

HONG KONG / JUDGMENT

CD v. HX

[2025] HKCA 762

COURT

Court of Appeal

DECIDED

15 August 2025

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CACV 570/2025, [2025] HKCA 762

On appeal from [2025] HKCFI 3143

in the high court of the

hong kong special administrative region

court of appeal

Civil Appeal no 570 of 2025

(on appeal from HCMP NO 898 of 2025)

BETWEEN

CD

Applicant

and

HX

Respondent

Before: Hon Kwan VP, Au JA and Chow JA in Court

Date of Hearing: 12 August 2025

Date of Judgment: 12 August 2025

Date of Reasons for Judgment and Decision on Costs: 15 August 2025

REASONS FOR JUDGMENT AND DECISION ON COSTS

Hon Kwan VP (giving the Reasons for Judgment and Decision on Costs of the Court):

This is an appeal brought by the respondent (“Mother”) to resist the return of two children, a nine-year-old boy (“Son”) and a five-year-old daughter (“Daughter”), to their habitual residence in Australia. Au-Yeung J (“Judge”) gave judgment on 18 July 2025 (“Judgment”) on the application of the father (“Father”) and ordered that the children be returned to Australia no later than 8 August 2025.

On 29 July 2025, the Mother issued a summons for stay of execution of the Judgment and order pending appeal. This application was scheduled to be heard by the Judge on Monday 4 August 2025. She then filed her notice of appeal on Friday 1 August 2025 to set aside the Judgment. The Court of Appeal gave directions on 4 August that the appeal be heard on an urgent basis on 12 August due to the very special circumstances of this matter.

On 4 August, the Judge refused to grant stay of execution pending appeal, even though it is known that the appeal will be heard on 12 August, as she is not satisfied there is reasonable prospect of success of the appeal. The Mother informed the Judge she has opted not to return to Australia if the court should order the children’s return. On her further application to the Court of Appeal for a stay, Kwan V-P granted an interim–interim stay of the Judgment and order on 6 August 2025 until the hearing of the appeal on 12 August.

Having considered the written and oral submissions of the Mother and the Father, we gave judgment at the conclusion of the hearing on 12 August dismissing the Mother’s appeal. We think it is desirable that the parties should know the reasoning of this court as soon as practicable. These reasons for judgment of the court are handed down with that in mind and written as simply as possible in a manner readily comprehensible to a lay person. We will also deal with the costs of this appeal at the end of our judgment.

Background

It is not necessary to repeat in detail the background which has been set out in the Judgment at §§1 to 27.

For present purpose, we will just mention these matters.

The Mother came to Hong Kong with the children to stay with her parents on 21 December 2024 for Christmas and New Year, as agreed with the Father. They were due to return to Australia on 21 January 2025. On 30 January, the Mother instructed her lawyers in Australia to write to the Father expressing her wish to remain in Hong Kong with the children and enroll them into a Hong Kong school. She wrongfully retained the children in Hong Kong after the agreed period. The Father filed an affidavit on the same day in the Federal Circuit and Family Court of Australia (Division 2) to initiate urgent proceedings for the children’s return pursuant to the Convention on the Civil Aspects of International Child Abduction (“Convention”).

The proceedings in Hong Kong were brought by an originating summons issued on 3 June 2025 by the Secretary for Justice as the Central Authority under the Child Abduction and Custody Ordinance, Cap 512 (“Ordinance”), with the Mother and Father as respondents. The Judge made

an order on 3 June that the children should not be removed from Hong Kong without leave until further directions of the court. On 9 June, the Judge granted leave to the Secretary for Justice to withdraw from the proceedings and the Father was made the applicant of the originating summons.

The Mother opposes the application for the children's return relying on Article 13(b) of the Convention, namely, there is a grave risk that their return would expose them to psychological harm or otherwise place them in an intolerable situation. She has been diagnosed with major depressive disorder with high risk of relapse including risk of suicide. If the children should be ordered to return to Australia, with or without her, as she has been and is their primary carer, the risk of her suicide is of a "grave" level that may expose the children to psychological harm or place them in an intolerable situation.

The Father (now aged 47) married the Mother (now aged 36) in Hong Kong in 2014. Both were born in Mainland China. The Son was born in Hong Kong in 2015 and the Daughter in Australia in 2020. The family relocated to Australia in 2017. The Father has become a permanent resident of Australia. The Mother is a permanent resident of Hong Kong and of Australia. She lost both parents by the age of 10 due to medical illness and was adopted by a wealthy couple. Her adoptive father ("Grandfather") has substantial business interests in Mainland China and Australia including property development. She was well treated by her adoptive parents ("Grandparents") and their two sons. She received her secondary education in Australia and tertiary education in Mainland China.

The Mother suffered from post-natal depression after she gave birth to the Daughter during the Covid lockdown.

In August 2023, the Father, who had been working for the Grandfather in Australia, had a dispute with the latter concerning a property development and ceased working for him.

In February 2024, the Father and the Mother separated. According to the Father, the Grandfather exerted pressure and caused them to separate, and the Father and Mother remained on good terms even after the separation.

On 22 April 2024, the Mother committed suicide in the bathroom of her home by an overdose of medicine and a cut of part of her left radial artery. The Father went to her home to check on her because she did not answer his call and discovered her in time and saved her. She was admitted to hospital and underwent an operation to repair the broken blood vessel. She left a suicide note to the Grandparents, her elder brothers and the children full of sorrow and self-blame. She ended the note saying that the children shall be raised by their Father.

As stated in the discharge summary of the hospital, the suicide was prompted by multiple stresses:

“... This suicide attempt was precipitated by an upsetting conversation with her mother overnight (however not necessarily so) as well as a build up of multiple stressors and difficulty coping over several months including separation from partner (due to stress from family over how the husband handled the family business. [The Mother] has stopped the separation process during her admission), pressure from family, lack of income, moving accommodation and difficulty connecting with her children.”

