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19 September 2023

Section 9(2)(a)
Section 9(2)(a)

Our ref: OIA 106912

Tēnā koe Section 9(2)

Official Information Act request: Hague Convention conferences

Thank you for your email of 16 August 2023 to the Ministry of Justice (the Ministry), with follow up questions to our previous response of 16 August 2023 (our ref: OIA 106228). Specifically, you requested:

> *Issue 1 – Refusal to provide correspondence with judiciary.*
>
> *Regarding your refusal to provide correspondence with members of the judiciary, we disagree with your assertion that such would require substantial collation and research. It would only require checking:*
> *- Emails sent by any central authority email address (of which there are very few), against a list of emails to either the email of any judge;*
> *- The same in reverse (i.e. emails from any judge to any central authority email address).*
>
> *Given that it would be highly unusual for the Central Authority to be in contact with any member of the judiciary, there is unlikely to be a large amount of material. Please confirm this will now be carried out. If not, please advise your alternative proposal, with reasons.*
>
> *Issue 2 – Exclusion of emails relating to organisation of previous master classes*
>
> *When you provided details of the 2023 Master Class, you included emails between the Central Authority and guests, discussing what was to be presented, proposing speaking topics etc. Equivalent information in respect of earlier Master Classes has not been provided in your OIA response of 16 August 2023, despite this being covered by the scope of the 13 July 2023 request. Please confirm these will be provided.*
>
> *Issue 3 – Notes taken during 2023 Master Class*
>
> *In your response to our 7 June 2023 request, you advised that no written materials were available for some of the sessions. Given that, please provide any notes / records / minutes / recordings kept or taken by any Ministry of Justice agent and/or employee in connection with the content presented at the 2023 Master Class.*

Issue 4 – Request for clarification of what was meant by the Central Authority in written materials

With reference to your response to request (3), please provide all internal Central Authority documents which discuss the following recent court decisions (including their respective first instance, appeal, and enforcement decisions): Summer v Green, the LRR v COL decision, and Roberts v Cresswell.

On 29 August 2023 the Ministry contacted you to clarify your request for correspondence with members of the judiciary and for a timeframe. The Ministry advised that the wide scope of your request meant it may be refused under section 18(f) of the Act on the grounds that it involves substantial collation and research. The Ministry sent a further email on 5 September 2023 requesting that you provide clarification as in its current form the part of your request regarding emails to the judiciary would likely be refused.

On 6 September 2023, you provided clarification regarding correspondence with the judiciary and the timeframe. Your response was:

> *"I note your point that administrative emails might be captured. To reduce this, I do not require copies of any communications where the other party to a proceeding was copied into the communication. However, where the Central Authority is communicating directly with a judge without copying the other party – for whatever reason – that is precisely the kind of communication I am interested in receiving copies of. I am also happy to limit the timeframe for Issue 1 to communications from 1 January 2014 onwards."*

While I appreciate you refining your request, the refinements do not materially alter the amount of work that would be involved in collating the information and so I am refusing that part of your request under s 18(f) on the basis that the information cannot be made available without substantial collation and research. I also want to reiterate that most, if not all, correspondence between the Central Authority and the judiciary would be for administrative reasons. For the Central Authority to contact individual judges about specific cases would be both inappropriate and a breach of the Ministry's Code of Conduct, which is available at: justice.govt.nz/assets/Documents/Forms/Code-of-Conduct-2019.pdf.

In response to your request for emails relating to the organisation of Master Classes, I have provided a copy of the invitations sent to counsel to attend conferences in 2007, 2012, 2015, 2017 and 2019. Information provided for the 2017 and 2019 conferences are provided as excerpts of the emails sent. Copies of the emails sent inviting counsel to attend the 2017 and 2019 conferences and preparation arranging conferences have not been retained and therefore have not been provided.

I am refusing your request for notes taken during the 2023 Master Class under section 18(e) of the Act as the information requested does not exist. No notes, minutes or recordings were taken in relation to the Master Class.

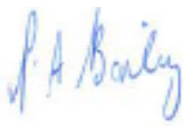
In response to your request for internal Central Authority documents in relation the following cases; *Summer v Green, the LRR v COL decision, and Roberts v Cresswell,* the Central authority has only discussed *LRR v COL* and *Roberts v Cresswell*. The relevant memos are provided (documents 7 and 8 attached).

Please see the document table below which details the information being released to you. Some documents have been provided to you as an excerpt in accordance with section 16(1)(e) of the Act.

