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[10/10/1996; High Court (Australia); Superior Appellate Court]
De L. v. Director-General, NSW Department of Community Services (1996) FLC 92-706

FAMILY LAW ACT 1975

HIGH COURT OF AUSTRALIA

BEFORE: Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ

10 October 1996

BETWEEN

De L.

v.

Director-General, NSW Department of Community Services & Anor

REASONS FOR JUDGMENT

APPEARANCES:

Solicitors for the Appellant: Stacks The Law Firm

Solicitor for the First Respondent: I V Knight, Crown Solicitor for

New South Wales

Solicitors for the Second Respondent: McDonell Milne & Tolz

Solicitor for the Intervener: Australian Government

JUDGMENT: Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. The appellant was born in Australia and her husband, the second respondent, in the United States. They were married in the Commonwealth of Virginia in 1983 and made their home there. There are two children of the marriage, born in 1984 and 1986.

On 17 February 1995, the appellant left the United States together with the children and came to Australia, where she and the children remain. On 21 February 1995, that is to say after the departure of the appellant and her children, her husband applied to a Virginia court which ordered that he have temporary custody of the children and that they not be removed from the United States. The court also ordered that "custody and visitation" would be reviewed at a hearing after the return of the children to the jurisdiction of the court.

In the Family Court of Australia the appellant successfully resisted an application under the Family Law (Child Abduction Convention) Regulations (Cth) ("the Regulations"). The

application was brought by the first respondent in his capacity as Central Authority for New South Wales. In that capacity, the first respondent has various powers and functions under the Regulations to which more detailed reference will later be made. The second respondent to the appeal, the husband, was not represented at the hearing, but has informed the Court that he will abide by any order made in the appeal, save as to costs.

The application for the return of the children to the United States was filed on 7 June 1995 and it was dismissed by Moore J on 13 December 1995 after a hearing on 3 November 1995. An appeal to the Full Court of the Family Court (Nicholson CJ, Kay and Mushin JJ) was successful [FN1]. However, the Chief Justice differed from the other members of the Court as to the orders which should be made consequent upon the allowing of the appeal.

The primary judge based her decision upon the finding that, within the meaning of reg 16(3)(c), the children objected "to being returned" to the United States and had "attained an age and degree of maturity" at which it was appropriate to take account of their views. Nicholson CJ would have referred the matter back to the primary judge to ascertain whether the children objected to their return. His Honour reached that conclusion on the footing that an incorrect direction had been given by the primary judge to a Family Court counsellor. The direction had been to ascertain the wishes of the children; it had not been to ascertain whether the children objected to being returned to the United States. The Chief Justice also said that, where there is a clear issue as to whether a child objects to being returned [FN2]:

"I consider that the Court has an obligation to give the child an opportunity to be heard in an appropriate manner and that is a right of the child independent of the person opposing return."

The other members of the Court favoured the making of orders the effect of which was to require the children, accompanied by their mother, to return to Virginia and to remain there for a sufficient period to enable the wife to make an application to a court of competent jurisdiction for custody of the children. The order made by the Full Court was stayed by order of this Court, pending the outcome of this appeal [FN3].

The appeal is brought to determine whether the Full Court erred in the construction given to reg 16(3)(c). The appellant also argues that, if the proper construction of this provision is one with adverse results for her case, then it is beyond the relevant regulation-making power in the Family Law Act 1975 (Cth) ("the Act"). As well, she contends that the orders of the Full Court were made in breach of the requirements of procedural fairness.

<u>The Convention on the Civil Aspects of Child Abduction ("the Convention")</u>

Schedule 1 to the Regulations ("the Schedule") sets out the English text of the Convention which is generally known as the Hague Convention. The term "Convention", as used throughout the Regulations, is defined in terms of the text set out in the Schedule (reg 2(1)). The provisions of the Regulations thus have to be read with those of the Convention. As a matter of municipal law, the Schedule forms part of the Regulations as a whole [FN4]. Schedule 2 lists those countries as between Australia and which the Convention has entered into force. These include the United States of America, with effect from 1 July 1988, but with certain reservations which are not presently material [FN5}.

The Convention was concluded at The Hague on 25 October 1980. It entered into force for Australia on 1 January 1987. The Convention applies to any child habitually resident in a Contracting State immediately before any breach of custody or access rights and ceases to apply when the child attains the age of 16 years (Art 4).

Article 3 relevantly provides that the removal of a child to, or the retention of a child in, any Contracting State is to be considered wrongful where it is in breach of rights of custody attributed to a person, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. The effect of Art 31 is that, in the present case, the reference in Art 3 to habitual residence is to be construed as referring to habitual residence in Virginia. The Regulations, so far as is material, defined "removal" as meaning "wrongful removal or retention of a child within the meaning of the Convention" (reg 2(1)). The primary judge found that, at the time of removal of the children, their father was a guardian of the children under the law of Virginia and that this included rights of custody. It followed that the action of the wife was a removal of the children which attracted the operation of the Regulations.

The Preamble to the Convention recites the firm conviction of the State parties "that the interests of children are of paramount importance in matters relating to their custody" and their desire (i) "to protect children internationally from the harmful effects of their wrongful removal or retention" and (ii) "to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access". The objects of the Convention, as stated in Art 1, are:

"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Thus, it may be said that the Convention is concerned with reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and of access. This entails preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to "its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case" [FN6].

A decision under the Convention concerning the return of a child is not to be taken as a determination on the merits of any custody issue (Art 19). Further, the relevant judicial or administrative authority of the Contracting State from which return is sought is not bound to order the return of the child in the circumstances detailed in Art 13, the text of which is set out later in these reasons. One such circumstance is, to put it neutrally, reflected in Australian municipal law by reg 16(3)(c) of the Regulations. In addition, Art 20 provides that the return of a child "may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms". It will be noted that the reference is to "the fundamental principles of the requested State", not to international conventions or declarations concerned with the protection of human rights and fundamental freedoms which may have been ratified or accepted by Contracting States.

The Convention thus reflects a compromise. The nature of the compromise has been identified as follows [FN7]:

"Most delegates at The Hague were agreed that, after a wrongful removal to or retention in another country, its courts - in principle at least - should order the return of the child forthwith without entering into the merits of any custody dispute between the parties. Some delegates, indeed, argued that the achievement of the main purpose of the Convention would be imperilled if the door were left even slightly ajar to abductors to justify the new situation of the child by an inquiry in the State to which the child had been abducted into what allocation of custody rights was in the best interests of the child. Other delegates, while accepting that in

principle an abducted child should be returned forthwith, considered that in certain cases a departure from this principle might be justified in the interests of the child. ...

What emerged was inevitably a compromise. It was agreed that a refusal to return the child should not be based on public policy or any analogous general ground. The Convention should rather limitatively enumerate the exceptions which it allowed."

The Regulations

The jurisdiction of the Family Court in respect of this matter was conferred by s 39(5) of the Act. Paragraph (d) of s.39(5) relevantly confers jurisdiction with respect to a matter being a proceeding instituted under regulations made for the purposes of s 111B of the Act. Jurisdiction is also conferred by s 39(5)(d) with respect to a matter being a proceeding instituted under regulations made for the purposes of pars (f) or (g) of s 125(1) of the Act. Neither of these paragraphs is concerned with subjects related to those of the present litigation. Accordingly, the relevant source of legislative authority is to be found not in s 125 but purely in s 111B. This states:

"(1) The regulations may make such provision as is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 but any such regulations shall not come into operation until the day on which that Convention enters into force for Australia."

It will be noted that s 111B refers not only to provisions which are necessary to enable the performance of Australia's obligations but also to provisions necessary to obtain for Australia "any advantage or benefit" under the Convention.

The subject-matter of the Regulations, the return of children abducted from Australia and the return of children abducted to Australia, is concerned with the movement of children between Australia and places physically external to Australia. It thus falls within the content of the phrase "external affairs" in s 51 (xxix) of the Constitution. Accordingly, the legislative authority for the making of the Regulations, found in s 111B, is to be supported in this sense as a law with respect to external affairs [FN8] independently of the Convention [FN9], and the Regulations, in turn, take this character.

The above consideration is important in dealing with a submission by the appellant as to the invalidity of the Regulations. The submission appears to conflate two questions. The first is whether s 111B is a law with respect to external affairs independently of the Convention. The second is whether, if s 111B is such a law, the Regulations nevertheless are beyond the power conferred by s 111B, because they go beyond what is reasonably capable of being considered appropriate and adapted to the implementation of the Convention. Once it is accepted that s 111B is a law with respect to external affairs independently of the Convention, that second question does not arise. Further, the construction which is given later in these reasons to the provision of the Regulations upon which this appeal turns, is such as to meet the terms in which the regulation-making power is conferred in s 111B.

The appellant also contended that s 111B, when considered in relation to the Act as a whole, had to be construed so that any regulations made thereunder conformed to what counsel for the appellant identified as "the paramountcy principle". That submission also should not be accepted. The reasons for this will appear in the course of a consideration of the submissions bearing upon the validity of the Regulations.

The present proceeding

At the time the present proceeding was instituted, reg 3 provided that the Attorney-General was to appoint an officer in the Australian Public Service [FN10] as the Commonwealth Central Authority entrusted with various powers and functions with respect to children wrongfully removed from their country of habitual residence. Included in the functions conferred upon the Commonwealth Central Authority was the doing or the co-ordination of the doing of anything necessary to enable the performance of the obligations of Australia or the obtaining for Australia of any advantage or benefit under the Convention (reg 5(1)(a)). The Attorney-General was also empowered to appoint a Central Authority for a State or Territory for the purposes of the Regulations (reg 8) and a State Central Authority had the duties and was authorised to exercise all the powers and perform all the functions of the Commonwealth Central Authority (reg 9). As earlier indicated, the first respondent is such a State Central Authority.

At the time of the institution of the application which was before the primary judge (7 June 1995), reg 15 authorised the responsible Central Authority, in relation to a child removed to Australia, to apply to a court for various orders, including an order for the return of the child to the applicant or any other order that the court thought fit [FN11]. Regulation 15(1A) specified a Form for such an application. This was used in the present proceeding, but with the unexplained description of the application as one between the father on the one hand and the mother and the State Central Authority on the other. The application included a statement, specified in the prescribed Form, that the respondent, the wife, might object to the return of the children on grounds including the following:

"(f) the children object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of the views of the children".

Regulation 19(2) required service of the application upon the wife and reg 15(1B) provided for her to file an answer and cross application. This was done, the wife seeking therein an order from the Family Court for the custody of the children. It is not clear what, if any, orders were made for service of the Answer and Cross Application upon the husband but, on 26 September, he swore an affidavit headed "Affidavit and Answer to Cross Application" which was filed on 3 October 1995.

On 4 October, the primary judge made an order for the preparation of a Family Report by a Court Counsellor. The order was made pursuant to s 62A(1) of the Act. This states:

"Where, in any proceedings under this Act, the welfare of a child who has not attained the age of 18 years is relevant, the court may direct a court counsellor or welfare officer to furnish to the court a report on such matters relevant to the proceedings as the court thinks desirable and may, if it thinks necessary, adjourn the proceedings until the report has been furnished to the court."

Such a report may be received in evidence (s 62A(6)) [FN12].