“This depression was precipitated by significant family conflict and stress. [The Mother’s] adoptive parents, who have extremely high standards for achievement, run a successful real estate business in Australia and they employ her husband. He made some mistake in the business, leading to her family severing ties with him and initially demanding that [the Mother] divorce him. She began ruminating on these thoughts, feeling like a worthless mother, daughter and partner, and slid into this depression over a period of several months.

She has never attempted suicide in the past and normally has robust psychological coping strategies. She has never required psychiatric hospital admission. Her early life was characterized by loss of both her parents to medical illness, age 7 and 10, and adoption by a wealthy family. There is some skepticism in the family about the relevance of psychiatric illness, though they have demonstrated their support in facilitating [the Mother’s] transfer to a private hospital and through her brother visiting her most days.”

The Grandfather and one of her brothers happened to be in Australia at the time and they stayed on to take care of her till July 2024.

The Mother was discharged from hospital on 3 May 2024. She presented herself to another hospital on 9 May 2024 due to ongoing suicidal ideations and depressive symptoms and was admitted to the second hospital until 21 May 2024. She consulted a psychiatrist Dr Zhuang (Zan) Miao (“Dr Miao”) on 21 May 2024. She reported her mood had returned to normal at the initial consultation and appeared euthymic in mood. Dr Miao prescribed medication, discussed a “safety plan” with the Mother (calling Lifeline or mental health line, contacting the local crisis team and following up by the local community mental health team) and gave her psychoeducation.

When Dr Miao reviewed her on 28 May, the Mother was upset and anxious due to relationship issues with the Father, although she denied any recurrence of suicidal thoughts. At the request of the Grandfather to consolidate her improvement, with which Dr Miao agreed, he admitted her to his clinic with her consent the next day.

The Mother did well during her admission to Dr Miao’s clinic from 29 May 2024 to 10 June 2024, benefitting from both pharmacological and psychological interventions. According to Dr Miao’s report:

“Her mood remained stable at a euthymic level, and she no longer experienced suicidal ideation. She was hopeful and future-oriented, feeling well supported by her parents and brother. She demonstrated love and care toward her children. A family meeting was held during the admission to provide psychoeducation to her family about [the Mother’s] illness and how to support her after discharge. ...”

When she was discharged from the clinic on 10 June 2024, the Father took care of her at her home. She had the assistance of a live-in maid hired by the Grandfather to take care of the household during her recovery.

In late June 2024, the Father commenced proceedings in the Family Court of Australia and sought reliefs including the freezing of assets under the Mother's name, division of property on final orders and appointing a litigation guardian for the Mother. He served the papers of the family proceedings on the Mother on 9 July 2024. The Mother felt distressed and asked the Father to move out. She looked after the children with the support of a live-in maid and her good friends being a couple known as Tammy and James.

Dr Miao reviewed the Mother on 11 July, two days after she was served with the legal documents and reported as follows:

"... she reported feeling shocked and heartbroken after her husband proposed divorce and sought to claim her assets. Since then, she had been feeling upset, tired, and occasionally dizzy. However, she denied other symptoms of depression. While she expressed fear about seeing her husband, she was not anxious in other situations. [The Mother] had returned to her family home, where she was receiving strong support from her parents. With medication adjustment, psychotherapy, and family support, she fortunately did not experience a relapse of a major depressive episode, despite the significant stress related to legal proceedings with her husband. She had consistently denied suicidal thoughts over that period, with her children and parents remaining strong protective factors."

In August 2024, the Father abandoned his application to appoint a litigation guardian for the Mother.

When Dr Miao reviewed the Mother on 10 September 2024, he found that "Given the circumstances, [the Mother] is doing well with no relapse of depressive illness", she presented herself as "euthymic and calm" and "has consistently denied any suicidal ideation" since her discharge from his clinic in June. He stated in another report:

"[The Mother] was doing well on recovery while the depressive symptoms were in remission, even though she has still been under the stress from legal matter with her ex-husband. She kept herself busy by occupying herself with studying languages, exercise, dancing class and social activities while she was looking after her two young kids. She was well supported by her father and family and she consistently denied any suicidal ideations."

However, her mental state deteriorated in December 2024, as explained by Dr Miao:

"[The Mother's] mental state deteriorated due to the stress of going back to Hong Kong over the coming seasonal holiday time which triggered her more reflection on her life and unclear plan for the future. She feels guilty and ashamed that she still needs to rely on family as an adult, and now with two kids. She felt anxious and low in mood with all these thoughts, then she started drinking alcohol to cope. ... [Dr Miao has] discussed with her about the harm of alcohol use especially it could increase the risk of suicidality, even though she has consistently denied any current suicidal thoughts. She agreed to stop drinking alcohol when [Dr Miao] reviewed her last couple of times this week. She has no alcohol

dependence, and declined any need of professional help to stop drinking.”

As mentioned, the Mother came to Hong Kong with the two children in December 2024. They stayed initially with the Grandparents. After she decided to remain in Hong Kong, the Grandfather arranged alternative accommodation for her and the children, being a four-bedroom apartment close to his residence, engaged a domestic helper for her household, allowed her the use of a car and the use of the drivers engaged by him and his sons. The children have been enrolled in the Australian International School.

The Mother said her mood and emotions were “much more stable after arriving in Hong Kong”. With the childcare assistance and support of her family, she has more time to recover and do what she enjoys which helps her combat her depression.

She was taken ill in mid-May 2025 and was admitted to hospital for three days. The comprehensive medical examination indicated that her physical health was stable and that her symptoms were primarily psychological. She was referred to a psychiatrist Dr Liao, with whom she attended the first session on 5 June.