Please note that this response, with your personal details removed, may be published on the Ministry website at: justice.govt.nz/about/official-information-act-requests/oia-responses/.

You have the right to make a complaint to the Office of the Ombudsman under section 28(3) of the Act about my decisions to refuse aspects of your request. The Office of the Ombudsman may be contacted by email to info@ombudsman.parliament.nz or by phone on 0800 802 602.

Nāku noa, nā



Patricia Bailey
Manager, Central Authority

Documents in scope of your request

No.	Date	Document type	Title	Decision on release
1.	23 January 2007	Letter	Hague Abduction Workshop: Wellington 2 April 2007	Released in full
2.	4 April 2012	Letter	Hague Abduction Workshop: Wellington 21st May 2012	Released in full
3.	2012	Agenda	Index – Agenda 2012	Released in full
4.	17 June 2015	Letter	Hague Abduction Workshop: Wellington 21st August 2015	Released in full
5.	2017	Email excerpt	Hague conference 2017	Released in full
6.	2019	Email excerpt	Email to counsel: Hague Forum 2019	Released in full
7.	8 June 2020	Memo	Memo to Hague Convention Panel Counsel: *LLRR v COL [2020] NZCA 209*	Released in full
8.	17 August 2022	Memo	Memo to Hague Convention Panel Counsel: *Wood v Payne [2022] NZHC and Cresswell v Roberts [2022] NZHC 1363*	Released in full

MINISTRY OF JUSTICE
Tāhū o te Ture

23 January 2007

Stephen Coyle
Barrister
PO Box 13284
Tauranga

Dear Stephen

HAGUE ABDUCTION WORKSHOP: WELLINGTON 2 APRIL 2007

I am writing to invite you to a one day workshop on the Hague Convention on the Civil Aspects of International Child Abduction which will be held on the 2nd April 2007 in Wellington.

This conference will be limited to counsel instructed by the Central Authority to represent applicants. We believe the small group format with experts and experienced personnel permits a level of detailed discussion which may be lost if the workshop grows too big. I attach a letter from Principal Family Court Judge Peter Boshier supporting this workshop and encouraging attendance at the conference.

The workshop will be held on the Ground Floor, Vogel Building, Aitken Street, Wellington (next door to the Court of Appeal).

We have divided the conference into two parts: recent trends in case law; and counsel's perspective and specific legal issues of general interest. I attach for your information a copy of the preliminary agenda.

In preparation for the workshop I attach a copy of the Conclusions and Recommendations from the 6th Special Commission Meeting held October/November last year. We would also like you to give some consideration to recent significant judgments made by New Zealand courts in international child abduction matters and any issues that would be of interest to your colleagues attending the conference.

I would be grateful if you could inform me of your intention to attend by Wednesday the 7th March 2007. You may contact me by telephone (04) 918 8827 or e-mail Patricia.Bailey@justice.govt nz

If you have any queries, please do not hesitate to contact me.

Yours sincerely

PA Bailey
For Central Authority
Ministry of Justice
Wellington

Document 2

MINISTRY OF JUSTICE
Tāhū o te Ture

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4 April 2012

Dear Colleagues,

HAGUE ABDUCTION WORKSHOP: WELLINGTON 21st May 2012

I would like to extend an invitation to you to participate in a one day workshop on the Hague Convention on the Civil Aspects of International Child Abduction which will be held on the 21st May 2012 in Wellington.

The workshop will focus and discuss key concepts of the Convention that are not always what they seem such as rights of custody, grave risk and child's objection defence and how we interpret those within New Zealand and internationally. I attach for your information a copy of the preliminary agenda.

In preparation for the workshop I invite you to consider the agenda items and would be interested in receiving any questions or comment you may care to make. You are the experts and we want to hear from you your experiences, perspective and strategies developed to respond to the evolution in practice. In other words, it is now time to strategise. What can we do better?

We would also like you to give some consideration to recent judgments made in Hague proceedings by New Zealand and overseas. A list of judgments is attached for your reference.

Do let me know if there are any issues that you would like to discuss or would be of interest to your colleagues attending the conference.

I would be grateful if you could advise by email if you will be attending by Tuesday 17th April 2012.

If you have any queries, please do not hesitate to contact me.