The application had been filed less than one year after the removal of the children to Australia. Accordingly, reg 16(1), in its form at the time of the institution of the proceeding, was satisfied. It is appropriate now to set out in full the text of reg 16 in that form:

"(1) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application made under sub-regulation 15(1) if the day on which that application was filed is a date less than one year after the date of the removal of the child to Australia.

(2) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application for an order of the kind referred to in paragraph 15(1)(d) if the date on which that

application was filed is a date that is at least one year after the date of the removal of the child, unless it is satisfied that the child is settled in its new environment.

(3) A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that -

(a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal;

(b) there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

(4) For the purposes of sub-regulation (3), the court may take into account such information relating to the social background of the child as may be provided by the Central Authority of the convention country from which the child was removed.

(5) A court may stay or dismiss an application for an order of the kind referred to in paragraph 15 (1)(d)in relation to a child if it is satisfied that the child is no longer in Australia."

Regulations 14, 15 and 16 were omitted by the 1995 Amendment [FN13] and fresh regs 14, 15 and 16 substituted, with effect from 1 November 1995. The new reg 16 thus was in operation at the time of the making by the primary judge of the orders disposing of the application. Nevertheless, the new reg 16 took as its subject-matter an application under the new reg 14. The new reg 16 was expressed to operate upon an "application under regulation 14". The application before the primary judge was in Form 2 required not by the future reg 14 but by the then operative reg 15(1A). Accordingly, even if the changes effected by the 1995 Amendment be construed as procedural, the new reg 16, in terms, was not directed to the pending application before the primary judge. Moreover, the repeal of the former regs 14, 15 and 16 did not affect the continuation and completion of that pending application [FN14].

The contrary appears to have been assumed in argument before the Full Court [FN15] and before us [FN16], where extensive reference was made to reg 16(3) in its later form. In particular, submissions were made as to the presence in reg 16(3) of the words "[a] court may refuse to make an order ... if a person opposing return establishes ..." (emphasis added). The words emphasised did not appear in the previous reg 16(3) which, as already indicated, applied in this case. And the reasons for judgment of the primary judge indicate that she approached the matter on that footing. Accordingly, criticism that her Honour, after determining that the ground in par (c) of reg 16(3) was made out, went on to dismiss the application rather than deciding whether the wife, as a person opposing return, had established the matters referred to in par (c), is misplaced.

"Objects to being returned"

The majority of the Full Court approached the matter on the basis that there should be a "strict and narrow reading" [FN17] of what it identified as the exceptions to the obligation imposed upon the court to order the prompt return of the abducted child to the jurisdiction of habitual residence. Kay J [FN18] referred to decisions from various jurisdictions, including a

decision of the United States District Court in Levesque v Levesque [FN19]. That was an application pursuant to the International Child Abduction Remedies Act 1988 (US) [FN20]. By s 2 of this statute the Congress established procedures for the implementation of the Convention in the United States, stipulating that the provisions of the statute were in addition to, and not in lieu of, the provisions of the Convention, which had become effective in the domestic law of the United States on 1 July 1988. The District Court was thus concerned directly with the terms of the Convention. The Court had regard to the terms of the publication *Hague International Child Abduction Convention: Text and Legal Analysis by the Department of State* [FN21] for the proposition that [FN22]:

"[a]ll of the exceptions which allow courts to deny return of children under the Convention are intended to be construed and applied very narrowly to effectuate the objectives of the Convention."

Proceeding from that point, the majority of the Full Court of the Family Court appears to have accepted the proposition found in an English decision [FN23]:

"The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

As we have indicated, the Convention itself contains a compromise, reflected in the terms of the Regulations, by which certain exceptions are allowed to the general principle that an abducted child be returned forthwith to the State of the child's habitual residence. We have set out the text of reg 16 in its applicable form. Article 13 of the Convention provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." (emphasis added)

In this setting there is no particular reason why reg 16(3)(c) should be construed by any strict or narrow reading of a phrase expressed in broad English terms, such as "the child objects to being returned". The term is "objects". No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition. No "additional gloss" [FN24] is to be supplied.

The judgments of the Court of Session in Urness v Minto [FN25] are in point. Section 1 of the *Child Abduction and Custody Act* 1985 (UK) relevantly provided that the provisions of the Convention, set out in a Schedule to the statute, were to "have the force of law in the United

Kingdom". Accordingly, the Court was construing directly the terms of Art 13. At first instance, Lord Penrose said [FN26]:

"The expression ['the child objects to being returned'] is to be applied in its ordinary literal sense. The child must object to returning to the country from which it was wrongfully removed in the circumstances envisaged at the time. The questions were whether the child objected to being returned and whether the child had attained an age and degree of maturity at which it was appropriate to take account of its views, these being matters of fact to be determined in the light of the information before the court."

A reclaiming motion was dismissed. The opinion of the Court was delivered by the Lord Justice-Clerk, Lord Ross. His Lordship [FN27] applied the following statement of the principle by Balcombe LJ in S v S (Child Abduction) (Child's Views) [FN28]:

"[T]he return to which the child objects is that which would otherwise be ordered under Art 12, viz, an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live ... There is nothing in the provisions of Art 13 to make it appropriate to consider whether the child objects to returning in any circumstances."

Balcombe LJ had continued [FN29]:

"Thus, to take the circumstances of the present case, it may be that C would not object to returning to France for staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under Art 12."

In New Zealand, it has been said, dealing with the equivalent provisions in ss 12 and 13 of the *Guardianship Amendment Act* 1991 (NZ) [FN30]:

"Section 13 sets out the only circumstances which constitute grounds for the refusal of the order for return. Where those grounds are made out to the satisfaction of the Court by the person resisting the order for return (here, the mother), the consequence is not that the order will be refused but that the Court is no longer obliged to return the child but has a discretion whether or not to do so. That discretion must be exercised in the context of the Act under which it is conferred and the convention which it implements and schedules. (See Re A (Minors) (Abduction: Custody Rights) [FN31].) It therefore requires assessment of whether decisions affecting the child should be made in the Court from the country from which the child has been wrongfully removed or the country of the Court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other."

Further, as was pointed out by Nicholson CJ in the present case, the policy of the Convention is not compromised by hearing what children have to say and by taking a literal view of the term "objection". That is because it remains for the Court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised [FN32].

Regulation 16(3)(c) fell for application in this case upon the construction indicated by Nicholson CJ and in the authorities, to which we have referred above, from Canada, Scotland, England and New Zealand. It follows that the majority of the Full Court misconstrued what had been the task of the primary judge in applying reg 16.

<u>Other questions of construction and the validity of reg 16</u>

Although the appeal must succeed for the reason indicated, it is appropriate to state briefly our reasons for rejecting other arguments of the appellant going to the construction and validity of reg 16.

As the Act stood at the time of the decision in the present case, s 64(1)(a) provided that in proceedings in relation to the custody, guardianship or welfare of, or access to, a child, the court must regard the welfare of the child "as the paramount consideration". Section 64 was contained in Pt VII of the Act (ss 60-70F) and s 63 conferred jurisdiction on the Family Court (and certain other courts) in relation to matters arising under that Part [FN33]. This jurisdiction had an affinity to the *parens patriae* jurisdiction of the Court of Chancery, where the welfare of the minor was the first and paramount consideration [FN34]. In the appellant's submissions to this Court, s.64 and the *parens patriae* jurisdiction were said to embody "the paramountcy principle".

Had the Regulations not applied and had the issue before the Family Court been whether it should make a summary order that a child residing in Australia be returned to a foreign jurisdiction so that a foreign court might determine questions concerning custody, the relevant principles would have been those propounded in this Court in ZP v PS [FN35]. The first issue would have been whether the welfare of the child required the making of a summary order that the child be returned to the foreign jurisdiction; if the Family Court determined that the welfare of the child did not require the making of such an order, then it would have been for the Family Court to embark on a determination of the issue of custody itself [FN36].

It was contended for the appellant that, by reason of s 64(1)(a), the paramountcy principle applies in proceedings under the Regulations. Alternatively, it was contended that, if the principle is not applicable, the Regulations are, and at all relevant times have been, invalid. The first of these propositions treats s 64(1)(a) as governing proceedings under the Regulations. That proposition must be rejected. The Regulations reflect the objects of the Convention to settle issues of jurisdiction between the Contracting States by favouring that forum which has been the habitual residence of the child. The underlying premise is that, once the forum is located in this way, each Contracting State has faith in the domestic law of the other Contracting States to deal in a proper fashion with matters relating to the custody of children under the age of 16. Necessarily, proceedings under the Regulations are to be seen as standing apart from proceedings to which s 64(1)(a) is directed. It follows that they are not subject to the paramountcy principle.

The appellant's alternative argument must also be rejected. That argument proceeds on the basis that, if the paramountcy principle does not apply, the Regulations are, and at all times have been, inconsistent with the Act and thus beyond the regulation-making power conferred by s 111B. It was also put that they are beyond the power conferred by s 125 of the Act which at the relevant time provided, as it still does, that regulations may be made "not inconsistent with this Act, prescribing all matters that are required or permitted ... or are necessary or convenient ... for carrying out or giving effect to [the] Act".

As already indicated, s 111B confers a regulation-making power which is separate and distinct from that conferred by s 125 of the Act. Unlike s 125, it is not subject to the requirement that regulations be consistent with the Act. But even if it were, there could be no question of inconsistency so long as the Regulations conformed to the terms of s 111B. And, as appears from what has been said as to the construction of reg 16(3)(c) in its previous form, that regulation satisfied the terms of that section which authorises regulations which are "necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention". Moreover, as we have already indicated, s 39 of the Act conferred jurisdiction with respect to proceedings instituted under regulations

pursuant to s 111B. It follows that the question whether the Regulations exceed the power conferred by s 125 of the Act is irrelevant.

Procedural fairness and separate representation

It is necessary to consider the appellant's further argument that the orders of the Full Court were made in breach of the rules of procedural fairness, for it is that matter which determines whether it is sufficient merely to restore the orders made by the primary judge. Quite apart from the report which the primary judge directed be obtained, there was evidence from the appellant that the children did not want to return to the United States. Her Honour observed that the weight of this evidence, taken alone, was minimal. Indeed, that would ordinarily be the situation in any proceedings under the Regulations.

If, as here, children are not separately represented in proceedings under the Regulations, the only practical means of ascertaining whether or not they object to being returned to their country of habitual residence is by the obtaining of a report from a Court Counsellor directed to that question. It is in that context that we turn to consider the significance of the terms in which the instruction was given to the Court Counsellor in this case and the further procedural consequences of the point made by the Chief Justice that the children should have been afforded an opportunity to be heard in an appropriate manner.

The report of the Court Counsellor identified the proceedings as involving an application under the Convention for the return of the children and a cross application for custody in Australia. It continued that the purpose of the report was "to ascertain the wishes of the children and their maturity to express those wishes". While that description might have been apt in relation to a custody application, it did not correctly identify the issue which arose under the Convention application. Thus, the present application was determined by the primary judge upon reliance, at least to a significant degree, upon the report of the Court Counsellor which had not been directed to the relevant issue concerning the objections of the children. The Full Court was correct in holding that, on that account, the proceedings were "fatally flawed". However, given the evidence of the appellant that the children did not want to return to the United States and given the practical difficulties confronting her in establishing whether or not they objected to being returned, procedural fairness requires that there be a rehearing of the matter to determine whether, in fact, they do object to that course.