Before that, she was served with the papers of this application. The Mother said in her affirmation:

“... It struck me as a re-occurrence of what had happened in Australia in July 2024 when I was served with papers from [the Father] seeking to take away my family assets, reviving my feeling of a loss of will to live. I was shocked and upset, and my feelings went down quickly into depression and fear. In fact, this time is even worse as he wants to take away the children from me.

... I still cannot visualize the Children’s life upon returning to Australia. Who will be taking care of them? Who can assist? Where are they going to attend school? How does it work? Whenever I thought about this, I became anxious and depressed. I do not see any hope and future in returning to Australia.

The call-over hearing of the [originating summons] took place on 9th June 2025. At Court, I saw [the Father]. I became worried and nervous. My cognitive and physical functioning became significantly impaired – I struggled to think clearly or conduct myself normally, and found myself needing to rest my head on the table frequently during breaks and while consulting my legal representatives. My condition worsened after seeing him that day in court.

My physical and emotional condition worsened since receiving the [originating summons]. I cannot sleep well and woke up before 5 am. Every day when I woke up, I could not breathe. I had to go back to see Dr. Liao to adjust the dosage of my medication. I felt very stressed and worried.

Currently, I require prolonged rest periods each day, with only limited windows where I can maintain focus or complete tasks. I experience frequent panic episodes and heightened anxiety, particularly when dealing with the stress of these ongoing legal proceedings. ...”

The Father commenced custody proceedings in Australia on 28 March 2025. These proceedings have been adjourned. The current position is that the Father and the Mother share joint custody of the children.

When in Australia the Son messaged the Father regularly. Since the children's arrival in Hong Kong, they had stopped responding to the Father's messages. It was only at the call-over hearing of this application on 9 June 2025 that the parties agreed on access arrangements and the Judge made an order for interim access of the children to the Father.

The legal principles

The applicable legal principles are not disputed. The Judge considered a number of relevant authorities and set out the principles in §§28 to 39 of the Judgment. There is no need to mention the facts of the cases referred to by the Judge.

The relevant principles as rightly stated by the Judge are as follows.

The objective of the Convention is to ensure the prompt return of children who had been wrongly removed by one parent against the wish of the other parent to another country, back to the country of the habitual residence of the children, so that the courts of that country may determine the question of custody and residence of the children on the basis of a full welfare investigation. Factual disputes about the primary care of children, where they should live and allegations of the parents against each other are likely to be better able to be resolved in the country where the family had its home.

In determining an application for a summary order of this kind, it is not the object of the Convention for the court to conduct an in-depth examination of the child's future or the entire family situation. This does not mean that the determination should not be properly and carefully made.

We would add that the Convention is designed for the benefit of children, not of adults. The children's best interests have two aspects: to be reunited with their parents as soon as possible, so that one does not gain an unfair advantage over the other through the passage of time; and to be brought up in a sound environment in which they are not at risk of harm. The Convention is designed to strike a fair balance between these two interests.

To establish a defence under Article 13(b) of the Convention:

(1)

The burden of establishing the defence lies on the abducting parent, the standard of proof is on the balance of probabilities. In evaluating the evidence, the court will be mindful of the limitations in the summary process. It will rarely be appropriate to hear oral evidence of the allegations made under this Article.

(2)

The risk to the child must have reached such a serious level as to be considered “grave”, it is not enough that the risk be “real”. Although “grave” characterises the risk rather than the harm, there is a link between the two. A relatively low risk of death or really serious injury might properly be qualified as “grave” while a higher level of risk might be required for other less serious forms of harm.

(3)

Putting a child in an “intolerable” situation means that the child should not be expected to tolerate or put up with it. Every child has to put up with a certain amount of rough and tumble, discomfort and distress as part of growing up, but there are some things which it is not reasonable to expect a child to tolerate. Among these are physical or psychological abuse or neglect of the child. Among these can also be exposure to the harmful effects of seeing and hearing the physical and psychological abuse of his or her own parent. If there is such a risk, the source of it is irrelevant: eg, where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

(4)

Article 13(b) is concerned with the future when the child is returned to his or her home country. This is not necessarily the same as being returned to the person who has requested the child’s return. The situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when the child gets home. If the risk is serious enough to fall within Article 13(b), the court is not only concerned with the child’s immediate future, because the need for effective protection may persist.

We would add that the grave risk exception requires the court to make some prediction, based on the evidence, of what may happen if the child is returned. Necessarily there will seldom be any certainty about the prediction and certainty is not required. What is required is persuasion that there is a risk which warrants the qualitative description “grave”. 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.

Where the abducting parent has psychiatric or psychological issues:

(1)

An abducting parent may rely upon his or her own anxieties about the return of the child, which were not based on objective risk to the parent, but nevertheless of such intensity as to be likely to destabilise the parenting of the child to the point at which the child’s situation would become intolerable. A court will look very critically at an assertion of intense anxieties not based upon objective risk and will, among other things, ask whether they can be dispelled.

(2)

The critical question is what will happen to the abducting parent who asserts intense anxieties if the child is returned. If the court concludes that, on return, that parent will suffer such anxieties that their effect on his or her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether that parent's anxieties will be reasonable or unreasonable, or whether the anxieties are the result of objective reality or of the parent's subjective perception of reality, or a combination of the two. Nevertheless, the extent to which there will, objectively, be good cause for the parent to be anxious on a child's return will be relevant to the court's assessment of the parent's mental state if the child is returned.

(3)

The court should scrutinise the evidence with great care to ensure that the object of the Convention is not cynically defeated by a parent creating the risk in order to sustain the grave risk defence. Where the eradication of any and all risk of psychological harm to the child lay entirely within the abducting parent's power, the issue is whether that parent has the psychological resilience to make rational decisions. If threats of suicide by a parent, with the consequential risk of harm to their children, are easily upheld as the basis upon which the "grave risk" defence is established, then such claims would multiply enormously. The evidence must be sufficiently sound to establish that defence.

