NOTE: PURSUANT TO S 182 OF THE FAMILY VIOLENCE ACT 2018 AND S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA518/2021
[2021] NZCA 667

BETWEEN	S Applicant
AND	R Respondent

Court:	Gilbert and Goddard JJ
Counsel:	A M Corry for Applicant Respondent in Person
Judgment: (On the papers)	8 December 2021 at 2 pm

JUDGMENT OF THE COURT

A The application for leave to appeal against the judgment of the High Court in *[S] v [R]* [2021] NZHC 1874 is declined.

B We make no order for costs.

REASONS OF THE COURT

(Given by Gilbert J)

[1] This is an application for leave to bring an appeal on questions of law arising out of a decision of the High Court[1] affirming a decision of the Family Court[2] declining to make a protection order.

[2] The purpose of the Family Violence Act 2018 (the Act) is to stop and prevent family violence in all its forms.[3] There are two requirements for making a protection order: (1) the respondent has inflicted, or is inflicting, family violence against the applicant, or a child of the applicant's family, or both; and (2) the making of an order is necessary for the protection of the applicant, or a child of the applicant's family, or both.[4]

[3] The Courts below were satisfied the first of these requirements was established, but not the second. This was because the family violence was occurring through the respondent's conduct of the Court proceedings and the applicant's protection could be secured by appropriate written undertakings provided to the Court by the respondent, combined with ongoing judicial oversight and directions.

[4] There is only one right of appeal from a Family Court judgment declining to make a protection order. The High Court's judgment dismissing the appeal can only be appealed to this Court on a question of law and then only with leave.[5] This Court will not grant leave unless the proposed question or questions of law are capable of bona fide and serious argument and involve some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal.[6]

[5] Before addressing whether the proposed questions of law meet these criteria, we briefly summarise the context and the decisions below.

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1 *[S] v [R]* [2021] NZHC 1874 [High Court judgment].
2 *[S] v [R]* [2020] NZFC 2636 [Family Court judgment].
3 Family Violence Act 2018, s 3(1).
4 Section 79.
5 Section 179(1).
6 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

Background

[6] The parties commenced a relationship in October 2003, married in June 2004 and their daughter was born in March 2008. Since separating in August 2009, they have been engaged in acrimonious proceedings in the Family Court about appropriate care and contact arrangements for their daughter ("X"). The relationship dynamics which have impeded resolution were briefly summarised by Judge Hunt at the outset of his comprehensive and thoughtful decision declining to make a protection order:[7]

> [3] [S] has experienced considerable trauma in her life. This has made her very vulnerable and she has required ongoing psychiatric treatment and support for her mental health including periods of hospitalisation for treatment.
>
> [4] [R's] personality and his approach to [S] means that dealing with the care/contact arrangements for [X] are not straightforward and marked by deep seated personal conflict and bitterness. A resolution is difficult to discern given the history, the issues, their personalities and the positions they have adopted.

[7] After reviewing the evidence and submissions in detail, the Judge found there had been psychological violence by R in the context of the Family Court proceedings concerning care and protection arrangements for X.[8] However, the Judge did not consider a protection order was necessary for X's protection because appropriate safeguards for her could be provided for in parenting orders.[9] The Judge considered it was also not necessary to make an order for the protection of S because a viable (and better) alternative to secure that outcome was available, namely judicial oversight, active case management and appropriately tailored written undertakings being given to the Court by R.[10] The Judge acknowledged this was an unorthodox approach, but stated, as counsel for S had observed, "it is novel that a protection order should be justified based on the conduct of a party in the course of litigation".[11] The Judge considered the course he settled on would best serve the interests of both parties.[12]

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7 Family Court judgment, above n 2.
8 At [91].
9 At [93].
10 At [100], [103], [107] and [112].
11 At [116].
12 At [116].