Moreover, the question which arises on the Convention application closely concerns the interests of the children, making it most appropriate that a properly directed report be obtained. That likewise will be the case, for example, where it appears to the Court that there is a question of the exposure of the child to physical or psychological harm on return of the child or that the return would otherwise place the child in an intolerable situation, within the meaning of reg 16(3)(b).

In the present case to date, there has been no separate representation for the children. Where issues of the kind involved in this case arise, or appear to the Court to arise with respect to a child of the age and degree of maturity spoken of in reg 16(3)(c), there ordinarily should be separate representation. A recent example is Clarke v Carson [FN37]. There the issue before the New Zealand court, on a Convention application, concerned the objections by two children, aged 7 and 11, to their return to the United States.

In Australia, s 68L of the Act [FN38] states:

"(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, *or a relevant, consideration*. [emphasis added]

(2) If it appears to the court that the child ought to be separately represented, the court may order that the child is to be separately represented, and may also make such other orders as it considers necessary to secure that separate representation.

(3) A court may make an order for separate representation:

(a) on its own initiative; or

(b) on the application of:

(i) the child; or

(ii) an organisation concerned with the welfare of children; or

(iii) any other person."

The presence of separate representation should not hinder, and indeed should assist, the prompt disposition of Convention applications.

The Convention requires the judicial or administrative authorities of Contracting States to "act expeditiously in proceedings for the return of children" (Art 11). The system established for Australia by s 111B and the Regulations is one which engages the judicial power of the Commonwealth. Regulation 15(2), in its present form, obliges a court, so far as practicable, to give to an application such priority "as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows". Prompt listing for hearing is one thing; an over-hasty and insufficient hearing is another. That point is made in the concluding terms of reg 15(2) set out above. Further, there may be cases where, consistent with those precepts, some, even if restricted, cross-examination upon affidavits is appropriate to assist the court to reach a decision whether to refuse an order for the return of the child [FN39].

Remaining considerations

As earlier indicated, the so-called "paramountcy principle" is not applicable in proceedings under the Regulations. However, it is to be noted that, if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree of maturity spoken of in reg 16(3)(c), it remains for the judge hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the "discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]" enable it to be said that a particular consideration is extraneous [FN40]. That subject-matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion.

It should also be noted that, in its present form, the effect of reg 15(1) is to provide that, in making an order in relation to the return of a child from Australia, the Court may include in its order a condition the Court considers appropriate to give effect to the Convention [FN41].

In delivering the leading judgment in the Supreme Court of Canada in Thomson v Thomson [FN42], La Forest J said:

"Given the preamble's statement that 'the interests of children are of paramount importance', courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention: see Re L [(Child Abduction) (Psychological Harm)[FN43]; C v C [(Minor:

Abduction: Rights of Custody Abroad) [FN44]; P v P (Minors) (Child Abduction) [FN45]; and Re A (A Minor) (Abduction) [FN46]. Through the use of undertakings, the requirement in Article 12 of the Convention that 'the authority concerned shall order the return of the child forthwith' can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated."

Both the Supreme Court of Canada and the English Court of Appeal in C v C (Minor: Abduction: Rights of Custody Abroad) [FN47] were concerned with Convention applications raising an issue as to whether the return of the child would expose the child to grave risk of psychological harm. In the latter decision, undertakings were given to the Court of Appeal by the father seeking return of the child to Australia. Butler-Sloss LJ said [FN48]:

"These undertakings are crucial to the welfare of the child, who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home. The mother has been the primary caretaker throughout his short life, and since the parting of the parents when he was three for all but access periods his sole caretaker. If possible, she should for his sake and not for hers be with him and help him to readjust to his return. The father should not be instrumental in putting obstacles in the way of that easy return, or make difficulties once the child is back. It is essential that the judge hearing the future issues of custody and access or indeed the Australian Family Court should have the opportunity to consider the welfare of the child as paramount without emergency applications relating to the manner of the return of the child."

It is impossible to identify any specific and detailed criteria which govern the exercise of the power whereby the Court may impose such conditions on the removal of the child "as the court considers to be appropriate to give effect to the Convention". Many of the criteria which may be applicable in a particular case are illustrated in the above passages from the Canadian and English decisions. The basic proposition is that, like other discretionary powers given in such terms, the Court has to exercise discretion judicially, having regard to the subject-matter, scope and purpose of the Regulations [FN49].

Conclusions

Among the orders sought by the appellant are orders that those of the Full Court of the Family Court made on 29 February 1996 and 14 March 1996 should be set aside, and the proceeding be remitted for rehearing by a judge of the Family Court.

Those orders should be made. Upon that rehearing, it is to be expected that the Court will exercise powers under the new reg 26 for the preparation of a report by a family and child counsellor or welfare officer, and that the Court will also give serious consideration to the exercise of its powers now conferred by s 68L [FN50]. The costs of the appellant in this Court should be borne by the first respondent. The costs order made in favour of the appellant in the Full Court on 22 March 1996 should not be disturbed.

KIRBY J. This appeal, from the Full Court of the Family Court of Australia [FN51] concerns the law applicable to a case of international child abduction.

Australia is a party to the Convention on the Civil Aspects of International Child Abduction ("the Convention") [FN52]. In 1983, the Federal Parliament inserted s 111B into the Family Law Act 1975 (Cth) ("the Act"). That section empowers the making of regulations to give effect to the Convention. In purported compliance with that provision, the Family Law (Child Abduction Convention) Regulations ("the Regulations") were made. Regulation 16(1) requires that, in a case of unlawful removal of a child from another Convention country, upon application to a court in Australia, that court must make an order for the return of the child

[FN53]. Various exceptions are provided in respect of cases in which the court may refuse to make such an order. The exceptions follow those referred to in the Convention. Relevantly to this case, reg 16(3)(c) permits the court to refuse to make an order where:

" the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views..."

This appeal concerns the validity of the Regulations. If they are valid, other subsidiary issues arise as to their meaning and application. Such issues include the suggested obligation of Australian courts to construe reg 16 as subject to a "paramountcy principle" protective of the "best interests of the child"; the meaning of the word "objects" in reg 16(3)(c); the principles governing the application of the Regulations and the practices to be observed in that regard; as well as the relief appropriate in the facts of this case.

A mother abducts two children from the United States

In December 1983 Ms De L ("the appellant"), an Australian citizen, married Mr De L ("the second respondent"), a citizen of the United States of America. The marriage took place in Virginia in the United States. The couple established their home in that State. Their first daughter was born in June 1984 in the United States. She is now aged 12 years. Their second daughter was born in February 1986 in Australia. She is now aged 10 years. The children enjoy dual nationality.

Disputes arose between the parents, leading to the appellant's returning to Australia with the children. She took them back temporarily to the United States in January 1995 but she did not resume cohabitation with her husband. Negotiations began over the termination of the marriage and about arrangements for the parenting of the children. The negotiations were not successful. Whilst the second respondent was away from the family home, the appellant, on 15 February 1995, took the children to Dulles airport, Washington. She returned with them to Australia. In doing so, she removed them from the joint custody which she and her husband enjoyed in respect of the children under the law of Virginia. She deprived him of guardianship rights which he enjoyed under that law.

On 21 February 1995 a court in Virginia made ex parte orders in favour of the second respondent. It granted temporary custody of both children to him. In effect, it made provision for an expedited hearing of the permanent disposition of the custody of, and access to, the children, after they were returned to the United States. The appellant has ignored these orders.

The United States of America, like Australia, is a party to the Convention. By the Convention, each contracting State is required to designate a Central Authority to discharge the duties imposed by the Convention upon such authorities [FN54]. On 3 March 1995, the second respondent applied to the United States Central Authority for relief under the applicable United States law and pursuant to the Convention. The United States Authority sought the assistance of its counterpart in Australia to arrange for the return of the children to the United States [FN55]. Pursuant to the Regulations [FN56] the Federal Attorney-General may appoint a person to be the Central Authority of a State to carry out the obligations of Australia under the Convention. The Director-General, New South Wales Department of Community Services ("the first respondent") is so appointed as the relevant "State Central Authority". On 7 June 1995, pursuant to the request from the United States Central Authority, the first respondent applied to the Family Court of Australia for orders, directed to the appellant, for the return of the children to the United States.

In August 1995, the appellant filed her answer disputing this application. Amongst the grounds expressed was one which stated that "the children object to being returned and it is

appropriate to take their views into account". The appellant also filed a cross-application seeking an order, under Australian law as it then stood, for the custody of the children to be granted to her, reasonable access being allowed to the husband.

The second respondent was joined as a party to the proceedings in the Family Court of Australia. Apart from providing information to the State Crown Solicitor, acting on behalf of the State Central Authority, he took no part in the proceedings. In this Court, he submitted to the orders of the Court save as to costs. His conduct throughout has been one of insisting upon the return of the children to the United States where they were habitually resident before the appellant unilaterally removed them.

Proceedings in the Family Court of Australia

On 4 October 1995 an order was made, in advance of the hearing of the application , for the preparation of a report by one of the counsellors appointed under the Act [FN57]. Unfortunately, instead of addressing the issue posed by the Convention and the Regulations, as to whether either or both of the children "objects" to being returned to the United States, the counsellor was asked for a report appropriate to an ordinary case of custody, under the Act as it then stood. Thus the counsellor was directed to "ascertain the wishes of the children and their maturity to express those wishes". Unsurprisingly, the counsellor addressed the questions asked. This threshold mistake occasioned much debate as to how it could be repaired. The mistake was not noticed by the primary judge (Moore J). No fresh counselling report was sought. Her Honour heard the State Central Authority's application on 3 November 1995. On 13 December 1995, she dismissed it. She did not proceed to decide the appellant's cross-application.

The first respondent appealed to the Full Court of the Family Court of Australia. That Court heard the appeal in late February 1996. All members of the Court identified the mistake concerning the question addressed by the counsellor. However, the members of the Court divided on the relief proper to the circumstances of the case.

Nicholson CJ was of the opinion that the proper course was to return the application to a judge at first instance to secure a report addressed to the correct issue, namely whether the children, or either of them, objected to being returned to the United States within the meaning of reg 16(3)(c). If they did, the primary judge could determine whether those matters had been established.

Kay J saw no point in returning the case to the judge at first instance. In his opinion, the counsellor's report and other evidence (principally of the appellant) fell far short of the strong and compelling case necessary to establish an objection under the Regulations and the Convention. Instead, the evidence was nothing more than expression of the preferences of young children as to the parent with whom they wished to reside. This was no foundation for refusing to order the immediate return of the children to the United States. His Honour was critical of the serious delays which had already attended the application.

Mushin J substantially agreed with the reasons of Kay J. His Honour resolved the difference between the other members of the Court by reference to the assignment, by reg 16(3), of the burden of persuading the court to refuse an order to the "person opposing return". It was that person who was obliged to establish the ground for refusal. The onus was therefore upon the appellant to establish the ground:

"It is not for the Court to go out looking for the evidence in the absence of even a prima facie case that a ground is made out, which is the situation here [FN58]."

