

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2021-009-001389
[2022] NZFC 1015**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SPENCER PAYNE] Applicant
AND	[KERRY WOOD] Respondent

Hearing: 18 January 2022

Appearances: I Mitchell for the Central Authority on behalf of the father
A Bayliss for the mother

Judgment: 4 February 2022

RESERVED JUDGMENT OF JUDGE M J DUGGAN

[1] The applicant, [Spencer Payne] (“the father”), seeks an order for the return of [Luis Payne] (“[Luis]”) to Australia.

[2] The Respondent, [Kerry Wood] (“the mother”), opposes the application for return.

[3] [Luis] was born prematurely and required [under a week] in neo-natal care. He is now 18 months old and physically thriving.

[4] The mother has said that if the Court orders [Luis]'s return to Australia, she will return to Australia with [Luis].¹

Background to application

[5] The father was born in Australia, the mother in New Zealand. They met when the mother moved to Australia in 2014. They were in a seven-year relationship, living in Brisbane, until May 2021. [Luis] was born in Australia. [Luis] is the mother and the father's only child.

[6] The parents' relationship was tumultuous; marred with family violence, mental health challenges and drug use. It seems that separation, divorce and reconciliation were discussed on several occasions.

[7] By the time the parents arrived in New Zealand, on holiday, on 20 April 2021, their relationship was clearly tenuous.

[8] Return tickets, for the New Zealand holiday, were booked shortly after the COVID-19 travel restrictions were lifted and quarantine-free travel into New Zealand was possible. It was intended that the family would return to Brisbane on 1 May 2021.

[9] The mother and father separated during their holiday in New Zealand. The father returned, as planned, to Brisbane on 1 May 2021. The mother remained in New Zealand with [Luis] who was then 9 months old. The mother refused to agree to [Luis] returning to Australia with the father.

[10] Since the mother retained [Luis] in New Zealand, he has had regular video calls with the father. There has not been any physical contact. Since late July 2021, due to the COVID-19 pandemic regulations, quarantine-free travel into New Zealand, from Australia, has not been possible.

¹ Pg 269 at paragraph 108 of the bundle.

[11] On 5 October 2021 the father filed his application for an order for [Luis]'s return to Australia under the Care of Children Act 2004. As part of his application, and as is usual, the father sought and obtained, pending determination of his application for return, an Order preventing [Luis]'s removal from New Zealand.

[12] The father's application was served on the mother on 8 October 2021.

[13] The mother filed her Notice of Defence on 22 October 2021.

[14] A judicial conference was held on 27 October 2021 and a hearing date of 8 December 2021 was allocated.

[15] At the judicial conference it was agreed that counsel for the mother would make her submissions first. This was because, as it was agreed that the requirements of s 105 of the Act had been established by the father, the onus was on the mother to establish an evidential foundation for the 'grave risk' defences she is relying on. This meant that counsel for the mother had a right of reply to counsel for the father's submissions. This is why, in this decision, the submissions of counsel for the mother and the mother's evidence are referred to before counsel for the father's submissions and the father's evidence.

[16] This matter did not proceed to hearing on 8 December 2021 because counsel for the mother was unable to work. A medical certificate was provided to the Court and the hearing was adjourned to the next available hearing date in the New Year.

[17] The hearing proceeded, on the usual, submissions-only, basis on 18 January 2022.

Summary of legal issues

[18] As is well known, New Zealand is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"). The Convention is implemented in New Zealand law by sections 94 to 110 of the Care of Children Act ("the Act").

[19] As acknowledged earlier, counsel agreed prior to the hearing that the father's evidence established the requirements for an application for return, as set out in s 105 (1) of the Act, namely:

- (a) [Luis] is in New Zealand.
- (b) [Luis] has been removed from Australia and retained in New Zealand, by his mother, in breach of the father's rights of custody.
- (c) That when [Luis] was retained in New Zealand by the mother, the father had been exercising his rights of custody.
- (d) Immediately prior to being retained in New Zealand, [Luis] was habitually resident in Australia.

[20] The mother's opposition to the application for [Luis]'s return is based on the 'grave risk' defences contained in s 106(1)(c)(i) and (ii) of the Act, namely:

- (a) That there is a grave risk that [Luis]'s return to Australia would:
 - (i) Expose him to physical and/or psychological harm or
 - (ii) Would otherwise place him in an intolerable situation.

