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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004 AND THE RAMIFICATION THEREBY OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980 ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2016-077-000064
[2022] NZFC 11049

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004 AND THE RAMIFICATION THEREBY OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980
BETWEEN	[SOLOMON CREEK] Applicant
AND	[MELISSA HODDER] Respondent

Hearing:	21 October 2022
Appearances:	K Lellman on behalf of J Niemand for New Zealand Central Authority on behalf of the Applicant E Eggleston for the Respondent
Judgment:	17 November 2022

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO APPLICATION FOR AN ORDER FOR RETURN – SS 105 AND 106 CARE OF CHILDREN ACT 2004]

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[1] On 11 March 2022 Ms [Hodder] travelled to New Zealand with the parties' daughter, [Lily] who is currently eight years old. In travelling to New Zealand Ms [Hodder] obtained the consent of [Lily]'s father, Mr [Creek], as was required pursuant to a consented Parenting Order made in the Australian Family Court on 16 March 2018. However, within two weeks of arriving in New Zealand, Ms [Hodder] advised Mr [Creek] that she and [Lily] would not be returning to Australia. Mr [Creek] has now applied, through the New Zealand Central Authority, for an order that [Lily] be returned to Australia pursuant to s 105 of the Care of Children Act 2004. Sub-part 4 of the Care of Children Act 2004 enacts the Hague Convention on the Civil Aspects of International Child Abduction 1980.

[2] This is not the first time that Mr [Creek] has had to seek the return of [Lily] to Australia. On 1 July 2015 Ms [Hodder] left Australia with [Lily] and came to New Zealand but again, once in New Zealand, she made the decision to retain [Lily] in New Zealand. Following a defended hearing, on 30 November 2016, her Honour Judge Wills directed the return of [Lily] to Australia.

[3] In relation to the current application, jurisdiction pursuant to s 105 of the Act has from the outset been accepted by Mr Eggleston on behalf of Ms [Hodder]. Thus, the Court must make an order for the return of [Lily] to Australia unless one of the affirmative s 106 statutory defences are established.[1] The Hague Convention therefore has inter alia the objective of securing a prompt return of a wrongly removed child to any Contracting State except when one of the convention defences is made out. Ms [Hodder] relies upon the defence contained in s 106(1)(c)(ii); that is, that there is a grave risk that [Lily]'s return would otherwise place [Lily] in an intolerable situation.[2] If that defence is established, the Court retains a residual discretion to decline to make an order for return. It is well-established that the Convention is fundamentally concerned with the issue of forum, rather than making substantive determinations about the best future care arrangements for children. That approach can be derived from the key objective of the Convention set out in Article 1:

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1 *Secretary for Justice v HJ* [2006] NZSC 97, [2007] 2 NZLR 289, (2006) 27 FRNZ 213.

2 Whilst Ms [Hodder] had pleaded s 106(1)(c)(i) and (ii), Mr Eggleston conceded at the outset of the hearing that Ms [Hodder] now solely relied upon subs (ii).

(a) Firstly, to secure the prompt return of children wrongfully removed to or retained in any Contracting State.

(b) Ensuring the rights of custody and access under the law of one Contracting State are reflectively respected in the other Contracting States.

[4] As to an intolerable situation, in *H v H* Greig J held that the word "intolerable" means:[3]

> Something cannot be tolerated; it is not just disruption or trauma, inconvenience, anger. It is something which must be of some lasting serious nature which cannot be tolerated.

[5] The Court of Appeal in *Simpson v Hamilton* stated at [46]:[4]

> [46] The exceptions in the Hague Convention, relieving the obligation to return a child abducted from her place of habitual residence, were not intended to be given an expansive interpretation. Professor Elisa Pérez-Vera, the official Hague Conference reporter, made this clear in her explanatory report on the Convention:
>
> > … it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them — those of the child's habitual residence — are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

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3 *H v H* (1995) 13 FRNZ 498 (HC) at 504, cited with approval in *Robinson v Robinson* [2020] NZHC 1765 at 244.

4 *Simpson v Hamilton* [2019] NZCA 579, [2019] NZFLR 338.

[6] The Court of Appeal in *Smith v Adam* held that the s 106(1)(c) defences should not be given a wide interpretation noting (with reference to previous decisions) at [7] that:[5]

> (a) The grave risk defence is not easy to invoke successfully, in part due to the higher threshold established by the expression "grave risk" and, in part because of the hurdle provided by the expression "grave risk" and in part, because of judicial expectations of other countries would ordinarily protect children from harm;

[7] The Court of Appeal in that decision considered that this extended to an expectation:

> …that the health and welfare systems of other countries will also usually be designed to keep people well and to protect children from harm.

[8] Similarly, a full bench of the Court of Appeal in *A v Central Authority for New Zealand* held that:[6]

> Where the system of law of the country of habitual residence makes the best interests of the child paramount to the rights mechanisms by which the best interests of the child can be protected and properly dealt with, it is for the Courts of that country, and not the country to which the child has been abducted, to determine the best interests of the child.

[9] More recently the Court of Appeal in *LRR v COL* identified the following eight principles regarding the defences arising under s 106(1)(c).[7]

> (a) First, 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.
>
> (b) Second, the Court must be satisfied the return of the child would expose the child to a grave risk. This language requires something more than a substantial risk. It is a risk that deserves to be taken very seriously. The assessment turns on both the likelihood of the risk eventuating and the seriousness of the harm if it does eventuate.
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> (c) Third, a situation is intolerable if it is a situation which this particular child in these particular circumstances could not be expected to tolerate.

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5 *Smith v Adam* [2007] NZFLR 447 (CA).
6 *A v Central Authority for New Zealand* [1996] NZFLR 517.
7 *LRR v COL* [2020] NZCA 209 at [87]–[96].

(d) Fourth, the enquiry contemplated is future looking. The Court is required to make a prediction, based on the evidence, about what may happen if the child is returned. What is required is for the court to be satisfied that there is a risk which warrants the qualitative description of "grave". Any protective measures that will reduce a risk that might otherwise exist on return are relevant to that assessment.

(e) Fifth, it is not the Court's role to judge the morality of the abductor's actions.

(f) Sixth, the burden is on the person asserting the grave risk to establish that. The Court should apply the burden having regard to the timeframe involved and the ability of each party to provide proof of relevant matters.

(g) Seventh, the impact on the returning parent may be relevant to an assessment of impact on the child, however the focus is on the child.

(h) Eighth, s 106(1) confers a residual discretion on the Court to decline to make an order for the return of the child even where one of the specified exceptions is made out. However, if a grave risk of an intolerable situation is made out, it is almost impossible to conceive of circumstances in which it would be a legitimate exercise of the discretion nevertheless to order the child's return. Nonetheless, if a grave risk of exposure of a child to an intolerable situation is identified, the Court can consider whether protective measures in the requesting state would remediate and protect the child from such risk.

