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[06/10/1993; Full Court of the Family Court of Australia (Sydney); Appellate Court]
Murray v. Director, Family Services (1993) FLC 92-416

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Sydney

BEFORE: Nicholson CJ, Fogarty and Finn JJ

19, 23 August and 1 September 1993

Appeal No. EA51 of 1993 / File No. CA1162 of 1993

BETWEEN

Gabrielle Forsythe Murrary

Appellant

-and-

Director Family Services, A.C.T.

Respondent

REASONS FOR JUDGMENT

APPEARANCES:

Mr Rose, QC, with Mr Brewster, instructed by Macphillamy Cummins and Gibson, Solicitors, appeared for the appellant.

Mr Killalea and Ms King, instructed by A.C.T. Government Solicitor, appeared for the respondent.

Dr Griffith S-G, QC, with Mr Gageler, instructed by the Australian Government Solicitor, appeared for the Commonwealth Attorney-General.

JUDGMENT:

Nicholson CJ and Fogarty J: This is an appeal from the decision of Baker J given on 16 July 1993, when his Honour ordered that three children, A born 27 July 1988, L born 25 July 1989 and H 12 July 1991 be returned to New Zealand.

The order was made on the application of the State Central Authority for the Australian Capital Territory, instituted pursuant to the Family Law (Child Abduction Convention) Regulations (hereafter referred to as "the Regulations)". The Regulations are made pursuant to the power conferred by s 111B of the Family Law Act 1975 which enables the making of

"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 1980" (hereafter referred to as the Hague Convention).

The three children had been brought to Australia by their mother, from New Zealand on 13 April 1993.

The mother is an Australian citizen and she first commenced cohabitation with the father, H.T., who is a New Zealand citizen, in August 1987. All the children were born in New Zealand, are New Zealand citizens and have lived there throughout their lives. They were married on 27 February 1993 and separated some six weeks later when the wife brought the children to Australia.

According to the wife, in an affidavit sworn in support of her custody application to this Court and later re affirmed in an affidavit sworn in these proceedings, the relationship was characterised by many acts of violence on the part of the husband, which culminated in violent attacks over some days in April 1993, which included head butting, punching, kneeing her at the base of the spine and death threats and which led to her leaving him and coming to Australia with the children. She claimed that many of the acts of violence to which she deposed either took place in the presence of or in close proximity to the children.

The husband for his part, in an affidavit sworn on 18 June 1993 in support of the application to return the children, admitted that he had always had a turbulent relationship with the wife and that there had been some incidents of violence between them, but he said that the wife's claims made by her to this Court after arriving in Australia were exaggerated and in parts untrue.

In an affidavit sworn in these proceedings, the wife exhibited photographs of herself taken on 14 April 1993 which are indicative of considerable physical damage and bruising to her, consistent with the sort of violent attack which she described in her earlier affidavit.

She said that she had left New Zealand, not to gain an advantage over the husband in custody proceedings, but to remove herself and the children from a situation of violence, fear and terror and that she had her father and extended family to call upon for assistance in Australia. She said that if she returned to New Zealand she could not safely stay with any of her relatives or friends, but would have to stay in a Women's Refuge.

She expressed particular concern because of her husband's membership of a gang known as the "Mongrel Mob", which she claims, are likely to be enlisted by the husband to perform acts of violence against her.

She also claimed that the husband keeps an assortment of weapons including unlicensed firearms, "Nunchukas", knives, chains and meat cleavers at his home and that he is a violent person who is likely to use such weapons against her.

She said that the children had been detrimentally affected by the husband's violent behaviour in the past and that there was a grave risk that they would be subjected to an intolerable situation and psychological harm if they are returned to New Zealand.

Immediately following her arrival in Australia, on 15 April 1993, the wife made an application to this Court for, inter alia, orders for custody of the children and for orders for her personal protection and an injunction restraining the husband from removing the children from Australia.

This application was returnable in the Canberra Registry of the Court on 15 June 1993 and it appears that it, together with the accompanying affidavit by the wife, was duly served on the husband in New Zealand.

On 15 June 1993, the husband did not appear and the matter was set down by the Registrar as an undefended matter for hearing on 25 June 1993 and the Registrar directed the wife's solicitors to give notice to the husband to this effect, which they did, by letter dated 15 June 1993, a copy of which was sent to the husband's solicitors.

On the same day, the solicitors for the husband forwarded a facsimile transmission addressed to the Registrar of the Court in Canberra submitting that the Court had no jurisdiction to entertain a custody and guardianship application and stating

"We further advise that we have drafted an application in accordance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction for the return of these three children abducted from New Zealand. Mr T. will be attending our offices tomorrow to sign this application and to give us further information for a supporting affidavit and we intend filing these with the New Zealand Justice Department before the end of this week."

A similar communication was made on the same day to the wife's solicitors.

Presumably, by the time the matter next came before the Registrar on 25 June 1993, the Registrar was aware of the foreshadowed Hague Convention proceedings.

On 25 June 1993, the Registrar adjourned the matter for hearing before Judicial Registrar Nikakis on 28 June 1993 and requested that the wife's solicitors advise the husband's solicitors of the new date, which they forthwith did by facsimile transmission on that day.

