IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 28/2023
[2023] NZSC 62

BETWEEN	CRESSWELL Applicant
AND	ROBERTS Respondent

Court:	O'Regan, Ellen France and Kós JJ
Counsel:	B J R Keith and A J Summerlee for Applicant V A Crawshaw KC, S R Jefferson KC and S M Wilson for Respondent
Judgment:	25 May 2023

JUDGMENT OF THE COURT

A **The applications for an extension of time to apply for leave to appeal *Roberts v Cresswell* [2022] NZCA 625 and the Court of Appeal's decision declining the application to adjourn the substantive hearing are dismissed.**

B **The application for leave to appeal (*Roberts v Cresswell* [2023] NZCA 36) is dismissed.**

C **There is no order as to costs.**

REASONS

Introduction

[1] The applicant seeks leave to appeal from a decision of the Court of Appeal.[1] This decision ordered the return of her two children to France under the Care of Children Act 2004 (the Act).[2] The applicant also seeks extensions of time to appeal earlier procedural decisions.[3] The proposed appeal would focus on the approach to s 106(1)(c)(ii) of the Act. That section provides a ground for refusing to make an order for return of a child where "there is a grave risk that the child's return—(i) would expose the child to physical or psychological harm; or (ii) would otherwise place the child in an intolerable situation …".

Background

[2] The background is set out in the judgment of the Court of Appeal on the substantive appeal.[4] We need only note the following by way of factual narrative. Up until October 2020 the two children lived in France with the applicant, their (New Zealand born) mother, and their (French) father. By 2020 the parents' relationship had broken down. In October 2020, with the father's agreement, the mother and the children came to New Zealand for a holiday. Their anticipated return to France, in April 2021, was frustrated by Covid-19 documentation issues.

[3] The father sought return of the children to France under the Convention on the Civil Aspects of International Child Abduction.[5] An order was made by the Family Court under the Act for the return of the children.[6] The mother appealed from that decision to the High Court. She argued that the children would be at grave risk of being placed in an intolerable situation if returned to France because:

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1 The names of the parties and the children have been anonymised.
2 *Roberts v Cresswell* [2023] NZCA 36 (Brown, Goddard and Wylie JJ) [Substantive CA judgment].
3 *Roberts v Cresswell* [2022] NZCA 625 (Brown and Goddard JJ) [CA leave judgment].
4 Substantive CA judgment, above n 2, at [10]–[32].
5 Convention on the Civil Aspects of International Child Abduction 1343 UNTS 89 (opened for signature 25 October 1980, entered into force 1 December 1983).
6 *[Roberts] v [Cresswell]* [2021] NZFC 12991 (Judge Hambleton).

(a) they would be removed from their primary carer, the mother (at that point the effect of a decision of the French court was to award the father primary care of the children);

(b) they would be adversely affected by a decline in their mother's mental well-being; and

(c) if placed in the father's care in accordance with the orders of the French court at the time, he would be unavailable to care for them for extended periods of time due to his unique business commitments.

[4] The High Court concluded the grave risk exception was met in the event the children were not in the care of their primary parent (the mother); and because of the likelihood of the adverse effects on the mother's mental health and on her parenting, and the adverse consequences that would follow for the children.

[5] The Court of Appeal granted leave to appeal from the High Court decision to the father and provided for new evidence to be received.[7] The mother unsuccessfully sought an adjournment of the hearing of the substantive appeal and the matter proceeded to a hearing.[8]

[6] The appeal was subsequently allowed.[9] In allowing the appeal, the Court did not consider grounds (a) and (c), above, were made out. That was essentially because, by then, the father had obtained modifications of interim orders made by the French court to provide for shared care between the parents in the event the mother returned to France.

[7] On ground (b) the Court, adopting the approach outlined in *LRR v COL*, accepted the mother's assertions relating to family violence were of such a nature, detail and substance that they could not (in these proceedings) be discounted.[10] That

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7 CA leave judgment, above n 3.

8 The direction was made on 13 February 2023 by Brown and Goddard JJ. Reasons for the refusal to adjourn the hearing were given in the Substantive CA judgment, above n 2, at [32].

9 Substantive CA judgment, above n 2.

10 *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610.

said, the Court was not satisfied the risks met the "grave" threshold. The Court concluded that:

> [198] … critically for present purposes, the evidence does not satisfy us that the risk of an intolerable situation for the children merits the qualitative description "grave". Even when the stressors on the mother were at their highest, while she was living with the father, she continued to be an effective and competent parent. The children were far from being in an intolerable situation. If she returns to France, the mother will be less exposed to relevant psychosocial stressors than she was before her departure. Her position will in some respects be better than it was before. As a result of the modified interim orders, she will have some financial support from the father. There is evidence that she will also be entitled to certain welfare benefits.
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> [199] The mother will have access to support from her own family, mostly from a distance, though it seems likely that the maternal grandmother will continue to visit her daughter and grandchildren in France regularly, as she has in the past. She came to France to support her daughter when Amelia and Brigitte were each born, and can be expected to provide similar support in the future.
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> [200] The mother is also likely to have access to counselling and (if needed) mental health services. The mother expressed concern about availability of counselling in English in the area where she would be living, bearing in mind her limited fluency in French. We accept she will need to access English-language counselling. But the suggestion this will not be available in the area in which she would be living seems speculative. And one option would be for her to continue counselling online with her existing counsellor in New Zealand.
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> [201] We can also expect that the mother will be able to seek further protective measures from the French Family Court, if these are required in the best interests of the children. There is every reason to expect the father to comply with such orders, given the risk to his standing and to his business if he fails to do so. This is not a case like *LRR v COL* where there was a history of failure to comply with court orders, and where there was a significant risk that such behaviour would continue.
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> [202] We do not discount the real difficulties and stresses that a return to France will involve for the mother. She is likely to be significantly worse off than she would be in New Zealand. But the risk that this will impair her parenting to an extent that gives rise to an intolerable situation for the children is, in our view, too speculative to be described as a grave risk.