During the hearing before the Full Court, and in this Court, reference was made to the suggested difficulties of the appellant in securing an appropriate visa to re-enter the United States to contest the custody hearing and to the possibility that she might be prosecuted, pursuant to the *International Parental Kidnapping Crime Act* 1993 (US) [FN59] or the *Alien Exclusion Act* 1990 (US) [FN60], for removing the children from the United States. Reference was also made to the high cost of legal fees in Virginia and the absence of legal aid to the appellant if she were required to return to the United States on a tourist visa. Mushin J left open the possibility of further orders should it be shown that the appellant was unable to re-enter the United States. The orders finally made by the Full Court reserved liberty to both parties to apply on short notice to a single judge of the Family Court for further relief, should that prove necessary.

Additional delay in giving effect to the Full Court's orders for return of the children to the United States was occasioned by the appellant's claim that she was unable to obtain a suitable visa. The first respondent notified the appellant of the possibility of commencing proceedings for contempt. The Full Court refused a stay of execution of its orders pending an application for special leave to appeal to this Court. However, on 4 April 1996, Gummow J provided a stay [FN61]. On 5 August 1996, special leave was granted. This Court heard argument on the appeal without delay.

Whilst due allowance must be made for the complexity of some of the questions raised, the serious legal interests in apparent conflict, the novelty of some of the propositions (at least so far as the higher courts in Australia are concerned) and the general importance of the matter as a "test case", I cannot but agree with Kay J that the delays have accumulated to defeat the apparent purposes of the Convention, the Act and, if they be valid, the Regulations. By repeated provisions, the Convention envisages a speedy process and a summary procedure [FN62]. The same sense of urgency is reflected in the Regulations [FN63]. It is reflected in judicial observations about the meaning and purposes of the Convention and of municipal laws designed to give it effect [FN64].

The objective fact is that it has taken the Australian legal system more than eighteen months to complete its decision in this case. This offends the spirit of Article 11 of the Convention which provides:

" The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be."

In this Court, the appellant denied that she was to blame for unnecessary delays or that she had sought to frustrate the application of the Convention and Australian law incorporating it. That may be so. But the fact remains that the Convention and Australian law have not operated as their clear language and purpose intended. That language and purpose must be kept in mind in considering the arguments of the parties in the appeal.

<u>Preliminary points</u>

A number of points may be mentioned at the outset. They represent common ground and define the limits within which the case was argued:

1. The constitutional validity of s 111B of the Act, and of the Regulations, was not contested. A challenge to the validity of the Regulations, and to the jurisdiction of the Family Court under them, was mounted in McCall and State Central Authority; Attorney-General of the Commonwealth (Intervener) [FN65]. The Full Court of the Family Court, in that case, rejected the challenge, holding that the constitutional source sustaining the validity of the applicable laws, and the jurisdiction of the Family Court, was the power conferred upon the Parliament by s 51 (xxix) of the Constitution to make laws with respect to external affairs [FN66]. This Court refused an application for special leave to appeal against the decision in McCall. In the present case, no argument of constitutional invalidity was advanced on the basis of the matters disposed of in McCall or the requirements of Ch III of the Constitution. Specifically, it was not argued that the engagement of federal judicial power obliged a particular construction of the Act or Regulations. The appellant accepted the decision in McCall. So shall I.

2. The foundation of the jurisdiction of the Family Court in this case was not the jurisdiction with respect to "matrimonial causes" but a special jurisdiction conferred by the Act. The Act provides for the Family Court to have jurisdiction in proceedings instituted under regulations made for the purposes (relevantly) of s 111B of the Act [FN67]. Thus, in this case, the Family Court was exercising a special jurisdiction which the Parliament expressly envisaged would be exercised once s 111B was enacted.

3. No basis was shown for any technical invalidity of the second respondent's application to invoke the Convention procedures. The proceedings were commenced within a period of less than one year after the wrongful removal complained of [FN68]. The children concerned had not attained the age of 16 years [FN69]. It was suggested at first instance that the husband had "consented to or subsequently acquiesced in" the removal of the children from the United States [FN70]. This submission was rejected in the Court below. It has not been re-agitated.

4. No one contested that the order to the counsellor failed to address the correct legal issue of objection or that the primary judge had erred in failing to address that question. But that left the question identified in the conflicting opinions in the Full Court of the Family Court, namely what followed from that error and what relief was appropriate in the circumstances.

5. No one could contest the objective record of the substantial time which had passed since the unilateral removal of the children and the orders under appeal. The assumption is that the return of a child to a foreign jurisdiction, if concluded within a very short time, will not ordinarily cause irreparable harm to the child [FN71]. The longer the delay, the greater the potential for harm to the child. Similarly, the longer the delay, the more likely is it that a counsellor's report or the impression of the primary judge (even if directed to the correct issue) would become invalid as a basis for decisions of the judicial authority at a later time [FN72]. Amongst the many reasons which explain the urgency reflected in the language of the Convention and the Regulations are:

(i) There is a need, by prompt response, to deter those parents who might be tempted to take the law into their own hands and to bring home to those advising such parents that, ordinarily, such conduct will not avail them [FN73].

(ii) There is also a need to prevent an abducting parent from gaining the benefit of delays and thereby profiting from their wrongdoing by invoking the legal system of the country of resort [FN74]. If such action were to succeed it would undermine confidence in the Convention and in the municipal laws designed to give it effect.

(iii) A child removed from one parent and taken to a country different from that in which the child was habitually resident [FN75] is then likely to be subject to the concentrated influence of the custodial parent [FN76]. Unless firm steps are taken to ensure the prompt

implementation of the Convention procedures, in a prolonged separation from a parent his or her influence on the child would have a tendency to wane. Time would favour the abductor.

(iv) The parent remaining in the place of the child's habitual residence, from which the child is taken, would ordinarily be at a considerable disadvantage in litigating a contested claim for custody and access (or equivalent orders) in the courts of another country rather than those of the place of habitual residence. Few persons can readily afford litigation in their own jurisdiction, still less contemplate the prospect of participating in courts (or administrative authorities) far away, where the legal system may be different, laws and even language unfamiliar, costs substantial and facilities for legal assistance difficult to obtain or non-existent.

(v) Time may also affect the operation of the Convention or the Regulations. What may have been no more than a "preference" at the time of abduction (as here, in February 1995) or at the time of the preparation of a counsellor's report (as here, in October 1995) or even at the time of the trial before the primary judge (as here, in November 1995) may have matured into an objection 12 or 18 months later (by the time of final appellate review). This might be so by reason of nothing more than the passage of time, the advancing age of the child or children concerned and the establishment, during critical childhood years, of bonding with the custodial parent, that parent's family, school friends, teachers and others. Particularly as the child approaches the age of 16 years, the longer the interval of time between abduction and decision, the more likely is it that the child will have "attained an age and degree of maturity at which it is appropriate to take account of its views"[FN77].

The foregoing considerations show why it is essential, and part of the scheme of the Convention and of the Australian laws giving effect to it, that a summary procedure should be adopted when the Convention is invoked. The appellant did not contest this. She insisted that a summary procedure was not incompatible with the observance of the basic norms of procedural fairness affecting her children. Even more fundamentally, she insisted that the rule of law required that the summary procedure should be addressed to the correct legal issue.

6. No provision was made at any stage in these proceedings for the separate legal representation of the children. Some authorities suggest that such separate representation is inappropriate to the summary procedure envisaged by the Convention and the Regulations [FN78]. To afford it could consume time and run the risk of distorting the character of the proceeding from one designed to respond to a case of unlawful child abduction to one addressed to the substantive wishes and welfare of the child concerned. It will be necessary to return to this question. For the moment, it is enough to note that the real contestants in the litigation were the State Central Authority seeking the return of the children to the United States and the appellant who objected to that course and claimed an order for custody from the Family Court of Australia.

<u>The Convention</u>

The Act was substantially amended, with effect from 11 June 1996, by the *Family Law Reform Act* 1995 (Cth). Amongst the changes introduced by that Act were amendments altering the Australian law on custody and access. However, these proceedings have been conducted in accordance with the provisions of the Act as it stood before the amendments. At that time, s 111B(1) provided:

" The Regulations may make such provision as is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the 'Convention') but any such regulations shall not come into operation until the day on which that convention enters into force for Australia."

The Convention comprises Schedule 1 to the Regulations. Its first preambular statement asserts that the States parties to the Convention were:

" Firmly convinced that the interests of children are of paramount importance in matters relating to their custody..."

The second such statement asserts that the States parties were:

" Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access..."

The objects of the Convention are stated in Article 1 to be:

"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

The Convention contemplates that, within the several Contracting States, differing arrangements may apply to the determination of applications for the return of a child. Thus, they may be judicial or administrative in character. [FN79] In Australia, they are judicial.

There follows the article of the Convention imposing the duty to return a child [FN80] and the article providing exceptions [FN81]. The former provides (so far as relevant):

" Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

The critical provisions of Article 13 read:

" Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The Convention provides that a decision relating to custody in the requested State should not by itself be a ground for refusing to return the child [FN82]. The power of the judicial or administrative authority to order the return of the child at any time is not limited by the Convention [FN83]. By Article 19 it is expressly provided:

" A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

A further exception to the obligation of return appears as follows [FN84]:

" The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Provisions are made to ensure that formalities are minimised [FN85] and applications facilitated [FN86]. The remaining articles of the Convention need no comment.

<u>The incorporating regulations</u>

The Regulations commenced operation on 1 January 1987. It was on that day that the Convention came into force in Australia [FN87]. As they now stand, the Regulations, in Part 1, contain, inter alia, certain definitions. In Part 2> provision is made for applications other than for access to be made to Central Authorities. Part 3 provides for court applications in cases other than for access. Regulation 14 provides for the application by the responsible Central Authority to a court in relation to a child who is removed from a Convention country and retained in Australia. A wide range of powers are conferred on the court under reg 15 [FN88]. There follows reg 16. In the form in which it has been assumed to be relevant to these proceedings, it reads, relevantly:

"(1) Subject to subregulations (2) and (3); on application under regulation 14, a court must make an order for the return of a child:

(a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or

(b) if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.

...

(3) A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:

(a) the person, institution or other body making application for return of a child under regulation 13:

(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

..."

The language of the opening words of reg 16(3) has been altered from that originally appearing. As originally made, the sub-regulation mirrored more precisely the provisions of the Convention. Until 26 October 1995 [FN89], the opening words of the sub-regulation read:

"(3) A court may refuse to make an order under sub-regulation (1) or (2) *if it is satisfied that...*" (emphasis added)

Clearly, the purpose of the amendment to reg 16(3) was to cast on the "person opposing return" the obligation of establishing the application of one or more of the exceptions [FN90]. The appellant attached significance to the suggested variance between the language of the Convention and the amended language of reg 16(3).

I have read the opinion of the other members of the Court to the effect that the new form of reg 16(3) did not apply to this case because it did not attach to the initiating application as one "[made] under subregulation (1) [of reg 16]" in its revised terms. The contrary was assumed by the Full Court of the Family Court and by the arguments of all parties in this Court. I am not convinced that the previous form of the regulations applied. The words in the new sub-regulation would ordinarily be given an ambulatory meaning in keeping with its procedural character. If the opinion of the other members of the Court is correct on this point, many of the arguments of the parties were irrelevant to the proceedings. However, as those arguments were heard and concern the validity and meaning of the Regulations, I am of the view that the Court should answer the arguments.