[10] That having been said, the Court of Appeal in *LRR v COL* was clear that a material change to the approach the Courts will take to determine Convention applications was not intended. Rather it commented that its decision was to restate and provide minor clarification on the principles governing Convention proceedings in New Zealand. Indeed, the Court of Appeal at [148] sounded a clear warning to potential abductors not to be encouraged to think that removing a child to New Zealand would be an attractive option.

[11] Subsequently, in *Summer v Green* the Court of Appeal reiterated:[8]

> … In *LRR v COL* this Court explained that the result in that case should not encourage potential abductors to think that removing a child to New Zealand is an attractive option. It emphasised that its decision did not represent a material change in the approach which the Courts will take to determine Hague Convention applications.

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8 *Summer v Green* [2022] NZCA 91 at [17].

[12] Relevant to the Court's considerations in these matters is the HCCH Guide to Good Practice for Article 13(1)(b), which came about as the Hague Conference recognised the concerns about the increased use of the grave risk defence, as well as the effects on the taking parent and the child. New Zealand has contributed to the development of this Good Practice Guide, which is aimed at ensuring consistent interpretation of the grave risk exception.

[13] The key points relevant to the present case from the Good Practice Guide include:

(a) The Court must assess the asserted grave risk to the child.

(b) The Court must assess whether the effect on the child meets "the high threshold of the grave risk exception taking into account the availability of protective measures to address the grave risk".

(c) Where the taking parent is asserting return is not possible because of a new family formed, "the fact that the mother would be facing an uncomfortable dilemma will not be deemed sufficient to conclude that the return of the older child would expose that child to a grave risk".

(d) As a rule, a parent should not be allowed to create a situation that is potentially harmful to the child and then rely on it to establish the existence of a grave risk to the child.

(e) The separation of siblings does not usually result in a grave risk determination.

Ms [Hodder]'s Case

[14] Ms [Hodder] asserts that there would be an intolerable situation for [Lily] arising out of return because of:

(a) The impacts on [Lily] of a consequent deterioration in Ms [Hodder]'s mental health upon her return to Australia;

(b) Ms [Hodder]'s inability to access mental health support in Australia, and;

(c) Ms [Hodder]'s inability to provide adequate financial resources and housing for her and [Lily] in Australia.

Ms [Hodder]'s Mental Health

[15] The most significant ground advanced by Ms [Hodder] is around her mental health issues, and the consequent impacts upon [Lily]. The Court has obtained a s 133 report from Dr Calvert.[9] Ms [Hodder] also engaged a psychiatrist, Dr Wright, to provide an opinion on her behalf as to the mental health issues affecting Ms [Hodder]. Both Dr Wright and Dr Calvert provided written reports and were available for cross-examination in the hearing before me.

[16] The approach of the Courts in relation to privately commissioned evidence as being potentially unreliable was addressed by the Court of Appeal in *LRR v COL*. In an interlocutory application prior to the substantive hearing, an objection was raised by the respondent in that case to the appellant introducing a psychiatric report. The interlocutory judgment rejected an argument advanced that the privately commissioned psychiatric report was inadmissible under s 25, noting that it could potentially also be admitted under s 12A of the Family Court Act 1980.[10] Then in the substantive judgment at [127] the Court of Appeal specifically ruled that the evidence was admissible. Thus, as Doogue J concluded in *Roberts v Cresswell*:[11]

> The criticism that privately commissioned evidence cannot per se be relied upon has been answered — it may be, subject to the usual rules of evidence.

[17] I note that Mr Eggleston has submitted that her Honour issued that judgment in error because leave to appeal from the High Court to the Court of Appeal is not required, there being a right to appeal as a matter of course. Even if that is correct, it

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9 Neither counsel took issue with Dr Calvert being a suitably qualified expert in terms of s 25 of the Evidence Act 2006; no issue was taken with her methodology either.

10 *LRR v COL* [2019] NZCA 620 at [14].

11 *Roberts v Cresswell* [2022] NZHC 2337 at [54]. This decision was a judgment by Doogue J declining leave to appeal her Honour's substantive decision to the Court of Appeal.

is a useful judgment as it re-iterates the approach to be adopted by Courts in receiving private expert evidence.

[18] There is no issue as between Drs Calvert and Wright that Ms [Hodder] has had a longstanding diagnosis of anxiety disorder and/or depression. Indeed, Dr Calvert opines that she has likely had mental health difficulties since her childhood.

[19] It is significant that Ms [Hodder]'s mental health was an issue in the 2016 hearing before Judge Wills. On 26 July 2015 Ms [Hodder] was admitted to Rotorua Hospital after an attempted overdose. Dr Wright described at [5.8] of her report that this incident represented a "major depression" for Ms [Hodder].[12] Dr Wright stated in her report that Ms [Hodder] took paracetamol with an intention to die, but feeling guilty about this called her mother and went to the hospital. A comprehensive mental health assessment was undertaken at the Rotorua Hospital and her hospital notes record that Ms [Hodder] had depression but that she refused to take anti-depressants. The medical notes record that Ms [Hodder] was at that time medically cleared and stable and that "today's OD not attempt to kill self but to shut things out".[13]

[20] Mrs Lellman put to Dr Wright in cross-examination the apparent discrepancy between her report in which she stated that there was an intention to die by Ms [Hodder], and the report from the hospital at the time that this was not an attempt by Ms [Hodder] to kill herself. Dr Wright's response was:

> No, I don't think she – she took six grams of paracetamol. That's 12 tablets. I think that she was acutely distressed and I think that comes through. There are multiple factors. [Melissa]'s recollection of that when she spoke about it was at that point she had a wish to be dead. She had genuine suicidal intent.[14]

[21] That is significant in my view. For at the time, it was the assessment of those treating Ms [Hodder] that this was not a genuine suicide attempt. Yet when being assessed by Dr Wright Ms [Hodder] is now indicating that there was in fact a genuine suicide attempt. Judge Wills noted at [44] of her decision that:

> The respondents [Ms [Hodder]'s] evidence as to her own psychological well-being centres on the breakdown of her relationship with the applicant

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12 Bundle of Documents, p 314.
13 Bundle of Documents, p 169.
14 Notes of Evidence, p 20, line 33 to p 21, line 3.

> [Mr [Creek] and her psychological response to that. She has attended counselling to address her response. There is no suggestion that the respondent genuinely suffers from a mental disorder or has a diagnosed depressive disorder which might impact on her ability to care for [Lily] following return to Australia.

[22] Thus, there is a conflict in the evidence between the hospital records, what Ms [Hodder] was asserting in the hearing before Judge Wills, what Ms [Hodder] has more recently reported to Dr Wright, and the recent opinion of Dr Wright.

