EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN DELETED.

NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT HUTT VALLEY

FAM-2017-096-000238
FAM-2017-096-000286
[2017] NZFC 6950

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
AND	
IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[SANYA SHARAF] Applicant
AND	[RAJI PRASHAD] Respondent
AND	[HALIM MISRA] [PAVANI SANDHU] Associated Respondents

Hearing:	8 August 2017
Appearances:	Ms J Greally for the Applicant Mr C Nicholls for the Respondent and Associated Respondents
Judgment:	30 August 2017

RESERVE DECISION OF JUDGE P J CALLINICOS
[Protection and Spousal Maintenance]

Introduction

[1] This decision arises from a hearing allocated to determine two matters between the applicant, Ms [Sharaf] and her husband the respondent Mr [Raji Prashad]. It also involves the respondent's parents, Mr [Halim Misra] and Mrs [Pavani Sandhu]. I will refer to the applicant and respondent as being "the parties" and the respondent's parents as "the associated respondents".

[2] The first matter arises under s 80 The Domestic Violence Act 1995 consequent upon a temporary protection order having being made on Ms [Sharaf's] without-notice application on 12 June 2017 against all three respondents. The issue is whether that order be discharged or be made final against any of the respondents. It is salient to record that at the commencement of the hearing the applicant confirmed she was discontinuing her application for a protection order against the associated respondents but wished a final protection order against the respondent.

[3] The second matter pertains to an application for a spousal maintenance order that her husband to pay to her maintenance pursuant to The Family Proceedings Act 1980.

Background

[4] Through the involvement of the parties' respective families, they entered an arranged marriage in India on [date deleted] March 2016.

[5] The respondent left for New Zealand about a week later, leaving the applicant to live with the associated respondents in India from the time of the marriage until she travelled to join her husband in New Zealand on [date deleted] June 2016.

[6] The respondent has New Zealand residency, whereas the applicant arrived in New Zealand on a work visa. Until recently her husband was her sponsor but since separation he has withdrawn his sponsorship, leaving the applicant with what is likely to be a precarious immigration status.

[7] The respondent's parents arrived in New Zealand on [date deleted] May 2017 on a tourist visa. They are due to return to India on [date deleted] September 2017. After their arrival, the parties and the associated respondents resided together in the same home.

[8] It is fair to say that all was not happy in the home. The respondent did not believe that the applicant was showing his parents adequate respect and attention. From her perspective she felt that his parents were snubbing her parents in India and became upset that her new husband was not being protective of what she perceived as his responsibility to his new wife. She viewed him as being bullying and domineering by repeatedly demanding that she do things which she did not wish to do.

[9] Whatever the reality, an increasing divide occurred, pitching the applicant against the respondent and his parents. Arguments between the parties occurred with regularity, they were often heated and often involved the associated respondents joining the fray. It is the specifics of what actually occurred in these disputes that forms the focus of the domestic violence proceedings.

[10] Matters escalated to the point where, on [date deleted] June 2017 the applicant filed her without-notice application and obtained the temporary protection order against her husband and the associated respondents. She was living in the same home as them at the time. Despite her expressed wish that the marriage continue, albeit under the protective umbrella of a protection order, the parties eventually separated [date – 2 days after obtaining the temporary protection order in] June 2017. Since that time they have become even more polarised.

[11] The evidence demonstrates that the respondent never wishes to sight his wife again, instead he hopes that she will return to India, sooner rather than later. His

perception of the applicant is unquestionably linked to his anger arising as a consequence of police involvement when he was arrested and charged with one charge of injuring with intent to injure and two of assault with intent to injure. In examination, when asked whether he accepted he had a responsibility to support his wife and if he felt his wife had enough money to live off, he answered;

> Do I? I have been sent to jail under something I haven't done.[1]

[12] He held a very negative view of her, one which palpably overrode any perception of either his wife's desperate living situation or any duty he had to provide support. He regarded the applicant's statements to police as being cynical and that her application for a protection order was merely a means for her to extend her stay in New Zealand.

[13] In any event, the police elected to withdraw all charges against the respondent. The reasons for the withdrawal of those charges in a criminal jurisdiction are largely irrelevant, as the Family Court retains an obligation to assess and determine any application for a protection order according to the admissible evidence assessed to the balance of probabilities according to the requirements of the Domestic Violence Act. That is a different analysis from that undertaken by a District Court in its criminal jurisdiction.

[14] As opposed to the respondent, the applicant still expresses a strong wish for the marriage to continue, a wish which, by any analysis, may be generously described as wildly optimistic given the rigid position taken by the respondent. He has all but eliminated her from his memory.

