NOTE: PURSUANT TO S 182 OF THE FAMILY VIOLENCE ACT 2018, 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

CA634/2021
[2022] NZCA 305

BETWEEN	G S Applicant
AND	L M Respondent

Court:	French and Collins JJ
Counsel:	Applicant in person A J Bell and A A P Wooding for Respondent
Judgment: (On the papers)	11 July 2022 at 11.30 am

JUDGMENT OF THE COURT

A **The applications dated 19 February 2022 and 13 June 2022 for leave to amend the application for leave to appeal dated 28 October 2021 are granted.**

B **The amended application for leave to appeal is declined.**

C **The applicant must pay the respondent costs on a standard application on a Band A basis together with usual disbursements.**

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr S is unhappy with a decision of the Family Court which granted the respondent Ms M a final protection order against him under the Family Violence Act 2018 (the Act).[1]

[2] He unsuccessfully appealed the decision to the High Court[2] and now wants to bring an appeal in this Court. To do that he must first obtain leave under s 179 of the Act. Whether he should be granted leave is the question for determination in this judgment.

[3] Mr S, who is self-represented, filed his application for leave to appeal the High Court decision on 28 October 2021. Then, in an application dated 19 February 2022, he sought permission to amend his application for leave to appeal. Since then he has filed two subsequent applications for leave to appeal — one dated 20 February 2022 and the other dated 8 June 2022. He also filed a memorandum dated 13 June 2022 in support of his second amended application for leave to appeal. Although it was not formally constituted as such, we treat this memorandum as a second application to amend Mr S's application for leave to appeal. Counsel for Ms M objects to these late amendments. However, we are not persuaded there is any prejudice to Ms M. We accordingly grant Mr S permission to add the new proposed grounds of appeal and address them in this judgment.

Background

[4] Mr S and Ms M were in a relationship for some 10 years and have one son.

[5] In October 2018, the Family Court granted Ms M a temporary protection order. In December that same year, Mr S was charged with breaching the temporary order. Ms M then applied for the temporary order to be made final. That application was declined by Judge Mahon who also discharged the temporary order in June 2019.

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1 *[LM]* v *[GS]* [2020] NZFC 10445 [Family Court judgment].
2 *G S v L M* [2021] NZHC 2522 [High Court judgment].

[6] The criminal charge of breaching the order against Mr S was also dismissed. However, after a series of incidents, Ms M obtained a second temporary order in October 2019.

[7] Then followed a contested hearing as to whether that order should also be discharged or made final. The case came before Judge Southwick who found that Mr S had psychologically abused both Ms M and the couple's child.[3] The abuse was held to be cumulative and included:[4]

> (a) Threats that [Ms M] and her career will suffer serious unpleasant consequences if she proceeds with her application [for a protection order].
>
> (b) Persisting on visiting the home occupied by [Ms M] and [their child], in the knowledge that [she] wished him to remain away from her.
>
> (c) Sending multiple persistent text messages to [Ms M] [(37 of them)] after researching the law and concluding that he could not be charged with a breach [of the protection order] whilst both parties were overseas. This was in the face of [Ms M's] lawyer's advice [to Mr S] that there was to be no direct communication.
>
> (d) Including in text messages to [Ms M] derogatory comments about her parenting skills, threats and suggestions that he was able to influence the outcome of hearings.
>
> (e) Disseminating to known and unknown persons unproven information that [Ms M] was a "criminal" and had mental health issues.
>
> (f) Taking deliberate steps to vary the family trust to enable him to exclude [Ms M] as a beneficiary for the sole purpose of then evicting her with one week's notice from the family home. This action ignored the comments of another Judge who expressed the view that [Ms M] and [their child] had a strong case to remain there.
>
> (g) Engaging a [private] agent to track the movements of [Ms M] and subsequently taunting her with the knowledge he had gained from that exercise.
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> (h) Attempting to engage directly with [their child], placing the child in a pressured and stressful position. This step was particularly inexcusable and damaging in the context of a hotly contested parenting dispute, in which lawyer for the child was engaged.

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3 Family Court judgment, above n 1, at [108]–[109].
4 At [113]–[114].