(4)

Courts will understandably have a real concern about the disingenuous adoption of stances designed to achieve the purposes of abductors in resisting orders for the return of children. The response to this concern cannot be to disregard evidence, but to scrutinise it with great care.

(5)

The court may need to consider if the facts provided by the abducting parent to the doctor or psychologist are accurate or inaccurate in material aspects.

(6)

The court may consider if there are protective measures, including therapy, that may alleviate the concerns of the abducting parent before making an order of return.

The medical evidence

In the present case, there is no allegation that the Father has exerted any psychological harm on the children or the Mother at all.

Medical evidence was adduced by the Mother's legal team, without first seeking permission from the Judge or the consent of the Father. Short notice of this evidence was given to the Father. Two of the reports are from the Mother's treating psychiatrists in Australia and Hong Kong, Dr Miao and Dr Liao. The third is from a forensic expert Dr Choi who interviewed the Mother for about three hours and reviewed the reports of the treating psychiatrists. The Father did not request to cross-examine the Mother or the medical experts. He did not engage his own expert. Other than

Dr Miao who had spoken to the Father in the early days of the Mother's treatment in 2024, the three medical experts did not engage with the Father when they provided their reports in June 2025 for the purpose of this application.

The Mother's stress can be divided into two categories: (1) baseline stress; and (2) event-triggered stress, such as when she received legal documents, or two weeks before she flew back to Hong Kong for a holiday in December 2024.

All three psychiatrists diagnosed the mother as having major depressive disorder with suicidal ideation. The depressive disorder is recurrent in nature, currently in a state of partial remission with a high risk of relapse that can be quite severe. They described the suicide in April 2024 as lethal. They discussed the mother's low esteem, self-guilt, self-condemnation and shame, which have all contributed to her extreme psychological fragility. They emphasised the importance of the children to her as a strong supporting factor against suicidality and opined that a forced return of the children to Australia with limited support, or separating them from the Mother, will very likely result in her relapse into suicidality. They are of the view that the support of the Grandparents in Hong Kong is crucial to her mental health and overall well-being, and warn against the return of the Mother to Australia where her support system is weaker than in Hong Kong, and may result in suicidal attempt again.

The Judge noted that the psychiatrists "virtually spoke with one voice". She did not think their reports, made after detailed investigation and professional judgment, could be "disingenuous adoption of stances designed to achieve the purposes of abductors". The totality of their reports establishes that the Mother's mental fragility is not something engineered and the risk of her suicidality is real.

The Judge decided to give "great weight" to the psychiatrists' views.

The Judge's assessment of "grave" risk

The Judge's key finding is that weighing all the factors she has considered, she is of the view that although the Mother's mental condition and risk of suicide exist, they have not reached a "grave" level that may create psychological harm on the children or may create an intolerable situation for them if an order for return is made.

This finding was reached after the Judge has taken into consideration the medical evidence mentioned above, to which she gave "great weight". She carried out an analysis in Section G of the Judgment. She took into account the importance of the children and the Grandparents to the Mother and the extant factors causing stress. She found that reading the medical reports against undisputed factual circumstances existing in Australia up to December 2024 "sheds other light". The Judge mentioned five matters in this regard:

(1)

The suicide note was not addressed to the Father. Despite how the Mother smeared the Father as an uncaring and unreliable father, the note expressly stated that the children should live with the Father.

(2)

It was the Father who saved her, even though they had separated by then. The Father had observed that the Mother's mental health declined rapidly between February and April 2024. Due to her messages, he took care to seek her out and discovered her suicide in time. When she was released from the clinic in June 2024, she returned home to stay with the Father on Dr Miao's advice. The Father was seen by the Mother as unreliable and uncaring, but was a source of help to her at the worst of times even in the eyes of Dr Miao.

(3)

During the Mother's hospitalisation in 2024, the Daughter was looked after by Tammy and James and the Son by the Father, his sister and a nanny. There is no evidence one way or other on how the children reacted to the suicide. The only evidence of the children's reaction came from Tammy who said that she helped the Daughter call the Mother a number of times, that the Daughter had asked the Mother why the Mother did not come to see her and said she missed the Mother and loved her dearly. The Judge drew the "irresistible inference" that the children were well protected and not psychologically affected at all by the suicide. She reasoned that were it otherwise, the Mother would have said so.

(4)

Dr Miao was aware of the risk of suicide when the Mother was under his care in Australia, see the details of his review of her mental condition in his reports from May 2024 to December 2024 mentioned earlier. From his reports, the Judge would not regard the Mother as having stabilised or recovered, and she is still being diagnosed by Dr Liao and Dr Choi in Hong Kong as having suicidal ideation. But the point is that her family members were content to leave her "alone" in Australia after July 2024 and Dr Miao raised no concern at that time. It is also not the Mother's case that her return to Hong Kong in December 2024 was premeditated, in search of family keep.

(5)

Dr Choi made six "psychiatric recommendations" in §56 of his report:

"a.

Immediate psychiatric evaluation and continuous monitoring to assess her mental health status and ensure her safety.

b.

Establishment of a robust support network in Hong Kong, including mental health professionals, social workers and community support.

c.

Legal advocacy to ensure her concerns about relocation and child custody are addressed, minimizing additional stressors.

d.

Consideration of therapeutic interventions, such as cognitive-behavioural therapy, to help her develop coping strategies for managing stress and emotional distress.

e.

Coordination with legal representatives in both Australia and Hong Kong to address unresolved issues regarding children's custody, relocation, and division of assets.

f.

Support for the children's adjustment and well-being in their new school environment, including the establishment of a stable care and support system."

The Judge considered the "psychiatric recommendations" of Dr Choi in line with Dr Miao's "safety plan" and recommendations in 2024. In fact, a month after the suicide, the Mother had effectively been implementing most of Dr Miao's recommendations whilst in Australia:

(i)

She had been receiving treatment from Dr Miao, which included pharmacological intervention and medication.