[21] As was acknowledged by the mother's counsel, the mother bears the onus of establishing the factual foundation for the grave risk defences.

[22] The mother's evidence, in support of her defence, comprises of:

- (a) An affidavit sworn by her on 22 October 2021.
- (b) A supplementary affidavit sworn by her on 15 November 2021.
- (c) An affidavit sworn by her mother, [Dolores Wood].

- (d) An affidavit sworn by her father, [Ronald Wood].
- (e) An affidavit sworn by Dr Catherine Brett (a psychiatrist) who prepared, on counsel for the mother's instruction, a report on the mother's past and current psychological/psychiatric wellbeing. The report was prepared after Dr Brett met the mother on 3 November 2021, the mother and [Luis] on 4 November 2021 and spoke with the mother by phone on 8 November 2021.²

Summary of counsel for the mother's submissions

[23] In her written and oral submissions, counsel for the mother submitted that the 'grave risk' defences had been satisfied by the mother's evidence and that the mother's evidence should be preferred over the father's because it was cogent and supported by other, independent evidence.

[24] Counsel for the mother submitted that the conclusions in Dr Brett's report about the grave risks posed to [Luis], should his return be ordered by the Court, should have significant weight attached to them.

[25] By way of a summary, Dr Brett's report concluded the following (as relates to the issues before the Court):

- (a) That the mother is recovering from the physical and psychological impacts of an abusive relationship, severe depressive illness and cannabis dependence. While the mother does not meet criteria for any mental illness currently, she is suffering from stress and anxiety related to the parents separation and the Court process. The mother is vulnerable to feeling distressed in relation to any contact with the father.
- (b) The relationship between the father and the mother is abusive, with the father being the perpetrator and the mother and [Luis] being victims; that the abusive relationship had a significant impact on the

² Dr Brett's report at pg 368 of the bundle.

development and maintenance of the mother's severe depressive illness after [Luis]'s birth which, in turn, had an impact on [Luis].³

- (c) [Luis] was harmed through exposure to his parents' abusive relationship, when he lived with the mother and the father. The harm is likely to have significantly impacted on his physical, emotional and social development.⁴ If the mother and [Luis] moved back to Australia there would be a deterioration in the mother's health and wellbeing which would negatively impact on [Luis].⁵
- (d) The grave risk of returning to Australia would expose [Luis] to physical and psychological harm and would put him in an intolerable situation.⁶

[26] In relation to the grave risk of [Luis] being exposed to physical and/or psychological harm if he returns to Australia, counsel for the mother referred to the history and pattern of family violence between the parents and its effect on the mother and [Luis].

[27] In counsel for the mother's submission, [Luis], if ordered to return to Australia, will be put at grave risk of further physical and/or psychological harm through further abuse by the father directly or indirectly through abuse towards the mother and its effect on her. Counsel for the mother referred to the mother's evidence about the father's abuse of her during the relationship and his continued abuse after the parents separated.⁷

[28] In relation to the grave risk of [Luis] being placed in an intolerable situation if ordered to return to Australia, counsel again referred to the conclusions reached by Dr Brett about this issue. In particular, counsel submitted that there would be a grave risk of [Luis] being placed in an intolerable situation because of the mother's vulnerability

³ BOE page 382, para 6(2).

⁴ BOE Page 382, para 6(3).

⁵ BOE Page 383, para 6(7).

⁶ BOE Page 384, para 6(9).

⁷ Paras 50-53 of counsel for the mother's submissions.

to further mental distress and unwellness and the effect the distress and unwellness will have on her ability to care for [Luis] and to make decisions that keep him safe.⁸

[29] Counsel for the mother submitted that the following factors, in cumulation, create the grave risk of intolerable harm, namely:

- (a) The mother's fears about returning to Australia and therefore being at increased risk of abuse.
- (b) The possibility that the mother's previous feelings of being trapped, isolated, blamed and her guilt over her previous parenting, cannabis use and the conflict with the father might re-emerge.
- (c) That the factors that led to the mother becoming unwell might also continue or re-emerge.
- (d) The possibility of the father and mother reconciling particularly given the mother's repeated reconciliations with her previous partner despite their unhealthy relationship.⁹
- (e) That the protective factors that have contributed to the mother's recovery in New Zealand will be absent in Australia.

