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FAMILY COURT OF AUSTRALIA

ARTHUR & SECRETARY, DEPARTMENT OF FAMILY & COMMUNITY SERVICES AND ANOR *[2017] FamCAFC 111*

FAMILY LAW – APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Wrongful removal – Where the primary judge ordered the return of the child to New Zealand subject to conditions – Where the mother appealed the return order – Whether the primary judge erred in finding that the father had and was exercising rights of custody at the time of the child's removal – Whether the primary judge erred in finding there was no grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation – Whether the primary judge erred in finding that the father had not consented to the relocation of the child to Australia — Where the Full Court found no merit in any ground of appeal – Appeal dismissed.

FAMILY LAW – APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Conditions to return – Where the primary judge imposed conditions on the return of the child – Where the father appealed certain conditions on the basis that he could not fulfil them – Where a failure to fulfil the conditions would lead to the child not being returned to the country of habitual residence – Where the Full Court held that the primary judge erred in failing to consider the father's capacity to satisfy the conditions – Appeal allowed – Particular conditions set aside.

Family Law Act 1975 (Cth) s 111B

Family Law (Child Abduction Convention) Regulations 1986 (Cth) regs 4(2), 15(1), 16(3), 16(1A)
Family Law (Child Protection Convention) Regulations 2003 (Cth)

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

A v Central Authority for New Zealand [1996] 2 NZFLR 517
Colak & Viduka (2016) FLC 93-707
C v C (Minor: Abduction: Rights of Custody Abroad) [1989] WLR 654
De L v Director-General, New South Wales Department of Community Services (1996) 187 CLR 640
Director General, Department of Community Services v Crowe (1996) FLC 92-717
DP v Commonwealth Central Authority; JLM v Director-General New South Wales Department of Community Services (2001) 206 CLR 401
Friedrich v Friedrich, 983 F 2d 1396 (6th Cir, 1993)

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Harris & Harris (2010) FLC 93-454
House v The King (1936) 55 CLR 499
In re D (A Child) (Abduction: Rights of Custody) [2007] 1 AC 619
Makita (Aust) Pty Ltd v Sprowles (2001) 52 NSWLR 705
McOwan v McOwan (1994) FLC 92-451
Police Commissioner of South Australia v Temple (1993) FLC 92-365
Re E (Children) [2012] 2 FLR 758
Re F (A Minor) (Child Abduction) [1992] 1 FLR 548
Re J (A Child) (1996 Hague Convention: Cases of Urgency) [2015] UKSC 70
Re M (Abduction: Undertakings) [1995] 1 FLR 1021
Smith v Adam [2007] NZFLR 447
Soysa & Commissioner of Police [2011] FamCAFC 39
Thomson v Thomson [1994] SCR 551
Wolford & Attorney-General's Department (Cth) [2014] FamCAFC 197

APPELLANT/FIRST RESPONDENT:	Ms Arthur
FIRST RESPONDENT/ SECOND RESPONDENT:	Secretary, Department of Family & Community Services
SECOND RESPONDENT/APPELLANT:	Mr Bates
FILE NUMBER:	SYC 4935 of 2016
APPEAL NUMBERS:	EA 12 of 2017
	EA 29 of 2017
DATE DELIVERED:	29 June 2017
PLACE DELIVERED:	Perth
PLACE HEARD:	Sydney
JUDGMENT OF:	Bryant CJ, Thackray & Austin JJ
HEARING DATE:	2 May 2017
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	22 December 2016

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24 January 2017

LOWER COURT MNC:	[2016] FamCA 1119 [2017] FamCA 204
REPRESENTATION	
COUNSEL FOR THE APPELLANT /FIRST RESPONDENT:	Mr Ward SC and Ms Bridgett
SOLICITOR FOR THE APPELLANT /FIRST RESPONDENT:	Feminist Legal Clinic
COUNSEL FOR THE FIRST RESPONDENT /SECOND RESPONDENT:	Mr Harper
SOLICITOR FOR THE FIRST RESPONDENT /SECOND RESPONDENT:	FACS Legal
COUNSEL FOR THE SECOND RESPONDENT /APPELLANT:	Ms Barnett
SOLICITOR FOR THE SECOND RESPONDENT /APPELLANT:	Dimocks Family Lawyers

ORDERS

(1) Appeal EA 12 of 2017 be dismissed.

(2) Appeal EA 29 of 2017 be allowed.

(3) Orders 1.2, 1.3, 1.4 and 1.5 made on 24 January 2017 be set aside.

(4) There be no order as to costs.

(5) The Court grants to the appellant in Appeal EA 29 of 2017 a costs certificate pursuant to the provisions of s 9 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant in respect of the costs incurred by him in Appeal EA 29 of 2017.

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Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Arthur & Secretary, Department of Family & Community Services and Anor* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

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THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal Numbers: EA 12 of 2017
EA 29 of 2017

File Number: SYC 4935 of 2016

Ms Arthur
Appellant/First Respondent

And

Secretary, Department of Family & Community Services
First Respondent/Second Respondent

And

Mr Bates
Second Respondent/Appellant

REASONS FOR JUDGMENT

1. Before the Court are two appeals concerning the return of a child to New Zealand pursuant to the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations").[1]

2. The mother appeals against the primary order for return and the father appeals against the subsequent order prescribing conditions for the return.

3. The Department of Family & Community Services, in its capacity as the Central Authority, opposes the mother's appeal but supports the father's.

BACKGROUND

4. The mother and father were in a de facto relationship at the time of the birth of their daughter in New Zealand in 2011.

[1] The Regulations are made pursuant to s 111B of the *Family Law Act 1975* (Cth) ("the Act") and give effect to the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("the Convention").

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5. In January 2013, a court in New Zealand made parenting orders pursuant to which the mother was to provide "day-to-day care" and the father was to have "supervised contact" with the child.

6. In August 2014, the mother resumed cohabiting with the father. In June 2015, she moved into a refuge and obtained a temporary Protection Order against the father. Related criminal charges were later dismissed after a trial.

7. In November 2015, the parties entered into a written agreement relating to the child, including for the father to have unsupervised contact.[2] The mother then applied to discharge the temporary Protection Order, but the court directed that her application for a final order proceed to trial in December 2015.

8. The father did not attend the December 2015 trial. He says he understood that the proceedings had been resolved by the November agreement. In any event, a final order was made for the protection of both the mother and child, with the court finding that the father had engaged in violence against the mother.

9. The father thereafter spent time with the child. In May 2016, the mother took the child to Australia, where mother and child have since lived with the mother's father. The mother told her mother that she would return to New Zealand in June 2016. When she failed to do so, the father invoked the Convention.

10. The application for a return order was heard on 14 December 2016. On 22 December 2016, the primary judge granted the application, and then adjourned for consideration of "the terms of the order … and any conditions or undertaking required for that order". On 24 January 2017, his Honour made a further order imposing eight conditions on the return order, including a requirement for certain undertakings to be given.