[15] After the parties separated on [date deletd] June 2017, the applicant subsequently applied on notice for a furniture order seeking a range of items of property. Agreement was reached in the hearing that the respondent will provide her with three such items, namely; a quilt, a bed and mattress and a set of drawers. Upon the basis that such items are supplied by the respondent to the applicant, the application for a furniture order is thereby discontinued. I trust that the respondent

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[1] Notes of Evidence 78, line 5

will honour his statement to the Court to supply those items, as the Court would not wish to have him recalled if he failed to abide his statement in Court.

[16] In addition to the application for a furniture order, the applicant also sought on a without-notice basis an interim spousal maintenance order. It was granted by a Duty Judge who correctly noted that the applicant was in impoverished circumstances, was not eligible for a benefit and the amount sought was modest. The Judge noted that the delay in proceeding to a hearing would cause some hardship to the applicant. The Judge was satisfied that the respondent had the means to pay and made an order that the respondent was to pay to the applicant spousal maintenance in the sum of $300.00 per week for a period of six months from the date of the application. He granted leave to the respondent to apply to set aside the order on three days' notice.

[17] The respondent duly made application to set aside the order, claiming that the applicant had failed to fully disclose material factual matters in her original application. Although the Court file is somewhat scant on detail, on 20 July 2017 his Honour Judge Black suspended the interim spousal order made 29 June 2017. He specified that the application to set aside the order be heard on 8 August 2017.

[18] It was not readily apparent to me from the Court file as to what the Court was expected to determine at this hearing given that the respondent had merely filed an application to set aside the interim order, which had been given effect to by way of suspension, but had not filed any notice of defence to the substantive matter. It was agreed by counsel that the parties wished the whole issue of maintenance to be determined at the hearing , namely determine whether or not the respondent pay any spousal maintenance and, if so, in what amount. I have proceeded on that agreed position by counsel.

The Evidence

[19] In determining these proceedings I had reference to some six affidavits filed by the applicant, three affidavits from the respondent and one affidavit from the

respondent's parents. I also had the advantage of observing each of those parties in extensive examination.

[20] I found that the applicant to be a reliable witness throughout her evidence. She displayed a remarkable consistency of recollection. I observed that in her cross-examination her answers were given spontaneously, concisely and the detail of her oral evidence was strongly consistent with her statements in her affidavits. She maintained consistency throughout her various answers to cross-examination and while, at times, she tended to provide a fuller answer than the question put to her demanded, this was not in a manner which was seeking to deflect the heart of the question put to her. She was a fair minded witness and I was not left with reservation as to her reliability.

[21] I did not hold such a degree of confidence in the evidence of the respondent. His recollection of some events was not consistent with some of his sworn statements, there were various areas in his examination where he did not have a very good recollection of the detail of the specific events and there were inconsistencies within it. I emphasise that I am not indicating that I found the respondent to be untruthful. Rather, as compared with the applicant, I did not hold the same confidence in the reliability of his far less accurate recollection of events. For that reason, where differences arose in the evidence of the applicant and respondent, I greatly prefer the evidence of the applicant.

[22] The respondent's mother was a very confused witness. It did not assist that her evidence was conveyed through an interpreter, and it was a somewhat torturous task for the interpreter and for anyone trying to follow what was being said by her. On many occasions when very simple questions were put to her, ones which should easily have been answered with simple "Yes" or "No" answers, [Mrs Sandhu] would give a lengthy statement in her native language. Despite my best attempts to have her break up her answers so that they could be translated in short segments, such an outcome did not arise. As far as I could ascertain from her evidence it was dominated with inconsistencies and confusion. I was left with considerable doubt as what she was actually saying, let alone the accuracy of it.

[23] The respondent's father, [Mr Misra], was somewhat easier to follow and he appeared to be a reasonably reliable witness. That said, he did not see a great deal of the particular events in issue as he was, for most of it, not present during material incidents as he was attending to his wife who had fallen during one of the incidents.

[24] In summary, where factual disputes arise I prefer the evidence of the applicant.

Domestic Violence Act Proceedings

Law

[25] In determining whether a Protection Order be made, whether in respect of an on notice application or in assessing under s 80 whether a Temporary Order ought to continue, the Court must be satisfied on the balance of probabilities as to three core matters;

1. that a domestic relationship as defined in s 4 exists or did exist between the applicant and respondent, and

2. that the respondent is or has committed an act or acts towards the applicant, or a child of the applicant's family, which amounted to domestic violence as defined in s 3, and

3. having regard to the mandatory matters in s 14, the making of a protection order is necessary for the protection of the applicant, or a child of the applicant's family, or both.