On the same day (25 June), the husband's solicitors forwarded a facsimile transmission to the wife's solicitors which, inter alia, contained the following passage:

"We acknowledge receipt of your facsimile dated 25 June 1993. As stated in our facsimile dated 15 June 1993, we are opposed to the making final of any orders on the basis that custody issues should be dealt with in New Zealand. We refer you to the Hague Convention on the Civil Aspects of International Child Abduction.

We confirm that formal applications were sent to the New Zealand Central Authority on 17 June 1993."

It is thus apparent that by the time the matter came on for hearing before the Judicial Registrar on 28 June 1993, the wife's solicitors were not merely aware that a Hague Convention application was foreshadowed, but that an application had been made to the New Zealand Central Authority.

Consistent with the position adopted by his solicitors, the husband did not appear and was not represented before the Judicial Registrar.

We have obtained a transcript of the proceedings before the Judicial Registrar and it is apparent that no mention was made to him by the solicitor appearing for the wife of any anticipated Hague Convention proceedings, or, in particular, of the fact that he had been informed of the making of an application to the New Zealand Central Authority by the husband.

He was clearly under a duty to do so and his failure may well have misled the Judicial Registrar as to the true situation. It is true that notice of a pending application had been given to the Registrar on 15 June, but by 28 June the matter had further progressed, to the knowledge of the wife's solicitor. In addition, he should not have assumed that the Judicial Registrar had knowledge of the earlier communication to the Registrar.

That failure is to be regarded even more seriously, when regard is had to Article 16 of the Convention, which is as follows:-

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

None of these matters were brought to the attention of the Judicial Registrar who proceeded to order that the wife have sole custody and guardianship of the children and also ordered, inter alia, that the husband be restrained from removing the children from Australia.

There can be little doubt that had the Judicial Registrar been informed as to what had occurred and as to the terms of Article 16, he would not have made the orders that he did.

The Hague Convention proceedings were commenced in this Court on 7 July 1993 and heard by Baker J on 16 July 1993.

In the meantime, the solicitors for the wife arranged for the registration of the order of the Judicial Registrar with a Registry of the District Court of New Zealand pursuant to s 22A(3) of the New Zealand Guardianship Act 1968.

It appears from Baker J's judgment that the husband has filed an application in the District Court of Dunedin, New Zealand, for the discharge of the Australian custody order, but neither his Honour or ourselves are aware of the fate of that application and we proceed for present purposes, as did his Honour, upon the basis that it is still in force.

Baker J found that prior to the time of their departure the parties and the children were living together in the former matrimonial home at Dunedin and that there were no orders in existence in New Zealand affecting their custody at that time.

Pursuant to the New Zealand Guardianship Act, it is clear, as his Honour found, that the husband was a joint guardian of the children and was exercising rights of custody in respect of them at the time that they were removed from New Zealand.

Under Regulation 2(1) rights of custody are defined as having the same meaning as in the Hague Convention and removal in relation to a child, means the wrongful removal or retention of a child within the meaning of that Convention.

Article 3 of the Convention is as follows:

"The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

New Zealand is a party to the Convention and its accession to the Convention was accepted by Australia on 23 February 1992.

In the present case, his Honour accordingly found that in all the circumstances the removal of the children by the wife was wrongful within the meaning of Article 3.

He rejected an argument by Counsel for the wife that the registration of the Australian order in New Zealand had the effect of removing the husband's rights of custody in New Zealand and that the decision of Kay J in Barraclough and Barraclough (1987) FLC 91-838 meant that the time for examination of the husband's rights of custody under the Hague Convention was the time of the hearing of the application and not the time of removal of the children.

His Honour sought to distinguish Barraclough's case on its facts and upon the basis that the order in the present case was made by a Judicial Registrar and that, although properly made, the time for review had not then expired.

His Honour also considered that by reason of Regulation 18 of the Regulations he was not obliged to give effect to the Australian custody order as registered in New Zealand as overriding the application under the Hague Convention.

Regulation 18 provides as follows:

"On the hearing of an application under sub-regulation 15(1) in relation to a child, a court shall not refuse to make an order under sub-regulation 15(2) for the return of the child to the applicant by reason only that in relation to that child there is in force or enforceable in Australia an order in relation to the custody of the child, but may take into account the reasons for making that order."

His Honour took the view that Regulation 18 "clearly contemplates orders made in identical circumstances to those made in this case" and that Regulation 18, prima facie, applies to any order which is either in force in Australia or enforceable in this Country in relation to the custody of children.

His Honour also rejected an argument by counsel for the wife based upon Regulation 16(3) that there was a grave risk that the children' return to New Zealand would expose them to physical or psychological harm or would otherwise place them in an intolerable situation.

This argument was based upon the wife's evidence and that of her mother and other witnesses as to domestic violence, the husband's involvement with the "Mongrel Mob", and various threats, including death threats, which he was alleged to have made to or in respect of the wife.

His Honour commented that it was not possible to determine the veracity of these allegations and that most of the evidence in relation to them would only be available in New Zealand.