11. The mother appealed against the primary order (EA 12 of 2017). The father was later joined as a respondent, and was granted an extension of time in which to appeal against the order imposing the conditions (EA 29 of 2017).

THE MOTHER'S APPEAL – EA 12 OF 2017

12. The mother has seven grounds of appeal, but advances two main complaints. The first relates to "rights of custody" and the second to a "grave risk of harm".

Rights of custody – Grounds 1, 2 and 3

13. As a necessary condition to making the return order, the primary judge found that under New Zealand law the father had "rights of custody", which are defined as including "rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child".[3] The

---

2 The agreement stated that it "supersedes" the orders of January 2013, but it was accepted by the father that the agreement may have no legal effect under New Zealand law.

3 The Regulations, reg 4(2).

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primary judge also found that the father was exercising those rights at the time of the removal and would have continued to exercise them but for the removal.

14. In concluding that the father had "rights of custody", his Honour had regard to the *Care of Children Act 2004* (NZ) ("the NZ Act"), and found that the concept of "guardianship" provided for in that Act incorporates "rights of custody".

15. Sections 15 and 16 of the NZ Act relevantly provide (original emphasis):

> **15 Guardianship defined**
>
> For the purposes of this Act, **guardianship** of a child means having (and therefore a **guardian** of the child has), in relation to the child,—
>
> (a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child:
>
> (b) every duty, power, right, and responsibility that is vested in the guardian of a child by any enactment:
>
> (c) every duty, power, right, and responsibility that, immediately before the commencement, on 1 January 1970, of the Guardianship Act 1968, was vested in a sole guardian of a child by an enactment or rule of law.
>
> **16 Exercise of guardianship**
>
> (1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—
>
> (a) having the role of providing day-to-day care for the child … ; and
>
> (b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
>
> (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.
>
> (2) **Important matters affecting the child** include (without limitation) —
>
> …
>
> (b) changes to the child's place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child's relationship with his or her parents and guardians; and

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…

(3) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a court order provides otherwise.

…

(5) However, in exercising (or continuing to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.

(6) Subsection (5) does not apply to the exclusive responsibility for the child's day-to-day living arrangements of a guardian exercising the role of providing day-to-day care.

16. His Honour also noted that s 29 of the NZ Act provides that a court may make "an order depriving a parent of the guardianship of his or her child".

17. It was common ground that the father was originally a "guardian" under the NZ Act and hence had "rights of custody"; however, the mother argued that the father had ceased to have such rights because of the January 2013 orders, which were expressed as follows (original emphasis):

…

(a) The following person during the times stated has the role of providing day-to-day care for

[the child] **… 2011**

until the child reaches the age of 16 years (or until an earlier specified date or event as the case may be):

[the mother]

While exercising the role of providing day-to-day care for a child, you have exclusive responsibility for the child's day-to-day living arrangements, subject to any conditions stated below and to any Court order.

If you are a guardian, unless your role or another guardian's role is modified by a Court order, you must act jointly (e.g. consulting whenever practicable with an aim of reaching agreement) when making guardianship decisions for a child.

(b) the following person has supervised contact with

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[the child] **… 2011**

during the following times and in the following ways:

[the father]

Supervised contact at a Court approved supervised contact facility.

18. The mother claimed that the orders left the father with only "rights of access", which would be insufficient to ground an order for return, even if all the other necessary conditions were satisfied. For the reasons that follow, we consider that argument was properly rejected by the primary judge.

19. Rights of access and rights of custody are not mutually exclusive concepts. Baroness Hale pointed this out in *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 before going on to say:

> 26. … A person may have both rights of access and rights of custody. The question is, do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amount to rights of custody or do they not? States' laws differ widely in how they look upon parental rights. They may regard the whole bundle of rights and responsibilities which the law attributes to parents as a cake which can be sliced up between the parents: one parent having the custody slice, with the package of rights which that entails, and the other having the access slice, with the different package of rights which that entails. This is by no means an unusual way of looking at the matter. Alternatively, the state may regard the whole bundle of parental rights and responsibilities as inhering, and continuing to inhere, in both parents save to the extent that they are removed or qualified by the necessary effect of a court order or an enforceable agreement between them. …

20. The primary judge properly drew attention to the fact that no order had been made removing the father's guardianship rights. It is true that the 2013 orders gave the mother "the role of providing day-to-day care", but this is only one part of the bundle of rights conferred on a guardian in New Zealand. The father continued to possess the rights bestowed by s 16(1)(b) and (c) of the NZ Act, which included, by virtue of s 16(2)(b), the right to determine changes to the child's place of residence that might affect her relationship with her father. The father therefore had "rights of custody".[4]

---

[4] The mother's reliance in argument on s 111B(4) of the Act was misconceived, as that provision merely seeks to resolve doubts about the implications for the Convention of amendments made to Australian law by the *Family Law Reform Act 1995* (Cth). Clearly that provision can be of no assistance in seeking to determine the nature of rights held by parents in New Zealand.

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21. The second string to the mother's argument was that the father was not actually exercising rights of custody at the time of the child's removal. This argument too was properly rejected by the primary judge, who recognised that the Convention can be invoked not only if a parent was actually exercising rights of custody, but also if the parent "would have exercised those rights if the child had not been removed".[5] His Honour found:

> 85. In my view, there is no doubt that the father would have been exercising his rights of custody but for the removal. He was not given the opportunity but it is highly likely that the father would have liked to be involved in any decision made on or after [the date of the child's departure] in relation to [the child] permanently leaving New Zealand. Both parents say that the father had been spending time with [the child] in the period leading up to her removal from New Zealand, although the amount and frequency of time deposed to by the mother and father differed.

22. It was argued that the finding concerning the desire of the father to be involved in any decision about the child leaving New Zealand was mere "speculation". Given that the test[6] necessarily involves a prognosis, there will inevitably be "speculation" when deciding whether the test has been satisfied. However, as one of the leading commentators on the Convention has said, a parent's conduct may "easily show that he or she has retained the expectation to be consulted about the child's place of abode".[7] We consider that the inference his Honour drew was well open to him, based on the father's conduct prior to the removal: see *Director General, Department of Community Services v Crowe* (1996) FLC 92-717; *Police Commissioner of South Australia v Temple* (1993) FLC 92-365;[8] *Friedrich v Friedrich*, 983 F 2d 1396 (6th Cir, 1993).

23. Associated with this part of the argument was a submission that his Honour had failed to consider reg 16(3)(a)(i), which creates a discretion to refuse to grant a return order if it is established that the left-behind parent "was not actually exercising rights of custody when the child was removed … and those rights would not have been exercised if the child had not been so removed …"

24. It is true that his Honour did not discuss the reg 16(3)(a)(i) defence;[9] however, there would have been no point, given it could not have been made out. His Honour had discussed the same issue when determining whether the removal was "wrongful", and it was in this context that he made his finding about the

---

5 The Regulations, reg 16(1A)(e)(ii).

6 Ibid: "**would have** exercised those rights **if** the child had not been removed ..."

7 Eekelaar, John, 'International Child Abduction by Parents' (1982) 32 *University of Toronto Law Journal* 281, 310.

8 Although a first instance decision, the relevant finding concerning the exercise of rights of custody was not challenged in the ensuing appeal to the Full Court reported at (1993) FLC 92-424.

