to give the mother a "first right of refusal" to care for the children if, contrary to his expectation, he was required to travel for business purposes at a time when the children were in his care.

[157] The father submitted that the Judge had erred in dismissing his assurances about the arrangements he had made to avoid the need to travel for business purposes, by dismissing them as inherently improbable. He also submitted that the Judge erred in dismissing the father's indication that he would call on the mother to care for the children if and when he needed to deal with business commitments, because these were "only intimations of protective measures and not protective measures in

actuality".[67] There was no good reason to think these assurances would not be honoured by him, or given effect in court orders if the mother sought to do so.

[158] Ms Crawshaw's primary submission, however, was that updating evidence about the modified interim orders made by the French Family Court superseded the analysis undertaken by the High Court. The French Family Court had now made orders providing for shared care by the mother and father. The children would not be away from the mother for more than a week at a time. That removes any concern about extended periods of separation from the mother.

[159] Ms Crawshaw also emphasised that in his updating affidavit sworn in October 2022 the father expressly confirmed that:

(a) He had made arrangements that would enable the business to operate without his being on site.

(b) If he does have any unexpected work commitments arising when the children are meant to be in his care under any shared care agreement, he is willing to provide binding undertakings that the mother is given the first right of refusal to have the children in her care. He expressed willingness for this to be recorded in an order of a French court. If the mother is not available to have the children in her care, then the father says he has support from wider family members to help him, in particular his brother and sister-in-law.

Submissions for the mother

[160] Mr Summerlee, who argued this issue for the mother, submitted that there are a number of issues that arise in relation to the modified interim orders. They had been issued by the French Family Court with limited participation on behalf of the mother. There was a risk that they might be undone as quickly as they had been procured. There were questions about the enforceability of these hypothetical orders, which he

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[67] High Court judgment, above n 4, at [119].

submitted appeared to be a "procedural novelty" in light of earlier evidence that the French Family Courts could not make hypothetical orders.

[161] Mr Summerlee also submitted that the orders would not be practically effective to address the risks identified. They made no reference at all to the "first right of refusal" arrangement offered by the father. The father had not even proposed that element of his offer as a matter to be included in the modified interim orders sought from the French Family Court.

[162] More fundamentally, Mr Summerlee said, shared care on a week about basis would still give rise to an intolerable situation. The High Court Judge had identified that the risk of the children being separated from their primary carer could be addressed "if the father acknowledged the mother's primary carer status and agreed to her having primary care of [the children] for any period pending further order of the French courts".[68] The orders made by the French Court did not go that far: they provided for a shared care arrangement, not for the mother having primary care of the children. Mr Summerlee submitted that this arrangement still involved the sort of separation from the mother that Mr Kelly had identified in his report as "disrupting their attachment bond with their mother". Mr Kelly said that requiring the children to be in the father's care without regular ongoing contact with the mother "is likely to be distressing for them and be reflected in more challenging behaviour and emotional disturbance". This, Mr Summerlee submitted, was the likely consequence of the proposed shared care arrangement.

[163] Mr Summerlee noted that the protective measures contemplated by the United Kingdom Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* and *Re S (A Child) (Abduction: Rights of Custody)* had ensured that the children in those cases would remain in the mother's primary care. The shared care arrangement contemplated by the modified interim orders fell short of this.[69]

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68 High Court judgment, above n 4, at [121].

69 *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144; and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257.

Discussion

[164] We agree with the High Court Judge that return of the children to France with their mother on the basis contemplated by the original interim orders made by the French Family Court would have been intolerable for the children. However as the High Court Judge recognised, those orders were made at a time when the mother's position before the French Family Court was unequivocally that she would not return to France. In those circumstances, the interim orders were hardly surprising. If the mother changed her mind, as she now has, and became willing to contemplate a return with the children, that would be precisely the sort of material change in circumstance that would be likely to prompt a court of a Contracting State, focusing on the children's welfare and best interests, to revisit interim orders of this kind.

[165] In circumstances where the mother's position had changed from that which she had previously conveyed to the French Family Court, one might reasonably expect her to apply for a variation of the interim orders. Making such an application was not obviously the responsibility of the father alone. Be that as it may, we agree with the High Court Judge that if the original interim orders were the only basis on which return was opposed, an adjournment would have been appropriate to enable those interim orders to be reconsidered. This could have been initiated by the mother, or the father, or potentially through judicial communication between the New Zealand Court and the French Family Court.[70]

[166] A modification of the interim orders has now occurred, on the application of the father. We do not think he can be criticised for the timing of that application: it was at the least a shared responsibility, and it is better that the position be clarified late than never. This Court is grateful to the French Family Court for the speed with which it proceeded to consider the application, to enable this Court to have the benefit of its decision.