[2] The Court of Appeal decision *Surrey v Surrey* [2010] NZFLR 1 is the leading authority on the issue of necessity, from which the following principles may be drawn;

- all that is required of an applicant is to establish the existence of past violence and a reasonable subjective fear of future violence; paragraph [77],

- There is no burden on an applicant to prove that future violence was likely; paragraph [77],

- once an applicant has proved existence of past violence and a reasonable fear of future violence, an evidential burden passes to the respondent to raise countervailing factors that weigh against the necessity of an order; paragraph [77],

- Unless the respondent meets this evidential burden, the applicant does not need to show that no countervailing factors exist; paragraph [43],

- under s14(3) the Court must consider whether past domestic violence forms part of a pattern of behaviour in respect of which the applicant, or a child of the applicant's family need protection; paragraph [99],

- under s14(5)(a) it is mandatory to have regard to the perception of the applicant, or a child of the applicant's family, of the nature and seriousness of the behaviour in respect of which the application is made. The scheme of the Act envisages that the Court will assess the risk of domestic violence on the basis of past conduct, informed by the subjective views of the victim and any other relevant factors; paragraph [101]

- the requirement to take account of the applicant's subjective fears regarding past violence is to ensure that not only are such persons safe from future violence, but feel safe; paragraph [102]. However, the subjective fears should not be the sole criterion where there are other relevant factors to be considered and/or where an applicant's subjective views are unrealistic or unreasonable; paragraph [120],

[26] Since *Surrey* the High Court in *Q v Q* [2012] NZFLR 582 has confirmed that the applicant's claim to holding a subjective fear of future violence must be shown to be reasonably held. Referring to the decision of Priestley J in *K v G* [2009] NZFLR 253, Heath J confirmed the following;

a) Despite s 14(5)(a) the Court needs to assess the reasonableness of the subjective perception of an applicant,

b) Whether or not a protection order is necessary is an objective exercise, informed by a number of factors, including the applicant's subjective perception. However, such perception is not the sole relevant factor,

c) It is not always sufficient to base a protection order on the applicant's view that it will give them peace of mind.

[27] The Court of Appeal in *SN v MN* [2017] NZFLR 436 undertook a close analysis of the approach adopted by the Family Court in assessing matters of what comprises domestic violence and the correct approach for assessing the issue of necessity. While the decision does not alter the *Surrey* approach, it provides guidance as to the application of principles to the specific circumstances of a particular case. The Court confirmed (at [19]) that the Act requires an essentially fact-specific inquiry conducted within its logical framework. In terms of whether domestic violence is found to have occurred, ultimately a Court must stand back and review the evidence in totality in order to decide whether it is satisfied that all incidents, viewed together, amount to domestic violence.

[28] If domestic violence is established then the second inquiry requires the Court to inquire whether an order is necessary, not upon proof to a particular standard, but upon the exercise of judgement based on all the evidence; see [22]. Where the Court is satisfied that the behaviour is such as to lead to reasonable fears for safety based on being subjected to a pattern of recent serious violence then, unless there are very strong indicators to the contrary, it is unlikely a protection order could be refused.

[29] The Court held that the approach of the Family Court in assessing necessity was incorrect in that the exercise was not a balancing act. The inquiry was not a discretion, but involved assessment and judgement. This is consistent with *Surrey* in that, rather than balancing the applicant's case against the respondent's, the correct approach is first to assess if an applicant has met the onus to establish the fact of

violence and a reasonable subjective fear of future violence, whereupon the onus shifts to the respondent to establish factors against necessity. That is not a balancing exercise. Rather, it is a progressive analysis of two separate onuses.

[30] I turn now to consider such of these principles as may be relevant to the proceeding before me.

Were there acts of Domestic Violence?

[31] The evidence assessed to the requisite standard supports a determination that there were acts of domestic violence perpetuated by the respondent to the applicant within the definition in s 3 of the Act. These acts of violence incorporated physical abuse, psychological abuse and elements of financial abuse.

[32] In terms of physical abuse I preface my findings by recording that the applicant and respondent were drawn into an unhappy marriage with various familial tensions forever at play. It was not easy for either of them. Their differences led to a variety of heated exchanges, in many of which they were each responsible for the escalation of the tensions. However, the evidence led me to a conclusion that the respondent dominated the violence, both in terms of imposition of his physical presence, his greater physical strength and his somewhat cold view of his new wife.

[33] In terms of the specific acts of physical abuse, the first occurred in or about October or November 2016, prior to the respondent's parents coming to New Zealand. As with almost every argument, it arose because the respondent accused the applicant of disrespecting his parents. He held to the view that she ought to be telephoning them in India and that she was not talking to them often enough. From the applicant's perspective she was not very keen on complying with her husband's demands of her. This lack of compliance by her to his demands was a common cause of distress between them.

[34] I accept her evidence that on this first occasion the respondent acted upon his ill feeling of her by pushing her onto a bed, then onto the floor, where he sat on her and put his hands over her mouth. The reason why he put his hands over her mouth

was because he was trying to keep her quiet as his brother was also in the house. While the respondent claimed there was mutual pushing, my preference for the applicant's evidence leads me to conclude that although at times she attempted to push him away in defence and a degree of anger, it was the respondent's greater level of anger and greater physical strength that drove the acts of aggression. His acts dominated the disputes and were acts of physical abuse.