9 For convenience, we will use the expression "defence", recognising that it would be more accurate to describe the matters set out in reg 16(3) as "exceptions to mandatory return", since satisfaction of any of those matters does not necessarily prevent an order for return being made.

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likelihood of the father wanting to be involved in any decision about the removal, as well as his finding that the father had been spending time with the child. These findings were fatal to the invocation of reg 16(3)(a)(i),[10] in relation to which the mother carried the burden of proof.

25. There is accordingly no merit in these grounds.

Grave risk of harm – Grounds 5, 6 and 7

26. The mother's principal complaint concerns the primary judge's rejection of her reg 16(3)(b) defence, namely 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."

27. Senior counsel for the mother accepted, as did his Honour, that the relevant principles are stated in *DP v Commonwealth Central Authority; JLM v Director-General New South Wales Department of Community Services* (2001) 206 CLR 401 ("*DP v Commonwealth Central Authority*"), where the High Court held that reg 16(3)(b) should not be given a "narrow" construction. In that case the plurality said (original emphasis, footnote omitted):

> 41 … 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.

[10] See *Soysa & Commissioner of Police* [2011] FamCAFC 39 at [47] – [48].

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> 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.

28. Senior counsel for the mother contended that the proceedings had miscarried because the judge had first concluded there was no "grave risk", but had then gone on to impose "conditions" that must have presupposed there was such a risk, and which, if not fulfilled, would result in the child not being returned to New Zealand.

29. There is no merit in the argument. When making the return order, his Honour indicated he was willing to hear from the mother about the imposition of conditions to ameliorate risk to her or the child, but this was premised on the clear finding that there was not a "grave risk", as appears from this paragraph of the reasons (our emphasis):

> 130. In my view the mother has not established that the return of [the child] to New Zealand would expose her to a grave risk of psychological harm or placed [sic] in an intolerable situation. The mother's case is based in part on her experience of unstable accommodation and lack of financial support. The Court has the capacity to establish conditions in respect of return. Those conditions could ensure, at least pending a New Zealand Court dealing with those issues on an interlocutory basis, that on return there was appropriate accommodation for the mother and child, adequate financial support, proper safeguards **if needed** in relation to maintaining protection from any interaction or communication between the parents. **If needed** the father could be invited to provide or secure those matters as a condition of return. The mother would have an opportunity to be heard in regard to such conditions.

30. There is no inconsistency between his Honour having concluded that there was not a "grave risk", while at the same time foreshadowing a preparedness to impose conditions on the order for return, since reg 15(1) permits it.

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31. It was further submitted that the primary judge erred since he avoided making a prediction of whether there was a "grave risk" by impermissibly deciding it was for the courts of New Zealand to determine issues relating to the child's best interests. Given the primary judge's careful analysis of the evidence about the risk posed to the mother and the child, we find little merit in this argument.

32. The only possible basis for the argument arises from this extract:

> 129. I accept that unlike the past, the general business of the convention is now most often concerned will [sic] evidence about women fleeing domestic violence. Nevertheless, the principle behind the Convention is a sensible one. Decisions about a child's welfare are usually best made in the place with which they have the strongest connection. Child care staff, medical practitioners, police, family members, friends and neighbours who have had recent or regular or important or any contact with the child will usually be located in that place … A professional who provides an assessment of the parents and the sisters would best undertake that work in New Zealand.

33. This paragraph was included in the judgment under the heading "Grave Risk" when arguably it should not have been. However, it came at the end of a long discussion of the risk issues. It is apparent, when the observations are read in context, that his Honour had already determined that the evidence was insufficient to make out the defence.

34. It was also argued that the primary judge set the bar too high by requiring the mother to establish "actual physical injury or admitted threats to murder" or at least "that it was more likely than not" that violence would actually occur. This proposition is difficult to sustain in light of his Honour's acceptance, consistent with *DP v Commonwealth Central Authority*, that "necessarily there will seldom be any certainty" when predicting risk, and that "what is required is persuasion that there is a risk which warrants the qualitative description 'grave'". His Honour went on to observe that "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" (at [120]).

35. The mother's argument on this issue relied on these paragraphs:

> 122. In *Harris & Harris* (2010) FLC 93-454 being a case in which the trial judge was upheld on her findings based on another defence, the Full Court rejected the first instance finding of grave risk of physical or psychological harm because the risk of harm to the children was not sufficiently identified. The evidence in that case was that on return the parents would not be living together and there was no evidence that the father had ever breached a domestic violence order. However, as to the degree of threat, among other findings of violent abuse, there were hospital records that enabled the trial judge to find that the father had on two different occasions,

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broken the mother's arm. Further, in that case, the father conceded that he had threatened to kill the mother.

123. Horrifying as the mother's evidence is in these proceedings, there is nothing in the corroborated evidence let alone in the agreed evidence, of that order here.

36. When read in context, it is clear that the primary judge was not suggesting it was necessary for the mother to prove that she would experience violence if she returned to New Zealand. His Honour had commenced his discussion of the authorities by stating that "[a]ll cases are determined on their own facts" (at [121]). Having referred to another case and then *Harris*, he went on to point out that in the present matter all of the allegations were "categorically denied" (at [124]). Although his Honour was criticised for describing the allegations as "general", he had applied that description only to part of the mother's evidence, and had then discussed in detail the "more specific" allegations. We find no error in his approach or in his conclusion.

37. Counsel for the mother also asserted that the father had provided nothing more than a "bare denial" of the allegations and argued that there should have been cross-examination at the hearing. However, the mother was represented, and there is no reason for us to look behind the forensic decision not to seek to cross-examine. Certainly, there was no error on the part of the primary judge, given the absence of any request to cross-examine.

38. In the absence of cross-examination, the primary judge was left in a difficult position. To the extent that there was conflict in the evidence,[11] he properly accepted that it could not be resolved unless there was extraneous independent evidence to support one version over the other, or unless the evidence of one party was inherently improbable and therefore so unreliable that he was entitled to reject it: *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548.

39. This brings us to the complaint about the finding that little weight should be given to the evidence of two experts which, it was claimed, would have assisted the court in understanding the dynamics of relationships involving violence, especially one involving a woman with "a learning disability".

40. Relying, inter alia, on *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, his Honour held that (footnote omitted):

> 19. … Little weight could be given to the affidavits of [Ms C] and Associate Professor [K] who were put in a hybrid position as experts seeming to express opinions about aspects of the ultimate issue in these particular proceedings, without qualifying themselves to do so.

[11] The mother's evidence was also contested by an affidavit sworn by her own mother.

