

HONG KONG / JUDGMENT

CD v. HX

[2025] HKCA 805

COURT

Court of Appeal

DECIDED

1 September 2025

CASE / FILE NUMBER

CACV570/2025

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CACV 570/2025, [2025] HKCA 805

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 Au and Chow JJA in Court

Date of Hearing: 19 August 2025

Date of Decision: 19 August 2025

Date of Reasons for Decision and Decision on Costs: 1 September 2025

REASONS FOR DECISION
AND DECISION ON COSTS

Hon Au JA (giving the Reasons for Decision and Decision on Costs of the Court):

Introduction

On 12 August 2025, this court (Kwan VP, Au and Chow JJA) dismissed the Mother’s appeal against the order (“CFI Order”) dated 18 July 2025 made by Queeny Au-Yeung J (“the Judge”) requiring the Mother to return the Children to Australia by 8 August 2025 under the Hague Convention on the Civil Aspects of International Child Abduction, 1980. Upon dismissing the appeal, this court further ordered, among others, that (a) the Mother shall bring the Children to the Father at a designated place on 19 August 2025 at 11am and (b) leave be granted to the Father to accompany the Children back to Australia on board a flight scheduled to take off on 19 August 2025 at 7:30pm (“CA Order”).

This court further handed down its Reasons for Judgment and Decision on Costs on 15 August 2025 (“CA Written Reasons”) [2025] HKCA 762. The relevant background leading to the CFI Order and the reasons for dismissing the appeal has been set out in detail in the CA Written Reasons. We will not repeat them here. We will further adopt herein the abbreviations used in the CA Written Reasons unless otherwise stated.

In the afternoon of 18 August 2025, by way of Summons (“the Summons”), the Mother (now represented by a new team of counsel and solicitors) applied on an urgent basis for stay of execution of the CA Order, pending the disposal of the Mother’s intended application for leave to appeal to the Court of Final Appeal (“CFA”). The Summons was supported by the Mother’s 3rd Affirmation, to which she exhibited a draft Notice of Motion (“Draft NoM”) seeking leave to appeal to the CFA, and the written submissions of her counsel (Mr Shaphan Marwah and Mr Eric Chim) in support of the Summons. The Mother has also filed her Notice of Intended Application for Leave to Appeal.

This court (Au and Chow JJA) directed the Summons to be heard on the next day (19 August 2025) at 10am. Before the hearing, the Father’s counsel (Mr Ian Chau) lodged his written submissions in opposition and the Father’s Affirmation sworn on the same date.

At the end of the hearing, we dismissed the Summons on the basis that we did not find the intended grounds of appeal to be arguable with reasonable prospects of success. We indicated that we would hand down our written reasons in due course. This is what we do now.

This stay application

As rightly accepted by Mr ØMarwah, to succeed in this application, the Mother bears the burden to show (a) Øan arguable appeal with reasonable prospects of success, which is a necessary but not sufficient requirement; and (b) Øgood reasons or special circumstances justifying a stay. However, if the appellant demonstrates a strong likelihood of success on appeal, this alone may justify a stay. In relation to the first requirement, the court needs only form a preliminary view of the appeal's merits to decide on the stay: see *Star Play Development Ltd v. Bess Fashion Management Co Ltd* [2007] 5 HKC 84 at [9(5)-(7)].

Further, the court generally exercises its discretion to grant a stay of execution where an appeal would otherwise be rendered nugatory, or execution would cause financial ruin or serious harm to the appellant: *Star Play*, [9(8), (3)-(4)]. The court also considers any prejudice to the successful party if a stay is granted. Ultimately, a balancing exercise is required in determining whether to grant a stay: *Star Play*, [10].

As we indicated at the end of the hearing, we do not find the intended appeal to be arguable with reasonable prospects of success, and hence the Mother failed to even meet the necessary threshold requirement in support of the stay application. We now explain why.

It is trite that leave to appeal to the CFA is only granted if the appeal involves questions of great, general or public importance (“GPI”). In the Draft NoM and Mr ØMarwah’s written submissions, it is submitted that the intended appeal from the CA Order involves the following two questions of GPI:

(1)

Question 1: Whether, or in what circumstances, the court is required to predict the impact on a child from the risk of harm to a parent in determining the Article 13(b) defence of “grave risk/intolerable situation”?

(2)

Question 2: Whether, or in what circumstances, the court may consider a child’s views in favour of return in determining the existence of a “grave risk/intolerable situation” under Article 13(b)?

In relation to Question Ø1, Mr ØMarwah in substance submitted that in the context where the abducting parent (the Mother in the present case) is suffering from depression with suicidal ideation which would be triggered by separation from the child (as in the present case), in assessing whether there is “grave risk” that the child will be put into an intolerable situation as stipulated under Article Ø13(b) of the Convention:

As a matter of principle, the court should adopt a 2-stage test where it should (a) first assess whether there is a high risk that the abducting parent would have his or her psychiatric suicidal condition triggered in having the child separated from that parent, and if established (b) secondly, assess and predict the impact on the child should that risk be realised (ie, in the event of the abducting parent’s death by suicide) to decide whether there is a grave risk that the child

would be put into an intolerable situation. This is so as the grave risk referred to in the Article is the risk of the child being placed in an intolerable situation but not about the risk relating to the parent's conditions.

In the present case, the Judge had erred in principle in having only assessed there being a high risk of the Mother committing suicide by reason of her psychiatric condition if the Children are separated from her, but without going into the second stage to further assess the impact of an actual death of the Mother on the Children before concluding (erroneously) that the risk that the Children would be put into an intolerable situation was not "grave".