[167] The modified interim orders remove the risk of prolonged separation from the children's primary carer that was created by the original interim orders. We do not have the benefit of expert evidence from Mr Kelly that specifically comments on the

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[70] High Court judgment, above n 4, at [124].

implications for the children of a shared care arrangement of this kind. But nothing in the information before this Court suggests that separation from the mother for up to one week at any given time will give rise to a grave risk of an intolerable situation for these children. They were in the care of their father for more than a week during his visit to New Zealand. In her discussions with Mr Wren, Amelia expressed a desire to spend time with both parents and suggested that she and her sister might spend 100 days with their mother then 100 days with their father on an alternating basis. She is only seven years old, and that suggestion is rather impractical. But importantly, she was not suggesting that spending a significant period with her father would be intolerable for her, provided she was confident that she would then return to spend a significant period of time with her mother. The modified interim orders ensure that the concern identified by Mr Kelly about a situation where the children are deprived of "regular ongoing contact" with their mother will not arise.

[168] In short, any risk created by the original interim orders has fallen away with the modification of those orders. We are not persuaded by the argument that the modified interim orders give rise to a grave risk of an intolerable situation for the children.

[169] The issue about arrangements for care of the children if the father is unavailable at a time when he is responsible for their care assumes much less significance in circumstances where the new orders do not contemplate the children being away from their mother more than a week at a time. We do not know why the father's undertaking was not addressed in his application for the new interim orders. We expressly record our expectation that the father will give effect to his stated willingness to formalise the undertaking to give the mother a "first right of refusal" if he is unavailable to care for the children. That undertaking should be provided on a formal basis to the French Family Court, if that is legally possible.

[170] We add that although the High Court Judge referred to protective measures that would involve the children being in the mother's primary care in France, no reasons were given for suggesting that that was the minimum necessary to avoid a grave risk of an intolerable situation. Nor is reference to protective measures contemplated in other cases a helpful guide to what is required on the facts of this particular case.

[171] Ultimately, however, the decisive factor before the High Court was the second ground: the potential impact of return on the mother's mental health, and as a result on the children. We turn to consider that issue.

Grave risk of the impact of return on the mother placing the children in an intolerable situation: second ground

[172] It was common ground before us that the date on which this Court should assess the existence of a grave risk is the date of the hearing before this Court. That is plainly correct. The assessment is a prospective one, made at the time of the hearing before the relevant court on the basis of circumstances as they exist at that time. It would make no sense to refuse an order for return of children based on a grave risk that existed at the time the application for return was made, but that had been fully addressed by protective measures put in place after that date. Conversely, it would be self-evidently inappropriate to make an order for the return of a child if, at the time a court came to consider the making of such an order, a grave risk of an intolerable situation had come into existence that was not present at the time the application for return was made, or at the time of a hearing before the Family Court. We proceed on that basis.

Submissions for the father

[173] Ms Crawshaw acknowledged that the evidence suggests that a return to France will be difficult for the mother and will possibly require her to access medical and/or therapeutic support. However she submitted that although there may be some risk to the mother, there is no sufficient evidential foundation for the Court to find that there is a grave risk that a return to France will place the children in an intolerable situation. She submitted that the evidence about the effect a return might have on the mother's psychological well-being, and the consequences of that for the children, is speculative and inconsistent, and does not establish the existence of any risk "which warrants the qualitative description 'grave'".[71]

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[71] Referring to *LRR v COL,* above n 10, at [90].

[174] Rather, Ms Crawshaw submits, even if the mother experiences PTSD symptoms on returning to France the evidence suggests she will remain able to parent the children effectively. She will enjoy the continued support of her family, albeit from a distance. The children will have the benefit of a shared care arrangement involving both their parents. The mother has not shown why the French legal, health and welfare systems will fail to protect the children against any potential risk to her health. The father has also given specific undertakings which reduce or remove any residual risk.

[175] Ms Crawshaw submitted that the High Court Judge erred in a number of respects:

(a) The expert evidence from Dr Macdonald was not subjected to sufficient scrutiny. The report could not safely be relied on, for the reasons explained by Dr Blackwell.