Yours sincerely

PA Bailey
For Central Authority
Ministry of Justice
Wellington

Index:

17 June 2015

Dear Colleagues,

HAGUE ABDUCTION WORKSHOP: WELLINGTON 21st August 2015

I would like to extend an invitation to you to participate in a one day workshop on the Hague Convention on the Civil Aspects of International Child Abduction which will be held on the 21st August 2015 in Wellington.

The workshop will focus on how the Convention is working in practice. Particularly between Australia and New Zealand which is our most significant partner. We will also discuss key concepts of the Convention that are not always what they seem such as grave risk, child's objection and the older child and what does 'unfounded application' mean. I attach for your information a copy of the preliminary agenda.

In preparation for the workshop I invite you to consider the agenda items and would be interested in receiving any questions or comment you may care to make. You are the experts and we want to hear from you your experiences, perspective and strategies developed to respond to the evolution in practice.

Do let me know if there are any issues that you would like to discuss or would like to raise that may be of interest to your colleagues attending the conference.

I would be grateful if you could advise by email if you will be attending by Friday 10th July 2015.

If you have any queries, please do not hesitate to contact me.

Yours sincerely

PA Bailey
For Central Authority
Ministry of Justice
Wellington

I thought I would give you a heads up that I am planning to hold another meeting of the Hague expert panel in July this year in preparation of the Special Commission Meeting to be held in October. This will assist the executive in the formation of a view prior to attending the meeting.

An issue that will be discussed is what constitutes a measure of protection when making an order for return. This topic has arisen as under the Child Protection Convention Article 12 a jurisdiction considering an application for return under the 1980 Convention may take measures of protection of a provisional nature.

In some jurisdictions, the view of what constitutes a measure of protection has been given a very broad interpretation which in my view does not sit comfortably with the principles of the 1980 Convention. I think some members of the judiciary have interpreted this Article as giving free reign to make orders that they have wanted to do and have little regard for the principles of mutual respect and trust.

But that is just my view and would be interested to hear from the experts. If you would be interested or up for chairing another one of these do please let me know.

Hello,

I now attach a copy of the draft agenda for the Hague Conference scheduled for 20 July 2017.

In preparation for the conference I invite you to consider the agenda items and would be interested in receiving any questions or comment you may care to make. You are the experts and we want to hear from you your experiences, perspective and strategies developed to respond to the evolution in practice.

Do let me know if there are any issues that you would like to discuss or would like to raise that may be of interest to your colleagues attending the conference. We will provide lunch and good company on the day

I would be grateful if you could advise me by the 26th May 2017 if you will be attending.

If you have any queries, please do not hesitate to contact me.

Kind regards
Trish

Forum: September 2019
Suggested Topics/Issue for Discussion:

I propose to hold a seminar 6th September in wellington this year so hold that date. There have been many developments or trends that would benefit from some discussion and I would appreciate your feedback about what issues you would like discussed.

I have come up with a few suggestions in no particular order:

1. **State of Victoria: Practice Note**

When you read the Guidance, you will note that the process described is very similar to the process that is currently employed in the Melbourne Registry, however there are a few significant changes. The first is the introduction of a preliminary family consultant report to be undertaken in conjunction with the first (with notice) hearing of the matter. This process has been used in some previous Hague matters in the Melbourne Registry but the trial will make it a regular part of the process.
This step will identify any support the child(ren) need at an early stage, explain the proceedings to them, and also enable the family consultant to form a preliminary opinion as to matters such as the child's views and their maturity. This may reduce the scope for respondent reliance on the child objection defence at an early stage. This step would also explore the willingness of the child to participate in electronic communication with the left behind parent and consider what that contact might look like so that meaningful contact can, in appropriate cases, continue while the Hague matter is under consideration.

As the Guidance mentions, the ACA will be having regular meetings with the other agencies involved in Hague matters in Melbourne every few months for the life of the trial to assess their usefulness and to assess the outcomes from robust and active case management. You are welcome to let the New Zealand CA know if you have any comments (good or bad) about the trial as it progresses.

2. **What is the risk of presenting to the Court proposals if a child is or is not to be returned?**
   Providing proposals has the potential to create a 'Double Bind' situation faced by parents who acknowledge that they would do certain things or take certain steps if not successful. Such as willing to forgo relocation or willingness to '*stay behind for the sake of the children'* or propose contact a rangements renders the status quo an attractive option for the presiding judge because it avoids the difficult decision that the application otherwise presents.