Summary of counsel for the father's submissions

[30] The father's evidence, in support of his application for return, comprises of:

- (a) An affidavit sworn by him on 17 September 2021.
- (b) A supplementary affidavit sworn by him on 24 November 2021.
- (c) An affidavit sworn by his mother, [Monica Payne].

⁸ Para 59 of counsel for the mother's submissions.

⁹ BOE Page 254.

[31] Counsel for the father submitted that the mother's medical evidence and her evidence about family violence, allegedly perpetrated by the father does not satisfy the legal requirements of the grave risk defences. Further, that the mother's medical evidence establishes that she has recovered from post-natal depression and is now more confident in her role as [Luis]'s mother and has established a bond with him.¹⁰

[32] Counsel for the father submitted that the Court should be careful about the weight it attaches to Dr Brett's report for several reasons (in summary), namely:

- (a) The mother's minimisation, to Dr Brett, of her cannabis and drug use.
- (b) That much of the information in Dr Brett's report is self-reported by the mother.
- (c) That Dr Brett has not spoken with the father, nor observed him with [Luis].
- (d) That Dr Brett's conclusion that the mother's health and wellbeing would deteriorate if she returns to Australia which would negatively impact on [Luis] contains an element of catastrophising.¹¹
- (e) That Dr Brett does not refer to positive actions by the father such as, prior to the parents' holiday, he sought support for the mother from her mother and that the father facilitated the family's travel back to New Zealand.¹²

[33] Counsel for the father submitted that the mother's evidence does not establish the high threshold for the grave risk defences and, accordingly, an order should be made for [Luis]'s return to Australia immediately. Counsel for the father submitted that the need for return is urgent as [Luis] is at a crucial time in his development and

¹⁰ Paras 46 and 47 of counsel for the father's submissions.

¹¹ Para 55 of counsel for father's submissions.

¹² As the mother is not an Australian resident she could not apply for a passport for [Luis] but the father could and did.

he needs to be returned so that he can maintain and develop his relationship with the father.

[34] In counsel for the father's submission, the tension that existed prior to the parents' holiday in New Zealand will be ameliorated by the fact that they are now living apart and the father's proposal that the mother and [Luis] live in their home and he live with his mother on the mother's return to Australia.

Recent decisions involving the grave risk defences

LRR v COL

[35] In mid-2020, the Court of Appeal, in *LRR v COL (LRR)*, considered the grave risk of intolerable harm that might be caused to the two-and-a-half-year-old child, removed from Australia to New Zealand by his mother, if the Court ordered that the child should return to Australia.¹³

[36] In *LRR* the Court decided that the mother had established a grave risk of intolerable harm and did not exercise its residual discretion to still order the return of the child to Australia. The child remained in New Zealand.

[37] In *LRR* the child's parents' relationship was dysfunctional and volatile. Family violence orders had been made against the father by the Australian Courts. The child's father had also been charged with and convicted of assaulting the mother. The mother had fragile mental health including a history of depression and substance abuse that, the Court accepted, was caused or exacerbated by the parties' dysfunctional relationship. While the mother was coping well in New Zealand, the Court of Appeal was satisfied that, if she returned to Australia with the child, there was a grave risk that she would experience a relapse of her mental health and substance abuse issues and that such a relapse would significantly impair her parenting capacity thus creating a situation which would be intolerable for the child.

¹³ *LRR v COL* [2020] NZCA 209.

Summer v Green

[38] In late 2021, Wylie J considered the grave risk defences and, referencing the Court's decision in *LRR*, commented that the Court of Appeal had;

...restated, and in some respects clarified the principles that govern Hague Convention proceedings in New Zealand.

While the Court in *LRR* had only considered the grave risk of intolerable harm, Wylie J expressed the view that many of the Court's observations in *LRR* were of wider application. Justice Wylie-set out those observations in his decision and they were¹⁴:

- (a) The Court emphasised that the Hague Convention is framed on the assumption that prompt return, in cases where no exception applies, is in the best interests of the child. The Convention however identifies certain circumstances in which the return of a child to its State of habitual residence may not be appropriate because return would be contrary to the interests of the child. The exceptions are integral to the scheme of the Convention. While it is not the function of a requested State to conduct a wide-ranging enquiry into the best interests of a child, the prompt and focused enquiry required is designed to ensure that the outcome does serve the interests of the child. The Court referred to s 4 of the Act, which deals with the child's welfare and best interests and requires that they be the first and paramount consideration in the administration and application of the Act. It noted that this imperative applies to proceedings seeking the return of a child.
- (b) The Court made a number of observations about the grave risk exceptions. It commented as follows:

[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. ...