<u>Interpretation of the Convention and Regulations</u>

Before considering the arguments of the appellant, it is useful to say something about the interpretation of the Convention. This is relevant both to the submissions about the validity of the Regulations as fulfilling the purposes identified in s 111B of the Act and, if valid, as to the meaning of the expressions contained in the Regulations derived from the Convention.

The apparent purpose of the Regulations is to make provision of the kind permitted by s 111B of the Act. So far as is presently relevant (and subject to the complaint about variance) reg 16 (3) follows quite closely the language of the Convention. It may therefore be inferred that it was intended by the rule maker that the words used in the Regulations should attract the same meaning as would be given by international law to the words of the Convention itself.

Where a treaty is incorporated as part of local law, Australian courts will interpret that law in accordance with the international law governing the interpretation of treaties [FN91]. The rules were originally governed by international custom. Stimulated by the work of International Law Commission, the International Court of Justice accepted that its "first duty", when called upon to "interpret and apply the provisions of a treaty", was to "endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur". If, however, the words are "ambiguous or lead to an unreasonable result",

the Court held itself entitled to resort to other methods of interpretation seeking to "ascertain what the parties really did mean when they used these words" [FN92].

This approach is now reflected in the Vienna Convention on the Law of Treaties [FN93]. Those provisions are regularly applied by Australian courts to guide them in a principled and consistent construction of treaties of local significance [FN94]. This is done as a matter of law and out of comity to ensure that the interpretation of international treaties by Australian courts will, so far as possible, conform to the approach which will be taken by the courts of other countries in relation to the same treaty.

Some courts have followed quite a strict rule, akin to that formerly observed by the common law: excluding travaux préparatoires, historical, argumentative and other material and confining attention to the language of the treaty in question. For example, this appears to have been the approach taken to the interpretation of the language of the present Convention in the decision of the Full Court of the Family Court in In the Marriage of Hanbury-Brown, SS & Hanbury-Brown, R; Director-General of Community Services [FN95]. However, it is probably fair to say that, both before international tribunals and municipal courts, there is now a greater willingness to look to relevant background material, than was formerly the case. In this respect, the practice of international law parallels that of Australian municipal law. By the time cases get before courts of high authority, international and municipal, suggestions of ambiguity or uncertainty tend to be insistent [FN96]. Even parties which support a construction, based upon the text alone, ordinarily seek to bolster their arguments by reliance on extrinsic material. So it has proved in this case.

The Supreme Court of Canada permitted reference to be made to, and itself utilised, the travaux on the present Convention in order to understand its purpose and in particular the reference, in the preamble, to the fact that "the interests of children are of paramount importance" [FN97]. Except in cases of unarguably clear treaty language, courts today regularly have resort to the opinions of scholars, reports on the operation of the treaty and decisions of municipal courts addressing analogous problems [FN98]. But in the end, the object of the task of interpretation of treaty language is the same as that of interpreting municipal legislation. It is to give meaning to the words used, read in their context and, to the fullest extent possible, for the purpose of achieving the objects which are stated or otherwise apparent.

Reference to the materials placed before this Court shows that the present Convention grew out of certain urgent contemporary needs:

"The spread of international transport throughout the world and the reduction of barriers to immigration and tourism mean that increasingly marriages and relationships cross nationalities and cultures [FN99]."

The impetus for a treaty to deal with international child abduction derived from the often dramatic circumstances in which children have been seized by parents or relatives from their place of habitual residence and removed to another country [FN100].

As a result of debates in the United Kingdom Parliament, and work of the Law Commissions of that country, initiatives were taken by the Council of Europe, the Secretariat of the Commonwealth of Nations and the Hague Conference on Private International Law to produce an effective response to the problem of international child abduction. The Hague Conference prepared a Draft Convention which, in turn, drew upon earlier work of experts of the Council of Europe [FN101]. The latter had proposed a system by which a custody decision would be obtained in one Member State for which, by a so-called "chasing order", steps would be taken to invoke the assistance of the authorities of another Member State. A Special Commission of the Hague Conference considered that it would be wrong to require a person to

obtain a "chasing order". It considered that this would be an inappropriate precondition and one likely to cause unnecessary delay [FN102]. It was also concerned that [FN103]:

"The removal of a child from the person who effectively had it in his care was considered to be legally and morally unacceptable where it was not authorised by the law of the State where the child habitually resided, even where such removal might be consistent with a decision rendered by the courts of the abductor's own State.

It was decided, therefore, to draft a Convention which would concern itself with custody *rights* rather than with custody *decisions* and which would concentrate upon securing the prompt return of a child who had been removed in breach of custody rights effectively exercised under the law of his habitual residence."

The approach proposed by the Special Commission of the Hague Conference for the Convention challenged the legal notions of both civil law and common law countries. For the former, it was a novel idea that a child might be returned although a local custody order had been made in favour of the abducting parent. For the latter, it was a new idea that a court should order the return of the child [FN104]:

"subject to certain limited exceptions, despite the possibility that further inquiries might disclose that the child's welfare would be better secured by its remaining in that State."

The experts from the common law countries accepted that the rules evolved by the common law (expressed, for example, in the Privy Council decision in Mark T McKee v Evelyn McKee [FN105]) were unsatisfactory. Those rules virtually assured protracted litigation in the search for what, objectively, was in the best interests of the child. Whilst that search went on through the court hierarchy time tended to run against the interests of the party who had suffered the wrong of abduction [FN106].

It was out of the recognition of the serious imperfections of previous remedies, of the "evil" of child abduction [FN107], of the growing incidence of the global problem of abduction which had accompanied modern international air transportation and the imperative need for effective international cooperation, that the Convention was framed as it was. Abduction cases were to be clearly identified as constituting a distinct category of cases affecting children. They were to be treated differently from other decisions concerned with the welfare of children [FN108].

This purpose appears, relatively clearly, in the language of the Convention itself. But any doubts are quickly dispelled by a study of the successive drafts, of the debates in the Special Commission which led to the adoption of the Convention and a consideration of the deliberations of a subsequent Special Commission on the operation of the Convention [FN109]. The Convention has been described by one author as "one of the most successful products of the Hague Conference on Private International Law" [FN110]. However, the author who expresses that view suggests that "some common law jurisdictions have not been over-enthusiastic in embracing its principles" [FN111]. When analysed, this reluctance derives not so much from constitutional inhibitions about fundamental rights or judicial power as from a deep seated bias of the courts of common law countries. That bias is in favour of ensuring procedural fairness to all before the courts (including children) and insisting that decisions affecting a child should be specially sensitive to the evaluation by the court in question of the welfare and best interests of that child.

The basic problem is well illustrated by the present case. Unless Australian courts can lawfully adapt their procedures to ensure a speedy and summary resolution of applications pursuant to the Convention, made under the Regulations, they will inevitably become engaged in the objective assessment of the individual welfare of the child. This could frustrate and defeat the

achievement of the purposes of the Convention. Central to those purposes is the intention that, save in the most exceptional of cases, a child should ordinarily be returned quickly to the jurisdiction of habitual residence from which the child was abducted. Disputes about custody and access should be determined in that jurisdiction. Save in exceptional cases, the procedures for return under the Convention should not be transformed, effectively, into a hearing about the custody of the child. Whenever that happens, the fundamental objective of the Convention will be defeated. The abducting parent then secures the fruits of conduct which not only offends international law but is usually highly disruptive to the well-being of the child involved and its relationship with the other parent. The objective of deterring international child abduction is also defeated. International comity and cooperation, so necessary for the implementation of the Convention, are defeated. The purpose of the government and legislature of the requested State in adhering to the Convention and incorporating it in municipal law is defeated. All of this follows clearly enough from the Convention. A study of the travaux and other relevant writing available to elaborate its meaning merely confirms this.

Validity of the regulations

The first argument of the appellant, was that the attempted incorporation of the Convention into Australia's municipal law had failed because the regulations purporting to do so were invalid.

The argument was advanced upon three bases:

(1) that s 111B of the Act did not itself afford regulation making power and that the general power to make regulations, contained in s 125 of the Act, was subject to the limitation that any such regulations must not be inconsistent with the Act. By this means, the appellant sought to introduce what was described as the "paramountcy principle" of the best interests of the child, reflected elsewhere in the Act, most notably in the language of s 64 (1)(a) as it then stood. To the extent that the Regulations, and specifically reg 16(3), purported to require decisions to be made inconsistent with the determination of the child's best interests, the Regulations were invalid as inconsistent with the Actand hence outside s 125;

(2) If, contrary to (1), s 111B itself sufficiently empowered the making of the Regulations, it did so only to give effect to the Convention. But the Regulations, as made and applied to this case, went beyond the Convention and therefore beyond the power granted to the lawmaker by s 111B. To that extent the Regulations were invalid; and

(3) if contrary to (1) and (2), the Regulations were otherwise valid, because they failed specially to provide a procedure whereby the court, with procedural fairness, reserved to itself the determination of any objection on the part of a child, reg 16(3) was invalid as not giving effect to Art 13 of the Convention.

The last two grounds of objection merge into each other. The first is distinct. Obviously, if the Regulations are not valid, the Convention would be no more than an unincorporated international treaty. This would leave it open to the appellant to invoke the "paramountcy principle" of the welfare of the child in a custody (or equivalent) proceeding in Australia, uncontrolled by an international treaty relating to child abduction.

This first argument has no merit. Section 111B (1) provides ample foundation for the making of the Regulations, without need to resort to s 125 of the Act. Moreover, as s 111B(1) of the Act is expressed, the Regulations are not required simply to incorporate the Convention. Section 111B states that the Regulations will be valid in so far as they are "necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention". It is hard to imagine a more ample grant of regulation-making power. The argument that another source of power is necessary (viz s 125) fails, when

the obvious purpose of s 111B is considered. The attempt, by way of s 125, to incorporate all of the express references to the welfare or best interests of the child contained in the Act fails at the threshold.

But what of the argument that the variance between the Regulations and the Convention with respect to the burden of establishing an objection, represents such a departure from the terms of the latter as to take the former beyond the Parliament's imputed intention, as stated in s 111B? This argument also fails for a number of reasons.

First, as has been pointed out, the language empowering the making of the Regulations is not confined to a literal implementation of the Convention. Typically, international treaties are expressed in language negotiated at international conferences in which there is participation from different linguistic, legal and cultural traditions. In translating an international treaty into the detail typical of Australian legislation, a margin of discretion must be allowed. This is recognised in the terms of s 111B itself. Those terms place the emphasis upon the making of regulations which will secure for Australia the advantages and benefits of the reciprocity for which the Convention provides. The fact that there is some variance, at least of the relatively minor nature exhibited in the assignment of the burden of proof in reg 16(3), matters not.

Secondly, the introduction of an explicit provision as to the burden of proof in the new form of reg 16(3) may be no more than a recognition of the way in which an Australian court, being the "judicial authority" for this country, ordinarily operates. In contested custody matters Australian courts will often, of their own motion or upon request, investigate the wishes of a child of mature years. Such a court might make arrangements for the interview of the child or for the separate representation of the child. However, the adversarial system normally demands that issues be refined by the assignment to one of the parties before the court of the forensic obligation to establish a matter in issue. I take the opening words of reg 16(3), in its amended terms, to do no more than this.