[8] Judge Southwick concluded that a final protection order was necessary because in her view the risk of future abuse was substantial.[5] Rejecting a submission made by Mr S, the Judge also declined to exercise the Court's residual discretion to refuse to make an order.[6] Mr S had argued that the need for an order was outweighed by the seriously detrimental impact it would have on his business. Mr S is a manufacturer of specialist rifles and under s 99 of the Act a standard condition of a final protection order is that a firearms licence held by the person against whom the order is made is deemed to be revoked. The Judge held that the purpose of the Act did not permit inconvenience to the perpetrator to be taken into account.[7]

[9] On appeal to the High Court, Katz J upheld all the key aspects of the Family Court decision.[8] In her view the finding of family violence in the form of psychological abuse was well supported by the evidence.[9] She was also satisfied the Judge had not erred in finding a final protection order was necessary for the protection of Ms M.[10]

[10] As regards the issue of the firearms licence, Katz J further found the Family Court Judge had not erred in her treatment of that issue.[11]

The amended application for leave to appeal

The test for granting leave

[11] The right to appeal to this Court under s 179 of the Act is limited to appeals against determinations by the High Court on a question of law arising in the appeal heard in the High Court.

[12] Further the question of law must be a question that is capable of bona fide and serious argument and must involve some interest, private or public, of sufficient importance to outweigh the costs and delay of a second appeal.[12]

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5 At [119]–[120].
6 At [121].
7 At [123]–[127].
8 High Court judgment, above n 2, at [122].
9 At [122(a)].
10 At [122(b)].
11 At [122(c)–(d)].
12 *Renshaw v Underhill* [2008] NZCA 308 at [5].

[13] Applying that test, we now address each of Mr S's proposed questions of law.

Failure to consider s 110 of the Act

[14] Mr S contends that the Family Court wrongly characterised the proceedings before it as an application to make a temporary protection order final. In fact what was before it was his application to discharge the temporary protection order. The temporary order had been made under s 109 of the Act and that in turn meant that in deciding whether to discharge the order, the Family Court was required to address all the mandatory relevant considerations listed in s 110(2). It failed to do so and the same error was repeated in the High Court.

[15] Mr S further submits that had the High Court considered all the s 110 criteria the outcome would have been different.

[16] There is a significant jurisdictional difficulty with this proposed ground of appeal. An alleged failure on the part of the Family Court to consider s 110 was not part of the appeal in the High Court. There is therefore no determination of law on that point by the High Court as required by s 179 and therefore no ability to raise it now in this Court.

[17] In any event, we consider the point lacks merit. The application to discharge the temporary order was not the only application before the Family Court. There was also an application by Ms M to make the temporary order final.[13] The hearing covered both applications and as a matter of logic the focus was inevitably on the application to make the order final. If there were good reasons to make the temporary order final, that necessarily meant the interim order should not be discharged. Further although neither Court expressly referred to s 110, the most important of the criteria listed in that section were in fact considered.

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[13] This is made clear in the opening paragraph of the decision: see Family Court judgment, above n 1, at [1].

Failure to give sufficient weight to facts which explained Mr S's conduct at various times

[18] This proposed ground of appeal essentially seeks to re-litigate findings of fact, and is therefore outside the scope of a permissible appeal in this Court.

Failure to consider evidence of abuse by Ms M

[19] Mr S contends that both lower courts failed to consider evidence that Ms M abused him after the temporary protection order was issued and that her abuse was far worse than any of his conduct towards her.

[20] It appears from the High Court decision that this submission was made in that Court in support of an argument that it was Ms M's own conduct that had prompted Mr S to behave in the way considered to constitute family violence.

[21] However, as the High Court pointed out, the primary focus under the Act is of necessity on the conduct of the person against whom the order is sought and its effect.[14] It was Ms M seeking a protection order, not Mr S. In so far as Mr S raised this issue to justify his own conduct, it is well established that the cause or motivation for abusive behaviour is irrelevant.[15]

[22] We are not persuaded this proposed question of law is capable of serious argument.

Erroneous finding of family violence

[23] Mr S challenges the finding that his behaviour met the threshold of family violence. In particular he contends that his allegedly abusive behaviour was of limited duration.

[24] In the High Court decision, Katz J analysed the evidence in detail, noting that several of the incidents viewed in isolation were deeply concerning.[16] She further

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14 High Court judgment, above n 2, at [111].
15 See for example *SN v MN* [2017] NZCA 289, [2017] 3 NZLR 448 at [28].
16 High Court judgment, above n 2, at [81].

stated that when Mr S's conduct was considered in totality it was clear that he engaged in a sustained campaign of psychological abuse that caused considerable distress to Ms M resulting in the latter becoming fearful and apprehensive.[17] The Judge also found that Ms M's fear the abuse would continue in the absence of a protection order was justified having regard to Mr S's past conduct when orders were no longer in force.[18]

[25] In our assessment, the Judge was entitled to reach those conclusions on the evidence. Neither her analysis of the evidence nor her interpretation and application of the relevant provisions of the Act involved any arguable error of law.