3. **Conditions/ Measures of Protection:**
Issues continue to arise regarding conditions on orders for return and what constitutes a protective measure. The broad interpretation adopted by some states does not sit comfortably with the New Zealand interpretation and/or practice. Is it time we revisited our interpretation?

4. **Delayed return after order for return made:**
   The Central Authority is concerned by two recent cases involving Australia where orders for return were made by the court but the enforcement of those orders, that is, the prompt return of the children, did not occur.

   The parties were invited by the Australian Court to file applications in the New Zealand Family Court seeking relocation and /or interim orders that the children be allowed to remain in Australia pending determination of the application for relocation by the New Zealand Court and/or interim parenting orders.

Delayed return allowed by the Australian Courts have resulted in a lack of resolution for the parties despite the fundamental requirement that Hague cases be concluded promptly. Such delays in and of themselves constitute a violation of the Convention and the basic rights of the child and left-behind parent.

- Decision Judge Neal 20 July 2019 regarding a request to make interim parenting orders prior to or as a pre-requisite of a return order.

5. **Judicial Communication:**
Judicial communication may be helpful but is limited in is usefulness. Our courts rely on properly adduced evidence that can be tested so communication is limited to its usefulness. As set out previously in a paper by the NZ Law Society:

"There may be a perceived benefit of expediency of process provided by direct judicial communication (although that is not necessarily accepted by the Law Society)," the submission states.

"However, direct judicial communication is contrary to the principle that Judges act and determine matters on the basis of properly adduced evidence presented and tested in court (New Zealand does not have an inquisitorial judicial proce s as some European countries do). Justice must be done and seen to be done. This requires counsel having the opportunity to comment on and challenge information put before the court."

NZLS also notes that while the paper discusses certain safeguards in the proposal for direct judicial communication, it believes that no safeguards are sufficient in circumstances where there is no justification for direct communication because alternative, transparent communication methods are available.

Not sure the situation or views have changed.

6. **Grave Risk – intolerable situation:**
Special Category Visa Holders financial situation

7. **How to ensure a safe return:**
Undertakings – total disregard – child uplifted at airport by police on return even thought there were undertaking from the left behind parent the child would remain residing with the returning parent.
Mother arrested on arrival in Canada. Orders having been made in the Canadian court about the care of the child on return.

8. **How to deal with/ manage cases with the UK**
Request for information and evidence that at times the reasons are not always clear.

9. **Request for information: OT**
If evidence is sought from OT how or what is the best way to make a request to get the best evidence for a foreign jurisdiction. Are copies of CYRAS reports helpful?

Memo to Hague Convention Panel Counsel: *LRR v COL* [2020] NZCA 209

1. The Court of Appeal's reasons judgment of 3 June 2020 provides a valuable refresher on several key aspects related to the interpretation and application of the Hague Convention. The case does not represent a material change in the Court's approach to determine Convention applications; however, the decision restates, and in some minor respects clarifies the principles that gove n Convention proceedings in New Zealand (at [148]).

2. Appended is a summary of the background to the case, and the outcome. This memo sets out the aspects of the Court's decision which the Central Authority wishes to highlight for counsel and, where appropriate, to adopt in the future.

Court of Appeal's reasons judgment

Best interests of the child ([76] – [85])

3. The Court discusses the relationship between the paramountcy principle in s 4(1) of the Care of Children Act 2004 ('the Act') and the Convention, stating that s 4(4) of the Act does not 'disapply' s 4(1). Rather, s 4(4) makes it clear that the requirement to determine Convention proceedings speedily, and to return a child promptly if no exception is made out, is not limited by s 4(1). The inquiry into the best interests of the child must be approached n the manner contemplated by ss 105 to 107, such that it is not a broad inquiry.

Grave risk of an intolerable situation ([86] – [100])

4. The Court makes eight observations about the intolerable situation exception.[1] These restate previous comments made by the New Zealand courts, and the United Kingdom and Australian superior courts.[2] This is the first time the United Kingdom Supreme Court cases (*Re S* and *Re E)* have been cited in New Zealand appellate decisions for these propositions.

Importance of case management ([103] – [106])

5. The Court refers to the helpful guidance provided by the HCCH Guide to Good Practice on Art 13(1)(b) of the Convention.[3] The Guide was published before the hearing of the appeal, and was a very helpful resource because of the international context it provided. In particular, the Court focused on appropriate case management as being essential to ensure that issues are identified, and evidence relevant to those issues are provided to the court in the shortest, feasible timeframe. Further, that the court, at an early stage, should consider what evidence the parties propose to provide, and whether additional evidence is needed to enable the court to make an informed decision under s 106 were a 'grave risk' exception is invoked.