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41. His Honour later made these observations about the evidence of Ms C, a social worker working with victims of domestic violence, who met the mother just a few days before swearing her affidavit.

> 113. … In this jurisdiction expert evidence is almost invariably given by a single expert and it is unfortunate that such an approach was not taken here. Ms [C's] report and verifying affidavit do not comply with the requirements of r 15.62 of the *Family Law Rules* 2004. Ms [C] expresses her opinion about the nature of domestic violence about perpetrators and victims. She says that women with learning difficulties, those who are socially isolated and those who had a difficult childhood may be more vulnerable and may have more difficulty in accessing supports to ensure their safety. The mother confirmed those problems in her case …

42. His Honour then turned to Associate Professor K, who appears to be well-credentialed with much relevant experience. His Honour observed:

> 114. … She has not interviewed the mother but has reviewed "the affidavits provided by [the mother] and the attached police and court records from New Zealand; statements and records from psychology and welfare professionals in Australia and New Zealand; and relevant research literature". Associate Professor [K] deposes to having read the Expert Witness Code of Conduct in the NSW Civil Procedure Rules and agrees to be bound by that code.
>
> 115. The NSW code is similar to the provisions of the *Family Law Rules* 2004 about expert witnesses. The witness has not identified all of the particular material that she has reviewed and relied on for her opinions. Taking her statement about the material she has reviewed literally, it appears that she has read the mother's evidence but not the applicant's evidence and some other material that may or may not be before the Court. As is referred to above in this jurisdiction the normal approach would be to appoint a single expert on a particular issue. That would mean a joint letter of instructions and the provision of agreed material from the Court file and would have avoided some of the problems that have arisen. Unfortunately Associate Professor [K] has been put in the position of a partisan witness about one of the fundamental questions for the Court.
>
> 116. An example of the problems of the attached report is found in the paragraph at the foot of page 5 of the report. There the report writer opined that the father "did not show any concern that [the mother] had moved to Australia with [the child]". What could be the possible foundation for such a comment from someone who has never even spoken to the father?
>
> 117. As is indicated above, little weight can be placed on the affidavits of Ms [C] or Associate Professor [K]. Again, in my view the problems

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> arise from the way they were appointed and the tasks they were apparently set.

43. His Honour was clearly entitled to give the evidence of the two experts little weight for the reasons he gave. However, the mother argued on appeal that if his Honour was dissatisfied with the evidence, he ought to have "directed the parties to identify an expert to interview both parties". This overlooks the fact that the proceedings were adversarial and that the mother had the burden of establishing the exception. It was not for the court to look for evidence which might have assisted her. Quite apart from other considerations, the obtaining of further evidence would have involved delay, which would have been entirely inconsistent with the emphasis in the Convention on an expeditious resolution.

44. We are also not persuaded his Honour erred in deciding to place no weight on police records about events said to have occurred in Town E nearly 10 years ago, involving an alleged assault by the father against a former partner. His Honour described the records as including "unsigned statements purportedly from … a former partner of the father", together with statements from the father's relatives indicating that the father could not have committed the assault he was alleged to have perpetrated. His Honour concluded that "in the context of withdrawn criminal proceedings, the unsigned statements … are of no probative value" (at [108]).

45. Although it was submitted for the mother that these records were evidence of "tendency", nothing put to us explained how it could be that unsigned statements could be regarded as evidence at all, let alone given weight.

46. In arriving at his decision, his Honour made these pertinent observations:

> 127. Lest there be any suggestion that the issues are not understood, I accept that family violence can have a devastating impact on victims. I accept that victims can be and often are, rendered vulnerable and will often have difficulty in accessing services. In many cases they will be so destabilised as to be incapable of consistently defending and enforcing their rights and of presenting as credible witnesses. I accept that for victims who are already marginalised by the breakdown of extended family structures and disabilities, such as learning difficulties or mental health issues, the problems are exacerbated. Serious family violence is a crime. It is usually cowardly and disgraceful conduct and as it is alleged here, it is directly antithetical to the civilised order of things where the strong should protect the weak and partners should support and not brutalise or humiliate each other.

47. But, as his Honour went on to say:

> 128. ... there is a distance between those propositions and a finding of grave risk within the terms of reg 16, let alone plucking a finding of fact of family violence out of ambiguous and contested

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> circumstances. Circumstances that have been found by a competent court to not support such a finding, albeit on a more stringent evidentiary standard.

48. In our view, the key to his Honour's conclusions about "grave risk" can be found at [125] of the reasons where he said:

> Importantly, although threats were allegedly made, there is no evidence of physical violence when the parents did not live together. The father was never found to have breached a Protection Order.

49. That finding, which was not sought to be impugned, was properly described by his Honour as "important", since the order for return does not require the mother or the child to live with the father, or even on the same island of New Zealand as the father. Nor does it interfere with the Protection Order. Further, there is no order in place for the father to spend time with the child, other than at a supervised contact centre.[12]

50. Although the mother's counsel sought to persuade us that the mother was likely to recommence living with the father if she returned to New Zealand, it would not be appropriate to allow the mother's case to be bolstered on the basis of predictions about her own conduct, especially as she had not returned to the father in the period of nearly a year prior to her move to Australia. Furthermore, there were contradictions in the mother's evidence, which included these passages from her affidavit sworn in proceedings in New Zealand in November 2015:

> 5. I have had very little contact with [the father] since the Temporary Protection Order was made. As we have a young daughter together, [the father] and I have seen each other on at least two occasions now where we have organised contact. The only occasions that the father has tried to contact me has been to organise contact with our daughter. [The father] has not done anything to make me feel concerned for my safety or the safety of our daughter going forward ...
>
> 6. I am confident that [the father] has moved on from our relationship as have I, and will not try to contact me or harass me or intimidate me as he has in the past when we have been together. I am confident that [the father] will only want to contact me in the future to arrange contact between he and our daughter.

51. For all these reasons, the finding about "grave risk" was open on the evidence.

52. This leaves for consideration only the subsidiary complaint that his Honour erred in finding that the return of the child would place her in an "intolerable

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[12] See the January 2013 orders. The agreement made in 2015 for the father to spend unsupervised time with the child was an informal arrangement.

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situation" within the meaning of reg 16(3)(b). This complaint which was, in our view, not strongly pressed, relied on the financial difficulty the mother would experience if she returned to New Zealand.

53. His Honour dealt with this topic in these paragraphs:

> 111. The mother says that she has no funds and no accommodation or support in New Zealand. That would be consistent with the parents' arguments over money and the failure to pay a power bill. It would be consistent with the mother borrowing $1,000 from her father for airfares to Australia. The maternal grandmother has offered to help her daughter and granddaughter. However, the fact that the maternal grandmother gave evidence for the applicant confirms a current level of estrangement between her and the mother. If necessary, those matters may be able to be addressed with conditions for return.
>
> …
>
> 118. It is the mother's case that she is a particularly vulnerable person because of her learning disability and depression. She did not have sufficient personal supports in New Zealand and has lost confidence in the authorities there. The crux of her case is that although there are structures, services and regimes in New Zealand that would provide a safe environment for her and for [the child], she did not take advantage of them and she fears that she would not be able to take advantage of them in the future …
>
> …
>
> 131. The evidence does not support a finding that on return to New Zealand, [the child] would be … placed in an intolerable situation.