(ii)

As encouraged by Dr Miao, her network of mental health professionals included on-line psychotherapy (continuing now).

(iii)

Her network included family, friends, lifelines, and local community support.

(iv)

She has an Australian lawyer, and had used their service even on the rather non-contentious matter of a holiday to Hong Kong. She has since engaged Hong Kong lawyers. The two teams can co-ordinate on legal issues. The Australian legal system has the equivalent of social workers and Official Solicitor to act for the children, if needs be. Once legal proceedings are on foot, support can even be done more systematically.

(v)

There is no known issue of the children's education in Australia.

(vi)

The Mother did more – by studying languages, exercise, dancing class and social activities while she was looking after the children.

The Judge assessed the Mother's situation on the premise that the Mother is likely to return to Australia if the children are to return. There is nothing to prevent the Mother from accompanying the children to Australia and her family members can accompany her back to settle her at her home. If she does not accompany the children in the return, the court can impose a condition that the Father is to return the children to her within days of her arrival in Australia. The Judge took the view that what Dr  Choi recommends can be done and has been done just as well in Australia. While the support in Hong Kong may be wider and may help the Mother improve faster, it cannot be said that the support in Australia is ineffective.

As for event-triggered stress and the record in Dr Liao's clinical notes of "recurrent suicidal idea" directly linked to legal proceedings, the Judge noted that legal proceedings will have to continue for some time, whether the children are returned to Australia or not. Neither jurisdiction can say it is "suicide proof".

Lastly, the Judge took into account the undertakings given by the Father including the following: communications between him and the Mother will be confined to matters of the children and he will not wilfully cause himself to have face to face contact with the Mother without her consent; until further order and without prejudice to the current position of joint custody in Australia, they will share the care of the children and as an alternative the Father is to enlist the help of his sister in providing childcare. The Judge saw no reason not to treat the Father as a man of his words.

This appeal

This appeal is brought to challenge the key finding that the risk assessed of the Mother's mental condition and of suicide, although found to be real, has not reached a "grave" level that may create psychological harm on the children or an intolerable situation for them if an order for return is made. This is a finding of fact and was made after the Judge had assessed a number of factors and evaluated the weight to be given to each factor.

The Court of Appeal does not re-assess the risk all over again. Judgment about the level of risk required to be made under Article 13(b) is a decision to be made by the Judge. Our function is just one of review. We are to review the Judge's findings, evaluation and assessment in making that judgment. We are not at liberty to substitute our contrary judgment for that of the Judge, if it is open for her to make that judgment. It is not the task of an appeal court to disagree with the trial judge's assessment of the risk and how it could be avoided by protective measures. The fact that the Judge had not heard oral evidence does not deprive her judgment of its primacy in this kind of situation. An assessment or evaluation of a number of different factors to be weighed against each other is very often a matter of degree on which different judges can legitimately differ, and it is often difficult to say that after considering a number of factors, it can only point to one conclusion. The appeal court hardly interferes with the weight that should be given to various

factors by a trial judge, or how one factor should be weighed against another, unless it can be demonstrated clearly that the judge is in error and is plainly wrong. This is a high standard to be met by any appellant.

Ms Anita Yip, SC, who appeared for the Mother throughout, argued that the Judge's assessment of risk is plainly wrong and contains "multiple palpable errors".

Broadly speaking, her main arguments are as follows:

(1)

The assessment that the risk of suicide had not reached a "grave" level simply cannot be reconciled with the unanimous medical opinion which the Judge had accepted should be given great weight. In carrying out her own analysis, she wrongly substituted her own conclusions for the opinion of the experts.

(2)

The Judge focused too much on what happened in Australia up to December 2024 instead of the contemporaneous expert evidence which provides a professional, holistic and up-to-date assessment. What happened in the past has been overtaken by subsequent events. The assessment of risk should be forward-looking, based on the current circumstances as perceived by the Mother.

(3)

The Judge has taken irrelevant matters into consideration (the suicide note; Dr Miao's view of the Father as a source of support in June 2024), drawn the wrong inferences (the children were not psychologically affected by the suicide; the Mother's family was content to leave her alone in Australia after July 2024), taken the Mother's denial of suicide thoughts to Dr Miao at face value and under-rated the risk of suicide.

(4)

The Judge wrongly accepted the Father's undertakings as effective protective measures to negate any grave risk.

(5)

She made a fundamental error in law by improperly assessing the children's best interests, and wrongly treated the Son's wish to return as a "weighty" factor.

It would appear there is no complaint that the Judge had failed to take any matter into account. Such a complaint cannot realistically be made, given that the Judge had considered all aspects of the available evidence in a very thorough analysis. The criticisms are that she has given insufficient weight to some matters, or too much weight to others, or that she has taken irrelevant matters into account. As we have mentioned, this is a high threshold and it must be shown that the Judge is plainly wrong for the appeal court to overturn her findings and assessment.

We turn to consider the specific grounds of appeal.

Ground 1

Ms Yip argued that the unanimous medical evidence is “uncontroverted” (in the sense that the Father has not requested to cross-examine any of the psychiatrists or sought to engage his own expert) and the Judge is wrong not to give sufficient weight to it. Instead, through her own analysis, the Judge came to a view that the risk of suicide has not reached a “grave” level that would create an intolerable situation for the children. To establish the defence under Article 13(b), the critical evidence required is simply the high likelihood of lethal suicide of the Mother if the children are to be returned, and all the medical experts have warned against the Mother returning to Australia or the children returning with or without her.

Whether the risk has reached the level of “grave” for the purpose of establishing the defence under Article 13(b) is for the court to decide. The experts were not required to answer this ultimate question when they were asked in the instruction letters to give an assessment of the impact on the Mother if the children were ordered to return, with or without her. It is not a situation of the Judge substituting her conclusions for the opinion of the experts.