[35] The next specific event arose on 31 January 2017 when the respondent again became angry and frustrated. He was in a poor frame of mind and began shouting at her. When the applicant asked what his problem was, he responded by grabbing her clothes and pushing her. She deposed that her brother-in-law, [Tarak], came out of his room and stopped the respondent from attacking her by grabbing the respondent around his arms and telling him to stop. I accept the applicant's version of that event.

[36] The next event arose shortly after when the parties were driving to the applicant's work. Another verbal dispute erupted. To a level it was mutual, but I accept the applicant's version that the respondent was repeatedly swearing at her in a profane language. She did lose self-control in response to his verbal abuse, she swore at him and then grabbed his sunglasses before dropping them on the floor of the car. She accepts that she scratched him on the forehead as she grabbed his glasses.

[37] In terms of that specific event there was verbal abuse by the respondent to the applicant. It is my determination that although the applicant responded with a swear word, the abuse was dominated by the respondent and it was an act of domestic violence. It is also clear that the applicant acted in a way which could be described as perpetuating physical abuse by grabbing the glasses, whether or not they were broken by her is another issue given the respondent made no mention of damage to his glasses in his affidavit. Instead, he suddenly produced a pair of seriously damaged glasses when he was presenting his evidence-in-chief. While that aspect is not pivotal to my findings, it is most surprising that it was never mentioned in his affidavit. The applicant accepts that she scratched him on the forehead in the act of taking the glasses from him. However, given that there has been no application for a

protection order against the applicant, the Court's focus must be upon the respondent's behaviours, taking into account relevant matters of context.

[38] Perhaps the most significant arose after the associated respondents arrived in New Zealand in late May 2017. On 31 May 2017 there was yet a further argument between the parties. It arose when the applicant raised the subject as why her parents-in-law had not taken the trouble of visiting her parents on their way to the airport before flying to New Zealand. Issues of disrespect again arose. The discussion escalated and the respondent got up off a sofa where he had been sitting next to his mother and approached the applicant who was sitting in a chair.

[39] I accept the applicant's evidence that she was struck twice in the abdomen area as the respondent grabbed her arm with some considerable force, lifting her up out of her chair. Although the respondent denies ever striking the applicant in the abdomen, I have preferred her evidence. He did accept that he had grabbed his wife and lifted her out of the chair. That on its own is an act of physical abuse as he had no right under any analysis of the law to apply such physical force to another person. The fact he had done this to his wife led her to try and push him away, he was pushed backwards and his mother toppled over causing bruising to her arm.

[40] While the respondent and his mother both stated that the applicant had used one arm to push the respondent and one arm to push her mother-in-law, I do not accept that evidence. I did form the view that there had been a level of significant discussion between the respondent and his mother as to their recollections of events. I am justified in that perception for the reason that the respondent had acted as a translator for his parents when they drafted their affidavit in the presence of the respondent's counsel. It is somewhat unfortunate that the respondent was so intrinsically involved in the drafting of the affidavit from his supporting witness. Their affidavits cannot for a moment be viewed as being crafted in isolation of the other.

[41] In any event, it is my view that the fact that the respondent's mother fell over and was injured arose as a sole consequence of the respondent acting violently towards the applicant, the applicant having tried to defend herself from his attack by

pushing him away, in turn causing the mother-in-law to fall. Although the applicant has been targeted as the person responsible, I reject such a conclusion by a significant margin. The evidence supports the conclusion that the catalyst for that unfortunate event was the violence of the respondent to the applicant.

[42] After the mother fell, the respondent continued his violence by grabbing the applicant and pushing her out towards the front door, holding her up against the door with his left hand around her neck and again punched her in the stomach area. It is significant to note that neither of the associated respondents were present during that event. Mr [Misra] was busy attending to his wife who had fallen by the sofa in the lounge. They remained in the lounge before proceeding to their bedroom. Neither saw the events between the parties by the front door.

[43] The respondent then pushed the applicant from the area of the front door into the bedroom, where she fell and ended up lying backwards on the bed. It was only at the end of that act of abuse that the associated respondents, primarily the mother-in-law, came to the door pleading with the parties to stop.

[44] I also accept the applicant's evidence that she had heard her in-laws saying that she should pack her bags and that the respondent should send her back to India. I accept that such a statement was made, as it is corroborated by the fact that such is exactly the strategy that the respondent has pursued since separation. He has withdrawn his immigration sponsorship for her, has not paid her a cent of the interim spousal maintenance ordered by His Honour Judge Burns and instead obtained a suspension of that order some weeks later. The actions post-separation confirm those prior to it.

[45] The applicant alleged that she had been assaulted by her in-laws. Although I have otherwise accepted her evidence, it does appear to be that the interaction between these four adults (predominantly the parties and the respondent's mother) was of such intensity, with considerable pushing and yelling occurring, it was a somewhat confusing set of events. I am not satisfied from the evidence that the associated respondents used any direct intentional physical force upon the applicant.