[23] Justice Doogue in the substantive *Cresswell v Roberts*' decision set out at [71] to [79] of her Honour's decision the approach of the Court in assessing evidence, and in particular disputed evidence when, save in a situation such as this where there has been cross-examination of the experts only, there is contested evidence.[15] Her Honour relied upon the approach set out by the Court of Appeal in *Basingstoke v Groot*.[16] I adopt this approach in considering this dispute evidence.

[24] I also note that Dr Wright conceded the possibility that Ms [Hodder] may have changed or exaggerated her narrative in reporting to Dr Wright. In response to questions from Mrs Lellman the following portion of the evidence is relevant:

> Q. Have you also considered the possibility that [Melissa], having been a Hague proceeding once, knows how extreme she has to make the grave risks [seem] in order to avoid [Lily] being returned to Australia?
>
> A. Absolutely, of course.
>
> Q. Doesn't that, therefore, make it all the more important to contextualise externally her report in a desperate situation to you, the expert she has engaged?
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> A. I felt that there was validity in the way that she spoke about her experiences. There was [*sic*] a number of times where the autobiographical information she gave was really recounted in a very authentic manner and then there were other times where I had the impression that snippets of what she was saying she had said before. It helps you delineate between her recollections or her traumatic recollections. It is one of the things we do is listen quite carefully for that, but I am unable to discount the fact that she is the way she presents as important to the case.
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> Q. There is a possibility that the narrative has potentially changed or been exaggerated, isn't it?

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15 *Cresswell v Roberts* [2022] NZHC 1265.

16 *Basingstoke v Groot* [2007] NZFLR 363 (CA); see in particular [39].

A. Yes.[17]

[25] In light of the contemporaneous reports from the Rotorua Hospital, and the perspective and reporting of Ms [Hodder] in the 2016 hearing, I do not accept Dr Wright's opinion that at that time Ms [Hodder] made a genuine suicide attempt. Dr Wright's opinion was based upon what Ms [Hodder] had said to her at the time of interview in 2022. What she is saying down is entirely different to that represented and recorded at the time. I find that Ms [Hodder] has subsequently reported that to be the case contrary to her earlier position advanced in the hearing and contrary to the objective medical notes, and that Dr Wright has accepted that revisionist perspective without critical analysis.

[26] However, as I have stated above, both Dr Calvert and Dr Wright agree that clinically Ms [Hodder] has suffered from major depression for most of her life, and that there is a chance that it will reoccur. To Dr Wright, Ms [Hodder] has asserted that if [Lily] is required to be returned to Australia, that she will accompany [Lily] to Australia, but that she will more than likely consequently suffer from severe depression again. Ms [Hodder] further states that she would in all likelihood attempt to kill herself, and if she was successful, she would want [Lily] to be told that the reason she killed herself was because [Lily] was forced to be returned to Australia. Thus, it is Dr Wright's opinion that [Lily] should not be ordered to be returned to Australia on the basis of Ms [Hodder]'s stated intention to take her own life should an order for return be ordered, and Dr Wright's concerns that Ms [Hodder] will not receive adequate assistance from Mental Health Services in Australia.

[27] Rather Dr Wright postulates that the current situation, including therapeutic supports, for Ms [Hodder] is enabling her to be stable, well-supported, and mentally well, and consequently that this has benefits for [Lily]. Furthermore, it is her view that the supports that might be available for Ms [Hodder] in Australia would be inadequate to meet her psychiatric/psychological needs should she return with [Lily] to Australia. Increasingly, Courts in New Zealand are faced with s 106(1)(c) arguments arising out of the decreasing benefits available to New Zealand citizens

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[17] Notes of Evidence, p 28, line 30 to p 29, line 14.

when living in Australia. The Court of Appeal in the *LRR v COL* decision recorded these difficulties at [131] where it stated:

> The mother will receive some financial support from the Australian and, probably, New Zealand Government. But she will not be entitled to the same level of financial support as an Australian citizen. Her access to other forms of publicly funded support (such as medical care) will also be limited.

[28] The relevance of those concerns on the facts of this case relate not only to Ms [Hodder]'s ability to support herself financially (and I will consider this issue later), but also her ability to access sufficient mental health supports in Australia. It is Dr Wright's opinion that the resources available in Australia have been and will continue to be inadequate to support Ms [Hodder]. Mr Eggleston therefore submits that the current significant stressors are all Australia related,[18] and that the only way to ameliorate those stressors is for Ms [Hodder] to remain with [Lily] in New Zealand.

[29] Resolution of this issue requires a consideration of the history of Ms [Hodder]'s mental health involvement over a number of years.

[30] The [medical practice] in Rotorua reports are set out in the bundle of documents. On page 176 it records that Ms [Hodder] went to see [the medical practice] six weeks after her presentation at ED on 8 September 2015 following her suicide attempt. The notes record that she was doing well and did not need further counselling.[19] Following the order for return made by Judge Wills in 2016 Ms [Hodder] returned to Australia with [Lily] on 11 January 2017. At [5.1] of Dr Wright's report she sets out that Ms [Hodder]'s mental health deteriorated upon the return to Australia.[20]

[31] The Australian[21] GP notes from March 2017 record that Ms [Hodder] "presents with features suggestive of depression". I accept Dr Wright's evidence that in terms of a psychiatric definition she met the criteria for major depression at that time. However, the medical notes record:

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18 At [42] of Mr Eggleston's submissions.
19 Notes of Evidence, p 22, lines 24–27.
20 Bundle of Documents, p 314.
21 At p 191-192, Bundle of Documents.

> No suicide attempt and no suicidal ideation. No warning signs, no self-harm, no harm to others recorded and no other withdrawals recorded.[22]

[32] But as Mrs Lellman then set out to Dr Wright, there appears to be no other issues around Ms [Hodder]'s mental health for a number of years while she was in Australia.[23] As Dr Wright notes at this time Ms [Hodder] was in Australia and supported by her then partner Mr [Duncan]. Upon her return to New Zealand in 2015 she entered into a relationship with Mr [Duncan], and when [Lily] was ordered to be returned to Australia Mr [Duncan] had accompanied her back to Australia.

[33] Mr [Duncan] and Ms [Hodder] had a child together, [Jayden], and it is accepted that at the time of [Jayden]'s birth Ms [Hodder] suffered from post-natal depression. However, there is no evidence that there have been any ongoing mental health issues while she remained in a relationship with Mr [Duncan].

[34] Then, by the time of Ms [Hodder]'s decision to shift to New Zealand in March 2022 her relationship with Mr [Duncan] ended. She deposes that she had a major depressive episode in which she drove to an isolated lake, wrote farewell letters to a number of people, and intended to kill herself, but subsequently changed her mind. She did not seek any medical assistance at that time, and the letters that she said she wrote were subsequently destroyed by her. What is clear on her evidence is that in the period leading up to her move back to New Zealand, and following the ending of her relationship with Mr [Duncan], she was again depressed.