Evidence gathering role ([107] – [109])

6. The Court did not accept the appellant's submission that a court is required to make further inquiries to fill any gaps in the evidence, or that Art 13 of the Convention confers on the Central Authority the function and responsibility of carrying out further inquiries and providing evidence at the request of the Court. The Central Authority can and already does facilitate such enquiries for information held by relevant agencies in the requesting State.[4]

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[1] Notably, an assessment of whether the risk is 'grave' turns on both the likelihood of the risk eventuating, and the seriousness of he harm if it does eventuate. The court is required to make a prediction, based on evidence, about what may happen if the child is returned. Further, the impact of return on the taking parent may be relevant to the assessment of the impact of return on the child, however, the focus remains on the situation of the child.

[2] The United Kingdom Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144; *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257; the House of Lords in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619; and the High Court of Australia in *DP v Commonwealth Central Authority* [2001] HCA 39, 206 CLR 401.

[3] The Hague Conference on Private International Law *1980 Child Abduction Convention Guide to Good Practice Part VI Article 13(1)(b)* (The Hague, The Netherlands, 2020). The Guide was approved on 19 December 2019. An international working group was established by the HCCH in 2013 to develop a guide in response to the increased use of the art 13(1)(b) exception, and concerns about the correct application of the article.

[4] In this case, the New Zealand Central Authority was directed by the Family Court to seek general information regarding benefit entitlements in Australia (for non-protected special category visa holders) and benefit

Memo to Hague Convention Panel Counsel: *LRR v COL* [2020] NZCA 209

Protective measures to remove or reduce risk ([111] – [114])

7. The Court states that if there is cogent evidence that return would expose the child to a grave risk of an intolerable situation, the court needs to consider whether protective measures can be put in place in the requesting State to protect the child from that risk. The assessment of risk, and of the effectiveness of suggested protections against that risk, should be fact specific; it is not appropriate to make assumptions based on an expectation of what is available in a similar or familiar system. The example provided is that, where a parent has in the past breached court orders designed to protect the child or the other parent from harm, it may not be assumed such orders will provide effective protection in the future.

Conditions attached to return orders ([115] – [120])

8. In the course of revisiting its obiter remarks in *A v Central Authority of New Zealand*, the Court considered that the potential relevance of conditions arises at the point the Court is assessing whether an exception is made out. Any conditions must be effective to address a risk to the child that might otherwise be present, and may result in a finding that the risk is removed. The Court emphasises the importance of such conditions being 'practically effective'. The Court noted New Zealand had not yet ratified the 1996 Child Protection Convention; which many other Contracting States have and which provides a range of protective measures that can be put in place.[5]

Interim contact ([150])

9. Interim contact should be routinely addressed at an early stage in the case management of Convention proceedings in New Zealand; and that the Court should raise the issue even if parties do not. The Court says, in this case, the Central Authorities in Australia and New Zealand could have played a role in facilitating ongoing contact.

Priority to be given to second appeals ([149]

10. The Court set out the process whenever an application for leave to appeal in a Convention case is filed in its registry. The application will immediately be referred to the President to appoint a Judge to case manage the application, and the appeal if leave is granted. This will ensure matters such as the appropriateness of updating evidence are addressed at an early stage and avoid the kind of lengthy delays seen in this case.

Central Authority's points for Hague Panel counsel

11. The points the Central Authority seeks to reiterate to counsel are as follows.

12. *Interim contact*: Seeking interim contact for the left-behind parent should now be part of the standard interim directions sought at the first case management conference. The Court's decision should be used as authority for seeking such a direction.

13. *Evidence gathering*: The Court's decision emphasises the importance of specific and relevant evidence, and such evidence being provided early. The issue of what evidence and its relevance to the issues in the particular case should be raised early during case management. If there are any questions regarding how to obtain such evidence, the Central Authority can assist. In terms of the grave risk exception, evidence should focus on the particular risk being alleged, what protective measures are available in the requesting State, and the effectiveness of such measures in ameliorating the particular risk for this particular child.

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entitlements in New Zealand, including to undertake inquiries with appropriate agencies in Australia. The New Zealand Central Authority sought such information from its counterpart in Australia and from the Ministry of Social Development. On appeal, the New Zealand Central Authority provided information to the parties regarding how to obtain the respondent's criminal history, child protection records in respect of the respondent's other children, and certain Australian Family Court records.

