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[26/08/2003;Full Court of the Family Court of Australia; Superior Appellate Court]
Director-General, Department of Families v RSP[2003] FamCA 623

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal No. NA 13 of 2003

File No. BR 5717 of 2002

BETWEEN:

DIRECTOR-GENERAL, DEPARTMENT OF FAMILIES, Appellant

- and -

RSP Respondent Mother

REASONS FOR JUDGMENT OF THE FULL COURT

BEFORE: Ellis, Finn and May JJ.

DATE OF HEARING: 13 May 2003

DATE OF JUDGMENT: 26 August 2003

APPEARANCES: Mr Basten of Queen's Counsel and Mr Green of Counsel (instructed by the Crown Solicitor, Crown Law, Level 11, 50 Ann Street, Brisbane QLD 4000) appeared on behalf of the Appellant; Mr North of Senior Counsel and Mr Forrest of Counsel (instructed by Robert Downey Lawyers, PO Box 366, Hamilton QLD 4007) appeared on behalf of the Respondent Mother.

1. This is an appeal by the Director-General, Department of Families (QLD) as State Central Authority for Queensland under the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations") against an order made by Warnick J on 14 January 2003, whereby his Honour dismissed an application by the Central Authority for an order that a child, SSP (born 5 December 2000), be returned to the United States of America. (It will be convenient to refer to the Director-General as "the Central Authority").

2. The Regulations are made pursuant to s 111B of the Family Law Act 1975 for the purpose of making "such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit" under the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention").

3. The respondent to the appeal is RSP, who is the mother of the child (and to whom we will refer as "the mother").

4. This appeal raises again for consideration, the application of reg 16(3)(b) of the Regulations, which can be described as "the grave risk of exposure to harm" exception to the general requirement under the Regulations for the mandatory return of a child wrongfully removed from his or her country of habitual residence.

5. The terms of reg 16(3)(b), and its place in the scheme of reg 16 as a whole, are as follows:

16(1) Subject to subregulations (2) and (3), on application under regulation 14, a court must make an order for the return of a child:

(a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or

(b) if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.

16(2) A court must refuse to make an order under subregulation (1) if it is satisfied that:

(a) the removal or retention of the child was not a removal or retention of the child within the meaning of these regulations; or

(b) the child was not an habitual resident of a convention country immediately before his or her removal or retention; or

(c) the child had attained the age of 16; or

(d) the child was removed to, or retained in, Australia from a country that, when the child was removed to, or first retained in Australia, was not a convention country; or

(e) the child is not in Australia.

16(3) A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:

(b) there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

…

The factual background

6. The factual background to this matter as found by Warnick J can be summarised briefly as follows.

7. The mother was born in Fiji on 12 April 1971. She is now an Australian citizen. While travelling abroad in 1996, she met SRP (a United States citizen). They married on 12 April 1997 in the United States.

8. The child, S, was born in the United States, on 5 December 2000. The mother gradually developed a depressive illness, which was diagnosed as post- natal depression, and was prescribed anti-depressants.

9. In April 2001 the mother experienced neurological problems and she was eventually diagnosed as having arterio-venous malformation (AVM).

10. Warnick J found that on 18 September 2002 the mother secretively removed S from the marital residence in the United States and brought her to Australia.

11. The father filed an application under the Convention in the United States on 19 September 2002. Pursuant to that application, proceedings were commenced in the Family Court of Australia by the Central Authority on 8 October 2002. Those proceedings were heard by Warnick J on 2 December 2002. His Honour published his reasons for judgment and made the orders which are the subject of this appeal on 14 January 2003.

The issue before the trial Judge

12. At an early stage (paragraphs 4 to 8) in his reasons for judgment, Warnick J expressed himself satisfied that none of the matters which would prevent the making of an order for the return of the child and which are contained in reg 16(2) of the Regulations, existed. He explained that "the mother's resistance to an order for return" rested on the contention that the exception contained in reg 16(3)(b) to an otherwise mandatory return existed, being:

"there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"

The evidence before and the conclusions of the trial Judge

13. It was Warnick J's conclusion that the test contained in reg 16(3)(b) had been satisfied in this case. In order to understand his reasons for so concluding, it is necessary to have regard to the expert evidence upon which his Honour relied, and which he recorded in the following way:

36. Dr Bartholemew Klug is a consultant psychiatrist. He has been seeing the mother since 9 October 2002. In his affidavit he said:

"I am very concerned about Mrs P and truly and honestly believe that her threats of suicide must be taken seriously, she being a real suicide risk if her young child is forced to return to the United States of America."