[26] In substance, Mr S's complaint is essentially a factual one and outside the permissible scope of an appeal to this Court.

Failure to vary firearms licence condition

[27] Section 157 of the Act empowers the court to remove or vary the standard condition about weapons.

[28] One of Mr S's grounds of appeal in the High Court was that Judge Southwick had failed to consider exercising this power. Katz J accepted that the fact there was no formal application before the Family Court for variation of the weapons condition did not preclude Judge Southwick from considering the matter. However, in her view, it was a reasonable inference that the reason the Judge did not expressly address this issue was because she had insufficient information to enable her to reach any final view on the appropriateness of such a variation.[19] The Judge further noted that the Family Court Judge had asked Mr S to provide further submissions on the firearms issue and these were never forthcoming.[20] Katz J considered she herself also lacked the necessary information.[21]

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17 At [81].
18 At [85].
19 At [102].
20 At [99]–[100].
21 At [104].

[29] Mr S disputes all this and says in any event it was a breach of natural justice for the Court to fail to notify him of the kinds of information needed for varying the weapons condition. This, he says, was compounded by the fact that the notes of his McKenzie friend were confiscated and the notes of evidence were not supplied until six weeks after the hearing. Mr S says further that case law supports the High Court removing the standard weapons condition, citing the decision of *Foote v Crampton-Smith*.[22] He also contends that the Court's refusal to amend or vary the condition amounted to a disproportionate penalty. Finally, under this head, he points to the recent insertion of s 22H into the Arms Act 1983, which he says may impact on the discretion of the Court to vary the standard weapons condition.[23]

[30] We are not persuaded that any of these contentions are capable of bona fide and serious argument worthy of determination by this court.

[31] First, each case turns on its own facts and the facts in *Foote* v *Crampton-Smith* are very different from the facts here. In that case, the protected person supported the removal of the condition and only changed her mind when there was a dispute over money. Allegations that the appellant was violent towards a new partner were accepted by the first instance Judge despite the absence of any evidence to support them and there was a police report saying it would be an injustice for the application not to be granted.

[32] Secondly, the transcript of the discussions in the Family Court about the firearms issue in this case shows that Judge Southwick did call for further information. Contrary to a submission made by Mr S, her request was very clearly more than a passing comment.

[33] The transcript also reveals discussions about the sort of issues that needed clarification, including for example whether another person could hold the firearms licence thereby enabling Mr S to continue operating his business, details of Mr S's role and what supervision would be available.

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22 *Foote v Crampton-Smith* (2002) 22 FRNZ 131 (HC).

23 Section 22H was introduced by s 39 of the Arms Legislation Act 2020.

[34] There is no record of Mr S seeking further clarification from the Court which is hardly surprising given the discussion that had taken place and given the fact that s 157 itself sets out the key criteria the court should take into account when deciding whether to vary or remove a firearms condition.

[35] In all those circumstances we consider arguments about a breach of natural justice are not tenable. Nor are arguments that imposition of the standard condition amounted to a disproportionate penalty. In the circumstances as described it was not incumbent on the Family Court to provide any further clarification to Mr S about the information he needed to provide under that section.

[36] We also do not accept that a delay in obtaining the notes of evidence has somehow prejudiced Mr S. The hearing in the Family Court took place in July and August 2020 with the decision delivered in December 2020. The hearing of the appeal in the High Court did not occur until May 2021 so a six week delay in obtaining notes of evidence could not have had any bearing.

[37] Nor do we consider that the introduction of s 22H to the Arms Act 1983 provides any basis for an appeal on a question of law relevant to these proceedings. Section 22H simply provides that a person is disqualified from holding a firearms licence if the person has a protection order made against them under s 79 of the Family Violence Act. If questions of law do arise concerning s 22H, they are not questions which are engaged by Mr S's proposed appeal.

[38] Finally for completeness, we note it remains open for Mr S to apply to the Family Court under s 159 for an order varying the terms of the protection order by removing the firearms condition. Indeed Ms M says Mr S has already made such an application. In our view, that is the appropriate course of action rather than an appeal to this Court.

Further natural justice breaches

[39] Mr S also claims there were further breaches to his natural justice rights by the Family Court as a result of that Court's alleged refusal to release the transcript of a legal discussion that took place on 6 August 2020. He further asserts that the

Family Court refused to release the audio recording of the evidence which would have shown significant inaccuracies in the written transcript. In his submission the High Court failed to properly consider these matters.