[5] The absence of those Convention tools was the subject of discussion during the appeal.

Memo to Hague Convention Panel Counsel: *LRR v COL* [2020] NZCA 209

14. *Case management*: Related to this point, it will be important for counsel to explain or state what steps are being taken to obtain such evidence, so that the Court can appropriately manage the case (as in paragraph 5 above). While the cooperation of the parties may be essential to obtain evidence (e.g. a criminal conviction history), counsel can explain what information they've provided to their client and whether their client is assisting.

15. *Effectiveness of protective measures (including conditions)*: This will be a fact specific assessment. For example, in a family violence context, factors include what the nature of any breaches of orders have been, and frequency (i.e. its cumulative nature). Proposed conditions can be considered at the point of assessing the risk and whether it can be ameliorated. Evidence about the efficacy of such measures will be important to establish whether, for example, an undertaking provided is meaningful or not in that particular country.

Patricia Bailey
Manager, Central Authority
[xx] June 2020

Memo to Hague Convention Panel Counsel: *LRR v COL* [2020] NZCA 209

Appendix

Background to the case

1. The Appellant mother (a New Zealand citizen) and Respondent father (an Australian citizen) are parents of H. H is an Australian citizen, born in 2015. Numerous family violence orders had been made against the father by the Australian courts. The mother left Australia with H in August 2017 for New Zealand when the father was granted bail after being charged with assaulting the mother, and breach of a family violence order. The mother had a history of depression and substance abuse all either caused or exacerbated by the dysfunctional relationship and family violence

2. On 1 June 2018, the Family Court declined to make an order for return after the father filed an application seeking return. The Family Court found that the exception in s 106(1)(c)(ii) of the Care of Children Act 2004 ('the Act'), that there is a grave risk that H's return would place him an intolerable situation, was established. The Family Court had particular regard to documentation from the Tasmanian Child Protection Service, a report from the Hobart Woman's Shelter, and a report from the Wellington Woman's Refuge.

3. The High Court allowed the father's appeal on 8 November 2018 on the basis that the Family Court erred in assessing the evidence as discharging the mother's onus to establish that there is a grave risk H would be placed in an intolerable situation upon return.

4. The Court of Appeal granted leave to appeal on 24 June 2019. The question on which leave was granted was 'Did the High Court err in fact and law when it held there was not a grave risk that the child would be placed in an intolerable situation upon being returned to Australia?', accepting that further consideration of the Court's decision in *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA) was appropriate. The Court of Appeal allowed the mother's appeal on 3 April 2020.

5. The Central Authority, as intervener in this p oceeding, did not support or oppose the appeal, but sought to assist the Court with submissions on the interpretation and operation of the Convention and grave risk exception, as well as seeking to clarify the Court of Appeal's obiter remarks in *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA) in relation to the court's ability to impose conditions on a return order.

Court's analysis of the case

6. The mother sought to admit urther evidence including an affidavit from her in relation to the progress of the prosecution of the father, a registered clinical psychologist and Tasmanian Women's Legal Service. The new evidence about the mother's mental health and risks associated with her return to Australia provided up-to-date information for the Court, which it said it found to be of considerable assistance. The Court notes that, on appeal, the child should not be prejudiced by the failure of a party to adduce evidence at an earlier stage in the proceedings if it meets the credibility and cogency thresholds, so the freshness test plays a less significant role in a Convention context (at [124])

7. The Court considered that the psychologist's evidence could and should have been provided to the Family Court as it would have been of real assistance to that Court and to the High Court on appeal (at [127]). Whereas, the Tasmanian affidavit did not provide any real assistance in determining the appeal given its high level of generality (at [128]).

8. The Court also acknowledged it had the benefit of findings by the Tasmanian Courts (not available to the Family Court or High Court) in relation to the alleged violence by the father, allegations which were substantially upheld to the criminal standard of proof.

9 The Court found that the mother's fear that the family violence orders will not be effective to protect her in practice was both genuine and well-founded due to the father's record of breaching such orders (at [140]). Further that there is a very significant risk that her concerns would materialise, and that they would have a very serious adverse effect on H (at [141]), and this in turn would be intolerable for H, as he 'cannot be expected to tolerate the loss of effective parental care from his

mother, if her mental health deteriorates and she returns to alcohol abuse' (at [142]), particularly because the mother has been Harvey's primary caregiver throughout his life.