He referred to the decisions of this Court in Director General, Family and Community Services and Davis (1990) FLC 92-182 and Gsponer and Director General, Department of Community Services, Victoria (1989) FLC 92-001 and took the view that it would be to denigrate the New Zealand Courts and, in particular the Family Court of New Zealand, to assert that the wife and children could not be protected from harm by the Courts if the need arose.

His Honour also found that there was no evidence to suggest that the children would come to any harm if they were to be returned and that the New Zealand Courts would act swiftly to protect the wife should the need arise.

By reason of an injury to one of the children which had been sustained at kindergarten, his Honour stayed the operation of the order pending an improvement in her medical condition.

When the appeal first came on for hearing in Sydney on 11 August 1993, Mr Rose QC, for the Appellant wife, sought to argue that the application was also governed by s.64(1)(a) of the Family Law Act that the welfare of the child was the paramount consideration and/or by the United

Nations Convention on the Rights of the Child (hereafter referred to as the "UN Convention") and that the Hague Convention should be read as subject to the UN Convention.

We accordingly adjourned the further hearing of the Appeal to Canberra in order to give the Attorney General for the Commonwealth the opportunity to intervene. He did so and was represented by the Solicitor-General, Dr Griffith, QC, and Mr Gageler.

The hearing proceeded in Canberra on 19 August and being uncompleted, resumed in Melbourne on 23 August, when we reserved our decision. Before that decision was given, the wife's solicitors made application for the Court to be reconvened to hear an application to receive fresh evidence.

In the meantime the Court determined that it wished to hear further argument on the meaning of the Regulations and the Hague Convention and on the issue as to whether the Court should, of its own motion, review the decision of the Judicial Registrar of 28 June.

The Court accordingly reconvened on 1 September and heard the application to receive fresh evidence and further argument and determined to review the decision of the Judicial Registrar.

Before turning to the substantive grounds of appeal it is desirable to deal with the issue of the review, which has a significant effect upon the matter. We have already commented to the effect that, in the circumstances of the present case, the order of the Judicial Registrar should not have been made and that this view gains further force by reason of the provisions of Article 16 of the Hague Convention.

We shall discuss the relevance to Australian domestic law of those Articles of the Hague Convention, like this one, which have not been specifically incorporated into the Regulations, at a subsequent stage of our judgment, but at the very least, it is apparent that this was a matter which the Judicial Registrar should have taken into account in the exercise of his discretion to proceed to hear the matter and, as we have said, it should have been drawn to his attention by the solicitor appearing for the wife.

In the present case, the Court had notice that the husband was contending that the children had been wrongfully removed from New Zealand, as in fact they had been, and that he was proposing to make an application under the Hague Convention, such notice being constituted by his solicitors' facsimile transmission to the Registrar of 15 June 1993. In the circumstances the Registrar should not have set the matter down for hearing before herself on 25 June or before the Judicial Registrar on 28 June.

Further, we have already commented upon the wife's solicitor's failure to reveal the true facts to the Judicial Registrar. In addition, he did not draw his attention to the content of Article 16.

As we have said, we decided that we would review that decision and we now state our reasons for doing so. Section 26C(2) of the Family Law Act provides:-

"The Court may, on application made under subsection (1) or of its own motion, review the exercise by a Judicial Registrar of a power delegated under subsection 26B(1), and may make such orders as it considers appropriate in relation to the matter in relation to which the power was exercised."

Pursuant to a combination of s26B(1) and Order 36A(3)(d), Judicial Registrars exercise delegated power to make any order in undefended proceedings, but, any such order is subject to review by the Court of its own motion.

The procedure on such a review is governed by Order 36A Rule 7(4), which provides, inter alia, that the court shall proceed by way of hearing de novo, may receive as evidence any affidavit or exhibit tendered before the Judicial Registrar, may, by leave, receive additional evidence and may receive as evidence the transcript of the proceedings before the Judicial Registrar.

Mr Rose argued that we should not review the decision, because, firstly, if the Judicial Registrar had read the file he would have seen the facsimile transmission of the 15 June, secondly that the matter had been before the court before and the solicitors for the husband had notice of the application and could have appeared so that there was no reason why the Judicial Registrar should have adjourned the matter, and thirdly that there had been a significant delay in the making of the application under the Hague Convention by the time that the matter came on for hearing on 28 June.

We do not consider that these contentions have substance. It cannot be assumed that the Judicial Registrar had read the file. He was under no obligation to do so. Indeed, he probably had a positive obligation not to read correspondence on the file and there would have been no reason for him, in the circumstances of this case, to read notations as to the Registrar's previous orders or the orders themselves, assuming that they had been engrossed, unless they were brought to his attention. If he was aware of the Hague Convention application, this is all the more reason why he should not have made the orders.

Secondly, the solicitors for the husband and the husband himself were perfectly entitled to take the position that they did, namely that they would not appear but rely upon the Hague Convention application. At least one of the purposes of the Convention is to relieve parents from the necessity of appearing before the Courts of the country to which the child has been abducted in circumstances where the Convention applies.