[35] What is clear in the evidence is that despite Ms [Hodder] seeking the permission of Mr [Creek] to travel to New Zealand for a visit, she, in discussion with an aunt, had already decided to relocate. She had resigned her employment, she had obtained alternative passports for [Lily], and clearly notwithstanding her earlier "brush" with the Hague Convention, she decided to unilaterally shift to New Zealand.

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22 Notes of Evidence, p 23, lines 20–23.
23 Notes of Evidence, p 23, line 27 to p 24 to line 13.

[36] Dr Calvert set out in her evidence her opinion as to the history of Ms [Hodder]'s mental health well-being. In her opinion Ms [Hodder]'s mental health is inextricably linked with fractured relationships. In her report at [7.17][24] Dr Calvert records:

> [Melissa]'s life has been marked by the impact of limited access to social capital. Social capital can be thought of as the link to shared values and understandings in society that enable individuals and groups to trust each other and work together with advantage and development.

[37] Mr Eggleston asked Dr Calvert whether Ms [Hodder]'s social capital is better in New Zealand than Australia. Certainly, it was the view of Dr Wright that one of the advantages for Ms [Hodder] in remaining in New Zealand is, and she borrowed Dr Calvert's phrase, the social capital she has at present through relationships with her mother and her sister. Dr Calvert's response to Mr Eggleston was as follows:

> No. I disagree with Dr Wright about that. I think if you look at the history, and we traversed that history with Dr Wright in Court this morning, I think a core issue for [Melissa] is actually relationships and that [Melissa] tends to report improved mental well-being at the beginning of a relationship. However, her relationships are, regrettably, not sustained and that is, as they start to fracture, her mental health well-being decreases. There is a long history of that in respect to her mother. There is a lesser history of that in respect of her sister, although there is some triangulating data provided by [Solomon] and it would be a matter for the Court to consider the credibility of that, given the circumstances, that [Melissa] was very distressed when her sister returned to New Zealand from Australia, that their relationship had also had this times of closeness here [Melissa] felt exactly as the concept of social capital suggests supported, trusting, and then at times when she didn't, and that when those relationships – particularly with her mother and her sister – were not providing her with that sense of support, then her mental well-being decreased…We have a history of, if we go back to the relationship which she told me started when she was 13, with her first significant partner, that partner, [Solomon], then [Mr [Duncan]], then [name deleted], there has always been the cycle of the relationship initially being sustained and important for [Melissa] and then fragmenting and her mental health diminishing. We cannot predict whether that will or will not happen again, but it is certainly my view without significant intervention, it is likely to happen again.[25]

[38] For Dr Wright, as I have set out, she saw great advantages for Ms [Hodder] in the support provided by her current relationships, particularly with her mother, Ms [Donald]. However, as Dr Calvert sets out there are a number of concerns around this, particularly as her mother was an alcoholic and had an inconsistent and disorganised relationship with Ms [Hodder]. Dr Calvert is clear that a number of the

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24 Bundle of Documents, p 384.

25 Notes of Evidence, p 38, line 27 to p 39, line 18.

current issues with which Ms [Hodder] presents are more likely than not to be traced to her dysfunctional upbringing. Dr Wright does not appear to have considered this issue, and in my view appeared to minimise the impact on Ms [Hodder] of her mother's alcoholism and poor parenting on the current supports that Ms [Donald] could provide to Ms [Hodder] at this time. Dr Wright described for instance the difference in a role between a mother and a grandmother in an attempt to justify the ability of Ms [Donald] to provide support to Ms [Hodder]. In doing so she does not appear to have considered as to what supports could actually be offered, and the risks of that relationship having any longevity given the fractured history of the relationship. She does not appear to have considered whether Ms [Hodder]'s mother is still an alcoholic or not, and nor has Dr Wright considered the history of patterns of fractured relationships in Ms [Hodder]'s life.

[39] Thus, while I accept the evidence of Dr Wright that Ms [Hodder] has a major depressive diagnosis, I prefer the evidence of Dr Calvert that the patterns of mental unwellness appear to correlate with the fracturing of relationships or due to post-natal depression. That is important because Dr Wright's opinion is that Ms [Hodder] would be at increased risk of suicide in being forced to return with [Lily] to Australia. However, the history of her mental health well-being appears to follow the pattern of her depressive episodes being worse during the periods of disintegration in relationships.

[40] It is my determination that the evidence does not establish that there is a risk that a return of [Lily] to Australia in and of itself will lead to increased suicidal ideation by Ms [Hodder]. In conclusion I recognise that an order for return will create stressors for Ms [Hodder], and that if she were to return to Australia with [Lily], she would be extremely distressed, and that she may become depressed upon her return. I also acknowledge that if [Lily] is ordered to return, Ms [Hodder] will be in an invidious position as Mr [Duncan] does not consent to [Jayden] relocating to Australia with Ms [Hodder] and that this factor will be a source of enormous distress for Ms [Hodder]. But that this is so is as a consequence of her unlawful retention of [Lily] in New Zealand and Ms [Hodder] bringing her and [Jayden] with her to New Zealand. It is well-established that a party should not be able to create a situation that they then seek to rely upon in order to defeat the Convention.

[41] The issue is whether there are adequate supports in Australia for Ms [Hodder] to assist her to address the potential mental health concerns and provide her with the necessary support that she needs, leaving aside the issue of whether Ms [Hodder] chooses to engage in those supports or not. As set out at [7] and [8] above, the assumption is that Australia will be able to meet any potential grave risks through its provision of adequate supports to ameliorate those risks, unless I am satisfied on the balance of probabilities that it cannot.

[42] As Dr Calvert states:

> If [Melissa] has insight that for her and her children, wherever she lives, she needs to be fully engaged with appropriate services and that is a long-term involvement and commitment, that is likely to enhance both her life and the life of her children. If she doesn't, if she has an inconsistent involvement with Mental Health Services, among other things, then that is likely to diminish – to further impact on the quality of life, her social capital, her ability to engage in things.[26]

[43] Mr Eggleston put to Dr Calvert:

> In terms of [Ms [Hodder]'s] mental health and the comment about what that will be, do you agree that on a return there are some clear Australian stressors facing Ms [Hodder].

[44] To which Dr Calvert replied:

> Well, I think there always are in this point in a Hague proceeding if a parent who does not want to return is required to return, then I think they are always under extreme stress until the substantive decision is made by the Court in the country that they have returned to.[27]

[45] In giving that answer Dr Calvert recognises the obvious stressors on a parent who does not want to return having to return. As is common to all Hague Convention applications, and as Appellate Courts have made it clear, it is not a factor the Court can give significant weight to. Indeed, Dr Calvert is well-familiar with the Hague Convention, has written a number of reports for different Courts in relation to Hague proceedings, and is to shortly co-author a chapter in an international book on the Hague Convention. It can be contrasted with Dr Wright who candidly acknowledged she has no experience and only limited understanding of the Hague Convention.

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[26] Notes of Evidence, p 40, lines 19–26.
[27] Notes of Evidence, p 45, lines 24–30.