37. Dr Klug records that the presenting problems of the mother were depression and suicidality. The mother told him that the basic problem underlying her depression was the breakdown of her marriage and a dispute over the custody of her daughter S. The mother stated to Dr Klug that her daughter was her only purpose in life. She said she would "jump off the bridge" if she had to hand her daughter back to the father to be looked after by her mother-in-law.

38. Dr Klug concluded that the mother's mood was severely depressed and her expressed thought content included a suicidal ideation with a clearly stated intent to take her own life if she had to hand her daughter back to the father. On the other hand, she expressed no delusions and gave no indication of suffering from hallucinations or any other psychotic phenomena. She was in a clear state of consciousness with intact cognitive functions and an estimated average level of intellectual ability.

39. Dr Klug diagnosed the mother as suffering Major Depressive Disorder.

40. Dr Klug had seen the mother on five occasions prior to his report.

41. …

42. … She last saw Dr Klug on Thursday, 21 November 2002 but she also had appointments for times not long after those dates. She said that during the course of the recent appointment with Dr Klug, after many conversations she had with him, she promised him that she would admit

herself to hospital under his care for 15 days in the event that the result of the case was that S would be sent back to the USA.

43. Denise Britton, a psychologist, saw the mother and S at the request of the mother's legal representative. Ms Britton had been forwarded most, if not all, the extensive affidavit material filed in this matter. Her report dated 29 November 2002 discloses that she "observed" the mother and S over a period of approximately one hour on 28 November 2002. She expressly says "I did not interview Mrs P ". Ms Britton recorded her instructions as seeking:

"…an opinion as to whether or not S 'would be exposed to a grave risk of physical harm, psychological harm or some other intolerable situation' if required, as a result of a Hague Convention hearing, to return to the United States of America.'"

44. She said:

"I shall focus on the likelihood of her being exposed to a grave risk of psychological harm as a result of such action."

45. Ms Britton opined that S was securely attached to her mother. S presented as socially competent. The mother interacted appropriately with S. …

47. After discussing the content of medical reports she had read, Ms Britton expressed the view that:

"…it would be inhumane to force Mrs P to return to the United States in her current physical and mental condition, whether or not she was charged with the care of S. It is reasonable for her to expect to be able to rehabilitate in the environment provided by her parents, if this is what she desires."

48. Of course, this is not an application seeking the return of the mother to the USA.

49. Ms Britton then turned to consider the short term effects on S should she be returned to the United States without her mother. She said:

"It is my opinion that should S be returned to the United States without her mother, especially since she has had no contact at all with her father for over two months and has been in constant contact with her mother at her maternal grandparents home, she would experience a sense of loss and distress over the disappearance of her mother and would be at risk of suffering in the short to medium, as well as possibly the long term, as a result of feeling of abandoned (sic). She would not, at this stage of her life, have the cognitive capacity to understand explanations to her as to why she was separated from her mother."

50. Ms Britton then went on to discuss the long term effects on S should she be returned to the United States without her mother. These related mainly to personality traits and disorders of a dependent nature arising from the sense of abandonment that S might feel.

51. In relation to the risk of the mother suiciding if S is removed from her care Ms Britton said:

"The ramifications of this would obviously be devastating long term for S, in that she would grow up without any access to her biological mother."

52. Then, observing that it would be unlikely (if S was returned to the USA) that S would have any contact with her mother's side of the family, Ms Britton said:

"Such a situation is not desirable in that it would not foster a healthy sense of self, personal identity formation being fundamental to the development of well-integrated personality."

53. Ms Britton then addressed a further potential consequence if the mother committed suicide. She said:

"…S would be burdened with a not well understood phenomenon which is that suicide tends to 'run in families'. Although there are biological factors such as genetic predisposition to depression which might play a part, it is also thought that in some way the knowledge that a parent has suicided can be tantamount to suicide being presented to a vulnerable individual as a viable option for solving intractable problem situations. The ramifications of this are obvious."