Thirdly, reg 16(3) does not purport to remove from the Family Court of Australia its own independent function, where necessary, of determining whether a child "objects" in accordance with par (c). The opening words of reg 16(3) afford to that Court a discretion ("may") to refuse to make an order for return of a child. In the exercise of that discretion, the Family Court could make, or order, its own enquiries, as, at least in the case of possible objection, the language and structure of the Convention appear to envisage.

Fourthly, the assignment of the burden of proof to the person who opposes the return of a child is not unique to the Australian regulations. It is also found in the law of the United States of America [FN112] and New Zealand [FN113], two other common law countries accustomed to adversarial trial procedures.

Fifthly, the assignment of the burden of proof, as the equivalent of the "burden of persuasion", to the party opposing return of a child conforms to an opinion of the experts at the Hague Conference on Private International Law. Annexed to the written submission of the Commonwealth (intervening) was a communication from the Deputy Secretary-General of the Hague Conference to the Solicitor-General of Australia which was received by the Court without objection [FN114]:

" I do not think that the second paragraph of Article 13 requires States Parties to place the onus of proof on the person opposing return. Some legal systems may even require that the judge take the initiative of interviewing the child personally and ascertaining his or her views. On the other hand, I think that the Convention leaves States Parties free to allocate the onus of proof under this paragraph to the person opposing return, as well as to fix the onus of persuasion, as Australia, New Zealand and the United States have done in their various ways."

The appellant also sought to attack the validity of the Regulations, upon the ground that they did not conform to the "paramountcy principle", by reference to the terms of the Act. The invocation of s 64(1)(a) of the Act, in its then language [FN115], is irrelevant. Proceedings under the Regulations cannot properly be characterised as "proceedings in relation to the custody or access" of a child. The proceedings are brought under a different part of the Act and for separate, particular and identified purposes expressly authorised by the Parliament.

Australia has ratified the United Nations Convention on the Rights of the Child 1989 ("the CRC") [FN116]. Article 12 of the CRC provides:

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Australian legislation will be construed, and the common law developed, so far as possible, to conform with Australia's obligations under treaties which Australia has ratified. This principle extends to the CRC, although not expressly incorporated into Australia's municipal law [FN117]. The Full Court of the Family Court has held that the Convention in question in these proceedings is not inconsistent with the CRC [FN118]. However that may be, if there were any disharmony, the duty of an Australian court would clearly be to comply with the plain language of a valid Australian law. The Convention here in question is concerned, relevantly, with protecting the rights of children from the disruption and psychological harm which may follow international abduction. The CRC also envisages that action will be taken to combat this particular problem [FN119]. Both the Convention and the CRC are, in this sense, concerned with aspects of the welfare of children. Both Article 13 of the Convention and Article 12 of the CRC contemplate that, where children are mature enough to form their own views, they should be listened to for the purposes stated. But in the case of the Convention, which addresses a specific problem both of children and of the international community, the views will not be given weight, even in the case of a child of sufficient age and maturity, unless they amount to an objection. This specific provision must be respected not only because it is reflected in reg 16(3)(c) of the Regulations but also because any other approach would defeat the achievement of the objectives of the Convention which Australia has ratified and which the Parliament, by s 111B of the Act, has endorsed.

Regulation 16(3) is a valid exercise of the power afforded by the Parliament under s 111B of the Act. No other regulation addressed in argument has been shown to be invalid.

Interpretation and the "paramountcy principle"

Upon the assumption that the Regulations were valid, the appellant next contended that the judges in the majority in the Full Court of the Family Court had failed to construe the Regulations in a way consistent with the obligation to treat as paramount, in every decision affecting a child, the welfare (or as it is now expressed "the best interests" [FN120]) of that child. This obligation was described as the "paramountcy principle".

It was argued that the paramountcy principle was derived from the common law and from the duty of Australian courts to act as *parens patriae,* in succession to the Sovereign's prerogative as the ultimate protector of children [FN121]. It was submitted that this principle was a longstanding feature of child welfare legislation in Australia and of other statutes affecting children. It was "the legislative foundation" for the jurisdiction of the Family Court

established by the Act [FN122] as illustrated, at the time of these proceedings at first instance, most notably by s 64 (1)(a) of the Act. Even since the passage of the *Family Law Reform Act* 1995 (Cth), the principle was reflected in numerous sections of the Act, as then amended [FN123]. It was also reflected in the preamble to the Convention [FN124] and in many provisions of the CRC ratified by Australia [FN125]. The earlier Declaration on the Rights of the Child [FN126] also provided that "[t]he child shall enjoy special protection" and that "[i]n the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration".

Against the background of these features, both of international and of municipal law, the appellant argued that the Regulations should be construed, so far as possible, to ensure that Australian courts would address, and uphold, in every case, the best interests of each child before the court. In the event of ambiguity, for example, as to the meaning of the word "objects" or over the procedure to be followed to ascertain any objection, the Regulations should be construed to accord with the paramountcy principle [FN127]. Conformably with Australian law requiring procedural fairness to be accorded to persons affected by court decisions, it would require very clear statutory language to deprive a child of the opportunity to be heard before a decision was made affecting his or her best interests [FN128].

The answer to these arguments is that the welfare (or best interests) of a child, involved as the subject of proceedings under the Convention and the Regulations, must indeed be taken into account. But not so as to defeat the attainment of the objects of the Convention and the Regulations. Nor so as to turn a consideration of a possible objection of a child into a full scale custody hearing.

It is not strictly correct to say that the Convention is an exception to the usual concern of our law for the welfare or best interests of a child or that the Regulations incorporating it into Australian law exclude that consideration entirely [FN129], leaving it no part to play in the relevant decisions [FN130]. What the Convention, reflected by the Regulations, has done is to recognise that it is in the best interests of children as a class not to be subjected to the turmoil and emotional divisiveness of international abduction. Wherever this occurs the child involved is ordinarily to be returned to the country in which the child was habitually resident before the abduction. It is in that jurisdiction that contests about custody and access (or their equivalent) are to be litigated.

The exceptions provided for by the Convention (and reflected in the Regulations) are narrowly drawn. They should be narrowly construed. Any other approach would be completely inconsistent with the language, objectives and history of the Convention as I have explained them [FN131]. It would undermine the attainment of those objectives if, in the guise of deciding whether a child objected to being returned, a court were to enlarge its inquiry into the kinds of considerations which are normal to custody and access decisions (and their equivalents) - exploring to the full an assessment of the best interests of the child. That is not how the Convention is expressed. It is not how it is intended to operate. Nor is it the intended operation of the Regulations. It is not the way in which the Convention, and the domestic law incorporating it, has been construed by the courts of the United Kingdom [FN132], the Republic of Ireland [FN133], New Zealand [FN134], Germany [FN135], Argentina [FN136] or other Convention States [FN137].

To the extent that this conclusion implies some modification of the "paramountcy principle", or even adaptation of the ordinary expectations of procedural fairness under Australian law, this is what the Convention, and the Regulations incorporating it, clearly require. Any other construction would amount to a defiance of the clear intention of the Australian Parliament, reflected in the Regulations, whose constitutional validity has not been challenged. It would undermine the reciprocity upon which the Convention rests. And it would run the risk of

returning this country to the unsatisfactory state of the law before the Convention was negotiated and came into force. Putting it quite bluntly, Australia cannot expect other contracting States to trust its courts to determine lawfully and fairly the best interests of abducted children, where such children are returned to Australia, if our courts do not accord a similar reciprocal respect to the courts of the other Contracting States, exceptional cases aside [FN138].

The meaning of a child's objection

The appellant next submitted that the judges in the Full Court of the Family Court had misconstrued the meaning of the word "objects" in the Convention [FN139] and the Regulations [FN140]. They had done so by holding that the evidence of the appellant, and of the counsellor about the children's views in this case, fell short of an objection of the kind referred to. The appellant argued that the word "objects" in its context meant no more than to exhibit "an expression or feeling of disapproval".

A number of arguments can be advanced to support the adoption of a broad interpretation of the word "objects":

1. The word is used to describe the response of children who may be of differing ages and maturity and who may exhibit differing capacities to articulate their sentiments. No particular form of words or assertiveness in their expression should be required. To do so would ignore not only the different capacities of individual children but the varying cultures in which the Convention is expected to operate [FN141].

2. Naturally, the child whose response is sought, will often be torn between loyalty to, and dependence upon, the abducting parent. But the child will also typically have affection towards the other parent. In the real world, such affection would often make it difficult for a child to express a strong and assertive objection. But that sentiment may nonetheless be felt.

3. Because courts typically, and understandably, discount the evidence of the abducting parent, they are forced into reliance upon expressions of views conveyed by a child to counsellors and, by them, to the court. However professional they may be, counsellors are strangers to the child who will often find the interview an intimidating experience in which it is requested to express to a stranger deeply felt emotions. Unless the child's views have been rehearsed, it is unlikely that it will express them in terms of the adult notion of objection.

4. Even where an objection is found, it still falls to the Family Court to determine whether the child has "attained an age and degree of maturity at which it is appropriate to take account of the child's views". Even where this is concluded, the Court nonetheless retains a discretion under reg 16(3). It may, in the exercise of its discretion, order the return of the child. Because it is necessary to pass through two further stages of decision-making, the objection contemplated in sub-reg 16(3) should not be narrowly construed [FN142].

These arguments are insufficient to persuade me that the word "objects" in the present context should be given a broad construction. Many reasons may be advanced for insisting upon a meaning of "objects" which "imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute" [FN143]:

1. The word must be read in the context of the international treaty from which it is derived, the primary purpose of which is to require the return of a child to the State of habitual residence; to deter international child abduction; and to deprive those engaged in it of the rewards for such conduct. The structure of the Convention, as of the Regulations, is ordinarily to require the return of the child unless a relevant exception is established [FN144]. Any other

construction would tend to undermine the achievement of the purposes of the Convention and of the Regulations incorporating it.

2. The Convention draws a clear distinction between the determination of rights of custody and the determination of an application following abduction [FN145]. The preference or wishes of a child of sufficient age and maturity will be relevant to a decision on custody, access or the equivalent. But something more is needed to defeat the high policy expressed in the Convention which the Contracting States have negotiated on a reciprocal basis. They have done so in the asserted belief that, in general, return will be in the best interests of children as a class. To defeat that policy something more than mere preference, wishes, convenience or even a local opinion on the welfare and best interests of the child is needed. The object of the Convention (and of the Regulations) is that those questions should be committed to the courts of the state to which the child is returned unless very exceptional circumstances exist [FN146].

3. This narrow approach not only conforms to the meaning of the word "objects" taken in its context. It is supported by the available background material on the Convention [FN147]. It is also confirmed by the comparison of the expression in the French language text, equally authentic, ("s'opposer à"). Dictionaries of the French language confirm as the primary meanings of that phrase: "faire obstacle, offrirer de la résistance"; "mettre obstacle ... agir contre, résister". As in the English language version, the word imports a denotation of strong aversion to something. This impression is also supported by the practical consideration that unless the word "objects" is given a narrow meaning, the court, hearing an application for return, would all too easily be led into a lengthy and detailed evaluation of the best interests of the child which would be to "drive a coach and horses through the primary scheme" [FN149].