[46] In summary, I determine that the respondent had perpetuated physical and verbal abuse upon the applicant, the physical abuse comprising forceful grabbing of her arms, holding of her neck and punches to her abdomen. That conclusion is supported by my preference for the applicant's evidence and the inconsistencies in aspects of the evidence of the respondent and particularly the mother-in-law. In addition, there is medical evidence of hospital notes dated 7 June 2017 which refer to the applicant stating that she had been hit in the abdomen and grabbed around the neck and arms. The medical evidence shows bruising over both arms with at least three small circular bruises, which in my view would be consistent with the grabbing action. While there were no bruises disclosed around the applicant's neck, that is unsurprising given it is somewhat more difficult area of the body to bruise than the softer areas of the arms. Those examinations also occurred some eight days after the incident in question.

[47] I have determined that although there were some aspects of mutual abuse both verbal and physical, by far the dominant source of abuse was the respondent.

[48] The respondent also dominated the applicant in a psychological manner, to a level which amounts to psychological abuse. It is clear he held little, if any, respect for her, thereby limiting his ability to moderate his interaction with her to something approaching that expected of a loving husband. While it is unclear whether this palpable lack of any emotional support was a product of an arranged marriage, the end result was an almost disdainful attitude by the respondent towards her. He often swore at her, made her feel inferior and has done nothing to make her feel supported in any way, let alone ever loved. His treatment of her throughout this short marriage, was very poor and is very evident in the way he has sought to 'cut her adrift' when the marriage ended.

[49] In terms of whether there was any financial abuse, although the respondent maintained a considerable control over matters of finance, the reality is that neither of the parties was possessed of great financial wherewithal. His close management of fiscal matters during the marriage fell short of amounting to financial or economic abuse. In reaching this conclusion, I do record my concern that the respondent has taken a very harsh approach to any financial support of the applicant following

separation and while those matters might be viewed as inappropriate, I do not believe they reach the threshold of being financial abuse. In any event the paucity of his financial support to her can be resolved by determination of the spousal maintenance application without the need for a protection order.

[50] Accordingly, having determined that there were acts of domestic violence committed by the respondent against the applicant, I move to consideration as to whether the applicant has established the onus that she holds a reasonable subjective fear of future violence.

Is there a fear of future violence?

[51] As indicated in *Surrey,* if an applicant has established that acts of violence have occurred then she must also establish that she holds a reasonable subjective fear of future violence. That analysis derives from consideration of s 14. The Court is required to have regard to the perception of the applicant as to the nature and seriousness of the behaviour underpinning the application and also the effect of that behaviour upon the applicant. *SN v MN* confirms that a collective evaluative assessment of all evidence is required, as opposed to an incident by incident approach.

[52] There was no evidence produced by the applicant, either by affidavit or in examination as to her fear of any future violence. At best her views and perception can be inferred. It is her position that she wishes the marriage to resume, a wish which I must say is unrealistic given the emphatic statements of the respondent and the immense gulf between the applicant and the respondent and his family. She stated she was seeking a protection order to protect her against being hit or abused if her wish for reconciliation should transpire in reality. If that was a realistic proposition then I would have no difficulty in reaching a conclusion that the applicant did hold a reasonable subjective fear of future violence.

[53] However, given there is no prospect of the applicant and respondent resuming their relationship and that there has been no ongoing relationship of any kind except through the Court process, the applicant cannot hold a reasonable subjective fear of

future violence ever occurring. In the actual circumstances before the Court, the applicant's position that she requires a protection order in the event of reconciliation is practically unrealistic. It would be an unsustainable conclusion given that reconciliation is not remotely likely to occur.

[54] Accordingly, the applicant has not established the second of the two elements required to be established by her according to the legal principles. That in itself carries a consequence that there is no legal basis for sustaining an ongoing protection order. However, for the avoidance of doubt, and given I have heard evidence on all elements I do record my factual finding on the issue of whether the respondent has met the onus, which would otherwise have moved to him, to establish factors against ongoing necessity.

Is there a necessity for an order?

On all the evidence, the respondent would have established that there is no ongoing need for a protection order. In reaching such a conclusion, I applied the approach mandated by both *Surrey and SN v MN* by ensuring that I did not adopt a balancing act approach. Instead I have confined my enquiry to whether the respondent has established countervailing factors against necessity.

[55] The respondent has established there is no necessity for an ongoing protection order for the following reasons;

(a) The marriage is clearly over. There is no realistic prospect of reconciliation.

(b) Since separation the parties have had no form of contact with each other, except for communications for the purposes of post-marital purposes.

(c) There has been no violence of any kind since separation. Although there are concerns regarding the respondent's approach to financial support of his wife in her financial circumstances, those matters are

more appropriately viewed as being disputes in the nature of spousal maintenance.