14. It is important to record that there was no cross-examination of any witness in this case. Thus the evidence of the experts as recorded by his Honour was unchallenged, as was all the evidence before him.

15. His Honour's conclusions in relation to the application of reg 16(3)(b) were then as follows:

68. I do not accept that the mother could not return to the USA…

69. Whether, if S is returned to the USA, the mother will herself return, is more speculative, depending as it does entirely upon the mother's degree of determination to remain in Australia (and leaving aside the risk of suicide).

70. However, I do not accept that it is more probable than not that in those circumstances she would remain in Australia but, even if I thought that she would, I would not find that would produce a situation which would expose S to a risk of harm of the degree required under regulation 16(3)(b) or place S in an intolerable situation.

72. … I would not accept the contention that the father and/or his family could not adequately care for S...

73. Concerns about the lack of contact (such as voiced by Ms Britton) between S and the father in recent times since the removal of the child from the USA might be met by arranging for contact between the father and the child in Australia over a period of time preceding the return of the child with the father to the USA.

74. Though no doubt some distress for S upon removal from the mother might be anticipated, I do not find that this gives rise to a grave risk of harm to her, or places her in an intolerable situation. The mother may well follow her to the USA.

…

76. That leaves for consideration the risk of the mother committing suicide if the child is returned to the USA.

…

78. On the evidence, I accept that there is a grave risk that if S is returned to the USA the mother will suicide.

79. I accept the evidence (particularly that of Mrs Britton) of the harm for S which might follow a suicide by the mother. I find that there is grave risk of psychological harm.

80. I do not reach these findings without disquiet. Courts will understandably have a real concern about the disingenuous adoption of stances designed to achieve the purposes of abductors in resisting orders for the return of children. But the response to this concern cannot be to disregard evidence, but rather to scrutinise it with great care.

81. In this case there is a history of depression and mood changes in the mother. She demonstrated an intense need for the comfort and support of her family. She has suffered dramatic and no doubt traumatic health difficulties. She threatened suicide when cohabiting with the father.

82. Her consultations with Dr Klug are apparently for the purpose of treatment, not evidence gathering. His medical opinion of the risk is clear and unchallenged.

83. The risk in my view is little alleviated by the arrangement that the mother will enter hospital under Dr Klug's supervision if S is sent back to the USA. Though this is clearly an arrangement to mitigate the prospects of the mother taking her own life, there is nothing from which I can gauge any reduction in risk thereby achieved. The same applies to the prospect of detention of the mother under Mental Health legislation.

…

86. I accept that notwithstanding the findings made, I might still order a return of S to the USA. However, in view of those findings, I see no factor which would render such an order appropriate.

…

Grounds 1 and 2: the test for the application of Regulation 16(3)(b)

16. Grounds 1 and 2, which must be considered as one since it is only in Ground 2 that the error asserted in general terms by Ground 1 is particularised, are in the following terms:

1. The learned trial judge erred in finding that the Respondent had satisfied him that the requirements of reg. 16(3)(b) of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) had been established.

2. In particular, His Honour erred in failing to hold that he was not affirmatively satisfied that:

(i) the psychological harm to which the child would be exposed would result from an order for the return of the child to the United States of America, rather than from a possible custody order depriving the mother of custody of the child;

(ii) the risk that the mother would commit suicide if an order were made for the return of the child to the United States of America satisfied the test of "grave risk" in reg. 16(3)(b).

(iii) the risk that the mother would commit suicide was sufficiently alleviated by the arrangements that had been put in place by the mother's family, her attending psychiatrist, and the relevant provisions of the Mental Health Act 2000; and

(iv) any psychological harm to which the child would be exposed should the mother commit suicide, was of sufficient seriousness as to satisfy the test in reg. 16(3)(b).

17. Counsel for the Central Authority began his submissions, both written and oral, with an analysis of paragraphs 68 to 86 of Warnick J's judgment, which we have largely quoted in paragraph 15 above, and which contain his essential reasoning for concluding that the test for determining that there is a grave risk that a return of the child to the United States would expose the child to harm or otherwise place the child in an intolerable situation, was satisfied in this case.