54. We consider the finding was well open to his Honour. "Intolerable" is a strong word, which, when applied to a child, must mean a situation which the child in the particular circumstances should not be expected to tolerate: *Re E (Children)* [2011] 2 FLR 758. While recognising the mother's financial difficulties, we do not consider her case can be advanced by a self-serving claim that she would not take advantage of the supports that she acknowledged would be available in New Zealand, where she brought up the child before coming to Australia. In our view, his Honour appropriately considered that issues relating to the accommodation and support of the child were best left for consideration in the context of conditions that might be imposed on the return order.

55. There is therefore no merit in these grounds.

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Consent to the removal – Ground 4

56. Before concluding our discussion of the mother's appeal, we should record that in Ground 4, the mother asserted that his Honour erred in concluding that the father had not consented to the "relocation of the child to Australia".

57. Although the mother's written submissions maintained the proposition that the father had consented to the removal, the argument was not pressed in oral submissions before us. The primary judge was clearly right in concluding that, even taking her evidence at its highest, the mother had failed to establish the unequivocal consent required for this defence to succeed.

58. There being no merit in this, or any of the other grounds, the mother's appeal will be dismissed.

THE FATHER'S APPEAL – EA 29 OF 2017

59. This appeal challenges Orders 1.2 to 1.5 inclusive of the orders made on 24 January 2017, the effect of which was that the mother was not required to return the child until a number of specified conditions were met.

The controversial conditions

60. Some of the conditions were agreed, including the first requiring the father to meet the costs of the airfares for the mother and child. But the following four conditions were controversial, and the father seeks they be set aside:

> 1.2 The receipt into an account nominated by the mother of such reasonable sum as may be nominated by her or approved by the Court for the purposes of securing furnished accommodation in New Zealand for two months, comprising the cost of rent for that period and of any necessary rental bond.
>
> 1.3 On receipt by the mother's solicitors of a written undertaking from the father that he will pay into an account nominated by the mother at the rate of NZ$535 per week for the sustenance of the mother until the mother commences to receive welfare payments from the New Zealand Social Service authority, the first payment is to be made not later than seven days prior to the date fixed for the mother's flight to New Zealand and payments are to be made weekly thereafter.
>
> 1.4 On receipt by the mother's solicitors of advice that the father has fully paid his child support obligations in relation to any child support assessed or levied in New Zealand or in Australia.
>
> 1.5 On receipt by the mother's solicitors of a written undertaking from the father:

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(a) that he will forthwith provide to his current employer a copy of the existing New Zealand Protection Order effecting [sic] him and the mother; and

(b) that he will not use or access any firearm pending further order of the New Zealand Family Court.

61. There were three other conditions. Although made by consent, and not challenged in this appeal, they provide context to the dispute about Order 1.5.

1.6 On receipt by the mother's solicitors of a written undertaking from the Central Authority that the said flight details will be kept confidential and will not be provided to the father or to any members of his family or the family of the mother.

1.7 On receipt by the mother's solicitors of a written undertaking from the father that he will not attempt unsupervised contact with the mother or the subject child and will act in strict accordance with the existing parenting and protection orders made by the New Zealand Family Court.

1.8 On receipt by the mother's solicitors of a written undertaking from the father that he will not attempt to make any contact with the mother's [other daughter].[13]

62. There were three other orders with potential bearing on the appeal:

3. The mother shall sign all documents and do all things as soon as practicable to make application to the New Zealand government for:

(a) social welfare payments and subsidised accommodation for her return to New Zealand; and

(b) access to any funds available to parents returning to New Zealand pursuant to orders made in Hague Convention proceedings.

4. The mother shall forthwith give written notice to the applicant, the father and upon the commencement of parenting proceedings in respect of the child in the New Zealand Family Court, that Court, of the outcomes of her applications referred to in order 3.

5. The Central Authority must not disclose to the father or any member of his family or to any member of the mother's family, the address of accommodation occupied by the mother on her return to New Zealand.

[13] The mother's other daughter lives with her father pursuant to a court order made by consent.

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The reasons of the primary judge

63. In giving his ex tempore reasons, the primary judge correctly recorded that he was obliged to make the order for return because of the findings made in the substantive hearing. Indeed, his Honour had already made an order granting the Central Authority's application. Nevertheless, his Honour went on to say:

> 4. … As the reasons for judgment in the substantive proceedings make plain, the financial circumstances and difficulties of the parents were influential in the lead up to the wrongful removal of [the child]. Those same issues loom large in relation to conditions necessary for a practicable and enforceable order for return.

64. Having recorded that some of the conditions the mother proposed were "not well fleshed out", his Honour then properly reminded himself of earlier authority of this Court regarding limitations on the imposition of conditions or acceptance of undertakings as a condition of return:

> 6. The [Full Court] has been critical of trial judges complicating the issue of return and establishing conditions that are difficult to meet. In a decision of *Wolford & Attorney-General's Department* (2014) FamCAFC 197, 10 October 2014, the [Full Court] referred to a decision, of the Court of Appeal of England and Wales, *Re M.* (Abduction: Undertakings) [1995] 1 FLR 1021, at 1025, where Butler-Sloss LJ explained the role of undertakings. She said:
>
> > It is perhaps helpful to remind those engaged in Hague Convention applications about the position of undertakings or conditions attached to an Article 12 order to return. Such requirements are to make the return of the children easier and to provide for their necessities, such as a roof over the head, adequate maintenance, etcetera, until, and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction.

65. His Honour then referred to another decision of this Court[14] citing a passage from *DP v Commonwealth Central Authority*, albeit the plurality of the High Court was there discussing the acceptance of undertakings as a condition of return in circumstances where the discretion not to order the return had been enlivened, whereas here there was no discretion. The observations of the plurality are nevertheless instructive and we will therefore recite the passage cited (original emphasis):

> 40 ... 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

[14] *Colak & Viduka* (2016) FLC 93-707 at [78].

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established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. 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.