[8] In dismissing the appeal to the High Court, Nation J concluded that the Family Court made no error in determining that it was not necessary to make a protection order in the particular circumstances:[13]

> [157] I consider, faced with a most difficult case, Judge Hunt assessed all the circumstances as he had to. I do not find there was any error in his assessment or the conclusion he reached. The mother had undoubtedly suffered psychological abuse through [R's] conduct in the longstanding proceedings in the Family Court. With the directions the Judge made and his considerable commitment to the case, there was no error in his deciding that the making of a protection order was not the necessary or appropriate way to protect the mother from the psychological abuse.

Proposed questions of law

[9] We set out below the seven questions of law for which leave is sought:

(a) Whether there is jurisdiction under the Act to provide an alternative to making a protection order once there have been findings of family violence and a finding that an order is necessary to stop the violence.

(b) Whether the decision of the High Court is consistent with the purpose, principles and provisions of the Act, when properly interpreted.

(c) Whether under the Act the Family Court can properly dismiss an application for a protection order if the respondent undertakes to stop the violence, without hearing from the applicant on that proposed resolution and when further violence is likely.

(d) Whether there was an error in the assessment of what constituted family violence in the present case.

(e) Whether there is any discretion to exclude a child of the family from a protection order.

(f) Whether psychological violence committed in separate court proceedings should be subject to a separate test for necessity.

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13 High Court judgment, above n 1.

(g) Whether an applicant's understanding of the consequences and implications of an order are a relevant consideration when evaluating necessity.

[10] None of these questions meets the criteria for leave for a second appeal confined to questions of law. The application for leave to bring a second appeal on questions of law must be declined for the brief reasons that follow.

[11] The first proposed question is incorrectly premised on the basis that the Family Court found "an order is necessary to stop the violence". On the contrary, the Courts below both found an order was *not* necessary to stop the violence. There can be no doubt that the Family Court had jurisdiction to decline to make the order and instead make the directions it did in combination with enforceable undertakings from R. It is well established that the existence of other protective measures will be relevant to the determination of whether a protection order is necessary.[14] This proposed question is not seriously arguable.

[12] The second proposed question focuses on the appropriateness of the particular decision in the somewhat unusual circumstances of this case. It asks in very broad terms the question that might arise on a general appeal — whether the High Court decision was in accordance with the purposes and principles of the Act in the particular circumstances — but raises no question of law of general or public importance.

[13] The third proposed question is also particular to the facts of this case. Even if there had been a failure in the Family Court to seek submissions on the specific arrangements found to obviate the need for a protection order (we emphasise that we make no such finding), any potential injustice was cured on appeal to the High Court where the issue was fully canvassed. The proposed appeal is, of course, against the High Court judgment. We do not consider this issue is seriously arguable and, in any event, it raises no question of law of sufficient general or public importance that could justify the cost and delay of a further appeal.

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[14] *Colledge v Hackett* [2000] NZFLR 729 (FC) at 737–738, endorsed in *Surrey v Surrey* [2008] NZCA 565, [2010] 2 NZLR 581 at [121]–[122].

[14] The fourth proposed question, intended to address the nature and extent of family violence in the present case, is self-evidently fact-specific. Again, no question of law of general or public importance arises.

[15] The fifth proposed question, whether there is any discretion to exclude a child from a protection order, does not arise because no protection order was made, the jurisdictional requirements not having been met.

[16] We do not consider the sixth proposed question, as to whether there might be a "separate test for necessity", is seriously arguable. The concept of "necessity" in the Act means what it says and must be applied consistently in all cases. The assessment requires careful evaluation of the relevant facts and will always be case-specific.

[17] The seventh proposed question concerns whether an applicant's understanding of the consequences and implications of an order is a relevant consideration. This was not a decisive consideration in the present case as it did not feature in Judge Hunt's assessment that a protection order was not necessary. The Judge simply noted S's subjective view that a protection order was necessary but observed that she had limited understanding of what it would achieve.[15] More importantly, this issue was not relied on by Nation J in dismissing the appeal.

Result

[18] The application for leave to appeal against the judgment of the High Court in *[S] v [R]* [2021] NZHC 1874 is declined.

[19] We make no order for costs.

Solicitors:
Patient & Williams, Christchurch for Applicant

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15 Family Court judgment, above n 2, at [94].