Dr Miao stated that the support of the Grandparents in Hong Kong is “crucial” to the Mother’s mental health and overall well-being, and “removing the children from her care” would likely have a detrimental impact on her mental health, “increasing the risk” of depressive relapse and suicidal ideation.

Dr Liao mentioned it is “highly likely” that the Mother will relapse into severe depression and resort to suicide attempt again if she returns to Australia where her support system is “much weaker” than in Hong Kong, while facing the stress from divorce proceedings. If the children “were returned without her”, the chance of her developing post-traumatic stress disorder on top of the underlying depression is “very high” and her suicide is of “paramount importance”.

Dr Choi opined that her depressive illness and risk of suicide would be “further exacerbated” if the Mother had to return to Australia with the children where she had “limited social support” or having separation with the children. She would be at “high risk” of mental health deterioration if she returns with the children or if she is separated from them. He mentioned that the ongoing divorce proceedings “add significant emotional stress”, and potentially “increasing her risk of suicidal ideation or attempts”.

The relevant parts of the medical reports mentioned above have been considered by the Judge. While the experts have mentioned high or very high risk and increase of risk of suicidal ideation or attempts, this does not mean that any scrutiny or further analysis would not be necessary in order for the court to find the risk is “grave” for the defence to be made out. How is the expert opinion to be weighed in light of the surrounding circumstances of the case? Can the risk be dispelled, avoided or ameliorated? Is the premise on which the opinion was expressed sound and correct (such as that the children would be removed or separated from the Mother if they are ordered to be returned; or that the support system in Australia, which is weaker compared to

Hong Kong, would not be effective)?

We find no error in the Judge's approach, treatment and evaluation of the expert evidence. We do not accept the arguments of Ms Yip in Ground 1.

Grounds 2(1) and (5)

Ms Yip argued that in conducting an analysis based on the factual circumstances in Australia up to December 2024 only, the Judge had taken a "compartmentalised" approach and an artificial cut-off date. This led to her wrong conclusion that the Mother had done well in Australia and her mental condition and risk of suicide had not reached a "grave" level. The Judge should have attached greater weight to the subsequent reports of the psychiatrists on the Mother's ongoing condition and up-to-date assessment.

We do not agree with the criticisms. The Judge did not limit her analysis to December 2024 as a cut-off date. The circumstances of the Mother before she took the children to Hong Kong are clearly relevant. Matters relevant to a forward-looking assessment does not mean they should not be evaluated against past circumstances. Nor did the Judge conclude that the Mother had done well in Australia. The Judge recognised there are extant factors causing stress and would not regard the Mother as having stabilised or recovered. We have dealt with the point of attaching greater weight to the expert opinion.

Ground 2(2)

The complaint here is that the Judge should not have placed considerable weight on the suicide note and on Dr Miao's view of the Father as a source of support on the Mother's discharge from hospital. It was argued that the Judge failed to recognise that these matters have been overtaken by subsequent events, such as the Father commencing legal action in the Family Court of Australia and seeking appointment of a litigation guardian for the Mother, which have undermined the Mother's faith in him.

Again, this goes to the weight given by the Judge in evaluating the evidence. The weight she decided to give to those matters cannot be said to be plainly wrong. The Judge has taken into consideration the legal proceedings brought by the Father and the impact on the Mother, and the periodic review of Dr Miao of her mental condition during this time.

Ground 2(3)

The error of the Judge argued under this ground is that she concluded that the children were protected and unaffected by the Mother's suicide attempt, when there is no evidence they were even aware of it. Even if this inference were correct, it is logically odd how this could lead to a conclusion that the risk of exposing the children to psychological harm or otherwise placing them in an intolerable situation is not "grave". The assessment of risk involves prediction of an event in future, not the actuality of the risk.

The Judge has mentioned the evidence and circumstances on which she drew the inference that the children were not psychologically affected by the suicide attempt. We do not think there is any basis to interfere with the inference drawn, nor could it be said that the inference is totally irrelevant to assessing potential psychological harm or intolerable situation to the children. It is obvious that the assessment of risk in this kind of situation involves prediction of some kind. To suggest that the court is in effect asking for proof of the actuality of the risk is wide of the mark.

Ground 2(4)

The argument here is that the Judge was wrong in concluding that the Mother had improved from her suicidal ideation due to the care provided by the Father, the Grandfather, her brother, Tammy and James, and a domestic helper, by relying only on Dr Miao's contemporaneous medical notes, which provided only a snapshot of the Mother's condition at specific times. Based on this, the Judge wrongly concluded there was no "grave" risk. The Judge was wrong to apply a rational or logical mind to predict how the Mother would react to stressors. She wrongly took the Mother's denial of suicide thoughts to Dr Miao at face value and ignored that her psychiatric condition is ongoing.

Plainly, the Judge had not ignored that the Mother's psychiatric condition is ongoing. We have mentioned the ongoing assessment by the psychiatrists, which the Judge had taken into account, and that the Judge recognised extant factors causing stress and would not regard the Mother as having stabilised or recovered. The finding she made that the risk was not "grave" was not based just on the matters singled out for criticism under this ground of appeal. She had conducted a holistic assessment in a thorough analysis. We do not think the criticisms against the Judge are fair.

Ground 2(6)

This ground seeks to argue that the Judge was wrong in holding that the Mother's family was content to leave her alone in Australia after July 2024, when the totality of the evidence suggests that her family was discontent with her staying in Australia alone.

We do not think there is any substance in this ground. It is a fact that the Mother's family members did not stay on after July 2024. The Judge is entitled to take the view that her family members were content to leave her alone in Australia. It is the Mother's case (not accepted by the Father) that her travel to Hong Kong in December 2024 was not pre-meditated with the intention of staying indefinitely or instigated by the Grandparents, and the Judge analysed her case on that basis.