The Judge's said error in principle is similarly committed in the CA Written Reasons as this court in substance only upheld the Judge's assessment without looking into the second stage of the assessment.

In the premises, Question 1 involves a GPI question and the appeal under it has merits.

In relation to Question 2, Mr Marwah submitted that the issue before the court is whether and when it is permissible to consider a child's view in favour of return when determining whether a "grave risk" exists under Article 13(b). However, the CA Written Reasons did not determine whether it was impermissible to do so at the first stage, albeit it was held to be permissible as part of the residual discretion once "grave risk of harm" is established (at [93]).

Discussion

For the following reasons, we are unable to agree with Mr Marwah.

First, the word "risk" means or is about the chance or possibility of an identified event or matter happening. It is a prediction as to how likely that event would occur, but not about the situation where that identified event or matter has actually occurred.

Second, whether an abducting parent can establish that there is a "grave risk" that the return would place a child in an intolerable situation must be dependent on the factual circumstances of each case. This in turn depends on what is the abducting parent's case in saying why the return of the child would lead to such grave risk. Hence, this is an exercise to be carried out by the court to assess the risk based on the factual circumstances of each case.

In the present case, the Mother's case is that the Children would be placed in an intolerable situation in the event that the Mother dies by suicide when they are separated from her. However, what is required for the court to assess for the purpose of Article 13(b) is, and is only about, the level of the "risk" (and hence "the chance or possibility") of that event (ie, the Mother dies by suicide) happening and thereby putting the Children in an intolerable situation. It is axiomatic that the relevant assessment of the relevant risk is not and cannot be premised on the assumption that the identified event has actually occurred.

In the premises, for the purpose of the stay application, we are of the clear preliminary view that:

Mr Marwah's contentions in support of the 2-stage assessment and the complaint that the Judge and this court had erred in failing to proceed to the second stage of the assessment are wrong and unarguable, as they are premised fundamentally on the incorrect proposition for the need to assess the "risk" on the actual occurrence of the death.

Hence, the intended appeal under Question 1 is not arguable with reasonable prospects of success.

Insofar as Question 2 is concerned, as we have explained clearly at [91] [93] of the CA Written Reasons:

On a proper reading of Article 13(b), the court should not take into account a child's wish to return in determining the question of whether there is a grave risk that the return would place the child in an intolerable situation, but the court is entitled to take that factor into account in the final exercise of discretion to decide whether the court will order the return of the child even after the relevant grave risk exception has been established. This is plain from the language of the Article.

In the present case, reading the CFI Judgment as a whole, it is plain to this court that the Judge in considering the question of whether the grave risk exception was established at [66] [87] of the CFI Judgment, she had not taken into account the wish of the Son to return.

We do not find any errors in our reasons for reaching those conclusions. In the premises, for the present purpose, we are similarly of the clear preliminary view that the intended appeal under Question 2 is without merits.

For all the above reasons, we do not find the intended appeal under Questions 1 and 2 to be arguable with reasonable prospects of success. We have therefore dismissed the Summons.

Costs

Mr Chau for the Father has asked for the costs of the Summons and on an indemnity basis. In support, counsel submits that:

Some line should be drawn between (a) a parent attempting to act in what he or she considers to be the best interests of the children; and (b) making obviously hopeless interlocutory applications and intended appeals.

The intended grounds of appeal to the CFA advanced by the Mother are clearly bad, according to well-established principles governing what constitutes a question appropriate for the CFA.

The Mother has already had the benefit of reading the CFI Judgment and the CA Written Reasons. She has had her day in court twice.

The Father should not be saddled with the costs of unmeritorious attempts to delay the Children's return to Australia.

For the Mother, Mr Marwah asks for no order as to costs. This is appropriate, counsel submit,

as:

This application is in relation to the interim arrangement for the Children, and the application is made as the Mother is concerned with their best interests given the risks involved. In this respect, the courts have always said that they do not wish to discourage parties from coming to court.

Although the court has dismissed the application on the basis that the intended appeal has no arguable merits, this is not a case where the merits of the arguments are so far beyond the realm of what is reasonable that it should be met with an adverse costs order, let alone an indemnity one.

The court should also consider the impact that the costs orders could have on the conflict and the relationship between the parents as well as on the Children.

Looking at the matters in the round, we find the just and fair costs order that should be made after taking into all the circumstances in this case is that the Mother shall pay the Father costs of the Summons, on a party to party basis, to be taxed if not agreed. This is so as:

We agree that the Mother has had her day in court twice seeking to address her perceived concerns with the best interest of the Children, and has already had the benefit of the CFI Judgment and the CA Written Reasons as to the reasons why she has failed to establish the grave risk exception.

In the premises, although she is entitled to seek to take the matter further by making this stay application based on her intended application for leave to appeal to the CFA, there are no more justifiable reasons not to follow the usual principle that costs should follow the event.

On the other hand, although for the present purpose we are of the preliminary view that the intended grounds of appeal are without reasonably arguable merits, they are not of such extent so as to render the Mother's stay application based on those grounds an abuse of process. We therefore do not find it justified to order the costs to be taxed on an indemnity basis.

(Thomas Au)

(Anderson Chow)

Justice of Appeal

Justice of Appeal

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

Mr Shaphan Marwah and Mr Eric Chim, instructed by Long An & Lam LLP, for the Respondent

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