[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. ...

[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

¹⁴ *Summer v Green* [2021] NZHC 3111 at [37].

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”. ...

[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. ...

[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.
...

[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, ... 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”.

[100] ... what matters is that if the return of a child to that child’s State of habitual residence would expose the child to a grave risk of an intolerable situation, it would not be

appropriate to make an order for the return of the child. The interests of the child in not being exposed to that risk cannot be outweighed by the goal of deterring future would-be abductors.

(citations omitted)

[39] Justice Wylie in *Summer v Green* was considering the mother's appeal against the Family Court Judge's decision that the grave risk defences had not been established. On appeal, the mother did not challenge the Family Court Judge's conclusion about the grave risk of physical harm but challenged the Judge's conclusion about the grave risk of the children being exposed to psychological harm or being placed in an intolerable situation.

[40] The factual background in *Summer v Green* was, very broadly, similar to the background considered by the Court in *LRR* and the background in this case.¹⁵ The parents' relationship was marred with violence; Mr Green was subject to a Family Violence Order though he, unlike [Luis]'s father, had also been charged with family violence offending and was later convicted on some charges.

[41] In *Summer v Green* the parties filed further evidence for the appeal including, by the mother, a report from a psychologist who concluded that the mother was suffering from PTSD and had experienced debilitating anxiety. In the psychologist's opinion, it was highly probable that Ms Summer's PTSD would heighten significantly, if she and the children returned to Australia and, if that occurred, it would potentially significantly compromise her ability to parent.

[42] In both *LRR* and *Summer v Green*, the Courts had to deal with contested allegations of family violence. As Wylie J observed:¹⁶

This places the Court in some difficulty because there has been no viva voce evidence and neither party has been subjected to cross-examination.

[43] In tackling this difficulty, Wylie J referred to the Court of Appeal's endorsement in *LRR* of the approach of the English Court in *Re E*.¹⁷

¹⁵ At [5].

¹⁶ At [41].

¹⁷ Referring to *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144.

[111] There is no simple and universally applicable answer to that difficult question. It seems to us that in such circumstances there is much to be said for the approach adopted by the English courts, which is helpfully summarised by the Supreme Court in *Re E*:

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.

[44] Having taken the approach endorsed by *LRR* to competing allegations about family violence, Wylie J concluded that the risk of psychological harm was not as grave as alleged by the mother and agreed with the Family Court Judge's conclusion that the defence had not been established.

[45] In considering whether there was a grave risk that the children would be placed in an intolerable situation, if they returned to Australia, because of the risk that their mother's mental health would decline, and her parenting be negatively impacted, Wylie J determined, like the Family Court Judge, that the defence had not been established by the appellant mother.

The grave risk defences

Is there a grave risk of [Luis] being exposed to physical or psychological harm?

[46] As the Courts did in *LRR* and *Summer v Green*, I am required to consider the mother's allegations of family violence, the father's responses, any other evidence and the protective measures available in Australia.

[47] The mother's evidence was that the police visited the parents' home on the following occasions, in response to callouts related to the father's violence;

- (a) 2015 (unspecified date) – the mother’s evidence was that, after the father left their house with a knife saying that he would kill himself, she called the police because she was scared for her own and the father’s life and the police helped find him but did not find a knife.¹⁸

The father’s evidence acknowledged that he left the home to get away from an argument as he was afraid for his safety, and that the police later spoke to him, in the context of a wellbeing check, at a nearby bus stop. Once he told them what had happened, the police left. The father denied having a knife and/or threatening to kill himself.¹⁹

- (b) [Mid-2015] – after the parents returned home after a night out, the mother’s evidence was that she and the father were physically aggressive to each other and the police were called by a neighbour and she was taken to the police station. Both parent’s evidence was that the following day they both attended Court and Protection Orders were issued against both parents.