[40] The case on appeal does not however show that that these matters were ever traversed in the High Court. In any event, they are entirely case specific, devoid of merit and unimportant.

[41] The transcript of the legal discussion was part of Mr S's bundle of documents so it must have been provided to him at some stage. We have read the transcript and it does not support his further contention that the discussion confirmed agreed evidence that he was acting on police instructions.

[42] As for the alleged tampering with the notes of evidence, Mr S does not provide any particulars. It is a bare assertion.

Breaches of the Family Court Rules 2002

[43] Mr S says that the above breaches of his natural justice rights were exacerbated by the Family Court's failure to comply with both the purpose of and time limits specified in the Family Court Rules 2002.

[44] This contention is also not particularised and was not the subject of a determination by the High Court. It too is not capable of reaching the threshold for a second appeal.

Exclusion of s 133 report

[45] Prior to the hearing in the High Court, Mr S filed a memorandum containing extracts from a report written by a clinical psychologist for the purposes of proceedings under the Care of Children Act 2004 between him and Ms M. The extracts were cited in support of a submission that that Ms M's fears of Mr S were not well founded.

[46] Katz J treated the memorandum as an application for leave to adduce further evidence.[24] She acknowledged that the evidence was fresh because the report post-dated the Family Court hearing.[25] She also accepted it was credible given the report writer's expertise.[26] However, she declined to admit it on the grounds it was only peripherally relevant and further that its admission would lead to unnecessary delay.[27]

[47] Mr S contends that the Judge erred in law by declining to admit the evidence and seeks to raise this as a ground of appeal.

[48] The admissibility of evidence is a question of law. And contrary to a submission made on behalf of Ms M we would be prepared to consider its exclusion as a question of law arising in the High Court appeal for jurisdictional purposes under s 179 of the Act. The fact it was a decision made pre-hearing does not alter that.

[49] However, we consider Katz J's reasoning to be unassailable. As the Judge noted, the threshold for allowing further evidence on an appeal under the High Court Rules 2016 is a high one requiring special reasons. Admitting further evidence on appeal is exceptional rather than routine for obvious reasons.

[50] In this case, the further evidence sought to be admitted was opinion evidence and not evidence of facts. It was therefore likely to be of limited assistance to the High Court. In addition, as Katz J recognised, the Courts will generally be averse to admitting further evidence where it will likely require a response, cross-examination and rebuttal evidence.[28] That was very much the case here.

[51] We add that we have had the opportunity to read the full report. Its focus was appropriately child-focused and of little relevance to the issues raised by this proceeding. Dr Calvert the clinical psychologist says nothing which would undermine the basis of the protection order. In particular she does not opine that Ms M's fears

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24 *[GS] v [LM]* HC Auckland CIV-2020-404-2504, 22 September 2021.
25 At [9].
26 At [10].
27 At [10]–[12].
28 At [8], citing *Sturgess v Dunphy* [2014] NZCA45 at [27].

are unfounded. Her concern was the harmful effect the conflict between the parents over a myriad of matters was having on their child. The extracts quoted by Mr S in his memorandum are taken out of context and selective. Mr S's memorandum says nothing for example about the statement in the report that Dr Calvert attempted to develop conversations with Mr S about his own presentation and that she did not think he had a genuine perception of why he is seen as "challenging" by others including Ms M.

No account taken of Ms M's failure to disclose all relevant information when applying for the temporary protection order

[52] Mr S does not provide any particulars in support of this assertion which is entirely case specific. If it is a reference to the more general complaint that Ms M's misconduct was ignored, that has been addressed at [19]–[22] above.

Conclusion

[53] For all the reasons traversed above, we are not persuaded that any of the proposed grounds of appeal qualify as sufficiently important questions of law capable of bona fide and serious argument. We therefore decline to grant Mr S leave to appeal.

[54] As regards costs, Mr S's application for leave having failed, there is no reason why costs should not follow the event. We therefore order him to pay Ms M costs on a standard application together with usual disbursements. For clarification, the costs award does not include costs incurred in relation to the applications for leave to amend the original application because Mr S was successful in relation to those.

Outcome

[55] The applications dated 19 February 2022 and 13 June 2022 for leave to amend the application for leave to appeal dated 28 October 2021 are granted.

[56] The amended application for leave to appeal is declined.

[57] The applicant must pay the respondent costs on the application for leave to appeal on the basis of a standard application on a band A basis together with usual disbursements.

Solicitors:
McVeagh Fleming, Auckland for Respondent