(b) The Judge failed to have proper regard to relevant factors, including conflicting evidence about the family violence allegations and aspects of Mr Kelly's s 133 report.

(c) Insufficient weight was given to the ability of the French system to provide protective measures, and the availability of therapeutic/medical treatment.

(d) On any view, the grave risk threshold was not met.

Submissions for the mother

[176] Mr van Bohemen emphasised the need for this Court to follow, and develop, the approach outlined in *LRR v COL*. He submitted that earlier New Zealand decisions which had influenced the approach of the Family Court Judge were out of step with the developing international jurisprudence on the Convention, and in particular the grave risk exception. *LRR v COL* had brought the New Zealand approach back into line with those developments. Consistent with that approach, it was important to recognise that the exceptions were as much part of the Convention as the obligation to

return. Nor is it appropriate to make assumptions about the availability of protective measures in the state of habitual residence, in the absence of evidence that those protective measures will in practice be effective.

[177] Mr van Bohemen expressed concern that the implications of *LRR v COL* were being read down by New Zealand courts, and an undesirably rigid approach adopted to Convention cases, by reference to the observation in *LRR v COL* that the decision "does not represent a material change in the approach the courts will take to determine Convention applications".[72] He submitted that properly understood, this Court's decision in *LRR v COL* represented a very significant step in the development of New Zealand's jurisprudence, and this Court should expressly recognise that.

[178] In this case, Mr van Bohemen submitted, the Family Court had adopted a pre-*LRR v COL* approach that put more emphasis on international relations between contracting states to the Convention, and less on the welfare and best interests of the children in each case. So for example, the Family Court Judge had relied on *KN v CN* and the English decision *C v C (Abduction: Rights of Custody)*.[73]

[179] The courts should not be wary in respect of defences based on psychological fragility, as suggested by the Family Court Judge.[74] Rather, the Court should adopt the approach outlined in *LRR v COL*,[75] which endorsed the approach outlined by the United Kingdom Supreme Court in *Re E*:[76]

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

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72 *LRR v COL*, above n 10, at [148].
73 *KN v CN* [2016] NZHC 2049 at [40] and [44]; and *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654 at 661. See Family Court judgment, above n 3, at [100].
74 Family Court judgment, above n 3, at [100(d)].
75 *LRR v COL*, above n 10, [111]–[114].
76 *Re E (Children) (Abduction: Custody Appeal)*, above n 69.

[180] Mr van Bohemen emphasised that the court is concerned with risks, not certainties. The critical question is what will happen if, with the mother, the children are returned. The analysis of risk should be grounded on the evidence before the court, not on assumptions about protections available in the requesting state.

[181] Mr Summerlee then addressed the details of this second ground. He submitted that the High Court Judge was entitled to rely on Dr Macdonald's evidence. The Judge carefully scrutinized that evidence, and considered the challenges advanced in relation to it by counsel. The risk identified by Dr Macdonald should be taken at its highest: recurrence of the mother's PTSD and extreme distress for the children. That would be intolerable for them.

[182] Mr Summerlee submitted that we should adopt the approach outlined by the Court of Appeal of England and Wales in *Re A (Children) (Abduction: Article 13(b))*:[77]

> [94] In the *Guide to Good Practice*, at [40], it is suggested that the court should first "consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk" before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in *Re K*, "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk". In making this determination, and to explain what I meant in *Re C*, I would endorse what MacDonald J said in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, at [7], namely that "the assumptions made by the court with respect to the *maximum level of risk* must be reasoned and reasonable assumptions" (my emphasis). If they are not "reasoned and reasonable", I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b) risk.
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> [95] But, I repeat, a judge must be careful when undertaking this exercise because of the limitations created by it being invariably based only on an assessment of the written material. A judge should not, for example, discount allegations of physical or emotional abuse merely because he or she has doubts as to their validity or cogency. As explained below, in my view this would lead the court to depart from the *Re E* process of reasoning while, equally, not being in the position set out in *Re K*
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> [96] If the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of Article 13(b), then, as set out in *Re E*, at [36], the court must "ask how the child can be protected against the risk". This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents

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77 *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939, [2021] 4 WLR 99.