Neither parent was charged with breaching the orders and the orders expired on 22 June 2016.²⁰

- (c) September 2016 – the police were again called to the parents’ home by a neighbour, the day before the funeral for the father’s father. The mother’s evidence was that father was angry with her and started threatening to kill himself and saying he was going to leave. To stop the father leaving, the mother says she grabbed his shirt and it ripped. The mother said that the father then held her up against the wall by her throat. The mother’s evidence is that the father was taken away for the night but the next day they both attended the funeral. The mother and father both attended Court in relation to this incident; neither were represented, and another Protection Order was issued against the father.

¹⁸ Page 256 of the bundle.

¹⁹ Page 397 of the bundle.

²⁰ Page 257 of the bundle.

In response to the mother's allegations, the father acknowledged he was taken from the home by the police the night before his father's funeral and that both he and the mother later attended Court and a Protection Order was made against him. The father denies holding the mother by the throat and says that the mother had been hitting him, and when he went to leave their home, she ran in front of him and locked the door and barricaded herself against it. The father says that he yelled for someone to call the police and, panicking, he grabbed the mother's jersey to pull her away from the door, so that he could leave. The father says he chose not to contest the further order because of the time he had already taken off work due to his father's death.²¹

The further order against the father expired on 19 September 2018 and no charges of breach were laid in relation to the order.²²

- (d) 15 February 2021 – the police were called to the parents' home by the mother because, according to the mother's evidence, the father's ongoing abusive behaviour.

The mother's evidence is that, earlier in the month, the father had locked her out of their home and that, when he eventually opened the door, he grabbed her and tackled her to the ground.

The father accepted that after the mother had gone outside, he had locked the door, that the mother broke the glass in the door and that, after he unlocked the door, he wrestled the mother to the ground because she tried to punch him.

Later in the month, the mother says that, when the father was verbally abusive to her again, she asked him to leave and, although he initially refused, he left but when he returned the following day was verbally abusive again.

²¹ Page 23 of the bundle.

²² Page 258 of the bundle.

The mother's evidence is that, when the police visited the home on 15 February, they took a statement from her and photographs of property damage that the mother says the father had caused; a hole in a wall and the broken glass in a door. The mother says the police referred her to a domestic violence counselling group and promised other help that was not subsequently provided.²³

In response, the father acknowledges responsibility for breaking the glass but accidentally when he was using a punching bag. The father acknowledges, on a different occasion, punching a hole in a door of their home. The father says he was frustrated because the mother would not let him sleep, when he needed to go to work the following day, but the mother did not.²⁴

Other incidents of alleged family violence

[48] The mother alleges that there was other family violence that did not involve the police including:

- (a) In 2015, when she was having a weekend in Melbourne with her mother and the father constantly called and messaged her while she was away, checking up on her.

In his evidence the father accepts that this occurred and that he did so because he was suspicious of the mother's motives for the weekend away.

- (b) Early in 2021, the mother's evidence is that the father, while leaning over [Luis] said, "your mother is just a fucking psycho". The mother says she pushed the father away from [Luis], picked [Luis] up and followed the father as he left the home. The mother says that the father

²³ Page 263 of the bundle.

²⁴ Page 399 of the bundle.

then grabbed and twisted her by the other arm (the arm not holding [Luis]).²⁵

- (c) The mother's evidence is that on 14 January 2021 the father sent her abusive messages calling her a "bitch", questioning why the mother wanted him to kill himself.²⁶
- (d) The mother's evidence is that immediately before they travelled to New Zealand in April 2021 their father sent her an abusive message telling her that he hated her and wanted a divorce and that she was a piece of shit. And that the father sent another abusive message shortly afterwards.²⁷
- (e) On 23 April 2021, immediately prior to the parents separation, the mother's evidence is that the father was verbally abusive to her and to her mother and that he threw a plastic toy at her.²⁸ The father accepts that he swore at the mother saying it was "not unprovoked". The father also acknowledges throwing a toy but says it was a soft toy.²⁹
- (f) The mother's evidence sets out messages sent by that father, after 23 April, where he calls her a child abductor, evil, "a terrible mother and even worse person" and that he hates her. The mother's evidence includes the abusive messages she received from the father prior to these proceedings being filed.³⁰ The father's evidence does not specifically refer to the messages exchanged after 23 April but he acknowledges that he "has not always acted in a positive healthy or safe way in the relationship, but that their interactions are in the past".³¹

²⁵ Page 262 of the bundle.

²⁶ Page 262 of the bundle.

²⁷ Page 284 of the bundle.

²⁸ Page 284 of the bundle.

²⁹ Page 401 of the bundle.