4. Considerations of this kind have persuaded courts in Switzerland [FN150], Israel [FN151] and the United States [FN152] that the narrower view of "objects" must be adopted so that the attainment of the purposes of the Convention will not be compromised. The same considerations have led knowledgeable writers [FN153] and courts name [FN154] to express the opinion that successful objections to an order for return are likely to be few and far between. I agree with that approach. It may require some modification of the ordinary operation of the paramountcy principle. It may even require modification of the usual procedures for procedural fairness in Australian courts. But this is clearly inherent in the scheme adopted by the Convention, endorsed by the Parliament and implemented by the Regulations. Unless these are shown to be unconstitutional (a matter not suggested) the duty of Australian courts is to conform to that scheme.

<u>Approach to relief</u>

This said, the Convention and the Regulations clearly contemplate that there will be cases where a child "objects". The word must therefore be given an effective operation. From a practical viewpoint, the Family Court will ordinarily be able to rely upon the parent with custody of the child to tender evidence suggesting the existence of an objection by the child. This is what the Regulations, particularly in their amended form, contemplate about the process of persuasion.. The motivations which have caused a parent to abduct a child overseas and bring it over the long distance to Australia will ordinarily be enough to ensure that such a parent will put the best available evidence before the Family Court to establish the child's objection.

Unlike administrative and judicial authorities in many other countries, the Family Court of Australia has available to it independent and skilled counsellors who can assist to elicit an understanding of the child's feelings in its predicament and an assessment of the age and degree of maturity of the child, relevant to the Court's taking the child's views into account, if appropriate. In may be expected that, after this case, judges of the Family Court will frame their orders, directed to such counsellors, in terms addressed to the relevant question. Cases of

this kind should be differentiated from other cases before the Family Court in respect of other children within its jurisdiction [FN155]. Addressed to the right issue, and appreciating that "objects" involves a much stronger negative response than a mere expression of views and preferences, the counsellor may be expected to assist the judge with the material necessary to determine quickly whether or not a relevant objection exists.

If the judge is uncertain, from anything that appears in the evidence, including the counsellor's report, he or she would be entitled to secure relevant information by such other means as was thought appropriate [FN156]. In a proper case, the judge might interview the child concerned [FN157]. In an exceptional case, the judge might require that the child, or children, have separate legal representation. In my view, it is undesirable that this Court should limit the wide powers properly enjoyed by the experienced judges of the Family Court in discharging their duties, including by the exercise of the discretion which is reposed in them by reg 16(3) of the Regulations. So long as the judge keeps clearly in mind the limited purpose of the jurisdiction conferred, the ordinary way in which the Regulations and the Convention are expressed to operate and the need for a clear and compelling case to sustain an objection which permits an exception to the ordinary duty to order the return of the child, it can be left to the judges to deal with individual cases as the evidence requires.

Orders in the present case

When the foregoing principles are applied to the evidence in this case, I do not doubt that such evidence fell far short of establishing an objection of the kind to which the Convention and reg 16(3)(c) speak. It was no more than an expression of preference, of the children's wishes and convenience. It should not have stood in the way of an order for return.

However, there are three complications which restrain me from simply confirming the orders favoured by the majority in the Full Court of the Family Court.

First, those orders are substituted for the orders of the primary judge which, in turn, were based upon a counsellor's report addressed to the wrong issue. It may be said that, if the evidence, including the counsellor's report, did not establish the existence of an objection, it would not have done so if the correct issue had been identified in the order to the counsellor. That is probably so. But it is important that the proceedings should not miscarry because an opportunity was lost to gather evidence directed to the relevant question. It is especially important that they should not miscarry because of an error of a judge in defining that question.

Secondly, by reason of nothing more than the delays which have attended this litigation, a great deal of time has now elapsed since the order was made by the primary judge. What might have been proper at that time, by the summary procedure envisaged by the Convention and the Regulations, cannot now be entirely recaptured by the orders of appellate courts. The lapse of time presents a risk that the children, who are now a year older than when they were seen by the counsellor, may indeed have formulated an objection of the kind contemplated by reg 16(3)(c). Alternatively, it might now be open to a court to conclude that to return them to the United States would pose a grave risk that they would be placed "in an intolerable situation" as reg 16(3)(b) envisages. The serious lapse of time cannot be ignored.

Thirdly, the Court was informed that, apparently because of that lapse of time, the State Central Authority now agreed "that the proceedings be remitted for rehearing by a judge with the benefit of an updated report from a court counsellor". In the face of that agreement, and considering for myself the procedural error and the lapse of time, I would not be prepared simply to dismiss the appeal.

When the matter is returned to the Family Court, it may be expected that the judge will have the advantage of a counsellor's report directed to the correct issue. In the light of this decision, it may also be expected that the judge will exercise the jurisdiction of the Family Court in a summary manner. Cases where a child is not returned after abduction will be confined to the truly exceptional circumstances envisaged by the language, purpose and scheme of the Convention and the Regulations.

A judge of the Family Court of Australia enjoys a wide discretion in the procedures to be adopted in cases of this kind. But not so large as would defeat the attainment of the objectives of the Convention and Regulations. Nor such as would repeat the chronicle of delay which has marked this case. That delay should stand as a warning of the way in which, without firm judicial control, ordinary procedures can be used to undermine the objectives of an international treaty with important benefits for Australia, to frustrate the will of the Parliament that Australia should enjoy and reciprocate those benefits and to defeat the application of valid Regulations which contemplate that Australian courts will deal with such cases quickly and accurately.

For these reasons, I agree in the orders proposed by the other members of the Court.

[1] Director General, Department of Community Services v De L [1996] FLC 92-674.

[2] [1996] FLC 92-674 at 83,015.

[3] De L v Director-General, NSW Department of Community Services (1996) 70 ALJR 532; 136 ALR 201.

[4] cf Re Foley; Channell v Foley (1952) 53 SR (NSW) 31 at 36.

[5] Schedule 2 also includes in the list of Convention countries, Canada, the United Kingdom, Ireland and New Zealand and in argument this Court was taken to authorities from those countries.

[6] Eekelaar, "International Child Abduction by Parents", (1982) 32 *University of Toronto Law Journal* 281 at 305.

[7] Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 550.

[8] *Victoria v The Commonwealth* (1996) 138 ALR 129 at 145, 211-212, 215.

[9] *Victoria v The Commonwealth* (1996) 138 ALR 129 at 146-148, 211-212, 215.

[10] The Family Law (Child Abduction Convention) Regulations Amendment, SR No 296 of 1995 ("the 1995 Amendment"), substituted (by reg 3) a definition of the Commonwealth Central Authority as the Secretary of the Attorney-General's Department.

[11] Regulation 14 was in these terms:

"Nothing in these Regulations prevents a person, institution or other body from applying directly to a court of competent jurisdiction, whether or not under the Convention, in respect of the breach of rights of custody of, or breach of rights of access to, a child removed to Australia."

[12] Specific provision to like effect is now made in the Regulations themselves (reg 26, inserted by the 1995 Amendment).

[13] regs 13, 14 and 15.

[14] ***Acts Interpretation Act*** **1901 (Cth), s 50.**

[15] [1996] FLC 92-674 at 83,014 and 83,022.

[16] The true position had been pointed out in the decision on the stay application to this Court: ***De L v Director-Genera, NSW Department of Community Services*** **(1996) 70 ALJR 532 at fn 1; 136 ALR 201 at fn 1.**

[17] [1996] FLC 92-674 at 83,027 per Kay J (Mushin J agreeing).

[18] [1996] FLC 92-674 at 83,028.

[19] (1993) 816 F Supp 662.

[20] 102 Stat 437; 42 USC SS11601.

[21] (1986) 51 Fed Reg 10493 at 10509. This analysis had been sent by the Department of State to the Chairman of the Senate Committee on Foreign Relations to assist consideration by the Committee and the full Senate of the Convention, which had been transmitted by the President for the advice and consent of the Senate. It was annexed to a Public Notice published in the Federal Register.

[22] (1993) 816 F Supp 662 at 667.

[23] Re R (A Minor: Abduction) [1992] 1 FLR 105 at 108.

[24] S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 at 499 per Balcombe LJ.

[25] [1994] SLT 988.

[26] [1994] SLT 988 at 993.

[27] [1994] SLT 988 at 998.

[28] [1992] 2 FLR 492 at 499.

[29] [1992] 2 FLR 492 at 499-500.

[30] ***Clarke v Carson*** **[1996] 1 NZLR 349 at 351. This passage was accepted without challenge by the New Zealand Court of Appeal in** ***A. v The Central Authority for New Zealand*** **unreported, 11 June 1996 at 8.**

[31] [1992] 2 WLR 536 at 550 per Lord Donaldson of Lymington MR.

[32] [1996] FLC 92-674 at 83,017.

[33] A reference to Part VII was repealed, and a new Pt VII substituted, by> s 31> of the ***Family Law Reform Act*** **1995 (Cth) ("the 1995 Act"), which commenced on 11 June 1996.**

[34] ***ZP v PS*** **(1994) 181 CLR 639 at 646-647.**

[35] ***ZP v PS*** **(1994) 181 CLR 639.**

[36] ***ZP v PS*** **(1994) 181 CLR 639 at 648.**

[37] [1996] 1 NZLR 349.

[38] Inserted by s 31 of the 1995 Act. Provision for separate representation previously had been made in s 65 of the Act, repealed by s 31 of the 1995 Act. In *Re K* (1994) 17 Fam LR 537 at 555-559, the Full Court of the Family Court suggested as "guidelines" thirteen categories of cases in which appointments should normally be made. These categories are not directed specifically to Convention applications.

[39] Examples (from cases where there were issues as to acquiescence (reg 16(3)(a)) and grave risk to the child (reg 16(3)(b)) are given by Budd J in the Irish High Court in *MDP v SMB* [1995] 1 ILRM 30 at 45.

[40] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

[41] As reg 15(3) stood at the time of the institution of the application, it authorised the inclusion in an order of "such conditions on the removal of the child from [a place specified in the order] as the court thinks fit".

[42] [1994] 3 SCR 551 at 599.

[43] [1993] 2 FLR 401.

[44] [1989] 2 All ER 465; [1989] 1 WLR 654.

[45] [1992] 1 FLR 155.

[46] [1988] 1 FLR 365. This and the preceding three decisions were given by English courts.

[47] [1989] 2 All ER 465; [1989] 1 WLR 654.

[48] [1989] 2 All ER 465 at 469; [1989] 1 WLR 654 at 659.

[49] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

[50] Section 68L commenced 11 June 1996. Regulation 26 was introduced by the 1995 Amendment, with effect from 1 November 1995 and amended, with effect from 11 June 1996, by the Family Law (Child Abduction Convention) Regulations (Amendment), SR 74 of 1996. These provisions are procedural in character (in the sense described in authorities such as *Maxwell v Murphy* (1957) 96 CLR 261 at 267, 285-287) and thus should be applied at the rehearing.

[51] *Director General, NSW Department of Community Services (State Central Authority) v De L* [1996] FLC 92-674.

[52] Signed at The Hague (The Netherlands), 25 October 1980.