> will be living apart. But, the court must carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of Article 13(b). And, to repeat what was said in *Re E*, at [52]: "The clearer the need for protection, the more effective the measures will have to be".
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> [97] In my view, putting it colloquially, if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in *In re S*, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave [rise] to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the *Re E* approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish.
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> [98] The likely consequence of adopting this middle course is, in my view, that the court will be treating the allegations less seriously than they deserve, if true. Equally, there is the danger that, for the purposes of determining whether Article 13(b) is established, the court will not properly consider the nature and extent of the protective measures required to address or sufficiently ameliorate the risk(s) which the allegations potentially create. In my view, as explained below, this is what happened in the present case.
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> [99] This does not, of course, mean there is no evaluation of the nature and degree of the risk(s) which the allegations potentially establish. This is the essence of the approach endorsed in *Re E* because the court is required to determine *whether* the allegations, if true, would establish the required grave risk.

[183] Mr Summerlee cautioned against "falling between two stools" in the manner described in *Re A (Children) (Abduction: Article 13(b))*.[78]

[184] In this case, Mr Summerlee submitted, the Court cannot confidently discount the possibility that the allegations give rise to an art 13(b) risk. There is no satisfactory evidence before the Court to establish that the risk could be addressed or sufficiently ameliorated so the children will not be exposed to a grave risk within the scope of art 13(b). The High Court Judge was right to find that there was a grave risk that the mother's mental health would deteriorate to a point that had serious adverse consequences for the children, and that this would be intolerable for them.

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78 At [97].

Submissions of counsel for the children

[185] Mr Wren noted that because the modified interim orders had only recently been made by the French Family Court, he had had no opportunity to discuss those orders with the children, or seek their views on such an arrangement. He noted that the views Amelia expressed to him about an appropriate outcome were akin to a form of shared care. He did not have any similar view expressed to him by Amelia's younger sister, Brigitte.

[186] Mr Wren said that the Court would need to consider what weight to give to the children's views, having regard to their age and the views that had been expressed to him and to Mr Kelly. He emphasised that this was not a child objection to return case.

[187] Mr Wren also noted that at the time Mr Kelly prepared his updated s 133 report, he had not been aware of the modified interim orders. So this Court did not have the benefit of any evidence from him about the likely impact from his perspective on the children as a result of the arrangements contemplated by the orders.

[188] Mr Wren drew our particular attention to the following paragraphs in Mr Kelly's report:

> 18. [Amelia] and [Brigitte]'s views were sought by Lawyer for Child. It is apparent that [Amelia] and [Brigitte] want to remain in New Zealand with their mother and that [Amelia] has maintained a wish to spend time with her father in France. I understand that [Amelia] and to a lesser extent [Brigitte] tell their father they want to come to France.
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> 19. I think [Amelia] and [Brigitte] value their relationship with their father and want to retain it but do not want to be separated from their mother.
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> 20. I am still of the view that [Amelia] and [Brigitte] would consider their home to be wherever their primary attachment relationships are that is their mother and then their father.

[189] Mr Wren said that from his perspective, there may need to be a question mark over the statement recorded at [18] of Mr Kelly's report, especially in relation to Amelia. It would be reasonable to understand Amelia's preference as a desire to remain in the care of her mother rather than to remain in New Zealand as such.

[190] Mr Wren noted that the children identify their mother as their primary attachment/carer.

[191] Mr Wren submitted that it was crucial for the children's well-being that the proceedings be determined as quickly as possible.

Discussion

[192] We accept Mr van Bohemen's submission that the approach set out by this Court in *LRR v COL* should not be read down by reference to the comments at [148] of that decision. Those comments were intended to dispel any suggestion that invoking the grave risk exception would too readily result in a decision to decline return, or that New Zealand would become a haven for parents who wrongfully abduct their children from their habitual residence. They were not intended to signal that the deliberate shift in emphasis explained in the body of the judgment should be discounted or disregarded. But, as we explain below, it remains the case that an order for return must be made unless the court is satisfied that an exception is made out, and that assessment must be based on relevant and reliable evidence, not speculation.

[193] The difficult issue in this appeal, as in many other grave risk cases, does not lie in identifying the applicable principles. Rather, the difficulty is how best to approach conflicting evidence on significant issues in the context of speedy proceedings where a full trial of the competing allegations is not practicable. That issue was addressed by this Court in *LRR v COL*.[79] We do not discern any material difference between that approach and the approach described in the English decision *Re A (Children) (Abduction: Article 13(b))* on which Mr Summerlee placed some emphasis in his submissions.