³⁰ Pages 285 to 317 of the bundle.

³¹ Page 404 of the bundle.

[49] In addition to her specific evidence about the family violence she says the father perpetuated against her, the mother says that she is fearful that she will not, if she returns to Australia, be protected from the father in Australia. In addition, the mother's evidence is that she is scared that the father will use the system to control and manipulate her and that she is scared she will be worn down to the point that it is easier to do what the father wants than to fight him.³²

[50] In response, the father says that he has not and would never seek to control, manipulate or threaten the mother with the use of legal proceedings. Rather, the father says, his priority is working to ensure the best quality of life for [Luis] and, if proceedings are filed by the mother in Australia that he will engage with those proceedings.³³

Has the mother's evidence satisfied me that, if [Luis] returns to Australia, he is at grave risk of physical or psychological harm?

[51] Given the dispute in the parents' evidence about family violence allegedly perpetrated by the father and without the benefit of cross-examination, it is impossible to determine many of the allegations made by the mother against the father. There are however acknowledgments made by the father including that he deliberately made a hole in a wall in the parents' home when he was angry with the mother.

[52] There is clear evidence that the father has been abusive both in terms of the quantity and content of the messages he has sent to the mother.

[53] There were clearly several incidents that involved physical as well as verbal abuse, but it is impossible to determine, in relation to many of the incidents, who the abusive party was or whether both parents were.

[54] The parents' neighbours have been sufficiently concerned about them to call the police and an Australian Court has been sufficiently concerned that, in addition to issuing mutual orders against the parents in June 2015, it issued another order, against the father, in September 2016. The fact that family violence orders were necessary is

³² Page 270 of the bundle.

³³ Page 406 of the bundle.

concerning. Those orders were, however, made over five years ago and neither parent was charged with breaching the orders.

[55] Given the abuse that has been perpetrated, there is clearly a risk, if [Luis] returns to Australia with his mother, that the father will again be abusive. In terms of the risk of physical harm being caused to [Luis] by the father, given the evidence, appears minimal. The risk of him being psychologically harmed by violence perpetrated by the father against the mother appears greater though not substantial as the test, as emphasised in *LRR*, requires. This is because the parents have separated and there are measures and legal steps that the mother can and should take, if any of the father's abuse is repeated.

[56] As she has done in the past, the mother should, if the father is abusive, contact the police who will investigate the allegation and, as occurred in 2015 and 2016, require the father to attend Court. The Australian Court, as it has done, can make protective orders against the father. Though the mother has reservations about the ability of the police and courts in Australia, I am satisfied that there are sufficient protective measures available in Australia to guard against the risk of or respond to any risk of further family violence being perpetuated by the father.

Is there a grave risk of [Luis] being placed in an intolerable situation, if he returns to Australia?

[57] As observed by the Court of Appeal in *LRR*, a situation is intolerable if it is a situation which [Luis] could not be expected to tolerate.

[58] In support of her defence under this ground the mother relies heavily on the conclusion reached by Dr Brett in her report; that there would be a deterioration in her health and wellbeing, that would negatively impact on [Luis] if she and [Luis] returned to Australia.³⁴

³⁴ Page 383 of the bundle.

[59] The mother's evidence sets out the following relevant information in relation to her mental health:

- (a) prior to her return to New Zealand, the mother felt isolated and alone in Australia;³⁵
- (b) that she was diagnosed with postnatal depression when [Luis] was nine weeks old;³⁶
- (c) in the months before the trip to New Zealand she was suicidal.³⁷

[60] Attached to the mother's evidence are notes made by her GP when she visited her for [Luis]'s six-month check. The notes record that the mother's mood had deteriorated and that she disclosed interpersonal violence involving the father. The notes also record that the mother felt she lacked support from her family and wanted to return to New Zealand but was unsure of the legal ramifications.³⁸

[61] There is a further note attached to the mother's evidence from her GP, made on 22 February 2021. The doctor notes that the mother is back on (anti-depressant) medication and that her mood had improved. The note records that the mother had spoken with her parents and they were keen to get her and [Luis] home. However, the mother was unable to apply for a passport for [Luis] as she is not an Australian resident. The note refers to the mother wanting to seek couples counselling and that she is unsure what she wants to do as she still loves the father and holds out hope for the relationship.³⁹

[62] The mother's evidence also refers to the challenge she fears she will face, if she returns to Australia, in securing paid employment. The mother's evidence is that paid employment is essential for her mental health but that it is unlikely she will be able to find employment, as a nurse, doing day shifts. The mother considers that,

³⁵ Page 260-264 of the bundle.