[46] Dr Wright was sceptical as to the actual supports that would be available to Ms [Hodder] in Australia. Both she and Dr Calvert agreed that medication is insufficient in and of itself to treat Ms [Hodder]'s depression and that she needs ongoing therapeutic support. Dr Wright saw supports that had been offered, and those suggested by Mr [Creek] in his affidavits, as being inadequate. Yet Ms [Hodder]'s history indicates that there have been periods in which she has sought assistance and has utilised some of the tools gained through that therapeutic assistance while in Australia. For example, the "ice cube technique" has been referred to by both Dr Wright and Dr Calvert. This is a recognised strategy for addressing periods of mental unwellness and assisting patients in refocusing themselves. That was a tool she learnt in Australia and one which she has clearly utilised over a number of years.

[47] Certainly, a very positive factor from Ms [Hodder]'s perspective at this point in time is that with engagement with her current local general practitioner, she has changed her medication to one which appears to have greater efficacy and has assisted in stabilising her mental health. However, both Drs Calvert and Wright agree that medication alone is insufficient, and Dr Calvert has made some recommendations to Ms [Hodder] as to the type of supports she should engage in while living in New Zealand. Whilst Ms [Hodder]'s evidence is that she has begun counselling, there is no evidence of this before the Court and it is unclear whether she has acted on Dr Calvert's advice and whether the counselling has commenced or not.

[48] Significantly, the s 106 defence is centred in a grave risk to the child, and not to the returning parent. The proposition advanced by Ms [Hodder] is there is grave risk to [Lily] if her mental health deteriorates and its consequent adverse impacts on her parenting, and a risk that she kills herself, both of which would be psychologically intolerable for [Lily]. It is unclear to me whether the threat to kill herself by Ms [Hodder] is a genuinely held belief or intention or whether it has been proffered in an attempt to influence the outcome. I do note however that there is no concrete evidence of a serious suicide attempt by Ms [Hodder] to date, and on the one occasion in which she says she did consider killing herself, she was able to recognise that the impacts on her children would be significant and that acted as a fetter against her decision to kill herself. But if Ms [Hodder] became unwell, as Dr Calvert sets out in the context of a return to Australia, [Lily]:

> …would have access to the social capital provided by her father and her father's family in that environment, so that would become a protective factor.

[49] And then again:

> …[Lily] clearly feels well-integrated into her father's family. She regards her stepsiblings, her half-sister and the baby to come all as being of promotional significance to her and her general descriptions of that environment were – one would have to say – entirely positive.[28]

[50] Dr Wright's view is that Ms [Hodder] becoming mentally unwell would have a "profound and enduring negative effect on [Lily]'s psychological well-being". Firstly, it was not Dr Wright's brief to assess [Lily], and I was surprised and concerned that she met with [Lily]. While Dr Wright attempted to minimise and explain her involvement in that she did not conduct a formal interview, she nevertheless has had discussions with [Lily] which have found their way into her report and which have clearly informed her opinions, notwithstanding that it was not part of her brief to do so. Notwithstanding those concerns, Dr Calvert was asked whether she agreed with Dr Wright that Ms [Hodder] becoming unwell would have a profound and negative effect on [Lily]. Dr Calvert's evidence was:

> A. I don't agree – well, I don't think we can predict what the outcome is going to be for [Lily] if her mother returns to Australia and her mental health worsens, given other factors that at the moment we can't assess. So I don't agree with that. I certainly agree with Dr Wright that if [Melissa] was to return to Australia and to choose to commit suicide and people accepted her requirement that [Lily] was told that, in effect, she was the cause of that, that would likely have a deep and profound negative impact on [Lily] for the rest of her life.
>
> Q. And where you talk about not knowing what those other factors are, Dr Calvert, can I just be clear with you what you say those unknowns are?
>
> A. Well, the unknowns are we don't know what [Melissa]'s mental health will be like when she goes back to Australia. We don't know whether she will access appropriate services. We don't know what support [Solomon] and his family will effectively offer her, and we don't know whether [Melissa] will accept that support or not. We don't know how well [Melissa] will be able to resume a life in Australia.[29]

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[28] Notes of Evidence, p 44, lines 10–12 and lines 22–25.
[29] Notes of Evidence, p 45, lines 1–16.

[51] Not unsurprisingly Mr Eggleston relies upon the decision of Doogue J in *Cresswell v Roberts*.[30] In that case the Family Court Judge at first instance had ordered a return of the parties' children to France. Justice Doogue on appeal overturned that decision. In that case the mother was found to have been likely to be suffering from post-traumatic stress disorder in France prior to her coming to New Zealand.[31] That was against a background of her being the subject of family violence from the children's father. The decision of Doogue J was that her Honour found that on the balance of probabilities a return to France by the mother and the children in the face of the psychosocial stressors would trigger her PTSD and consequently, her parenting would more likely than not be impaired and that would have deleterious consequences for her children.[32] Additionally, a return to France would mean for these children that they were not going to be in their mother's primary care, she having been their primary caregiver for most of their life.

[52] The facts in this case are quite different. What Mr [Creek] is clear on is that if an order for return is made, he would simply seek to revert to the terms of the current Australian Parenting Order which provides for a nine/five split in the care arrangements for the children (although as I understand the evidence in reality, he had [Lily] in his care most weekends). This would mean that [Lily] would remain in the care of both of her parents, and Ms [Hodder] will continue to be a significant and involved caregiver for [Lily]. She has confirmed her intention to return to Australia with [Lily] should an order for return be made.

[53] Secondly, as I have set out above, I am satisfied on the balance of probabilities that the evidence establishes that Ms [Hodder]'s mental health and particularly her issues with depression are inextricably linked with the breakdown in relationships. Events have already proven that upon being forced to return, whilst having an initial period of depression, in accessing supports she was then able to manage her distress

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30 Note 15. Noting that it is, according to Mr Eggleston, the subject of a current appeal in the Court of Appeal, if leave to appeal out of time is granted.

31 *Cresswell v Roberts* at [191].

32 Although nowhere in the High Court decision could I see any reference as to why the Judge felt that France would not be able to provide appropriate supports for the mother to assist her with her PTSD. Consequently, the principles set out by the Court of Appeal in *Smith v Adam* and *A v New Zealand Central Authority* (notes 5 and 6 above) do not appear to have been considered by Doogue J.

and symptoms and depression and for a number of years. Further, the facts of this case indicate that when Ms [Hodder] has chosen to engage with the available therapeutic and medical supports in Australia, they have been of assistance in her managing her mental health. Her mental health has deteriorated postpartum, and when she has not engaged or accepted the treatment options offered to her.