[194] Adopting the approach outlined in *LRR v COL*, we consider that the assertions made by the mother in relation to family violence are of such a nature and of sufficient detail and substance that they cannot be discounted. Likewise, it would not be appropriate to discount, on the basis of the limited evaluation possible in

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79 *LRR v COL*, above n 10, at [108]–[114].

these proceedings, the evidence that while the mother was in France her psychological well-being was significantly affected by the circumstances in which she found herself.

[195] However it was common ground before us that the circumstances will be materially different if the mother returns with the children to France. She will not be living with the father. There is no suggestion that she or the children will be exposed to physical violence. Opportunities for controlling behaviour and other psychological violence affecting the mother will be much reduced. Both Mr Kelly and Dr Macdonald identified a number of sensible practical steps that could be taken to reduce those risks, including minimising direct contact between the mother and the father.

[196] We acknowledge that the mother will face difficulties in relation to employment in France. But she is clearly motivated and resourceful. There may be roles in which her English is an advantage rather than a disadvantage. Fully or partly remote work (with regular periods in another city when she is not caring for the children) may also be an option. It is impossible to predict what work opportunities may be available to the mother, and we decline to speculate about this.

[197] We cannot confidently discount the possibility that the mother suffers from PTSD, or that a return to France will involve psychosocial stressors that will trigger a recurrence of PTSD. But we do not accept Mr Summerlee's submission that this possibility means that we must take that risk at its highest, and assume that it exists. That would be an abdication of the Court's responsibility to consider whether it is satisfied that return would give rise to a grave risk of an intolerable situation. On the evidence before us, we consider that return to France will involve significant stress for the mother, and a level of risk to her mental well-being. We also accept that if she is under stress, that will have some adverse effects on the children for whom she is the primary attachment and primary carer.

[198] But critically for present purposes, the evidence does not satisfy us that the risk of an intolerable situation for the children merits the qualitative description "grave". Even when the stressors on the mother were at their highest, while she was living with the father, she continued to be an effective and competent parent. The children were far from being in an intolerable situation. If she returns to France, the mother will be

less exposed to relevant psychosocial stressors than she was before her departure. Her position will in some respects be better than it was before. As a result of the modified interim orders, she will have some financial support from the father. There is evidence that she will also be entitled to certain welfare benefits.

[199] The mother will have access to support from her own family, mostly from a distance, though it seems likely that the maternal grandmother will continue to visit her daughter and grandchildren in France regularly, as she has in the past. She came to France to support her daughter when Amelia and Brigitte were each born, and can be expected to provide similar support in the future.

[200] The mother is also likely to have access to counselling and (if needed) mental health services. The mother expressed concern about availability of counselling in English in the area where she would be living, bearing in mind her limited fluency in French. We accept she will need to access English-language counselling. But the suggestion this will not be available in the area in which she would be living seems speculative. And one option would be for her to continue counselling online with her existing counsellor in New Zealand.

[201] We can also expect that the mother will be able to seek further protective measures from the French Family Court, if these are required in the best interests of the children. There is every reason to expect the father to comply with such orders, given the risk to his standing and to his business if he fails to do so. This is not a case like *LRR v COL* where there was a history of failure to comply with court orders, and where there was a significant risk that such behaviour would continue.

[202] We do not discount the real difficulties and stresses that a return to France will involve for the mother. She is likely to be significantly worse off than she would be in New Zealand. But the risk that this will impair her parenting to an extent that gives rise to an intolerable situation for the children is, in our view, too speculative to be described as a grave risk.

[203] Our conclusion draws support from the appropriately balanced assessment in Dr Macdonald's second report. Dr Macdonald assesses the risk of incapacitation of the mother as unlikely. Even without taking protective measures into account, Dr Macdonald's assessment was that the mother would likely maintain a relationship with, and care for, her children even in extremely difficult circumstances. Dr Macdonald saw the more likely outcome if the mother's PTSD deteriorates as an adverse impact on the quality and sensitivity of her parenting. That would be unfortunate. But it would not amount to an intolerable situation for the children, especially when set in the context of restoration of regular contact with their other primary attachment figure, their father.

[204] In short, even before we consider protective measures, we are not satisfied that there is a grave risk that the children would be placed in an intolerable situation. Once protective measures that are realistically likely to be available and effective are taken into account, that risk is further diminished. The grave risk exception is not made out on this ground.