³⁶ Page 260 of the bundle.

³⁷ Page 262 of the bundle.

³⁸ Page 281 of the bundle.

³⁹ Page 283 of the bundle.

because of her role as [Luis]’s primary caregiver, day shifts are the only option available to her.

[63] The father does not dispute the evidence about the mother’s fragile mental health prior to and immediately after she returned to New Zealand. The father is, however, sceptical about how honest the mother was, in her disclosures to Dr Brett, about her drug use and the impact that drug use had on the mother’s mental health.

[64] As referenced earlier, it is Dr Brett’s clear view that there would be a deterioration in the mother’s health and wellbeing if she returned to Australia. Dr Brett’s evidence goes further than that however and she concludes that there is a grave risk that if [Luis] returned to Australia he would be put in an intolerable situation that was not in his best interests.⁴⁰

Has the mother’s evidence satisfied me that, if [Luis] returns to Australia, there is a grave risk of him being placed in an intolerable situation?

[65] It appears clear that there is a risk that the mother’s mental health will deteriorate if she returns to Australia with [Luis]. Attached to that risk is the risk that a deterioration will impact on the mother’s parenting and, therefore impact negatively on [Luis].

[66] I am not however satisfied that there is a grave risk of [Luis] being placed in a situation that he should not be expected to tolerate. I have reached this view because of the following factors:

- (a) The mother’s evidence that she has stopped using cannabis.
- (b) Dr Brett’s evidence that the mother’s mental health is significantly improved and that she does not currently meet the criteria for any mental illness.

⁴⁰ Page 384 of the bundle.

- (c) The mother can access, as she did previously, mental health services in Australia, including her GP and, if required, medication. The mother can also access, as she has in New Zealand, counselling services.
- (d) [Luis] already attends childcare and can attend childcare in Australia and could, if the mother agrees, also be cared for by his paternal grandmother. The father has also said that he wants to provide care for [Luis].
- (e) The availability of childcare will mean that the mother can seek paid employment which, as a qualified nurse, appears to be readily available in Australia.
- (f) The father has, in his evidence, undertaken to move from the family home, so that the mother can live there with [Luis]. The father has said, and it has been confirmed by his mother, that he will live with his mother.
- (g) As I have already noted, there are protective mechanisms available in Australia both for [Luis] and the mother. Further the Court can direct the New Zealand Central Authority to ensure that the appropriate Australian agencies are notified of [Luis]'s pending return. This would also assist the mother and hopefully ensure that assistance is available, if required by her.

[67] I am not persuaded that the risk of deterioration in the mother's mental health will lead to a grave risk of an intolerable situation for [Luis].

Conclusion

[68] For the reasons I have identified I am not persuaded that any of the grave risk defences in s 106(1)(ii) have been established by the mother.

[69] [Luis] has not had any physical contact with the father since the father's return to Australia in April last year. [Luis] has been in New Zealand, away from the father,

for half his life and his relationship with his father will have been affected. It is essential that he return to Australia as quickly as possible, so that his relationship with his father can be rebuilt. How the relationship is re-established and the terms of the father's ongoing contact, if it cannot be agreed between the mother and the father, should be resolved by an Australian Family Court as soon as possible.

Result

[70] An order for return of [Luis] to Australia is made. The order is to be sealed once the appropriate terms for [Luis]'s return are either agreed or determined by me.

[71] Ms Mitchell is directed to file, within 3 days, a draft order setting out the agreed and/or proposed terms of [Luis]'s return. It is expected that the draft order will require [Luis] to be returned to Australia within 14 days of the Order being sealed by the Court. The draft order also needs to address the timing of the discharge of the existing orders.

[72] I invite Ms Mitchell to include in the draft order, terms that address or provide for:

- (a) the mother's right to exclusive occupation of the parents' home;
- (b) the extent of and timing of the financial support that will be provided by the father to the mother;
- (c) the mother's unimpeded arrival in Brisbane (i.e that the father will not be at the airport when her and [Luis]'s flight arrives); and
- (d) restrictions on the father's ability to contact the mother or to visit, without agreement, the parents' home.