[54] It is my conclusion that I am not satisfied that the making of an order for return would result in an intolerable situation for [Lily] arising out of her mother's deteriorating mental health. For, as Dr Calvert has stated, if Ms [Hodder] accesses the type of supports she has in the past, and those that are clearly available to her at present, then she will receive assistance in managing her distress and potential depression in having to return to Australia. But additionally, if she does become unwell, then I accept and prefer the evidence of Dr Calvert that a protective factor for [Lily] is her father and his family in Australia. Conversely, for the reasons advanced by Dr Calvert, and not adequately addressed by Dr Wright, there are a number of concerns and risks for [Lily] around Ms [Hodder]'s current maternal supports in New Zealand given her fractured and dysfunctional relationship with her mother in particular.

Are there other factors which point to a grave or intolerable risk?

[55] Ms [Hodder] further argues that there is an intolerable situation for [Lily] if an order for return is made because of the financial difficulties Ms [Hodder] will have should she be ordered to return to Australia. Those circumstances arise out of a combination of debts she has in Australia, consequent difficulties she alleges she will have in being able to secure rental accommodation, and inadequate financial provision from the Australian Government so as to enable her to be able to provide for her and [Lily]'s day-to-day needs. In effect, Ms [Hodder] is arguing that because she is a New Zealand citizen, and not an Australian citizen, she is unable to access reasonable Government support. Further, she argues that it is uncertain whether she would in fact be granted legal aid in respect of any Court proceedings which would be required to determine the Final Parenting Orders or relocation of [Lily].

[56] Ms [Hodder] in her affidavit of 22 July 2022 sets out the financial assistance that she formerly received when in Australia. She had part-time work as a gymnastics coach at the [employer deleted]. Additionally, she was entitled to a family income support payment from Centrelink, Australia and at [62] of her affidavit she states that she had an average weekly income of between $475 and $550 per week, depending on the hours that she was able to work at the gymnastics club. It is her submission that that level of income is insufficient to meet her and [Lily]'s needs.

[57] Additionally, in November 2021 Ms [Hodder] ascertained that her driver's licence had been suspended. Enquiries she made with the Australian Department of Land and Transport resulted in her becoming aware that SPER (State Penalties Enforcement Register) had issued a repossession notice on her vehicle relating to unpaid tolls and fines. At that time the total fines amounted to $21,255.21. It is her evidence that she has paid nothing towards those fines and the balance as at the date of the affidavit was $23,089.66 of which she alleges $15,460 related to periods in which Mr [Creek] had the vehicle, with the tolls relating to his travel to and from the job in which he was currently employed. Additionally, because Ms [Hodder] had left what I understand to be a fixed term tenancy in coming to New Zealand with [Lily], she has a liability for the rental arrears. That liability is entered into the TICA Database (Tenancy Information Centre Australia) and operates as a "red flag" for any prospective landlord. It is Ms [Hodder]'s position that she in effect is now precluded from being able to rent a property in her own name in Australia as a consequence of that information.

[58] Mrs Lellman in her submissions relies upon the decision of *Scott v Jenkins*.[33] Specifically, at 5.20 of her submissions she sets out a number of supports, available in the *Scott v Jenkins* case, to which she submits Ms [Hodder] is entitled to. However, Ms [Hodder] states in response that she was on a temporary visa in Australia and not a special category visa as in the *Scott v Jenkins* decision, and thus is not eligible for all of the benefits that are alleged.

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[33] *Scott v Jenkins* [2021] NZFC 3340.

[59] However, information from the Australian Government included in the bundle of documents[34] indicate that available supports to Ms [Hodder] include:

(a) Benefits and other direct financial supports, such as the Family Tax Benefit, Single Income Family Supplement, Child Care Subsidy and Health Care Card.

(b) Additional to the supports in *Scott v Jenkins*, Ms [Hodder] could arguably access supports available for the Benefit of Aboriginal and Torres Strait Islander children, which includes additional health services and supports.[35]

(c) Community Services and Legal Aid. In respect of the latter it is noted that Australia, like New Zealand, employs a "means test" and a "merits test".[36]

(d) Public housing, including emergency/crisis assistance.

[60] Significantly, as Mrs Lellman sets out in her submissions, in the previous Hague proceedings before Judge Wills, Ms [Hodder] argued that she had no one at home, no support and no financial ability to return to Australia.[37] It is apparent however that Ms [Hodder] was able to "get by" financially following her return for a period of four to five years and establish herself and [Lily] in suitable accommodation and meet [Lily]'s and her day-to-day needs. While I accept in part that was as a consequence of her being in a relationship with Mr [Duncan], he was only able to secure low paying employment and they were in a difficult situation but managed to meet their needs.

[61] Cull J in *Green v White* held at [75] and [76]:[38]

> [75] As the authorities observe, the Hague Convention is a "strong international convention to which New Zealand is a signatory" which has the

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34 Bundle of Documents, p 391 onwards.
35 Bundle of Documents, p 399.
36 Bundle of Documents, p 399, 401–403, 279–282 and p 411.
37 Bundle of Documents, p 14 at [40].
38 *Green v White* [2018] NZFLR 938.

purpose of deterring the unlawful removal of children and ensuring their prompt return.27 McGrath J in Secretary for Justice v HJ reinforced the importance of the Hague Convention as follows:

> The Hague Convention has been described as a "groundbreaking" instrument, providing a "mechanism for the summary return of wrongfully removed and retained children and … establishing channels of co-operation between contracting States to facilitate and expedite return applications". The main object of the Convention is to ensure the prompt return of children wrongfully removed to or retained in any Contracting State. A removal will be "wrongful" where it is "in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone …". "Wrongful" thus means that a removal is contrary to the applicable custody law, and takes no account of particular reasons for the abduction, such as domestic violence. The rights of custody with which the Convention is concerned are defined to include rights to the care of the child and to determine the child's place of residence. These rights may of course be enjoyed by a parent who does not have custody of the child

> [76] These observations by McGrath J and the Supreme Court serve as a reminder that allegations of grave risk, whether they be domestic violence, financial hardship, or physical or psychological harm, need to be dealt with in the country from where the children have been removed. In this case, Mr White has played a parental role in the lives of these children, and removal of the children is wrongful, where it is in breach of the remaining parent's rights of custody and of access. Here, Mr White deserves an opportunity to defend any proceedings brought by Ms Green. The ultimate determination needs to be made after a consideration of all relevant issues at a Family Court hearing. That hearing should be in Australia, where proceedings have already been commenced.

[62] As Cull J set out, in a case such as this where Mr [Creek] has played an important parental role in the life of [Lily], and where, as Ms [Hodder] accepts, her retention of [Lily] was unlawful, the welfare and best interest issues needs to be considered at a full Family Court hearing, and that should be in Australia being the habitual country of residence.

[63] Additionally, I take judicial notice of the fact that there is a global labour shortage at present, including in Australia. As in New Zealand, a number of industries, including the hospitality and tourism sectors, have a huge workforce shortage. That is, should an order for return be ordered, I do not accept that the current employment situation in Australia is as dire as Mr [Hodder] represents; in fact, I suggest it would be relatively easy for Ms [Hodder] to find employment in, for example, the hospitality sector. Furthermore, Ms [Hodder] would be able to access the International Custody

Dispute Payment through Work and Income New Zealand. Mr [Creek] also currently pays child support at the rate of $138.50 a month.