Further ground — children settled in New Zealand

Submissions for the mother

[205] The mother submits that an order for the children's return to France would be psychologically harmful to them, or would place them in an intolerable situation, because they have been in New Zealand since October 2020 and they are settled here. Amelia has been here for one-third of her life, Brigitte for almost half her life. The mother submits that the girls want to stay in New Zealand. She acknowledges that the children's views are predictably immature but says that, essentially, those views are: they love both their parents; they feel at home in New Zealand (living with their mother, going to school and with new friends); they like their school; they feel they belong here; and they want to go back to France to visit (on this issue they give different answers to different questioners).

[206] The mother submits that the potential for a prompt return of the children to their familiar environment has now passed. Rather, if the children return to France now they would be uplifted from their settled life. They do not speak French.

Returning to France, and attending a French school, will be an overwhelming change and socially ostracising. It would be intolerable for them to be transplanted from a place where they are integrated and fluent to a society where they are effectively strangers.

Submissions for the father

[207] Ms Wilson, who argued this aspect of the appeal for the father, submitted that the new ground is misconceived. The Convention and the Act provide for a "settled" exception to return where an application for return is made more than a year after the removal of the child, and the child is now settled in their new environment. It is common ground that that exception does not apply here, as the application was made less than one year after the removal of the children. It cannot be extended to provide for a generally applicable "settled" exception: that would be inconsistent with the scheme of the Convention.

[208] Ms Wilson went on to submit that a grave risk of an intolerable situation cannot be established merely by showing that the children are now settled in New Zealand. Rather, the question is whether, if they return to France and are accompanied by their mother, they will be in an intolerable situation in that future scenario. There is no evidence to support the submission that the return to France would be an overwhelming change or socially ostracising for these children. The argument that they are effectively strangers to France is factually incorrect. Before their removal to New Zealand, the children were developing bilingually, achieving well, and by all accounts thriving in France. They have continued to enjoy a close relationship with their father, despite the difficulties posed by geographical separation. The views of the children are not as clear as the mother suggests: Brigitte has not expressed any clear view about return to France, and Amelia has expressed to Mr Wren a positive desire to spend extended periods living with her father in France. Moreover the views expressed by Amelia may have been influenced by the incorrect impression that their mother would not return with them to France.

[209] Return of a child under the Convention is inevitably disruptive to a child's life. But the evidence suggests that, despite the upheaval from a settled life in France, the children have adapted quickly and settled into a new environment in New Zealand. They are young: 7 and 5 respectively. That suggests they will similarly readjust happily to life in France, where they can return to familiar surrounds, enjoy a shared care arrangement with both parents, and have the opportunity to experience their French language, culture and family.

Discussion

[210] This new argument is, as Ms Wilson submits, misconceived. There will be disruption to the children in the short term if they return to France. But they have quickly adapted to life in New Zealand. There is no reason to think they will not equally quickly readapt to life in France. It is wrong as a matter of logic, and inconsistent with the scheme of the Convention, to assume that the mere fact that a child is settled in New Zealand means that return to their country of habitual residence, and the (transient) disruption that will entail, amounts to a grave risk that the child will be placed in an intolerable situation.

[211] In response to questions from the Court, Mr van Bohemen submitted that other factors needed to be taken into account, including the introduction of shared care when their mother has always been their primary carer, and the complexity of life with a poor mother and a rich father. We recognise that navigating the circumstances of their life in France will pose some challenges for the children. But we are confident that in doing so they will have the support of two loving, capable parents. They will also have the support of their wider families. Even taken at its highest, this ground does not approach the threshold of grave risk of an intolerable situation.

Overview of risks to children if they return to France

[212] Finally, to ensure we have not overlooked the cumulative effect of all these grounds, we stand back and ask whether in light of all the matters raised by the mother return to France will give rise to a grave risk of an intolerable situation for these children: one that they cannot be expected to tolerate.

[213] We cannot rule out the possibility of stress and challenges for the children on returning to France. The most material risk appears to be the second ground discussed above: risk to the mother's mental health that has flow-on consequences for the children. But looking at the situation in the round, the risk of outcomes that are so disadvantageous that they can be described as intolerable for the children is in our view far from grave. There will be transitional challenges for the children, but they can be expected to quickly readapt to speaking French and to life in France: that is after all where the parents made their home, where the children were born, and where the children were initially raised. As we have already acknowledged there will be significant challenges for the mother in returning to France. But the risk that these challenges will result in an intolerable situation for the children did not materialise before she came to New Zealand in October 2020, and the risk that that will occur on her return falls well short of the description "grave".

Should conditions be imposed or directions given?