18. We agree with Counsel that his Honour's findings in the first part of his analysis (paragraphs 68 to 75), where he considered the question of whether the mother would return to the United States with the child if the return of the child were to be ordered, are somewhat "ambivalent". It

seems clear from paragraph 69 of his reasons that his Honour was considering this question "leaving aside the risk of suicide". With respect to his Honour, we have some difficulty in seeing how, or what value there could be, in considering whether the exception contained in reg 16(3)(b) could be established in this case without having regard to the unchallenged evidence of Dr Klug in relation to the risk of suicide by the mother.

19. But however that may be, we consider that the discussion contained in paragraphs 68 to 75 of his Honour's reasons can largely be ignored for the purposes of this appeal. Rather the focus must be on his Honour's consideration (in paragraphs 76 to 85) of the question which he posed (in paragraph 76) of "the risk of the mother committing suicide if the child is returned to the USA". As Counsel for the Central Authority submitted this is "[t]he key question which his Honour was required to determine" (Written Submissions paragraph 3.5).

20. In seeking to establish that his Honour was in error in his ultimate determination that the requirements of reg 16(3)(b) had been satisfied in this case, Counsel for the Central Authority placed considerable reliance on the minority judgments of Gleeson CJ and Kirby J in JLM v Director-General, New South Wales Department of Community Services (reported as DP v Commonwealth Central Authority; JLM v Director-General, New South Wales Department of Community Services (2001) 206 CLR 401; (2001) FLC 93-081). That was a case which also involved a threat of suicide on the part of a mother who was resisting an order pursuant to the Regulations for the return of her child to Mexico. It was submitted that their Honours had required the risk inherent in that threat to be assessed at two stages, the first stage being if and when an order for the return of the child (in that case from Australia to Mexico) was made, and the second being when the Court of the foreign country (Mexico) made a decision in relation to the future custody or residence arrangements for the child. Accordingly, it was submitted that that two stage approach should have been followed in this case.

21. However, we agree with the submissions of Counsel for the mother that there were obvious factual differences between this case and JLM, and that the evidence in the present case does not permit the two stage approach adopted by Gleeson CJ and Kirby J in JLM to be applied in this case.

22. The relevant evidence of the mother in her affidavit sworn 8 November 2002 was as follows (at Appeal Book pp.127 and 131): 213. On 4th October we went to the Department [of Families] and Adele Tennant and Helen Tooth saw us and served me with the papers. I was shocked to see that [the father] had already lodged a Hague Convention Application on 19th September and had applied to the New Jersey Court for a divorce and custody. This broke my heart as it dashed all hopes of reconciliation and a future life with [the father] and [the child] in Australia. 214. At this point, I realised that I could not in any circumstances return to live in America because my health was poor and I needed the support of my parents, sister and brother. I also knew that I could not live with [the child] and that she was all that I had and that if I lost her there was no point in my continuing to live.

…

226. I desperately need the support I am getting here in Brisbane that I just could not get in the US, no matter what. My marriage to [the father] is now over. I cannot and will not now go back to the US. I cannot even contemplate the thought of not having [the child] with me and not being able to see her. Since she was born, she was all I had in the US accept (sic) for the times my own family members came over and stayed with us. I cannot even begin to think of how she will be without me given how attached she is to me. I just cannot.

23. The evidence of Dr Klug was contained in both an affidavit (sworn by him on 7 November 2002) and a report dated 28 October 2002 annexed to his affidavit. The relevant passages in Dr Klug's report are as follows (at Appeal Book pp 159 and 160):

Current symptoms. [The mother] told me that she could not bear the thought of losing her daughter and felt very depressed. She had lost her appetite, was eating only one meal a day and had lost some weight. She suffered from severe insomnia and was sitting up all night sending e-mails to her friends, or reading. However, she was still looking after her daughter whom she described as her only purpose in life and said that she would "jump off the bridge" if she had to hand her daughter back to her husband to be looked after by her mother-in-law.