(d) As there is no prospect of the parties coming into any form of contact, there is no opportunity for violence of the type that has occurred during the marriage.

[56] Given I have determined the applicant did not establish the onus upon her that she holds a reasonable subjective fear of future violence and, for the avoidance of any doubt, have confirmed that the respondent would have met the onus upon him to show factors against necessity, it follows that there is no basis for an ongoing protection order.

[57] The temporary protection order made against the respondent on [date deleted] June 2017 is therefore discharged. I also record that the application for a furniture order had been discontinued, noting the agreement by the respondent that he provide the furniture as previously specified.

Spousal maintenance

Introduction

[58] As prefaced, the applicant filed an application for interim spousal maintenance, leading to His Honour Judge Burns granting an interim spousal maintenance order in the sum of $300.00 per week commencing from the date of the application namely 28 June 2017. That order was suspended on 20 July 2017. The respondent has not paid any sum to the applicant since separation.

[59] There was some criticism made by the respondent of the applicant that she had removed $925.00 from the joint bank account, an aspect which she had not deposed in her original application. It appears that it was because of that non-disclosure that the interim order was suspended. Of greater concern to me is the salient fact that this applicant is of very limited financial means, has been left in a desperate situation since the end of the marriage. Despite her situation, and despite

the ill feeling that led to the demise of the marriage, the overriding consideration must be matters of legal obligation to support by reference to means and capacity of the two parties. The suspension of the interim order has served only to increase the hardship posed by the applicant.

Law

[60] Section 63(1) of the Family Proceedings Act 1980 creates a duty upon each party to maintain the other party to the marriage to the extent that maintenance is necessary to meet the reasonable needs of the other party, where the other party cannot practicably meet the whole or any part of those needs because of any of their circumstances in subs (2).

[61] In the case of *Wederell v Wederell* [1994] NZFLR 928 the High Court indicated that in determining matters of spousal maintenance the Court requires to identify the following;

(a) What are the applicant's reasonable needs and the amount of money required to satisfy them?

(b) To what extent can the applicant meet those needs?

(c) Does the applicant's inability to meet his or her reasonable needs arise because of a qualifying circumstance? If not, the applicant cannot obtain maintenance through the other spouse.

[62] By qualifying circumstance, the Court was referring to the variety of circumstances deriving from s 63(2). Any liability to pay spousal maintenance only exists to the extent that a spouse is unable to meet their needs due to any of the circumstances described in the Act.

[63] The Court of Appeal in *Z v Z* recognised that "reasonable needs" are not limited to a subsistence level. The Court confirmed[2] that what constitutes the

[2] *Z v Z* [1997] NZFLR 241, p 277

reasonable needs of one person may not be sufficient to meet the reasonable needs of another, stating:

> "What is appropriate provision for the reasonable needs of a wife in some circumstances may not be adequate for a wife in other circumstances. Maintenance to meet the reasonable needs of a party may vary considerably. Furthermore, the fact that the Court is to have regard to the reasonable needs of "each" party, indicates that … it will necessarily be examining their relative needs.

[64] Once liability to maintain is established under s 63, the inquiry turns to matters of quantum. Section 65 prescribes the matters that the Court must have regard to in assessing any amount payable. The Court of Appeal in *Z v Z* confirmed that s 65 'clearly confers upon the Court a significant measure of discretion in determining the amount of' any award.[3]

[65] Section 65(2) presents five mandatory factors to which the Court must have regard in this assessment. I need not repeat the full text of s 65. The analysis of factual matters that follows takes into account both s 63 and s 65 considerations.

Respective Earning Capacity

[66] These parties were married on [date deleted] March 2016, separated on [date deleted] June 2017 but remain legally married. Accordingly, the liability between them in s 63(1) in terms of a qualifying relationship is established.

[67] The consideration of respective potential or likely earning capacity of each party is relevant both to the assessments of liability in s 63 and quantum under s 65. I commence with the applicant. The applicant has tertiary qualifications in the area of [area deleted]. She obtained these qualifications in India but has no post-graduate work experience in that field. Since arriving in New Zealand her work opportunities have been limited to modest employment in [industry type deleted]. The evidence before me discloses that she has earned an average net weekly income of $152.66.

[68] The applicant is in New Zealand on a work visa, which expires on [date deleted] March 2018. She is not eligible for any benefit support.

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[3] Ibid n 2, p 277

[69] The respondent argued that the applicant has a tangible earning potential because of her tertiary qualifications. I am disinclined to accept that submission given that, firstly, the applicant has no work experience of any kind pertaining to her human resources qualification. Secondly, she has only temporary tenure to be in New Zealand.

[70] One must ask, how likely it is that she will obtain employment in [area deleted] when she has no post graduate work experience of that kind and could well be departing New Zealand in six months time? Put simply, her earning potential in New Zealand in her area of qualification is extremely limited.