[214] As this Court explained in *LRR v COL*, in circumstances where none of the s 106 exceptions is made out there is no power to impose conditions on an order for return of a child under s 105.[80]

[215] Our conclusion that there is not a grave risk of an intolerable situation was not dependent on the father's undertaking to provide the mother with a "first right of refusal" in relation to care of the children if he is absent for business reasons. So this undertaking cannot be incorporated in the orders we make. But as recorded above, we expect the father to formalise the undertaking and (if called on to do so) give effect to it in the French Family Court. Failure to do so after making such an unequivocal commitment would not reflect well on him.

[216] Mr Summerlee suggested that if the Court was minded to order return of the children, it should grant a stay until orders were made by the French Family Court providing for the children to be in the primary care of the mother. But as explained

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[80] *LRR v COL*, above n 10, at [116].

above, we do not consider that it is necessary for the children to be in the mother's primary care in order to avoid a grave risk of an intolerable situation.[81]

[217] The New Zealand courts do have the power to give directions to secure the return and "safe landing" of the children: for example, directions about who will accompany the child, payment for plane tickets, custody of the child's passport, timing of return, and other practical matters.[82]

[218] We urge the parents to strive to reach agreement about a reasonable approach to the return of the children to France. In particular, they should consider timing the return to minimise disruption to the children, while providing them with some time to adapt to life in France before beginning a new school year later in 2023. Consideration should be given to whether it may be less disruptive for the children to travel to France with their mother, rather than the father coming to New Zealand to collect them and bring them to France.

[219] We are confident that the father will want to minimise stress and disruption for his daughters, and ensure that their return to France is as smooth and happy as possible. He may wish to consider whether, to that end, he is willing to provide additional one-off funding to the children's mother to support the return of the children and their mother to France, and to support the establishment of a household in which the children will be well provided for and can flourish.

[220] If agreement cannot be reached about directions to secure the return and safe landing of the children, appropriate directions may be sought from the Family Court. We refer the proceeding back to the Family Court for that limited purpose.

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81 See above at [167]–[168].

82 *LRR v COL*, above n 10, at [116]; see also Hague Conference on Private International Law *1980 Child Abduction Convention Guide to Good Practice Part VI Article 13(1)(b)* (The Hague, Netherlands, 2020) at [49].

Costs

[221] Counsel agreed that for costs purposes this was a standard appeal to which band A applied. Ms Crawshaw submitted that costs should follow the event. Costs should be awarded for two counsel.

[222] Mr van Bohemen submitted that whichever way the Court determined the appeal, it should have regard to the conduct of the appeal, including the last minute change of landscape as a result of the father's belated application to the French Family Court to modify the interim orders. The provision by the father of a large amount of evidence on 7 February 2023, the day before the mother's submissions were due, should also be taken into account.

[223] Although the position before this Court was ultimately relatively clear, these proceedings have taken a somewhat tortured path. In the Courts below, and in written submissions filed in this Court, there was considerable speculation about what the French Family Court might do if the mother returned to France. As the recent orders made by the French Family Court demonstrate, there was a simple way of ascertaining this by approaching the French Family Court. That could and should have been done at an earlier stage of the New Zealand proceedings. Responsibility for this lies, however, with both parties: not just the father.

[224] Much of the complexity of this appeal stemmed from the significant quantity of updating evidence placed before this Court, and from the provision for the first time of expert evidence responding to Dr Macdonald's psychiatric evidence. Dr Blackwell's evidence was helpful to us. It would have been helpful to the Family Court and High Court, had it been made available in those Courts. The late provision of this evidence has added to the complexity of the proceedings. On the other hand, the need for that evidence stemmed in part from the deficiencies in the evidence filed for the mother.

[225] Standing back, we agree that the proceedings have been unnecessarily protracted and unnecessarily complex. Responsibility for that lies with both parties. In those circumstances we consider that each party should be left to bear their own

(undoubtedly substantial) costs, and neither should be required to contribute to the costs of the other party in this Court.

Result

[226] The appeal is allowed.

[227] The judgment of the High Court is set aside.

[228] The judgment of the Family Court, and the order made by the Family Court under s 105(2) of the Care of Children Act 2004, are reinstated.

[229] The proceeding is referred back to the Family Court at Christchurch to give any directions that may be necessary to implement the order for return of the children.

[230] There is no order as to costs.

Solicitors:
Glaister Ennor, Auckland for Appellant
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