Thirdly, a very short time only had elapsed before the matter was dealt with by the Judicial Registrar, in circumstances where there was no urgency about the matter because interim orders had been made in favour of the wife.

Mr Rose next submitted that the Full Court could only exercise power to hear an appeal pursuant to s94(2) and could not review a decision of a Judicial Registrar.

It is unnecessary to decide this issue, because as was pointed out in argument, s28(1) enables the original jurisdiction of the Court to be exercised by one or more judges and s28(2A) makes it clear that such jurisdiction may be exercised by members of the Appeal Division.

Accordingly, it becomes unnecessary to decide whether we are reviewing the decision of the Judicial Registrar as a Full Court or under s28>(1) as the effect is the same.

However, we should make it clear that we consider that we not only have a right, but a positive duty, to review the decision of the Judicial Registrar in this case in circumstances where it appears to have been an incorrect decision.

In Harris v Calladine (1991) FLC 92-217, Mason CJ and Deane J said at 78,469 that two conditions must be satisfied before a delegation of power by the federal judiciary could be constitutionally valid :-

"The first condition is that the delegation must not be to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court. This means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters. The second condition is that the delegation must not be inconsistent with the obligation of the court to act judicially and that the decisions of the officers of the court must be subject to review or appeal by a judge or judges of the court."

Similarly at 78,486, Dawson J said:-

"For where the function of exercising the discretion is delegated by a court, as it may be delegated to a Registrar, the exercise of the delegated discretion cannot confine the exercise of the same discretion by the person in whom it is primarily reposed."

In our view, in any circumstance where it appears that a decision by a person exercising delegated judicial power is or may be incorrect, a judge is under a positive duty to review the same, for if this is not done then the first test laid down by Mason CJ and Deane J would not be satisfied, in that it could be said that the judges no longer constitute the court.

After announcing our decision to review the decision of the Judicial Registrar, we invited Mr Rose to advance argument as to why we should not set it aside and adjourn the further hearing of the wife's application for custody to a date to be fixed, pending the outcome of the present application.

Mr Rose submitted that we should not do so, firstly because he sought to adduce evidence as to the welfare of the children at the present time, and secondly because the consequences of doing so would be that the order would no longer be enforceable in New Zealand and thus could not be relied upon in these proceedings.

As to the first argument we do not think that the wife should be permitted to now introduce further evidence as to the childrens' welfare on such a review, because the issue before the Court is not that of custody, but rather a threshold issue of whether, having regard to the application under the Hague Convention, the custody proceedings should be adjourned to await the determination of the Convention application. Under Article 16, as we have pointed out, decisions on the merits of rights of custody should not be taken until it has been determined that the children will not be returned.

As was pointed out in argument, the second submission is circuitous in that, if the order should not have been made, it is not to the point what the consequences will be if it is set aside.

For the reasons already given, we think that the order should be set aside and the wife's application for orders for guardianship and custody adjourned to a date to be fixed, following the determination of this appeal.

The effect of these orders will be that there will no longer be an enforceable order for custody and guardianship in favour of the wife in New Zealand (see s 22E(1) Guardianship Act (New Zealand)).

Returning to the appeal itself, it is unnecessary for present purposes to set out the grounds of appeal (as amended) in detail. It should, however, be appreciated that the substantive argument before us proceeded upon the basis that the Judicial Registrar's order was extant and had been validly registered as the issue of the review of it had not arisen or been determined at that stage.

The six broad arguments of the appellant were, firstly that his Honour erred in treating the time of removal of the children from New Zealand as the operative time for determining whether Article 3 of the Hague Convention applied and that the operative time was in fact the time of hearing. If this were done it was argued that the husband then had no rights of custody as these, it was said, were extinguished by the registration in New Zealand of the Australian order and its being rendered operative by New Zealand law.

Secondly, it was argued that his Honour erred in finding that Regulation 18 of the relevant regulations operated to nullify the effect of the registration of the Australian custody order in New Zealand.

Thirdly, it was argued that the matter should be regarded as one arising under the Court's "welfare" jurisdiction and that, under that jurisdiction, the Court was bound to apply the paramountcy principle contained in s64(1)(a) of the Family Law Act.

Fourthly, it was argued that his Honour erred in failing to consider and apply Article 3 of the UN Convention..

Fifthly, it was argued that his Honour erred in failing to conclude that the relevant regulations were subject to the provisions of s 64(1)(a) of the Family Law Act and in not applying that section.

Sixthly, it was argued that his Honour erred in not finding that there was a grave risk of physical or psychological harm or that the children would be placed in an intolerable situation if they were returned to New Zealand.

Turning to the first argument, Mr Rose said that Regulation 2(1) of the relevant regulations defined removal in relation to a child as wrongful removal within the meaning of the Hague Convention. He conceded that if removal for this purpose was referable to the situation at the time that the children left New Zealand then there had been a wrongful removal within the meaning of the Hague Convention. However, he said that the removal could no longer be regarded as wrongful by reason of the Australian order and the effect of its registration in New Zealand and that the operative time for determination of the question whether the removal had been wrongful was the time of hearing.