…

Mental Status. She presented as a conventionally dressed, well groomed young woman accompanied by her sister who was present at the interview. She was distressed and tearful from the start but talked freely and gave an extensive, detailed, well organized history. Her mood was severely depressed and expressed thought content included suicidal ideation with a clearly stated intent to take her own life if she had to hand her daughter back to her husband. On the other hand, she expressed no delusions and gave no indication of suffering from hallucinations or any other psychotic phenomena. She was in a clear state of consciousness with intact cognitive functions and an estimated average level of intellectual ability.

…

I have seen [the mother] on four further occasions …

On these occasions she reiterated her history of depressed mood, sleep problems, dreams involving a court room scene where she is ordered to hand over her daughter, marked loss of appetite and her intention to commit suicide if she had to hand over her daughter to her husband. Her clinical presentation was that of a depressed person. At her last visit on 24.10.2002, she reported feeling "as miserable as ever" with persistent insomnia and feelings of despair at the prospect of loosing (sic) her daughter.

She told me that she feels unable to return to America partly because [of] her poor relationship with her husband and in-laws and partly because of her medical problems for which she needs her parents' support.

…

In summary, [the mother] remains severely depressed. Her depression is clearly related to the prospect of having to hand over her daughter to her husband and her threats of suicide have to be taken seriously.

At this stage, it is appropriate to continue her treatment on an outpatient basis, given that her family are aware of the risk and keep her under continuous observation. However, her weight loss is a cause for concern.

24. In his affidavit, Dr Klug stated (at Appeal Book p155):

5. … I am very concerned about [the mother] and truly and honestly believe that her threats of suicide must be taken seriously, she being a real suicide risk if her young child is forced to return to the United States of America.

25. Thus while it has to be said that Dr Klug's evidence in his report might be read as establishing that the mother would be at risk of suicide only if she had to hand the child back to the father (in other words, if she lost custody of the child), it will be seen that in his affidavit the doctor stated that the risk of suicide arises if the child was forced to return to the United States.

26. It is important to repeat here that there was no cross-examination of Dr Klug or of the mother. Moreover there was no application made on behalf of the Central Authority to cross-examine either of them.

27. We thus agree with Counsel for the mother when he said in his written submissions:

13. …The facts presented by the evidence in this case cannot simply be arranged so that they fit into the two stage analysis by the Chief Justice and Kirby J...

14. Here the evidence just did not invite or require a comparison of the [mother's] beliefs as to the process of a relevant New Jersey Court in disposing of a custody application and the mother's belief to the same matter in a relevant Mexican Court in the JLM case. The evidence in this case presents the [mother's] case as stronger than the mother's case in JLM because the direct evidence of the mother in that case was that she would go back to Mexico with the child if the child was returned pursuant to the convention. It is that evidence which gave rise to the two stage analysis of the dissenting Judges in that decision. That analysis is not available on the evidence in this matter. The [mother's] evidence was that she could not return to the USA because of her need for support from her family here and a desire to retain treatment from her current treating doctors and further from her lack of support in the USA.

15. Notwithstanding that His Honour did not accept that the [mother] "could not" return (reasons [68] p20) His Honour did not determine whether (suicide aside) the [mother] would follow the child to the USA if the child's return was ordered, although he thought she "may well" (see reasons paragraph [69], [70], [74]).

16. A suicide by the mother as a result of an order for the return of the child was clearly regarded by her treating psychiatrist as a serious risk and in light of that evidence the question of whether the mother might be prompted to take such a course in the event that she ultimately lost custody in New Jersey simply does not assume the same importance in this case as did the apprehended response of the mother to an unfavourable outcome in Mexico in the judgments of the minority in JLM.

28. In rejecting the argument that it was necessary for the trial Judge in this case to have applied the two stage approach required by Gleeson CJ and Kirby J in JLM, we take the opportunity to emphasise what should be the self-evident proposition, that each application under the Regulations must be decided on the basis of the evidence available in that particular case. Attempts to extract principles from the particular facts of a particular case will only, in our view, cause further unnecessary complexity and confusion in this area of the law.

29. A second challenge contained in Grounds 1 and 2 to the trial Judge's application of reg 16(3)(b) related to the nature, in the sense of gravity, of the risk posed to the child by the mother's suicidal ideation.

30. In the written submissions of Counsel for the Central Authority, this question was said to involve the following three sub-questions:

(a) Is there a grave risk that the mother will commit suicide if the order of the Court requires the return of the child to the USA?