[53] Regulation 16(1). Regulation 2(1) defines "court" as "a court having jurisdiction under paragraph 39(5)(d) or 36(6)(d) of the Act..."

[54] Article 6.

[55] Pursuant to Art 8

[56] Regulation 8(1).

[57] Section 38(1)(d) creates the position of court counsellor as an "officer of the Court". At the relevant time s 62A(1) empowered the court to direct a court counsellor to "furnish to the court a report on such matters relevant to the proceedings as the court thinks desirable" under certain circumstances. See now ss 62C, 62D, 62E, 62G of the Act.

[58] [1996] FLC 92-674 at 83,018.

[59] 18 USC SS1204.

[60] 8 USC SS1182.

[61] ***De L v Director-General, New South Wales Department of Community Services*** **(1996) 76 ALJR 532; 136 ALR 201.**

[62] Article 1 ("prompt"); Art 2 ("expeditious"); Art 7 ("prompt"); Art 9 ("directly and without delay") and Art 11 ("expeditiously", "within six weeks from the date of the commencement of the proceedings").

[63] Regulation 13(3) ("As soon as possible"); reg 15(2) ("quickly"); reg 15(2) ("within 42 days"); and reg 20(2) ("within 7 days" and "immediately").

[64] For example, S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 at 501 per Balcombe LJ.

[65] (1994) 18 Fam LR 307.

[66] (1994) 18 Fam LR 307 at 319. cf ***The State of Victoria v The Commonwealth of Australia,*** **unreported, High Court of Australia, 4 September 1996 at 15-19, 119-120, 125.**

[67] Section 39(5)(d).

[68] As required by Art 12.

[69] See Art 4.

[70] Article 13. cf McClean, "The Hague Child Abduction Convention - The Common Law Response", (1993) 40 ***Netherlands International Law Review*** **67 at 75;** ***Re E (A Minor) (Abduction)*** **[1989] 1 FLR 135;** ***Soucie v Soucie*** **[1994] SCLR 1026; [1995] SLT 414.**

[71] See Art 12. cf ***Rajaratnam v Rajaratnam-Hertig*****, Decision of the Supreme Court of Appeals of the Canton of Zurich, Switzerland, 19 December 1988 cited by Kay J in the Family Court: [1996] FLC 92-674 at 82,028.**

[72] ***Director General, NSW Department of Community Services (State Central Authority) v De L*** **[1996] FLC 92-674 at 82,028 per Kay J.**

[73] Anton, "The Hague Convention on International Child Abduction", (1981) 30 ***International and Comparative Law Quarterly*** **537 at 543.**

[74] ***Soucie v Soucie*** **[1995] SLT 414 at 417;** ***P v P (Minors) (Child Abduction)*** **[1992] 1 FLR 155 at 161.**

[76] Hague Conference on Private International Law, "Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction", (1994) 33 ***International Legal Materials*** **225 at 242.**

[77] Article 13; see also reg 16(3)(c).

[78] cf Pérez-Vera, "Explanatory Report", Hague Conference on Private International Law, *Actes et documents*, vol 3 (1982) 425 at 434-435.

[79] Article 11.

[80] Article 12.

[81] Article 13.

[82] Article 17.

[83] Article 18.

[84] Article 20.

[85] Articles 22 (no security bond or deposit required) and 23 (no legalization or similar formality required).

[86] Articles 24 (language requests), 25 (legal aid) and 26 (costs).

[87] *Special Commonwealth of Australia Gazette*, 1 May 1986.

[88] Including for delivery up of the child's passport. See reg 15(3).

[89] That is, until the amendment of the subregulation by SR 1995 No 296, which commenced operation on 1 November 1995.

[90] Another drafting addition involved the insertion of "or" between each of the paragraphs of the sub-regulation but this is of no relevant consequence.

[91] *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 at 159.

[92] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion,* [1950] ICJ Reports 4 at 8.

[93] Articles 31 and 32. See *Australia Treaty Series* (1974) No 2.

[94] *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595 at 621-622.

[95] [1996] FLC 92-671, involving the meaning of the expressions "habitual residence" and "wrongfully removed".

[96] d' Aréchaga, "International Law in the Past Third of a Century" in *Académie de Droit International, Recueil des Cours,* (1978) vol 1 at 46.

[97] *Thomson v Thomson* (1994) 119 DLR (4th) 253 at 272-273.

[98] *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595; *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* [1991] 1 Lloyd's Rep 288 at 294.

[99] Dyer, "The Hague Convention on the Civil Aspects of International Child Abduction - towards global cooperation", (1993) 1 *International Journal of Children's Rights* 273 at 292.

[100] Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537.

[101] Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 541.

[102] Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 542.

[103] Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 542.

[104] Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 542.

[105] [1951] AC 352.

[106] See McClean, "The Hague Child Abduction Convention - The Common Law Response", (1993) 40 *Netherlands International Law Review* 67 at 70.

[107] Summerskill (then Under-Secretary of State of the Home Office) in *Hansard*, United Kingdom, House of Commons, vol 946 col 1846 cited in Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 537.

[108] McClean, "The Hague Child Abduction Convention - The Common Law Response", (1993) 40 *Netherlands International Law Review* 67 at 74.

[109] Hague Conference on Private International Law, "Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", (1990) 29 *International Legal Materials* 220.

[110] McClean, "The Hague Child Abduction Convention - The Common Law Response", (1993) 40 *Netherlands International Law Review* 67 at 67.

[111] McClean, "The Hague Child Abduction Convention - The Common Law Response", (1993) 40 *Netherlands International Law Review* 67 at 67.

[112] 42 USC 11603(e)

[113] *Guardianship Amendment Act* 1991 (NZ), s 13.

[114] Dyer, correspondence to the Solicitor-General for Australia, 28 August 1996.

[115] Section 64 of the Act was repealed by s 31 of the *Family Law Reform Act* 1995 (Cth) which commenced operation on 11 June 1996.

[116] *Australia Treaty Series* (1991) No 4.

[117] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

[118] *Murray v Director, Family Services, ACT* [1993] FLC 92-416.

[119] Articles 11.1, 35.

[120] The Act, ss 63B, 65E, 67ZC, 68E, 68F, 68K, 68L and 68T(2)(b).

[121] ***Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)*** **(1992) 175 CLR 218 at 258-259;** ***ZP v PS*** **(1994) 181 CLR 639> at 646-647.**

[122] See in particular ss 31, 39(5)(a), and 125.

[123] See ss 63B, 65E, 65V, 67ZC, 68E, 68F, 68K, 68L and 68T(2)(b).

[124] cf ***Thomson v Thomson*** **(1994) 119 DLR (4th) 253 at 273, 288.**

[125] The CRC entered into force for Australia as from 16 January 1991. See Arts 3.1, 9.1 and 18.1.

[126] Principle 2. See ***Human Rights and Equal Opportunity Commission Act*** **1986 (Cth), Sched 3.**

[127] ***Thomson v Thomson*** **(1994) 119 DLR (4th) 253 at 308.**

[128] cf ***J v Lieschke*** **(1987) 162 CLR 447 at 458-460.**

[129] cf ***Chalkley v Chalkley*** **[1994] 10 WWR 114.**

[130] ***McCall and State Central Authority; Attorney-General of the Commonwealth (Intervener)*** **(1994) 18 Fam LR 307 at 318.**

[131] ***Soucie v Soucie*** **[1994] SCLR 1026; [1995] SLT 414.**

[132] ***In re A (Minors) (Abduction: Custody Rights)*** **[1992] 2 WLR 536 at 550 per Lord Donaldson of Lymington MR.**

[133] ***Wadda v Ireland*** **[1994] ILRM 126.**

[134] ***Adams v Wigfield*** **[1994] NZFLR 132;** ***Anderson v The Central Authority for New Zealand,*** **unreported, Court of Appeal of New Zealand, 11 June 1996.**

[135] See ***G and G*** **(1996) 35** ***International Legal Materials*** **533;** ***M and M*****, unreported, Germany, Federal Constitutional Court, 15 August 1996.**

[136] ***Wilner v Osswald,*** **Supreme Court of Justice Argentina, 14 June 1995 pars 10 and 11: " The Convention assumes that the welfare of the child lies in returning to the status quo before the act of removal or retention ...**

[T]he aim of the Hague Convention is precisely to seek what is in the best interests of the child by ending the wrongful removal/retention."

[137] See, for example, in the United States of America: ***Friedrich v Friedrich*** **(1993) 983 F 2d 1396;** ***Rydder v Rydder*** **(1995) 49 F 3d 369.**

[138] McClean, "The Hague Child Abduction Convention - The Common Law Response", (1993) 40 ***Netherlands International Law Review*** **67 at 75. Cf Klabbers,** ***The Concept of Treaty in International Law*****, (1996) at 250-254.**

[139] Article 13.

[140] Regulation 16(3)(c).

[141] ***Turner v Turner,*** **unreported, Family Court of Australia, 27 June 1988 per Lambert J.**

[142] See ***Urness v Minto*** **[1994] SLT 988 at 998;** ***Shamsi v Heijkensköld-Shamsie,*** **Sweden, Sundsvall Administrative Court of Appeal, 29 June 1990 at 6.**

[143] ***Re R (A Minor: Abduction)*** **[1992] 1 FLR 105 at 107-108 per Bracewell J.**

[144] Article 12. cf ***Rajaratnam v Rajaratnam-Hertig*****, Decision of the Supreme Court of Appeals of the Canton of Zurich, Switzerland, 19 December 1988 cited by Kay J [1996] FLC 92-674 at 82,028.**

[145] Articles 16 and 17.

[146] ***Re R (A Minor: Abduction)*** **[1992] 1 FLR 105 at 107 per Bracewell J.**

[147] Perez-Vera, "Explanatory Report on the Convention on the Civil Aspects of International Child Abduction", ***Permanent Bureau of the Hague Conference*** **1992 par 34.**

[148] See for example Robert, ***Dictionnaire Alphabetique & Analogique de la Langue Française,*** **(1981);** ***Grand Larousse de la Langue Française,*** **(1976),** ***vol 5; Hachette Dictionnaire du Français,*****(1987).**

[149] ***S v S (Child Abduction) (Child's Views)*** **[1992] 2 FLR 492 at 501. See also** ***Police Commissioner of South Australia v Temple*** **[1993] FLC 92-424 at 79,830.**

[150] cf ***Rajaratnam v Rajaratnam-Hertig*****, Decision of the Supreme Court of Appeals of the Canton of Zurich, Switzerland, 19 December 1988 cited by Kay J in [1996] FLC 92-674 at 83,026-83,027.**

[151] ***Tournai v Mechoulam*** **decision WMFHN-1, Supreme Court of Israel, 15 April 1992.**

[152] ***Levesque v Levesque*** **(1993) 816 F Supp 662.**

[153] Boshier, "The Hague Convention Before and After: The New Zealand Experience" in American Bar Association, ***How to Handle Interstate and International Child Custody and Abduction Cases*****, (1994) at 211.**

[154] For example ***Director-General of Family and Community Services v Davis*** **[1990] FLC 92-182 at 78,226 per Nygh J.**

[155] See for example now, the Act, ss 64A, 65C, 65D, 65E, and 65F.

[156] cf s 68G(2).

[157] cf ***Tahan v Duquette*** **(1992) 613 A 2d 486.**

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