[64] Also, in relation to the debts, the issue of the debts is not new. It was an issue in the hearing before Judge Wills. A large portion of the current $23,000 debt existed at that time and did not operate as a bar to her Honour ordering a return of [Lily].

[65] In relation to the SPER debt, Mr [Creek] sets out in his affidavit of 8 August 2022 that he had provided her with information on a toll class action against SPER. Additionally, as he sets out SPER offers an arrangement whereby Ms [Hodder] could volunteer working hours at days and times to suit the schedule to repay the debt. Through this arrangement up to $1,000 a month could be removed from the debt. Mr [Creek]'s evidence is that Ms [Hodder]'s former employer had tried to help with the debt by arranging her employment hours around the SPER volunteer hours, but that Ms [Hodder] declined opportunities from SPER and her employer to volunteer hours to reduce the debt. I note that Ms [Hodder] denies this assertion, indicating that she did not qualify for the scheme because she was not a citizen.

[66] Neverthless, it is clear to me that the difficulties Ms [Hodder] has in accessing housing in Australia[39] are entirely of her own making. That she and her former partner, Mr [Duncan], are on the TICA Database is as a consequence of their decision to leave for New Zealand with an outstanding rental debt. There are a number of appellate decisions which make it clear that a party cannot rely upon a situation they have created in support of one of the statutory defences. As set out in the information provided by the Australian Central Authority via the New Zealand Central Authority, emergency housing is available to Ms [Hodder]. Additionally, as she concedes, she would be able to share accommodation with other people; just not hold a tenancy in her own name until her earlier debt is satisfied. As the Court held in *Scott v Jenkins* at [35]:

> [35] The risk that the court must consider is whether the mother's perceived lack of financial assistance from the Australian Government puts the children in an intolerable situation. Ms [Jenkins] relies entirely upon a claim of undue financial stress should she be returned to Australia. I accept the submission that she cannot be the maker of her own intolerable situation

[39] See her affidavit of 31 August 2022 at [40] and [41].

> and she must be expected to take such reasonable steps to ameliorate any possibility of that risk. Reasonable steps include properly accessing the financial support that is available to her such as exploring employment options and seeking child support.

[67] As in that case, I do not accept her argument that the financial options available to Ms [Hodder] in Australia do not meet her needs and puts her and [Lily] in an "intolerable situation". She has not satisfied me on the balance of probabilities that that aspect of the intolerable situation defence argument has been established. Rather I find as proven that there are payments available to Ms [Hodder] from the Australian Government, and that coupled with Mr [Creek]'s child support, and the International Custody Dispute Payment through WINZ NZ, together with the potential employment opportunities available to her in Australia, will be sufficient to meet her immediate financial needs in Australia. Additionally, as Mrs Lellman has set out, Ms [Hodder] already has a track record of being ordered to return to Australia against her wishes and being able to survive financially. While I accept that her ability to obtain housing is precluded in her own right, there will be options available for her in Australia such as flatting, or a boarding type arrangement until such time as she repays her outstanding debt arising out of the rental arrears.

Cultural considerations in terms of [Lily]

[68] Mr [Creek]'s whakapapa is Aboriginal and Torres Strait Islander. It is clear from Dr Calvert's evidence that [Lily] clearly identifies herself as Aboriginal, and for [Lily] her sense of identity[40] is centred in her Aboriginal heritage. Ms [Hodder] is Māori. On the evidence I am unclear as to what Ms [Hodder]'s (and hence [Lily]'s) whakapapa is, and on the evidence whilst Ms [Hodder] knows she is Māori, neither her nor her family operate through a tikanga/ te ao Māori lens. Thus, by genealogy and heritage [Lily] on the evidence before me in this hearing is Māori, Aboriginal/ Torres Strait Islander and Pakeha. But from [Lily]'s perspective her identity is Australian and Aboriginal/Torres Strait Islander. For her this is, I accept on the evidence, an important part of her identity.

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[40] Relevant in terms of s 5(f) of the Care of Children Act 2004.

[69] At issue is the extent to which this should be a factor in a s 105 application, particularly as these considerations fall squarely within welfare and best interests' considerations. The Court of Appeal in *LRR v COL* addressed the relevance of welfare and best interests at [76] to [84] of its judgment, concluding at [83], "But it remains the case that the welfare and best interests of the child are…at the forefront of the whole exercise." Doogue J in *Cresswell v Roberts*, with reference to the Supreme Court's decision in *Kacem v Bashir*, held that,[41]

> Thus s 5(a) is but one of a list of constituent elements that make up child wellbeing that the Court ought to have regard to, both in the wide-ranging enquiry concerning the best interests of a child in a domestic dispute and in the more prescribed summary approach enshrined in the Convention when considering an affirmative defence in which family violence is advanced.

[70] However, as Doogue J went on to state,[42]

> The application of the paramountcy principle, and the importation of s 5 principles into that consideration in the context of the application of the Act to the Convention, does not mandate a change to the customary way in which these matters are dealt with in New Zealand.

[71] Ms [Hodder], in her affidavit evidence, states:[43]

> It has only in [*sic*] been in the recent years that I believe [Solomon] has become more in touch with his Aboriginal side.

[72] In making that comment she demeans both Mr [Creek] and [Lily]'s Aboriginal heritage. As Mr [Creek] and his current partner have established their business "Culture Class, Indigenous Education in Youth Empowerment", using his cultural practices as a form of emotional and mental therapy. In his earlier statement attached to the affirmation of [name deleted], Mr [Creek] sets out that:[44]

> As I have spent my whole life in Australia, all my family and friends reside here. I am an Aboriginal Torres Strait Islander and have close ties to my culture and family, whom I spend time with regularly…I often have get-togethers with my family where we cook [traditional indigenous food] and teach our children about our indigenous practices and history.

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41 *Creswell v Roberts* at [132].
42 Ibid at [134].
43 Her affidavit of 22 July 2022 at [112], p 140, Bundle of Documents.
44 Bundle of Documents, p 43.