16. In its concluding remarks, the Court noted that the father has not had contact with H since July 2017. While the mother has good reasons for not being personally involved in making such arrangements, the Court noted that ongoing contact could have been arranged elsewhere, including through H's grandparents and the Central Authorities in New Zealand and Australia.

Memo to Hague Convention Panel Counsel: *Wood v Payne* [2022] NZHC 1265 and *Cresswell v Roberts* [2022] NZHC 1363

Hague Convention High Court Judgments:

These two recent High Court decisions have challenged our thinking which is always a good thing as it provides the opportunity to consider our approach and review our practice and processes. The two decisions are *Wood v Payne* [2022] NZHC 1265 and *Cresswell v Roberts* [2022] NZHC 1363 (copy of decisions **attached**).

The decisions revisit the interpretation of grave risk/intolerable situation where it is claimed there may be a decline or destabilisation of the taking parent's mental health to the point where the child's situation would become intolerable.

This is not a new ground in terms of cases where the grave risk exception is raised. However, our considerations are about whether our current approach needs refining in light of the recent decision.

If, as in the two cases referred to, the respondent relies on evidence from a psychologist or psychiatrist who is engaged for the respondent one of the issues for counsel appointed by the NZCA is how you should respond to or challenge this evidence and focus the Court on the situation for the particular child.

If the exception of grave risk/intolerable situation is relied on due to a deterioration of the mental health of the taking parent, you should consider whether to seek a s133 psychologist report to provide expert evidence from the child's perspective and it is important to tailor the brief accordingly.

Suggested strategies going forward:

- Front load the case prior to filing. This may mean pausing to seek additional information or clarification on points raised, or absent, in the initial affidavit. Ask if there have been any family violence proceedings or police involvement. Do not be reticent about obtaining this further evidence, or having a new affidavit sworn, before the application is filed in NZ. In *LRR v COL* the Court of Appeal emphasises the importance of specific and relevant evidence, and such evidence being provided early. (Summary of *LRR* **attached**)

- Don't be gatekeeping about the appointment of L4C as that should occur in child objection/grave risk cases. However, ensure the brief is focussed and the reporting timelines are tight.

- Provide detailed information in the affidavit(s) about context and timelines. If allegations of grave risk are addressed early or in the first affidavit then some of the defences may fall away – ie history to the relationship, drug use and incidents of violence. Provide a clear chronology.

- Address possible soft landing protective measures on return. As outlined in the **attached** summary, proposed conditions can be considered at the point of assessing the risk and whether it can be ameliorated if the discretion to return is used. Evidence about the efficacy of such measures will be important to establish that the suggested protective measures are meaningful.

- Request early on in the proceedings that the applicant consider protective measures, such as the financial assistance that may be available from the left behind parent, housing, vehicle, payment of bond monies, undertakings not to attend the airport etc, not to remove child from the care of the returning parent. This is particularly relevant for the period immediately after return and prior to gaining employment or receipt of government financial assistance.

- Identify the relationships which may be lost if the child is not returned, including siblings, extended family.

- If a party seeks to obtain or introduce a psych report about the taking parent, consider whether a s133 report for the child should be obtained as well to provide evidence of the situation for this particular child. What is relevant is the situation on return for this child. How might the child respond? What can be done to mitigate the situation for the child if they are returned with or without the taking parent?

- In your submissions refer to the Court of Appeal decisions of *LRR v COL* [2020] NZCA 209 and *Summer v Green* [2022] NZCA 91 to remind the Court we have clear guidance from the Court of Appeal and refocus the Court on the principles outlined by that Court and clarified in *Summer v Green* . (refer to the **attached** summary).

- Also remember to look at and refer the Court to the HCCH Guide to Good Practice for Art 13(1) which came about as the Hague Conference recognised the concerns about the increased use of the grave risk defence, as well as the effects on the taking parent and the child. NZ contributed to the development of this good practice guide which assists with the consistent interpretation of the grave risk exception. It can be found at: https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf

- Consider whether there should be cross-examination of the taking parent's psychologist/psychiatrist so that the evidence is challenged. Is the psychiatrist addressing psychological matters? This must be balanced against delay issues.

I have **included** a copy of the brief for the psychologist and have suggested a few alterations/ amendments which could help reinforce the above points. In practice a s133 report always includes these aspects and the brief will not be solely based on grave risk.