In support of this contention, he relied upon the decision of Kay J in Barraclough and Barraclough supra. In that case the mother took the children to Australia with the consent of the husband, ostensibly for a holiday. It was in fact her intention to remain in Australia with the children and she later informed the husband of her intentions. He then commenced divorce proceedings in England and sought the custody of the children. He subsequently filed an application in the Family Division of the High Court that the children be made wards of the Court. By reason of the filing of that application, s41 of the Supreme Court Act 1981 (UK) operated to make the children wards of Court from the time of filing the application. The wardship order was later continued.

Kay J took the view, after referring to the definition of "removal" in Regulation 2(1), that where wrongful retention is alleged, Article 3 (a) requires that the retention must be in breach of rights of custody of the other parent at the time of the hearing of the application. He said at 76,316:

"The words 'it is in' in Art. 3(a) are words of continuity and present tense in my view, and are not properly capable of interpretation of referring only to the time that the retention of the child initially took place".

In support of this interpretation, his Honour referred to the decision of the House of Lords in D (a minor) v the Berkshire County Council (1987) All ER 20 as to the interpretation of the words "is being " in English legislation in order to determine whether they referred only to the present tense or to a continuing situation. His Honour accordingly held that by reason of the wardship, the father did not have a right of custody within the meaning of the Hague Convention and dismissed his application.

In a sense, this argument is now somewhat academic in the present case, but, as it was fully argued, we think that it is appropriate that we deal with it.

The Hague Convention appears to treat removal and retention as quite separate concepts, as indeed they must be, as is apparent from the facts of Barraclough's case where the removal of the children from England was lawful whereas their retention, at least to the stage of the making of the wardship order, was obviously wrongful. In fact we think that Barraclough's case was wrongly decided on this point and that it should have been treated as a case of wrongful retention regardless of the wardship order for the reasons which appear hereafter.

However it is perhaps unfortunate that the Regulations in Reg. 2(1) define "removal" as meaning the "wrongful removal or retention of a child within the meaning of the Convention", thus encompassing both removal and retention. However it is apparent from the definition that it is the Convention that must be looked at, to arrive at the meaning of these terms for the purpose of the Regulations.

In this regard we agree with the argument of the Solicitor General that the terms "removal" and "retention" are alternative and discrete past events for the purposes of the Hague Convention and we note that this is also the approach which has been taken by the House of Lords in Re H and S (1991) 3 All ER 230.

In that case, the issues both before the Court of Appeal and the House of Lords were firstly whether, even if removal was to be regarded as a specific event which occurred on a specific occasion, retention was a state of affairs beginning at a specific time but continuing from day to day thereafter.

Secondly, whether removal and retention are mutually exclusive concepts or whether removal can be followed by a continued retention.

Thirdly, whether both removal and retention contemplate removal from or retention out of the care of the parent having the custodial rights, or removal from or retention out of the jurisdiction of the courts of the child's habitual place of residence.

Both the Court of Appeal and the House of Lords, the leading judgment of which was delivered by Lord Brandon, took the view that by reason of Article 12 of the Convention, which refers to a period of one year from the "date of wrongful removal or retention", both removal and retention are to be regarded as events occurring on a specific occasion, for otherwise it would be impossible to measure a period of one year from their occurrence.

For the same reason, Lord Brandon considered that once it was accepted that retention refers to a specific event, it necessarily followed that removal and retention are mutually exclusive concepts. In this regard he said at page 240:

"For the purposes of the Convention, removal occurs when a child, which has previously been in a state of habitual residence, is taken away across the frontier of that state, whereas retention occurs where a child, which has previously been for a limited period of time outside the state of its habitual residence, is not returned to that state at the expiry of such limited period."

As to the third issue, he said that because of the nature and purpose of the Convention, which is only concerned with international protection for children from removal or retention and not with removal or retention within the State of their habitual residence, the removal or retention in question must of necessity be from the jurisdiction of the courts of the State of the child's habitual residence.

We respectfully agree with those conclusions. We also note that a similar approach has been taken in Scotland in Kilgour v Kilgour 1987 SLT 568 and in the USA in Rexford v Rexford (Alaska 1980) 631 P 2d 475, 478; Plas v Superior Court (1984) 155 Cal App 3d 1008,1015 (202 Cal Rptr 490,494.).

This argument gains further force when regard is had to the Travaux Preparatoires to the Hague Convention and in particular to paragraph 108 which (in part) is as follows:-

"Several questions had to be faced as a result of this approach: firstly the date from which the time limit was to run; secondly, extension of the time limit; thirdly, the date of expiry of the time limit. As regards the first point, i.e. how to determine the date on which the time limit should begin to run, the article refers to the wrongful removal or retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence."

The approach taken by Kay J in Barraclough's case has also been criticised on different grounds by the learned author of Conflict of Laws in Australia (5th Ed.), P.E. Nygh at 409, where it is

suggested that this interpretation clashes with the express words used in paragraph 16(3)(a) of the Regulations.

In our opinion, this criticism is well founded. Regulation 16(3)(a) provides as follows:

"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 been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal;"

Remembering for the purpose of the Regulations that removal encompasses both removal and retention within the meaning of the Hague Convention, it is nevertheless clear that the court is being asked by the sub regulation in the case of a removal, to look at the time when the removal occurred, and in the case of retention, to look at the situation at the time that the retention first occurred.