[73] Mr Eggleston is silent in his submissions as to this issue, but it is one that this Court should not ignore. The law has for some time been criticised as operating through a monocultural and colonising worldview. Yet within Aotearoa there is increasingly a recognition that within our legal construct, issues such as tikanga and the application of the law must be interwoven. Thus, the Supreme Court in *Deng v Zheng* recognises the application of customary laws in New Zealand Courts in a wider context than just that of tikanga and provides a methodology for inclusion of evidence on the subject of customary or cultural issues.[45]

[74] The Australian Aboriginal Customary Law is called "The Dreamtime" or "The Dreaming" and is traditionally conveyed orally through storytelling, oral performances, traditional dances and artwork. It is a complex network of knowledge, faith and practices deriving from creation stories. It governs the way people live and how they should behave. Those who do not follow the rules are punished. In Aboriginal culture, their connection and oneness with the land in which they live hold special and significant meaning – The Dreamtime comes from the land and is part of the land just as Aboriginal people are part of the land.[46]

[75] There are thus significant similarities between te ao Māori, tikanga and the Aboriginal concept of "The Dreamtime", and as such it would be remiss of this Court not to give the cultural issues from [Lily]'s perspective due consideration. Following *Deng* due consideration depends on the particular facts of the case. That involves, consistent with *Deng,* considering the cultural factors for [Lily] alongside the other evidence and case specific factors in the assessment of its relevance and the weight that the cultural factors should be afforded.

[76] What is clear to me on the evidence is that for Mr [Creek], his Aboriginal/Torres Strait Islander heritage is an integral part of his life, and as it has formed part of his life, and that it now is an important part of [Lily]'s identity. The Dreamtime practices, culture and expression have been matters to which [Lily] has been deliberately exposed to by her father. Ms [Hodder]'s belittling of that heritage

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45 *Deng v Zheng* [2022] NZSC 76.

46 Helen McKay (ed) *Gadi Mirrabooka: Australian Aboriginal Tales from the Dreaming* (ABC-CLIO, LLC, 2001) at xv – xviii and 13 - 18; Dreamtime "Spirituality" (2022) Spirituality - Dreamtime.

belies the actual reality for Mr [Creek] and [Lily], and their close affiliation and observance of traditional customary Aboriginal lore.

[77] To ignore, in the context of this case, that important aspect of [Lily]'s identity would require this Court to adopt a monocultural and colonist worldview which, as the Supreme Court has recognised, has no place in modern New Zealand/Aotearoa.[47] For [Lily] she will be deprived of her Aboriginal identity should she not be returned; whether that is in her welfare and best interests is an issue that should be considered in Australia by the Australian Family Court.

[78] In weighing up any of the s 106 defences, and more particularly, in considering the residual discretion as to whether to order a return or not, and the developing jurisprudence in New Zealand, it is impossible to ignore a child's particular cultural needs. That is, given the wealth of evidence of the impacts on people of being dislocated from their cultural identity, where a child such as [Lily] has his/her identity so emmeshed in her culture, and where it is impossible for that cultural identity to be preserved and strengthened[48] in the requested State because it has no such established practices or peoples of that culture, then this factor may prove to found "…a legitimate exercise of the [s 106(1)] discretion nevertheless to order the child's return."[49]

Decision

[79] I have determined that Ms [Hodder] has not made out the grave risk of an intolerable situation defence. This case can be distinguished from the *Cresswell v Roberts* decision where the triggering of the mother's PTSD, and the consequent adverse impacts upon the children was a significant factor in Doogue J declining to make an order for return. For there is evidence in this case, unlike in the *Cresswell* decision, that Ms [Hodder] has had in the past, and will have upon her return to Australia, supports available to her in Australia in terms of her mental health. Additionally, unlike the *LRR v COL* decision where there was a history of the Australian authorities/systems being unable to protect the safety of the mother, there

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47 *Ellis v R* [2022] NZSC 114 at [101].
48 To use the language of s 5(f).
49 *In Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257; referred to at [96] of *LRR v COL.*

is evidence in this case of the Australian mental health system meeting the needs of Ms [Hodder] when she chose to engage and take the proffered assistance.

[80] While I do not minimise the stressors and impacts on Ms [Hodder]'s mental health of an order for return, she has created those stressors through the choices she has made. For she well-knows what the Hague Convention entails, and yet despite that made a deliberate choice to deceptively return to New Zealand and remain here with [Lily] knowing that in doing so she would be in breach of the Hague Convention.

[81] In all respects I accept and prefer the evidence of Dr Calvert for the reasons set out above rather than that of Dr Wright. Should Ms [Hodder] choose to access them, I find as proven on the balance of probabilities if there continue to be a number of agencies and supports available to her upon her return to Australia, and that coupled with the fact she is now on her better medication which is meeting her current mental health needs, has led me to conclude that there is no grave risk of an intolerable situation for [Lily] in being ordered to return to Australia arising out of her mother's mental health should it deteriorate. Given that Ms [Hodder] is to return with [Lily], the consequences of a change in care that existed for Doogue J in *Cresswell* are not relevant in this case, and on the facts, her Honour's decision is further distinguishable.

[82] Furthermore, I do not find as proven on the balance of probabilities that there are grave or intolerable risks arising for [Lily] arising out of Ms [Hodder]'s financial circumstances upon return. Rather I find as proven on the balance of probabilities that, as occurred on her last return, the Australian Government is able to meet her financial needs, and that Ms [Hodder] is able to adequately provide for her and [Lily] in Australia. Additionally, I do not accept that she will have difficulty obtaining employment when in this post-Covid world, there is a global labour force shortage, and particularly so in Australia as in New Zealand.

[83] But additionally, the consequences of not ordering return have adverse impacts on [Lily]'s welfare and best interests in terms of her cultural identity. Indeed, if I had found the intolerable risk defence established, it is more likely than not I would have exercised my discretion and still ordered the return because of the adverse impacts on [Lily] of being dislocated from her Aboriginal culture.

Subsequent Orders

[84] Mrs Lellman urges me to make subsequent orders pursuant to s 108 of COCA, including the appointment of lawyer for the child to facilitate return, to give consideration as to who should provide for [Lily]'s care in the interim, and a direction that [Lily] continue to attend [school deleted]. Section 108 vests in the Court what is described as interim powers. Specifically, when an application is made for an order for return the Court may "at any time before the application is determined, give any interim directions it thinks fit for the purpose of securing the welfare and best interests of the child…" The proviso is "at any time before the application is determined". As a consequence of determining that the defence has not been made out, I need to consequently make an order for prompt return. That finally determines the s 105 application, and therefore there is no jurisdiction under s 108. Pursuant to s 105(2) the only order the Court can make is an order for prompt return. It is not within the power of the Family Court to make a return order subject to conditions.[50]

The Result

[85] I make an order for the prompt return of [Lily Creek] to Australia.

[86] Leave is reserved for the Central Authority to come back by way of memorandum seeking further orders to discharge the current order preventing [Lily] being removed from New Zealand so as to facilitate her return to Australia.

S J Coyle
Family Court Judge

Signed this 17th day of November 2022 at am / pm

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[50] *A v Central Authority for New Zealand* [1996] 2 NZLR 517, also reported as *A v A* (1996) 14 FRNZ 348 (CA) at 524; or 356 to 357. I note that in *LRR v COL* appears to suggest that return conditions can be made, but the jurisdictional basis for the Family Court to do, as an inferior court, in the absence of a specific legislative power, is unclear from that decision.