(b) If she were to commit suicide, is there a grave risk of psychological harm to the child in that event?

(c) If there is a risk to the child, is the level of harm sufficiently grave to satisfy the Convention test of what might be an "otherwise intolerable situation"?

31. The need to consider these three sub-questions was submitted to be based on the following comments made by the Full Court in Gsponer v Director- General, Department of Community Services (VIC) (1989) FLC 92-001 at 77,159:

In our view the three categories are to be read separately and to that extent we agree with the submissions of senior counsel for the wife. However it needs to be emphasised that there must be a "grave risk" of the occurrence of one or more of such events. Further, it is impossible to ignore the existence of the words "or otherwise". The consequence of those words is to link the quality which each of the first two categories must have to the emphatic words which describe the third category ("an intolerable situation"). That is, it is not the grave risk of any physical or psychological harm which would satisfy the first two aspects of this subparagraph. The physical or psychological harm in question must be of a substantial or weighty kind. This accords with the views of the Court of Appeal in Re A (supra), where at p. 372, Nourse L.J. said this:

"I agree with Mr Singer, who appears for the father, that not only must the risk be a weighty one, but it must be one of substantial, and not trivial, psychological harm. That, as it seems to me is the effect of the words 'or otherwise place the child in an intolerable situation'. It is unnecessary to speculate whether the ejusdem generis rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view."

32. It was further submitted that nothing in the High Court majority judgment in DP and JLM had cast any doubt on the correctness of these statements. Moreover, it was submitted the majority had recognised that the removal of a child from one country to another country, is likely to cause some disruption, uncertainty and anxiety for the child, but that more than this kind of result is required when reg 16(3)(b) speaks of a grave risk to the child of exposure to physical or psychological harm on return.

33. Having regard to these submissions on behalf of the Central Authority, it is appropriate to set out the relevant passages from the majority judgment in DP and JLM (footnotes omitted):

41. In the judgment of the Full Court of the Family Court which gives rise to the first of the matters now under consideration (DP v Commonwealth Central Authority) it was said that there is a "strong line of authority both within and out of Australia, that the reg 16(3)(b) and (d) exceptions are to be narrowly construed". Exactly what is meant by saying that reg 16(3)(b) is to be narrowly construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in "an intolerable situation". That requires some prediction, based on the evidence, of what may happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

42. Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description "grave". Leaving aside the reference to "intolerable situation", and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would expose the child to harm.

43. Because what is to be established is a grave risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.

44. These considerations, however, do not warrant a conclusion that reg 16(3)(b) is to be given a "narrow" rather than a "broad" construction. There is, in these circumstances, no evident

choice to be made between a "narrow" and "broad" construction of the regulation. If that is what is meant by saying that it is to be given a "narrow construction" it must be rejected. The exception is to be given the meaning its words require.

45. That is not to say, however, that reg 16(3)(b) will find frequent application. It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return.

34. We consider that little is to be gained by endeavouring to establish whether statements concerning the application of reg 16(3)(b) by the Full Court of this Court which pre-date DP and JLM continue to have validity. In our opinion, the necessary guidance in relation to the application of reg 16(3)(b) is to be found in the paragraphs just quoted from DP and JLM.

35. In the present case the trial Judge had to be satisfied that there was a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

36. His Honour had before him the unchallenged evidence of the psychiatrist, Dr Klug, that he believed "that [the mother's] threats of suicide must be taken seriously, she being a real suicide risk if her young child is forced to return to the United States of America". On the basis of this evidence, his Honour was entitled to accept, as he did, that there was a grave risk that if the child was returned to the United States that the mother would commit suicide.

37. His Honour also had before him the evidence of the psychologist, Ms Britton, that the ramifications of a suicide by the mother "would obviously be devastating long term" for the child "in that she would grow up without any access to her biological mother".

38. Again, his Honour was entitled to accept the unchallenged and only evidence of the harm to the child that might follow a suicide by the mother, and then to go on to conclude, as he did, that there is a grave risk of psychological harm to the child. Having regard to what was said by the majority in DP and JLM, we do not consider that his Honour was required to do more than he did. Obviously there was a degree of prediction involved, but the High Court majority have recognised this as necessary. Obviously the risk of harm to the child in this case was more than the "disruption, uncertainty and anxiety" which the High Court majority described as "well-nigh inevitable" when a child is taken from one country to another without the agreement of one parent.