[71] Her current earnings are extremely modest. The applicant has been unable to obtain further hours of work mainly because she appears to have been regarded by the employer as being in a "sad" state, which is unsurprising given the plight she is in. However, one could reasonably expect her to gain further hours in [industry type deleted]. It is not unreasonable to expect that she could obtain more work in [industry type deleted] for say 30 hours per week. At her current modest income, less approximate tax, it is not unreasonable to expect that she could earn $416.00 net per week, calculated at 30 hours at a net hourly rate of $13.88. I adopt that figure for the purposes of assessing income.

[72] In terms of the respondent, there is strong evidence to indicate that his income for the last financial year, including an Annual Incentive Plan (i.e. bonus) amounted to $61,123.00 gross per annum. From that was deducted $12,206.00 for tax. Other deductions include Kiwi Saver, which is an asset to him. The respondent presented income summaries from the Inland Revenue Department which advised that he earned $51,824.00 during the 2017 tax year. However, it must be emphasised that such information was current only for the year to 15 March 2017. It did not account for income from that date until the end of the financial year. I adopt the figures drawn from the payslip which disclosed the gross income of $61,123.00 for that financial year. For the purposes of assessing the respondent's income I adopt the figure of $940.00 net per week.

Reasonable Needs

[73] In terms of the reasonable needs of the parties, I have sought a level of parity in terms of the approximate living allowances given the living situations for both are uncertain. I have adopted modest allowances.

[74] On the limited information presented before me, I have made some adjustments to the information provided. For instance, in respect of accommodation costs, while the respondent was claiming $392.00 per week for rent, it must be noted that he was flatting in a situation where there could be three occupants. If I were to permit him to claim a deduction for rental of that full amount I would also require to take into account any income received from flatmates. One would normally expect that flatmates would be carrying an equal proportion of rent in any event, in this case the respondent's equal share of rent would have to reduce to $130.00.

[75] While the respondent indicated he is looking to changing his living arrangements to a single bedroom apartment, no financial details as to likely costs were provided and this proposal appeared more of an idea than anything which was about to occur. Accordingly I have approached matters on the basis of the present reality, namely his rental liability is in the vicinity of $150.00 per week if he brings in flatmates. I accept that in the case of the applicant, she should have an allowance for a similar amount, based upon her also sharing a flat.

[76] I have allowed for each of them to have weekly outgoings of power, phone and internet of $120.00, clothing $20.00 for the respondent but $50.00 for the applicant (as she has few possessions), transport $50.00 for the applicant and $58.00 for the respondent. I will permit them each the sum of $100.00 for food and groceries and an allowance for the respondent of $10.00 per week for dental and medical expenses and $15.00 for the applicant who is not a resident. I have allocated a figure of $50.00 to each of them for phone.

[77] In addition the respondent has loans of $425.00 per month (which equates to $98.00 per week) and car insurance of $79.00 per month ($18.00 per week). He should be permitted an allowance for those actual expenses.

[78] Unlike the respondent, the applicant does not have a fully equipped home. She resides in emergency accommodation and if she is able to join a flat, she would inevitably incur setting up costs, costs which the respondent does not have. He agreed to give her a bed, a set of drawers, a quilt, mattress and a bed. However, she would require significantly more items to set up her accommodation. Her claim for $3,000.00 for this was very modest. I accept that figure which, for purposes of assessment I calculate as being $60.00 per week.

[79] The respondent sought to indicate that he has a responsibility to support his parents. Section 65(2) requires consideration of whether a party is supporting any other person. The respondent provided no reliable evidence of how much this might be. It appears his brother was also assisting in some costs, again of an unspecified amount. As I was not provided with any evidence to permit me to make an informed assessment of how much the respondent actually paid to support them I make no allowance in this respect. The respondent had ample time to produce a detailed budget and supporting information if he wished to claim for such matters.

[80] In terms of the applicant, I have rounded her expenses to approximately $540.00 per week on the basis she has very few, if any, possessions and will need to establish herself given she is still living in emergency/refuge type accommodation. My assessment displays that the applicant has a weekly deficit in the order of $125.00 per week in meeting her reasonable and very modest needs.

[81] The allowances for the reasonable needs of the respondent indicate that he has weekly expenses in the approximate order of $574.00 per week, meaning he has a surplus of net income over expenses in the order of $370.00 per week. The evidence supports the conclusion that the respondent has a capacity to support the applicant in meeting her likely shortfall.

[82] As mentioned, s 63(2)(a)(iii) permits the Court to take into account "any other relevant circumstances". In terms of liability, theses are circumstances relevant to whether the claimant can practicably meet the whole or any part of his or her reasonable needs. Similarly, if a liability is established in the s 63 inquiry, s 65

requires that in assessing matters of quantum, the Court has regard to any 'other circumstances that make one spouse…liable to maintain the other'.