66. In explaining his decision to impose conditions, the primary judge said:

> 11. The father has agreed that he will meet the cost of airfares for mother and child to travel to New Zealand. The point of controversy is the payment of incidental travel costs. There is no evidence or indication of the quantum of the incidental travel costs. That was a matter that would be known to the mother. The father says he cannot meet those costs. That is a relevant consideration and of concern about other conditions. I will only make the agreed order that the airfares be paid.
>
> …
>
> 13. As to accommodation, the mother seeks that the father pay into a fund an amount sufficient to secure six months furnished accommodation, including rent and bond, and she wants to retain the bond at the end of the lease. The father does not agree. In my view such an order would go beyond what conditions are necessary. My obligation is to make practical orders to secure the return of the child to New Zealand and to identify provision for preliminary accommodation and sustenance, until those issues can be taken up by the New Zealand court. The mother and child will need to live somewhere on arrival. As is referred to in the substantive judgment, the mother is now estranged from the maternal grandmother, who has provided accommodation in the past. Suffice it to say, the mother cannot live with the father.
>
> 14. I will order is that [sic] the father pay the costs associated with two months of accommodation. That will give the mother time to make appropriate arrangements or to bring the proceedings before the New Zealand court and to secure appropriate orders. It may be, of course, that in that time she is able to access subsidised housing, or take advantage of a fund that I am told is available in New Zealand. That may be possible.
>
> …
>
> 19. The mother wants the father to bring his arrears of child support up to date. I think that is appropriate. He has invoked the Convention. The child has to be financially supported. The father must meet his obligations. It is the unchallenged case of the mother that the child support is in arrears. Therefore, a condition of return, will be that

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the arrears are brought up to date before the mother is required to leave the Australia [sic].

20. Condition 9 sought by the mother is that arrangements be in place with the New Zealand authorities for the mother to receive New Zealand welfare benefits: I do not have a way of influencing that outcome, nor do I believe that the Central Authority has that power. That will not be a condition. Albeit strictly not a condition of return, I will order that as soon as practicable, the mother take all steps available to her to seek the commencement of welfare benefits and any subsidised housing that is available to her in aid of these orders.

21. A further condition sought is that there be a payment of $535 per week by the father until the mother's benefits are paid. I am told that is a similar amount to the benefit. That is a category of condition that Butler-Sloss LJ identified. It is obviously necessary. Preliminary support will be needed on a weekly basis, and in advance. I will order that the father pay into an account nominated by the mother, weekly in advance, $535 per week until the mother commences to receive welfare benefits in New Zealand. The first payment is to be made not later than a week prior to the mother departing Australia and payments are to be made weekly thereafter. Of course, that order will be subject to any order of the New Zealand court.

22. There is an issue about firearms. The mother seeks an undertaking from the father to provide a copy of the protection order that is in existence in New Zealand to his current employer, and to provide an undertaking to the mother that he will not access or use firearms pending an order of the New Zealand Family Court. I will make that order.

The grounds of appeal

67. There were seven appeal grounds. The primary argument was that the orders were ultra vires. It was otherwise argued that his Honour erred in failing to recognise that the father could not comply with the conditions, and that in any event one of them was too vague to be enforceable.

Are the conditions ultra vires? – Grounds 1, 3 and 4

68. These grounds assert that the disputed conditions are ultra vires, since they are not "necessary or appropriate to give effect to the Convention".

69. The Convention does not mention conditions being imposed on return orders, however, at least in common law countries, the use of conditions (or the

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acceptance of undertakings as a condition of return) is well accepted.[15] In Australia, the power is conferred by reg 15(1) which provides:

> (1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under regulation 14:
>
> (a) make an order of a kind mentioned in that regulation; and
>
> (b) make any other order that the court considers to be appropriate to give effect to the Convention; and
>
> (c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.

70. The power to impose conditions is not limited to cases where a defence has been successfully raised. In this respect, our law may differ from New Zealand where it has been said in obiter that it seems "reasonably clear" that conditions can only be imposed on a return order if a defence has been established: *A v Central Authority for New Zealand* [1996] 2 NZFLR 517 at 524.[16]

71. The reg 15(1) power is limited only by the requirement that the condition is "appropriate to give effect to the Convention". But how are the limits of a power so expressed to be drawn? While the preamble of the Convention speaks of the desire to "protect children … from the harmful effects of their wrongful removal … and to establish procedures to ensure their prompt return to the State of their habitual residence", the entire Convention is predicated on the basis that "the interests of children are of paramount importance". Potentially, any condition attached to a return order that is designed to advance the interests of the child could be seen as giving effect to the Convention.

72. Useful guidance can be gained from the Fifth Meeting of the Special Commission held at the Hague in 2006, which concluded that:

> 1.8.1 Courts in many jurisdictions regard the use of orders with varying names, *e.g.*, stipulations, conditions, undertakings, as a useful tool to facilitate arrangements for return. Such orders, limited in scope and duration, addressing short-term issues and remaining in effect only until such time as a court in the country to which the child is returned has taken the measures required by the situation, are in keeping with the spirit of the 1980 Convention.[17]

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15 See Garbolino, James D, *The Use of Undertakings in Cases Arising Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, Federal Judicial Center, March 2016.

16 See also *Smith v Adam* [2007] NZFLR 447 at [27].

17 Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review inter alia the Operation of the Convention. The report of Part I of the Sixth Meeting of the Special Commission held in June 2011 noted at [115] that "in relation to voluntary undertakings, research to date showed that undertakings were commonly not respected where they were not enforceable or where there was no monitoring or follow-up after return".

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73. The High Court had earlier pronounced on the same topic in *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640 ("*DL*"), where reg 15(1) was discussed by reference to overseas authorities, commencing with a Canadian Supreme Court case[18] in which La Forest J said:

> 86. Given the preamble's statement that "the interests of children are of paramount importance", courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention … Through the use of undertakings, the requirement in art. 12 of the Convention that "the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated.

74. The majority of the High Court went on to say at 662 (footnotes omitted):

> Both the Supreme Court of Canada and the English Court of Appeal in *C v C (Minor: Abduction: Rights of Custody Abroad)* [[1989] 1 WLR 654] were concerned with Convention applications raising an issue as to whether the return of the child would expose the child to grave risk of psychological harm. In the latter decision, undertakings were given to the Court of Appeal by the father seeking return of the child to Australia. Butler-Sloss LJ said:
>
> > These undertakings are crucial to the welfare of the child, who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home. The mother has been the primary caretaker throughout his short life, and since the parting of the parents when he was three for all but access periods his sole caretaker. If possible, she should for his sake and not for hers be with him and help him to readjust to his return. The father should not be instrumental in putting obstacles in the way of that easy return, or make difficulties once the child is back. It is essential that the judge hearing the future issues of custody and access or indeed the Australian Family Court should have the opportunity to consider the welfare of the child as paramount without emergency applications relating to the manner of the return of the child.

75. The majority of the High Court concluded by saying at 662 (footnote omitted):

> It is impossible to identify any specific and detailed criteria which govern the exercise of the power whereby the Court may impose such conditions on the removal of the child "as the court considers to be appropriate to give effect to the Convention". Many of the criteria which may be applicable in

[18] *Thomson v Thomson* [1994] SCR 551 at 599.

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> a particular case are illustrated in the above passages from the Canadian and English decisions. The basic proposition is that, like other discretionary powers given in such terms, the Court has to exercise discretion judicially, having regard to the subject matter, scope and purpose of the Regulations.