39. At the conclusion of his judgment, his Honour expressed his concerns about cases such as this where a threat of suicide is raised in resistance to an application for the return of the child, making the following observations with which we agree:

80. I do not reach these findings without disquiet. Courts will understandably have a real concern about the disingenuous adoption of stances designed to achieve the purposes of abductors in resisting orders for the return of children. But the response to this concern cannot be to disregard evidence, but rather to scrutinise it with great care.

40. However, his Honour went on to explain why the threat in this case was sufficient to enliven the exception in reg 16(3)(b):

81. In this case there is a history of depression and mood changes in the mother. She demonstrated an intense need for the comfort and support of her family. She has suffered

dramatic and no doubt traumatic health difficulties. She threatened suicide when cohabiting with the father.

82. Her consultations with Dr Klug are apparently for the purpose of treatment, not evidence gathering. His medical opinion of the risk is clear and unchallenged.

41. Accordingly, in relation to Grounds 1 and 2, we have concluded that the trial Judge was entitled to find, as he did, that the mother had satisfied him that the requirements of reg 16(3)(b) had been established.

Grounds 3 and 4: the exercise of the discretion and the possibility of conditions

42. Grounds 3 and 4 which were dealt with together by Counsel for the Central Authority are as follows:

3. The learned trial judge erred in failing to consider whether there were conditions which might be included in an order, which conditions would lessen the risk that the mother might commit suicide or mitigate the psychological harm which the child might suffer were the mother to take her own life, and thereby alleviate what may have otherwise been a grave risk of the child suffering psychological harm, within the meaning of reg. 16(3)(b).

4. Having held that the requirements of reg.16(3)(b) were established, the learned trial judge erred in exercising the residual discretion by failing to balance the nature and severity of the risk identified against the purposes of the Convention, as reflected in the Regulations, and other relevant factors supporting a return order.

43. The essential submission put in support of Grounds 3 and 4 was that in the exercise of the discretion not to return the child following a finding that the "grave risk" exception in reg 16(3)(b) had been established, his Honour erred in failing to consider what conditions might be imposed on the return, such as would lessen or mitigate the gravity of the risk of exposure of the child to harm. In support of this submission, Counsel relied on the following passage from the majority judgment in DP and JLM (at CLR 417; FLC 88,389 -88,390)

40. So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that "there is a grave risk that [his or her] return ... would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. … If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.

44. We accept that there may well be cases where the imposition of conditions upon which the return is to occur will be a proper exercise of the discretion, notwithstanding that a case of grave risk might otherwise have been established. However, we do not see this as being such a case. Neither before the trial Judge, nor before us, were any conditions proposed other than those set out in paragraphs 45 and 46 below. But those conditions were not supported by evidence, which would, in the words of Counsel for the mother, "achieve a level in reduction of risk of the mother committing suicide such as to reduce the risk of exposure of harm to the child to something less than grave". (See Written Submissions on behalf of the mother, paragraph 40).

45. In his final submissions to the trial Judge, Counsel then appearing for the Central Authority put to his Honour that if he was to find "a grave risk that this child may suffer psychological harm", then he would need to consider whether there are any conditions which could be

imposed upon the return "which might ameliorate that risk". However, the only condition which Counsel then suggested to his Honour was that if the mother was to return to the United States, then his Honour might "consider imposing a condition that the father make available some of the matrimonial funds before the mother departs". (Transcript 2 December 2002 p 446). We do not see how a condition requiring the provision of funds to the mother were she to accompany the child on a return to the United States would alleviate the grave risk found to exist in this case.