Ground 4

There are a number of complaints under this ground. First, it is said that the Judge took into account that the Mother disturbed the status quo, which is irrelevant, and wrongly placed excessive weight on this. The assessment of risk should be forward-looking. Second, even if the

psychiatrist's recommendations had been implemented well from June to December 2024, the court cannot assume that the Mother would cope just as well if she is forced to return. Third, it is logically flawed to conclude that the triggering event of ordering a return would not produce "grave" risk, just because support in Australia is "not ineffective" and neither Hong Kong nor Australia can claim to be "suicide-proof". Fourth, in focusing on and comparing the support systems in the two places, the Judge failed to have regard that taking away the Mother's support in Hong Kong against her wishes will constitute a trigger or stressor for her.

The Judge did not hold that because the Mother disturbed the status quo, that would affect the assessment of whether the risk is "grave". Nor did the Judge assume that the Mother would cope just as well if she should return to Australia against her wishes. What the Judge is entitled to do is to look at the Mother's circumstances in the past, and come to a view how she might conduct herself in light of the support she had received and which would continue to be provided.

The Judge has not concluded that the triggering event of ordering a return would not produce "grave" risk, just because of the "not ineffective" support in Australia and neither Hong Kong nor Australia can claim to be "suicide-proof". This is a superficially plausible argument. We wish to emphasise again the finding that the risk has not reached the level of "grave" was not based on one or two matters singled out but was a holistic analysis after considering a basket of factors.

Ground 5

It is argued that the Judge was wrong to treat the Father as a man of his words and in not finding that his undertakings are not effective protective measures. The Judge had disregarded the fact that the Father brought legal proceedings against the Mother and sought an appointment of a litigation guardian for her. Further, the proposed undertaking is too vague, there is no guarantee that the Father would not make use of contacting the Mother on childcare issues as a means to exert pressure on her.

We see no basis to interfere with the Judge's assessment on the effectiveness of the Father's undertakings.

Ground 6

This ground repeats the earlier argument that in assessing risk in this kind of situation, the court is to make a prediction of an event in future and should not in effect be asking for proof of the actuality of the risk. Ms Yip argued that the "uncontroverted" medical evidence and the Mother's suicide attempt is "more compelling" than any of the cases cited to the court where the return of children was permitted or refused.

We have rejected the argument requiring proof of the actuality of the risk. Cases in which the defence under Article 13(b) was raised relevantly inform the court of the legal principles and the correct approach to be followed. It is not helpful to make factual comparison of past cases. We firmly decline to engage in the exercise of comparing the circumstances of the Mother with the factual circumstances and psychiatric evidence in the four cases highlighted by Ms Yip in which the courts refused to order return of the child.

Ground 8

The argument is that the Judge was wrong to take the view that the Mother can return to Australia, when the Mother has said in her affirmation she opted not to return even if the children were to return under an order of the court. Further, there is no evidence showing that the Grandparents could or would help the Mother to resettle in Australia, or the extent of their help if they should decide to help. The Judge wrongly speculated the Mother would have initial support from her family such that this would sufficiently negate the grave risk.

No reference was given for the relevant part in the Mother's affirmation in which she said she opted not to return even if the children were to return under a court order. We are not able to find any clear statement to that effect in §§120 to 130 of her affirmation under the heading of "My Decision". Be that as it may, Ms Yip has told the Judge at the hearing of the application for stay pending appeal that the Mother "has opted not to return to Australia with the children".

In the Judgment, the Judge did not find that the Mother can or would return to Australia. The Judge merely considered as an alternative that the Mother can return to Australia with the children and share their care with the Father. As the Judge rightly pointed out, one is talking about a short window before the children's custody matters are taken up by the Australian Family Court. She considered this is when family members can extend their support overseas without disturbing their base in Hong Kong.

We consider this is a view open to the Judge on the available evidence. There is no basis for the appeal court to interfere.

Grounds 3 and 7

These grounds relate to the children's views. It is argued that the Judge was wrong in concluding that the Son's wish to return to Australia was genuine relying on the video clips produced by the Father and wrongly considered it a "weighty" factor. In any event, the Son's wish to return is irrelevant in considering whether the Mother's defence under Article 13(b) is made out, and the defence is the sole issue in these proceedings. The Judge was also wrong in law in holding that the court could consider a child's wish to return, whereas under the Convention, only a child's objection to return is relevant as a defence under Article 12. The Judge further erred in law in engaging upon an exercise to consider if uprooting the children from Australia was in their best interests, this exercise is "outside the ambit of the Convention" and irrelevant to the Mother's defence under Article 13(b).

Ms Yip pointed out the Judge would seem to have made several contradictory statements in this regard. In §3 of the Judgment, the Judge said: “The Court is not asked to consider the best interests of the Children in deciding whether to order a return but, in substance, the best interests of the Mother, such that no order for return should be made, or else the risk of the Mother’s suicide may create an intolerable situation for the Children.” (emphasis supplied) The Judge then considered the children’s views in section F of the Judgment. After holding that the court is at liberty to consider the views of a child under Article 13 if the child has attained an age and degree of maturity appropriate to take account of his views, the Judge ruled that the video clips taken during the Father’s access with the children in June 2025 are “admissible and weighty”. Later, when the Judge considered the merits of this appeal for the purpose of the application for stay pending appeal, she said this in §10 of the Stay Judgment regarding the Son’s wish to return: “even if this Court has wrongly taken into account the Son’s wish to return, success on this ground will have no impact on the return order.” If the Son’s wish to return was regarded by the Judge as “weighty”, Ms Yip asked how it could be said to have “no impact on the return order.”

It is necessary to clarify the approach relating to children’s interests or their wish to return in proceedings under the Convention.