[83] There are circumstances in this particular case which are relevant in terms of both s 63 and s 65. Commencing with the respondent, he has residency in New Zealand, he has a permanent full-time job for which he receives a reasonable income and has been paid an annual bonus. He has far greater ability to manage his financial affairs than the applicant. Although he has some financial pressures, being a loan and a flexible arrangement to repay a debt incurred for a motor vehicle accident some years ago, he has the financial capacity to keep things under control.

[84] The applicant however is in a desperate and extreme situation. While she came to this country on the promise of the respondent's marital support, she now faces a most uncertain future as to her ability to remain in New Zealand. He has withdrawn his immigration sponsorship. She has no family support here. She is living in emergency accommodation and does not know what her tenure in that might be. Except for the most basic of personal items, she has no possessions derived from the marriage. The respondent has not made any approach to support her in any way, either financially or by the provision of items to permit her to make life a little more comfortable. She has no transport.

[85] It is a relevant circumstance that the respondent entered marriage with the applicant in the full knowledge that;

(a) He would be taking her from her country of origin to an unfamiliar and distant country,

(b) The applicant would have no support of any kind in New Zealand beyond him,

(c) As her husband, he would assume a duty to support her,

(d) Her entry to New Zealand was on the basis of a temporary immigration status and reliant upon him being her immigration sponsor,

(e) Withdrawal of his sponsorship would likely pose a serious impediment to both her immigration status and employment opportunities,

(f) Although she held tertiary qualifications in the area of [industry type deleted], she had no work experience in that role since graduating,

(g) Without his support she would be without any meaningful ability to provide adequately for herself.

[86] The recent marital breakdown, and the circumstances of it, combined with her fragile immigration status mean that her collective plight would unquestionably affect her stress and anxiety. That is reflected by medical notes which were provided to the Court. Collectively, these are very relevant circumstances as they are linked both to capacity of the applicant to meet her reasonable needs and matters of the respondent's liability to support.

[87] There is a clear legal obligation upon the respondent to assist in maintaining his wife in a situation where he entered a marriage with her, bringing her to an unfamiliar country in circumstances where he knew she had no form of support other than him. Although he has indicated that she could easily either return to India obtain assistance from her parents, there is no evidence that there is available support from her parents or that she should necessarily have to return to India merely because the marriage has ended. His duty to maintain remains even if his desire does not.

[88] In terms of the three-prong approach in *Wederell* I have; firstly, determined the applicant's reasonable needs and the amount required to satisfy them, secondly, identified that she cannot meet them to the extent of $125.00 and, lastly, that her

inability to meet those needs arises by virtue of qualifying circumstances under s 63(2), namely;

(a) her ability to be self-supporting is affected because of her likely earning capacity, and

(b) the unique circumstances in which she finds herself in a foreign country without any support and stability following this marriage.

(c) her inability to obtain full work is reasonable in all the circumstances given her predicament and that her earning capacity is consequently limited.

Decision

[89] In those particular circumstances, and adopting the relevant enquiries detailed in *Wederell*, I have identified her reasonable needs and the amount of money required to satisfy them.

[90] In adopting an extremely modest starting point, I have determined that, at the very least, the amount required to satisfy them would amount to $125.00 per week. In terms of her extent to meet those needs, it is extremely limited even taking into account that she has an earning capacity based upon her working 30 hours per week in a food outlet environment. Her inability to meet her reasonable needs arises because of qualifying circumstances of the type I have detailed.

[91] I reach a determination that the applicant has established a strong case for maintenance to be provided by the respondent. To this end I make the following orders;

(a) The interim spousal maintenance order which was suspended on 20 July 2017 is discharged.

(b) I make a maintenance order pursuant to s 63 Family Proceedings Act that the respondent pay to the applicant the sum of $125.00 per week

commencing on 28 June 2017. That order is to continue at that rate for the period of one year from that date, thereby concluding on 28 June 2018 or, if the applicant has departed New Zealand earlier, concluding upon the date of her departure.

(c) The respondent is to pay such maintenance liability as follows;

(i) the arrears of such maintenance calculated from 28 June 2017 until the date of this order in one lump sum, and

(ii) he is to make arrangements for periodic weekly payments at the rate of $125.00 thereafter.

[92] I am cognisant of the applicant's precarious immigration status and the likelihood that the Immigration Department may wish to know the circumstances of this failed marriage and the details of any domestic violence. I authorise the applicant to make a copy of this decision available to that department if so required.

[93] In so doing, I record that I have rejected the suggestion made to the applicant by Mr Nicholls that her application for a protection order was motivated by a desire to enhance her immigration status. Such assertion was wholly unmerited on the evidence. Instead, the evidence displayed some clear acts committed by the respondent which were domestic violence to her. The fact a final order did not issue was because of the strong evidence that the marriage is at an end and the parties are unlikely to come into contact again.

Delivered at pm August 2017

P J Callinicos
Family Court Judge