76. Despite academic criticism[19] of the undertakings required by Butler-Sloss LJ in the 1989 English case the High Court cited in *DL*, there has been no criticism of the principles her Ladyship stated in a later case, *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 at 1025 including that:

- conditions or undertakings should operate only until the courts of the country of habitual residence "can become seized of the proceedings brought in that jurisdiction";
- when imposing conditions or requiring undertakings to be given, courts "must be careful not in any way to usurp or be thought to usurp the functions of the court of habitual residence"; and
- conditions or undertakings "must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations".

77. Most importantly for the father's appeal, Butler-Sloss LJ stressed that undertakings that are required as a prerequisite to an order for return are:

> … designed to smooth the return of and to protect the child for the limited period before the foreign court takes over, but they must not be used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child.

78. This brings us to the father's argument, which in a nutshell is that:

- he could not afford to meet the cost of the conditions;
- the child would therefore not be returned;
- such an outcome did not give effect to the Convention; and
- therefore the conditions were ultra vires.

79. While accepting all of the premises, we are not persuaded it is appropriate to view this issue through the prism of power. Regulation 15(1) confers a wide discretion that must respond to a variety of circumstances. The corollary of the father's argument would seem to be that if he had the means to comply, then

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19 See Beaumont, Paul R and McEleavy, Peter E in their 1999 monograph for Oxford University Press, *The Hague Convention on International Child Abduction*, where it was said that the "excessive nature" of the "extreme form" of undertakings required in the 1989 case had not been repeated in subsequent English cases (at p 161–3). For current English practice in respect of undertakings, see also Lowe, Nigel and Nicholls, Michael, *International Movement of Children: Law, Practice and Procedure* (LexisNexis, 2nd ed, 2016) at 576, footnote 171.

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the conditions would have been within power. Such an argument seems to us to sound in discretion rather than in power.

80. If we are right in that view, the questions that must be asked instead are:

- whether the discretion was exercised judicially, having regard to the subject matter, scope and purpose of the Regulations; and
- whether appellate interference is warranted in the exercise of the discretion in accordance with *House v The King* principles.[20]

81. While therefore finding no merit in these grounds, this brings us to the next limb of the eloquent argument of counsel for the father, which was adopted almost in its entirety by counsel for the Central Authority.

The exercise of the discretion – Grounds 2, 5, 6 and 7

82. These grounds principally assert that the primary judge failed to have sufficient regard to the father's capacity to satisfy the controversial conditions and/or erred in not making a finding about his capacity to satisfy them.

83. The primary judge's only reference to the father's financial position appears at [11] where his Honour recorded the father's submission that he was unable to meet the "incidental travel costs" sought by the mother. His Honour said this was "a relevant consideration and of concern about other conditions".

84. There was limited evidence concerning the father's capacity to meet the conditions, and it appears the parties were content for the matter to be largely dealt with on the basis of information provided from the bar table, as no objection was taken to these statements from counsel for the Central Authority:

> MS NESBITT: Sir, the first condition is the payment of airfares and incidental travel costs for the flight to New Zealand for the mother and child. I'm instructed that the father is on a very low income. He's employed as a junior shepherd on a casual basis at a rate of $16 an hour. He agrees to pay the costs of the airfares for the mother and child; however, he can't make a financial contribution other than to cover the costs of the two airfares. So the condition specifies incidental travel costs, but we don't - - -
>
> HIS HONOUR: Sure. That means - - -
>
> MS NESBITT: The father might not be - - -
>
> HIS HONOUR: - - - the bus trip or train trip from an airport to where the mother's going. Yes.
>
> MS NESBITT: I'm told that other than the airfares he cannot make a financial contribution, or he may not be in a position to make – to pay whatever the incidental travel costs are …

[20] *House v The King* (1936) 55 CLR 499 at 504–5.

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(Transcript, 24 January 2017, p 2–3)

85. This provides context for the decision not to order payment of the "incidental travel costs". Although his Honour said at [11] that there was "no evidence or indication of the quantum of the incidental travel costs", it seems he accepted that such costs involved nothing more than the cost of a bus or train trip. While one interpretation of his Honour's decision was that he accepted the father could not even afford those costs, the better interpretation is that the costs were so modest it was not unreasonable to expect the mother to pay them.

86. There was also mention during the oral argument concerning the father's capacity to provide accommodation for the mother and child:

> HIS HONOUR: Okay. So the point about [proposed condition] 3 is the father can't provide accommodation.
>
> MS NESBITT: That's right.
>
> HIS HONOUR: He can't pay for accommodation, so it will be – and he can't pay any part of the cost of any accommodation.
>
> (Transcript, 24 January 2017, p 3)

87. Similarly, there was consideration given to the child support arrears which the father was ultimately required to discharge prior to the mother having to return the child to New Zealand. Counsel for the Central Authority pointed out to his Honour that there was no information about how much the father owed in child support and submitted that that was a matter for the child support authorities either in Australia or in New Zealand (Transcript, 24 January 2017, p 6).

88. There was a later exchange in which the mother's counsel advised that the father had paid "hardly any, if at all, [child support] payments" in New Zealand,[21] and that although he had commenced making some payments since being requested to do so by authorities in Australia, the payments were irregular.[22] After having given an indication that he was favourably disposed to the condition requiring the discharge of the arrears, his Honour asked whether the amount was known. Counsel for the mother was uncertain, but after seeming to take instructions, informed his Honour that the arrears were "over $4,000 … but, again, for the record that's not a certain amount" (Transcript, 24 January 2017, p 16).

89. The net effect of the conditions was that the father was required to pay:

- the cost of airline tickets for the mother and child to return home;

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21 Transcript, 24 January 2017, p 16. The mother also said at [23] of her trial affidavit that the father had "never paid child support while we lived in New Zealand".

22 Transcript, 24 January 2017, p 39. The assessment attached to the mother's affidavit indicated that the father's obligation was to pay at the rate of $30.43 per week based on the father having an "overseas taxable" income of $36,981.

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- an (unspecified) amount to cover the cost of furnished accommodation for two months including any necessary rental bond;
- maintenance of $535 per week until the mother commences to receive welfare payments in New Zealand (the end date of the obligation being dependent upon the mother complying with Order 3); and
- payment of an unknown amount, but perhaps more than $4,000, by way of child support arrears.

90. As there was nothing put to his Honour (or to us) to contradict the information given at the hearing below concerning the father's modest income,[23] we accept the submission of the father's counsel that the imposition of these conditions "set up a scenario where the child would not be returned to New Zealand".

91. Although his Honour foreshadowed at [11] that the father's financial circumstances were a matter "of concern about other conditions", he made no reference to this at all when accepting the proposals for the payment of the amounts summarised above. Given that the father's ability to pay was clearly a relevant consideration, we consider his Honour's discretion miscarried.