This construction gains further force from Regulation 18 insofar as it requires a court not to refuse to make an order by reason only of the fact of an existing custody order in force or enforceable in Australia.

This Regulation clearly derives from Article 17 which provides as follows:-

"The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention."

Article 17 and Regulation 18 could have no effect if it could be argued that the removal or retention was no longer wrongful by reason of an existing order in Australia in favour of the abducting parent.

We turn now to the second argument advanced by Mr Rose, to the effect that his Honour erred in finding that Regulation 18 operated to nullify the effect of the registration of the Australian custody order in New Zealand.

There can be no doubt that if the Australian custody order derived its force from Australia alone, then his Honour was correct in his application of Regulation 18 and Article 17 from which it is derived. This is in fact now the situation, as the only extant orders in force are interim orders, following the setting aside by us of the orders of the Judicial Registrar.

If the orders of the Judicial Registrar had not been set aside then some difficulty may have arisen from the legislative scheme for the recognition and enforcement of custody and like orders which was in force in Australia and New Zealand prior to both Countries' involvement with the Hague Convention.

Pursuant to s22B of the New Zealand Guardianship Act, and subject to ss22C and 22E(1), so long as the registration of a foreign order is not cancelled, the order may be enforced, varied or discharged as if it was the order of a New Zealand Court made under the Act.

Section 22C provides, in substance, that a New Zealand Court shall not exercise jurisdiction in relation to a child who is subject to a registered custody order unless the parties consent to the exercise of the jurisdiction or the Court is satisfied that there are substantial grounds for believing that the welfare of the child will be adversely affected if the Court does not exercise jurisdiction.

Section 22E(1) provides that where a Court is satisfied that an overseas custody order was either not, at the time of its registration, enforceable in the country in which it was made or has since registration ceased to be enforceable, the Court shall not enforce the order.

The corresponding Australian provisions are to be found in s68 of the Family Law Act, which are in similar, but not identical, terms.

In effect, in neither Country are orders registrable or enforceable if they are interim orders or notice of the application was not served upon the other party and no other person appeared upon the hearing of the application. However, in this case, it is clear that the order of the Judicial Registrar was not an interim order and that, although the husband did not choose to appear, he was served with notice of the application and the order was duly registered in New Zealand.

It is reasonably clear that the purpose of Article 17 of the Convention is to avoid the situation where the abducting parent could simply obtain an order in the country to which the children were taken and rely upon it to avoid the operation of the Convention.

It also appears that the reference to orders being enforceable in the receiving country was intended to cover the situation where the abducting parent had obtained orders of a similar nature in a country that was not the habitual place of residence of the child and then come to the receiving country.

The difficulty about the present case, had the order not been set aside, would have been that the wife had the benefit of an order which had the status of an order from a competent court in the childrens' habitual country of residence.

It is perhaps worthy of note that if the Australian order and its New Zealand registration was to remain in force, the practical effect of his Honour's order under the Convention would have been that the minute the wife and the children arrived in New Zealand, she would have been entitled to return with them to Australia as the order of the Judicial Registrar had extinguished the father's guardianship and custodial rights.

The Solicitor-General, in dealing with this issue, first referred to Article 12 of the Hague Convention. He argued that the peremptory nature of the last part of the first paragraph in Article 12 clearly means that once the judicial or administrative authority of the contracting State determines that the removal or retention has been wrongful and the application is brought within 12 months, then subject only to the exceptions contained in Article 13, there is a positive requirement to return the child notwithstanding any orders which may or may not have been made subsequent to the child's wrongful removal or retention.

In further support of this argument the Solicitor-General said that the making of the relevant custody order did not shut out the issue of access nor could any custody order be regarded as a final order. He accordingly said that to not order the return of the children in these circumstances would be to shut out the husband from access to the children, or from pursuing a further application for custody in the future in New Zealand, which, he submitted was clearly the correct jurisdiction in this case.

Mr Rose conceded that if the Court was against him on the issue of the time at which the wrongful removal or retention is to be considered and upon the alternative contentions advanced by him, then the argument advanced by the Solicitor-General was correct.

In the present case, while this may have been a concession validly made, it is unnecessary in the context of this case to finally determine this issue and we do not propose to do so, although we regard the arguments of the Solicitor-General as persuasive.

Before turning to the remaining arguments of the wife it is necessary to say something about the status of international instruments such as the Hague Convention and the Convention on the Rights of the Child in Australian domestic law.

This subject was recently considered by the Full Court of the Federal Court of Australia in Minister For Foreign Affairs v Magno (1993) 112 ALR 529 at 534. That was a case which involved consideration of the validity of a regulation made pursuant to s15 of the Diplomatic Privileges and Immunities Act 1967.

That section provides:-

"The Governor General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act."

Section 7 of that Act also provides that certain provisions of the Convention in question, namely the Vienna Convention on Diplomatic Relations, have the force of law in Australia and sets out in specific terms which Articles have such effect and makes specific reference to their provisions. The Convention itself is set out as a Schedule to the Act.