46. Before us, Counsel for the Central Authority again proposed a condition concerning the provision of funds by the father to the mother. In addition, conditions were proposed by the Central Authority which would require the variation in favour of the mother of an interim custody order which the father had obtained from a United States Court after the mother took the child to Australia, and an undertaking on the part of the father to ensure the expeditious resolution of the final custody proceedings. The terms of an order containing the conditions proposed by the Central Authority were submitted to be as follows:

3. That the child … be returned to … the United States of America:-

(1) Upon receipt by the Appellant of a variation to the order made by the Superior Court of New Jersey on 15 November 2002 to permit the child to reside with the Respondent (who shall have physical care and control of the child) on return to the United States of America pending a custody hearing in the Superior Court of New Jersey; and

(2) Upon the father:-

(i) Undertaking to take such steps as may be necessary to ensure the expeditious resolution of proceedings in the Superior Court of New Jersey, in relation to custody, access and welfare of the child; and

(ii) Filing with that Court an undertaking that he will, pending determination of the proceedings in that Court:-

(A) permit the child to remain in the care of the mother; and

(B) pay an amount of $ [to be fixed] to the mother on account of her expenses in maintaining herself and the child in the United States of America; and

(3) Paying to the appellant an amount sufficient to cover the travel expenses of the child, the mother [and return travel for a person to assist the mother on the trip].

47. Again, however, there is no evidence available to us as to whether such conduct would in any way alleviate the grave risk which has been found to exist in this case. Moreover, we have difficulty in seeing how an undertaking "to ensure the expeditious resolution" of the United States proceedings would be capable of enforcement.

48. Finally in relation to this question of conditions, we have great difficulty in seeing how any condition or undertaking could alleviate the risk of suicide on the part of the mother, which in Dr Klug's opinion existed if the child "is forced to return to the United States of America" and the consequent grave risk of exposure of the child to psychological harm. In our view, it cannot be contended that such a risk to the child does not warrant the description of "grave".

49. In this context, we draw attention to Warnick J's reservations concerning the efficacy of measures which might be taken in an attempt to alleviate the risk found to exist in this case:

83. The risk in my view is little alleviated by the arrangement that the mother will enter hospital under Dr Klug's supervision if S is sent back to the USA. Though this is clearly an arrangement to mitigate the prospects of the mother taking her own life, there is nothing from which I can

gauge any reduction in risk thereby achieved. The same applies to the prospect of detention of the mother under Mental Health legislation.

50. To the extent that Ground 4 asserts that his Honour's discretion miscarried because he did not balance "the nature and severity of the risk identified" in this case against "the purposes of the Convention as reflected in the Regulations", it is true that his Honour did not make mention of this matter when he explained the required exercise of discretion in the following terms: 86. I accept that notwithstanding the findings made, I might still order a return of S to the USA. However, in view of those findings, I see no factor which would render such an order appropriate.

51. However, in our view, his Honour clearly had in mind the purposes of the Convention and the Regulations when immediately after reaching his conclusion that there was grave risk of psychological harm to the child in this case, he went on to say:

80. I do not reach these findings without disquiet. Courts will understandably have a real concern about the disingenuous adoption of stances designed to achieve the purposes of abductors in resisting orders for the return of children. But the response to this concern cannot be to disregard evidence, but rather to scrutinise it with great care.

52. Given these observations by his Honour, it cannot be said that he has overlooked the purposes of the Convention and the Regulations.

53. Accordingly, we have not been persuaded that his Honour's discretion miscarried on account of a failure to consider conditions which might alleviate the grave risk identified in this case or to balance that risk against the purposes of the Convention or the Regulations.

Conclusion

54. Since none of the grounds of appeal have been established, the appeal will be dismissed.

55. In the event that the appeal was dismissed, the mother sought the following additional orders:

(b) That Orders 1 and 2 of the Orders made 11 October, 2002 be hereby discharged.

(c) That the Commissioner of the Australian Federal Police remove the names of the mother RSP born 4 December 1971 (sic) and the child SSP born 5 December 2000 (referred to in the Order of 11 October 2002 as born 12 May 2000) from the PACE Alert System.

(d) That the Registrar of the Court at the request of the Respondent Mother hand to her or her nominee all passports held by the Registrar relating to herself and the child.

56. However, in our view, it is more appropriate that an application for such orders be made at first instance rather than to this Court.

Costs of the appeal

57. It was common ground at the conclusion of the hearing of the appeal that it was appropriate that there should be no order for costs in this case.

Orders

58. Accordingly, we order:

(1) That the appeal be dismissed.

(2) That there be no order as to the costs of or incidental to the appeal.

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