[8] The Court declined to impose conditions on the order for the return of the children.

[9] The mother also raised the further ground that an order for the children's return to France would be psychologically harmful or would place them in an intolerable situation because they have been in New Zealand since October 2020 and are settled

here. The Court of Appeal found that this argument was misconceived and that there was no reason to believe the children would not readapt to life in France.

The proposed appeal

Procedural decisions

[10] On the proposed appeal, the mother first seeks leave to challenge the earlier decision of the Court of Appeal granting the father leave to appeal and allowing for new evidence.[11] In addition, she seeks to challenge the refusal of the Court of Appeal to adjourn the substantive hearing to allow her more time to consider the modified orders made by the French court and their implications.[12] Finally, there is a challenge to the decision of the Court of Appeal in the substantive decision to admit new evidence.[13]

[11] An extension of time to apply for leave to appeal is necessary in relation to the two earlier decisions.[14] We are satisfied the criteria for granting an extension of time are not met.[15] These aspects of the proposed appeal do not raise any questions of general or public importance and, in any event, have insufficient prospects of success to warrant an extension of time. We add that the way in which the further evidence came before the Court of Appeal now has no significance in any practical sense given it is accepted the grave risk exception must be evaluated on the factual position as at the time of the appeal. For these reasons, the challenge to the decision in the substantive judgment to adduce further evidence would also have insufficient prospects of success for it to be in interests of justice to grant leave. Nor does it raise questions of general or public importance.

Challenge to the order for return

[12] The other proposed grounds of appeal can be summarised in this way. First, there is a submission essentially that to dismiss the risk of harm required concrete

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11 CA leave judgment, above n 3. We assume, without deciding, that there is jurisdiction for the Court to hear an appeal from this decision.
12 See above at [5] and n 8.
13 Substantive CA judgment, above n 2.
14 Supreme Court Rules 2004, r 11(1)(b) and (2)(a).
15 Rule 11(4).

evidence of safeguards against that risk, not speculation; and second, that the risk to the mother of abuse should have been assessed having regard to better-informed approaches to domestic abuse. The first of these two grounds is buttressed by what is described as a further ground focusing on consideration of the adequacy of systemic protections and of the need for protective conditions on the order.

[13] Leave to appeal can only be granted by this Court if it is in the interests of justice to do so, including where the proposed appeal concerns an issue of general or public importance, or where there is a risk of a miscarriage of justice.[16] We do not consider it is in the interests of justice to grant leave in this case. It may be that this Court may wish to consider the approach to s 106(1)(c)(ii) of the Act at some point but we do not see the present case as an appropriate case for that consideration. We accept the respondent's submission that the proposed grounds of appeal essentially challenge the application of the principles to these facts.

[14] The high point of the applicant's proposed appeal is that the reforms reflected in *LRR v COL* are difficult and there is a need in some respects for further exposition of the relevant standard. The only one of the issues raised in this case that, in our view, may raise a question of general or public importance is that relating to the need for a wider understanding of domestic abuse, including recognition of the role of financial disparity, inequality of arms and legal processes in such abuse.

[15] Ultimately, however, this too is a challenge to the Court of Appeal's assessment of the facts. The Court clearly appreciated the nature of the abuse alleged and the suggestion, discussed in the expert evidence, that this contributed to mental health issues for the mother. As the Court of Appeal said, "ultimately the Court's focus must be on the overall mental health of the mother, and the likely impact on her mental health of a return to France. In that context, the [mother's] specific diagnosis … assumes less importance".[17] But the Court went on to note that "it was common ground before us that the circumstances will be materially different if the mother returns with the children" noting, amongst other matters, the change in living

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16 Senior Courts Act 2016, s 74(2)(a) and (b).
17 Substantive CA judgment, above n 2, at [153].

arrangements.[18] We add that the applicant's counsel endorsed the approach taken in *LRR v COL* to proof,[19] and the Court of Appeal said that *LRR v COL* should be given its full effect.[20] Nothing raised by the applicant calls into question the way in which *LRR v COL* was applied to the facts.

[16] Nor do we see any appearance of a miscarriage of justice in the Court of Appeal's factual assessment. The Court focused on the likely effect on the children. And, as we have noted, by the time the matter came before the Court of Appeal, the factual position had changed materially from that considered by the High Court.

Result

[17] The applications for an extension of time to apply for leave to appeal *Roberts v Cresswell* [2022] NZCA 625 and the Court of Appeal's decision declining the application to adjourn the substantive hearing are dismissed.

[18] The application for leave to appeal (*Roberts v Cresswell* [2023] NZCA 36) is dismissed. As was the case in the Court of Appeal, we make no order as to costs.

Solicitors:
Parry Field Lawyers, Christchurch for Applicant

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18 At [195].
19 At [179].
20 At [192].