In the event, the majority of the Full Court (Gummow and French JJ, Einfeld J dissenting) held that the Regulation in question was valid. In the course of his judgment, Gummow J expressed what might be regarded as a conservative view as to the effect of international conventions and treaties on Australian domestic law.

In making this comment we stress that we do not do so in any critical sense as the subject is not free from uncertainty, but rather to find a starting point against which the submissions before us can be measured. His Honour's views, which appear at pp 534-535, may be summarised as follows.

Firstly, that if an international obligation involves enforcement in the courts which is not already authorised by municipal law, legislation is needed to make the necessary changes in the law or to equip the Executive with the necessary means to execute the obligation.

Secondly not all legislative approval of treaties or other obligations entered into by the Executive renders the treaty binding upon individuals within Australia as part of the law of the Commonwealth or creates justiciable rights for individuals.

Thirdly, in cases where a convention has been ratified by Australia, but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic primary or subordinate legislation.

Fourthly, where a statute has adopted the nomenclature of a convention in anticipation of subsequent Australian ratification, it is possible to refer to the convention to assist resolution of an ambiguity, but not to displace the plain words of the statute.

Fifthly, in the exercise of a discretion and where the domestic law upon its proper construction permits it, regard may be had to an international obligation or agreement which has been ratified by Australia, but not otherwise incorporated into domestic law and where the domestic law is not ambiguous. In this regard, his Honour pointed to the still unresolved difficulty, if it is suggested that the obligation or agreement has been misconstrued by the decision maker, as to whether this amounts to an error of fact or law for the purpose of review or appeal.

Sixthly, in circumstances where Parliament has expressly given the same meaning to a law as the meaning it bears in a particular agreement or convention, it may attract the provisions of s15AB of the Acts Interpretation Act 1901, where the agreement or convention is "referred to" within the meaning of s15AB(2)(d). In such circumstances consideration may be given to it not merely to

construe provisions which are ambiguous or obscure but for the wider purposes set out in s15AB (1).

Gummow J concluded that the regulation making power conferred by s15 of the Diplomatic Privileges and Immunities Act authorised the making of regulations to give effect to s 7 of the Act, so as to implement the obligations imposed on Australia under the Vienna Convention and that the particular Regulation under attack was valid.

French J, who was the other member of the majority, did not in his judgment specifically address the general question of the incorporation of international agreements and conventions into domestic law. It is apparent from his judgment, however, that he considered that the human rights and fundamental freedoms of speech and assembly accepted in a number of international conventions and specifically asserted in Articles 19 and 20 of the Universal Declaration of Human Rights and Articles 19 and 21 of the International Covenant on Civil and Political Rights, to both of which Australia is a party, were relevant for consideration in the context of domestic law (see pp 555-6).

He said at p 557:-

The Diplomatic Privileges and Immunities Act 1967, through s7, imposes duties upon the Executive which are expressed in the words of the Convention itself. Those words and particularly arts 22 and 29 are capable of application to the full range of constitutional statutory and administrative regimes which are parties to the Convention. It is a paradigm of an Act which in the words of the High Court in Morton v Union Steamship Co of New Zealand Ltd "lays down only the main outlines of policy."

He concluded that s7 of the Act imposed on the Executive as a matter of municipal law the obligations undertaken by Australia at international law under the Convention and concluded that the relevant regulation was, subject to certain reservations, valid.

In his dissenting judgment, Einfeld J did not differ from the majority on the question of the incorporation of the Convention into domestic law. However, he considered that other conventions had achieved a similar status and that the validity of the regulation in question under this Convention had to be considered in light of them.

He drew a distinction between agreements or conventions which have been ratified by the Executive Government only and those which have been ratified by the Parliament, and a further distinction between the latter and those which, like the International Covenant on Civil and Political Rights, have been appended as schedules to legislation such as the Human Rights and Equal Opportunity Commission Act 1989.

He conceded that the High Court had made it clear in Dietrich v R (1992) ALR 385 that ratification, either by the Executive or Parliament, does not, of itself, result in the rights which it embodies becoming enforceable as part of Australian domestic law. However he pointed out that no argument had been put to the Court as to the effect of the Human Rights and Equal Opportunity Commission Act as Australian legislation embodying the Covenant or part of it and that the argument before the High Court appears to have proceeded upon the basis that there was no such legislation-see p 570.

In this regard it is of interest to note that in his dissenting judgment in In Re Marion (1991) FLC 92-193 at 78,275 (later upheld by the High Court on other grounds see Secretary, Department of Health and Community Services (NT) v JWB and SMB (1992) 66 ALJR 300), Nicholson CJ, after reviewing the authorities and the legislation, said in relation to the Declaration on the Rights of Mentally Retarded Persons and other international instruments, which are also incorporated into the Schedule of the same Act:-

"Contrary to what I said in In Re Jane, however, I now think it strongly arguable that the existence of the human rights set out in the relevant instrument, defined as they are by reference to them, have been recognised by the Parliament as a source of Australian domestic law by reason of this legislation."