As stated in the Supreme Court judgment in Re E at §§13 to 17:

(1)

Convention proceedings are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the child should be when that issue is decided. There is no express provision in the Convention requiring the court to make the best interests of the child its primary consideration.

(2)

The objective of the Convention in deterring people from abducting children also aims to serve the best interests of the child who has been abducted. This is done by making certain rebuttable assumptions about what will achieve the best interests of the individual child. First, there is an assumption that if there is a dispute about any aspect of the future upbringing of the child, the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay the resolution of that dispute. The next assumption is that the best interests of the child will be served by a prompt return to the country where the child is habitually resident. For restoring a child to familiar surroundings is seen as likely to be a good thing in its own right, and the courts and public authorities in the child’s own country will have access to the best evidence and information to resolve the dispute about the child’s future upbringing.

(3)

The assumptions may be rebutted, in a limited range of circumstances, but all of them are inspired by the best interests of the child. The requested state may decline to order the return of a child if proceedings were begun more than a year after removal and the child is settled in the new environment (Article 12). The person left behind has consented to or acquiesced in the removal or retention or was not exercising his rights at the time (Article 13(a)). The child objects to being returned and has attained an age and maturity at which it is appropriate to take account of his or her views (Article 13). There is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(b)). These are all situations in which the general underlying assumptions about what will best serve the best interests of the child may not be valid.

(4)

Thus the Convention is designed with the best interests, not only of children generally, but also of the individual child concerned as a primary consideration.

The Judge stated at the start of her analysis that it is certainly not in the best interests of the children to uproot them from Australia, or deprive the Father of his participation in their lives, and it is important to consider the Son's wish (with good reasons) for a return to Australia and she saw no reason to separate the Son from the Daughter. This is all part of the assumptions mentioned in (2) above. The Judge was not wrong to take them into account. And in the context of the exercise of any discretion to refuse to return the children to Australia, which arises in the event that the grave risk exception applies, the best interests of the children are applicable to the exercise of this discretion.

The primary issue before the Judge is whether the grave risk exception in Article 13(b) applies, namely, rebutting the assumptions as stated in (3). In considering whether the grave risk exception applies, it does not appear to us on a proper reading of the Judgment that the Judge had taken into consideration the wish of the Son to return. That is why the Judge said in the Stay Judgment even if she had wrongly taken into account the Son's wish to return, "success on this ground will have no impact on the return order" in that the Judge had found that the Mother's mental condition and risk of suicide have not reached a "grave" level for the purpose of Article 13(b).

For the above reasons, we do not find any apparent inconsistency in the Judge's statements.

As for the argument that the Judge was wrong in law in admitting in evidence the Son's wish to return in that Article 13 only allows the court to consider a child's objection – not his wish – to return, we agree with the Judge. Under Article 13, the court still retains a discretion as to whether or not to order the return of the child even if any of the stated exceptions are established. We see no reason why a child's wish to return, which is the flipside of an objection, may not be considered when the court exercises its discretion whether to refuse a return in the event that the grave risk exception applies.

Ms Yip argued that the Judge was wrong to allow the Father to rely on the video clips taken by his sister during the Father's access with the children. She relied on the statement in *M v F* [2016] 4 WLR 92 at §1 that "It is almost always likely to be wrong for a recording device to be placed on a child for the purpose of gathering evidence in family proceedings, whether or not the child is aware of its presence." The circumstances in which bugs were placed on the child in *M v F* and the extent of covert recordings are very different from the present situation. We do not think the Judge was wrong to exercise her discretion to admit the video clips as evidence.

Ms Yip also attacked the Judge's finding she has "no reason to doubt that the Son's wish to return to Australia was genuine" and considered it as "weighty". "Although children do not always know what is best for them, they may have an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters". The Judge has considered the factual circumstances in making that finding of fact and is entitled to come to that view and regard the Son's wish to return as "weighty". She cannot be said to be plainly wrong. There is no basis for the appeal court to interfere.

Conclusion and costs

For all the above reasons, we have dismissed the Mother's appeal. We have ordered that the children be returned to Australia not earlier than 18 August 2025.

Mr Chau asked for costs of this appeal as the Mother already had the benefit of the Judge's full reasons and the appeal is of no merit.

Ms Yip asked the court to make no order as to costs. Both parents are seeking to do what is best for their children, and the appeal is not entirely without merits.

We think it is appropriate to make no order as to costs for this appeal, as we have found it necessary to clarify the law in one respect. There will be no order as to costs of this appeal.

Postscript

There are two things we would like to say to the legal representatives.

Proceedings under the Convention require the courts to act expeditiously and in a focused manner. Appropriate case management is essential in a tight timespan and requires the co-operation of the legal teams. The parties appeared before the Judge for a call-over hearing, during which directions were given for the filing of evidence and a timetable was given for the conduct of the proceedings for a substantive hearing four weeks away. We see no reason why the Mother's legal team did not seek prior permission of the Judge in adducing expert medical evidence, in particular, the evidence of a forensic expert. The provisions of Order 38 rules 36 and 37 of the Rules of the High Court are laid down for good reason. It is not a matter of formality that no expert evidence be adduced without leave of the court or where all parties agree.

Difficult decisions are required to be made by the court in proceedings of this kind. Although the legal team for a parent must have the best interests of the client in mind, these proceedings need to be handled with sensitivity and empathy. Care should be taken to avoid taking arguments to the extreme. There is no need to resort to immoderate language or cite an extreme case to make a point. The courts should be trusted to understand the difficult situation of all concerned.

(Susan Kwan)

Vice President

(Thomas Au)

Justice of Appeal

(Anderson Chow)

Justice of Appeal

Mr Ian Chau, instructed by Wong, Hui & Co, for the Applicant (Respondent)

Ms Anita Yip SC and Ms Lily Yu, instructed by Chaine Chow & Barbara Hung, for the Respondent (Appellant)

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