92. Whatever may be the position where a defence has been successfully raised, we do not consider it proper, when making a mandatory return order, to impose conditions that cannot be met. The discretion to impose conditions has to be exercised having regard to the purpose of the Regulations. As this Court said in *Wolford & Attorney-General's Department (Cth)* [2014] FamCAFC 197:

> 75. We should observe that unlike *McDonald* [*& Director-General, Department of Community Services NSW* (2006) FLC 93-297] or *DP v Commonwealth Central Authority,* this is not a case where a grave risk of harm was otherwise established. It follows that in making it easier for children in their place of habitual residence, undertakings or conditions should not be imposed which are unnecessary or, rather than give effect to the Abduction Convention, undermine it.

93. As Butler-Sloss LJ has said, conditions also must not be used "to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child". Similarly, the High Court has said that conditions must be such that they "will be met voluntarily or … can readily be enforced".

94. We consider that his Honour erred in failing to recognise that the conditions would result in the child not being returned to the country from which she was wrongfully removed, and that they therefore did not satisfy the requirement that they be "appropriate to give effect to the Convention". On the contrary, the conditions were antithetical to the objective of the Convention as they placed

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[23] As referred to above, the Australian child support assessment attached to the mother's affidavit was calculated on the basis that the father's overseas taxable income in 2016/2017 was $36,981.

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the mother in a better position than she would have enjoyed had she not wrongfully removed the child.

95. For these reasons alone, the father's appeal must be allowed.

Conclusions in relation to specific conditions

96. While recognising that his Honour proceeded in a commendably expeditious fashion, we consider that given the other protective measures in place, Order 1.5 ought not to have been made.[24] Apart from anything else, no consideration was given to the impact of the required undertaking on the father's employment as a shepherd, and indeed no reasons were given for making the order.

97. Furthermore, for the sake of completeness we consider that:

- Order 1.2 requiring payment of a "reasonable sum as may be nominated by [the mother] or approved by the Court" ought not to have been made since it was vague and/or would lead to another hearing;
- it was unsafe to make Order 1.4 relating to the payment of arrears of child support, given that it was based on most uncertain information provided from the bar table in circumstances where the father was not represented and could not provide contrary information; and
- undertakings such as those required by Orders 1.3 and 1.5, which were to be provided to the mother's solicitors, are of no value since there is no remedy for breach: *DP v Commonwealth Central Authority* at [55] and [72]; *McOwan v McOwan* (1994) FLC 92-451 at 80,691.

Re-exercise of the discretion

98. We are not persuaded that there is any need for further mechanisms to be put in place to protect the mother and child upon their return to New Zealand. The mother will have the benefit of the Protection Order, and she will also have the benefit of the other orders his Honour made which would permit her to keep her whereabouts secret pending further proceedings in New Zealand.

99. We recognise the mother will be in a difficult financial position upon her return to New Zealand, especially as she will no longer have the security of the accommodation her father has provided in Australia. However, there is simply no evidence to show that the father has the capacity to ameliorate her financial position, after paying the airfares, which he has already agreed to do.

100. Furthermore, the evidence establishes that the mother has, in the past, been able to access many supports provided by the New Zealand welfare system. This

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[24] The mother said at [43] of her affidavit that she knew the father had access to a firearm which the police had not removed. The father gave evidence at [28.3] of his affidavit that he only ever had access to a firearm owned by his employer and which was only ever used for the purpose of putting down injured animals. We note that the Protection Order carried a "standard condition", that the father must not possess, or have under his control any weapon and must not hold a firearms licence.

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has included accommodation at refuges on those occasions when she has elected not to live with her mother. Although the mother claimed that there are waiting lists for refuges in New Zealand, an annexure to her affidavit establishes that she obtained a place in a refuge in June 2015 within hours of seeking assistance. The same document also discloses an impressive array of other supports that were very promptly arranged, including obtaining benefits; day care five days a week; and legal and police assistance. She then remained in the refuge for about five or six weeks before independent accommodation was obtained for her, together with a "relocation grant" and a "food grant".

101. There is no reason to consider that similar support would not be available to her upon her return to New Zealand. Notwithstanding her statements about her unwillingness to access supports if required to return to New Zealand, the mother has continued to demonstrate in Australia a similar capacity to obtain support by, for example, obtaining high level pro bono legal assistance; help from other support services and making arrangements for the child to see several doctors and obtain a referral to a child psychologist.

102. Nothing put to us suggested that there would necessarily be any hiatus between the mother losing her Australian Social Security benefits and commencing receiving benefits in New Zealand. In this context, Article 7(h) of the Convention requires Central Authorities to co-operate with each other and, in particular, either directly or through any intermediary, "take all appropriate measures … to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child". We consider it would be in the spirit of this obligation for the Central Authority to at least ensure that the mother is placed in touch with the appropriate government agency in New Zealand to ensure that she is not left without support upon her arrival.[25]

103. For these reasons, we are not satisfied that in the circumstances of this case it is appropriate to impose any additional conditions requiring the expenditure of funds by the father. We will therefore not make any orders other than to set aside the four controversial conditions.

THE 1996 HAGUE CHILD PROTECTION CONVENTION

104. The parties seemingly gave no consideration to the possibility of utilising powers available to the Court pursuant to the 1996 Hague Child Protection Convention.[26] The conclusions and recommendations of the Sixth Meeting of

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25 The Report of the Fourth Meeting of the Special Commission concluded at [1.13] that Central Authorities should "co-operate to the fullest extent possible to provide information in respect of legal, financial, protection and other resources in the requesting State, and facilitate timely contact with these bodies in appropriate cases".

26 *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, and implemented in Australia by Division 4 of Part XIIIAA of the Act and the Family Law (Child Protection Convention) Regulations 2003 (Cth).

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the Special Commission referred to the assistance that may be derived from Article 11 of that Convention which provides "a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention" (at [41]). In the absence of argument, we do not propose to say anything more about this topic.[27]

COSTS

105. In relation to the mother's appeal, counsel for the father sought only the dismissal of the appeal and did not seek an order for costs. In relation to the father's appeal, counsel for the father sought that the mother should pay the father's costs of the appeal or alternatively that certificates should be issued pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth).

106. Costs in proceedings under the Regulations are governed, in part, by s 117AA of the Act. In *Harris & Harris* (2010) FLC 93-454, the Full Court left open the question of whether this provision applies to appeals. As presently advised, we consider it does apply to appeals, as well as first instance proceedings, but it is unnecessary to determine that issue. It is sufficient to say that there should be no order as to costs given the mother's financial circumstances and her obligation to maintain the child with very little support from the father.

107. As the father's appeal succeeded on a question of law, and as there will be no order as to costs, we consider this an appropriate case for the grant of costs certificates. Cost certificates may only be granted if requested and, as the mother was represented on a pro bono basis, it was only the father who made such a request. We will therefore grant him a certificate in relation to his appeal.

I certify that the preceding one hundred and seven (107) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Bryant CJ, Thackray & Austin JJ) delivered on 29 June 2017.

Associate:

Date: 29/6/17

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[27] See the discussion of the reach of Article 11 in *Re J (A Child) (1996 Hague Convention: Cases of Urgency)* [2015] UKSC 70 per Lady Hale.

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