Having regard to the remarks of Einfeld J and to the fact that this issue does not appear to have been considered by the High Court in either Dietrich's case or in Marion's case on appeal, it may be that this is still an open issue.

After referring to the decisions of the High Court in Australian Capital Television Pty Ltd v Commonwealth (No 2) (1992) 108 ALR 577 and Nationwide News Pty Ltd v Wills (1992) 108 ALR 681, Einfeld J concluded that these cases established that in Australia there is a constitutional guarantee of freedom of speech, at least in discussion of federal political matters or public affairs, and that this, coupled with the provisions of the International Covenant on Civil and Political Rights, meant that substantial weight should be given to freedom of speech in interpreting the Regulations in light of their purpose.

He accordingly concluded, by reason of his view that the Regulations involved an unreasonable curtailment of freedom of speech and for other reasons not relevant to present considerations, that the Regulations were invalid.

In Dietrich's case, Mason CJ and McHugh J referred with tentative approval, but without deciding the issue, to what they described as a "common sense approach" of having regard to international obligations in helping to resolve uncertainty or ambiguity in judge made law (pp 392-3).

Toohey J was more positively in favour of this proposition (pp 434-5) and Brennan J was prepared to accept the International Covenant on Civil and Political Rights as a legitimate influence on the development of the common law (p 404). The only Judge who appeared to doubt the proposition was Dawson J (425-6). Further, as Einfeld J pointed out in Magno's case, in Mabo v Queensland (1992) 107 ALR 1, Brennan J, (Mason CJ and McHugh J concurring), said at p 29:-

"The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol (the First Optional Protocol to the International Covenant on the Protection of Civil and Political Rights) brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."

It thus may be that this can, with some degree of confidence, be added to the categories stated by Gummow J.

Further we consider, with respect, that Gummow J may have been too restrictive in his third category in concluding that the terms of the convention may only be resorted to for the purpose of resolving ambiguity in domestic primary or subordinate legislation. We think that such conventions may also be resorted to in order to fill lacunae in such legislation, having regard to the views of the High Court expressed in Dietrich's case and those expressed by Kirby P in Jago v District Court of NSW (1988) 12 NSWLR 558.

In applying these principles to this case, it is , we think clear enough that the Hague Convention stands in a different position to the Convention on the Rights of the Child.

We think that the latter Convention falls clearly within the third category of conventions described by Gummow J in Magno's case, in that it has been ratified by Australia but has not been given specific statutory recognition. It can thus be used to resolve ambiguities in domestic

primary and subordinate legislation. If we are correct it can also be used to fill lacunae in such legislation and to resolve ambiguities and lacunae in the common law. As such it may well have a significant role to play in the interpretation of the Family Law Act 1975 and in the common law relating to children. However, as hereafter appears, we do not think that its provisions have a significant role to play in the present case.

The Hague Convention stands in a different light in that it has been the subject of specific recognition by reason of s 111B of the Family Law Act and the Regulations made under that section, to which it is set out as a schedule.

The Solicitor General argued that it fell within the second category of such conventions described by Gummow J, namely a convention which had been given legislative approval but was not binding upon and not creating justiciable rights for individuals, except insofar as its terms had been specifically imported into domestic law by the Regulations.

S111B clearly recognises that Australia has obligations under the Convention and empowers the Executive to make such regulations as may be necessary, inter alia, to enable the performance by Australia of such obligations.

Although we find it unnecessary to decide the point in this case, we think that it is at least arguable that this gives those parts of the Convention as a whole which are not specifically incorporated by the Regulations a higher status in domestic law than a Convention falling within the third category described by Gummow J.

Mr Rose argued that the Hague Convention was inconsistent with and should be read as subject to, Article 3 of the UN Convention, which succeeded it in point of time and that this necessitated general consideration of the issue of the welfare of the child in any Hague Convention application, regardless of whether or not s64(1)(d) of the Family Law Act had any operation, although Mr Rose also argued that it did so.

However, we think that this argument fails on two grounds.

Firstly, we do not think that the Hague Convention is inconsistent with the UN Convention. The preamble to the Hague Convention is as follows:-

"The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

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,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions, - ".

It is thus apparent that the Hague Convention is predicated upon the paramountcy of the rights of the child. It proceeds upon the basis that those rights are best protected by having issues as to custody and access determined by the Courts of the country of the child's habitual residence, subject to the exceptions contained in Article 13.

The fact that issues relating to the welfare of the child are not relevant to a Hague Convention application is because such an application is concerned with where and in what court issues in relation to the welfare of the child are to be determined - see In re A (a Minor) (1988) 1 Fam LR (Eng) 365; Brown v Director General (Nicholson CJ 6 September 1988, unreported); Gsponer v Gsponer (1989) FLC 92-001.

In addition, the UN Convention, by Articles 11 and 35, clearly contemplates the negative impact on children of their abduction or non-return and the necessity of States concluding or acceding to bilateral and multilateral agreements to prevent such occurrences. Those Articles read as follows:

"Article 11

1. States Parties shall take measures to combat the illicit transfer and non- return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements." "Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

Even if it could be said that there was an inconsistency between the Hague Convention and the UN Convention in this regard, the Hague Convention would prevail, insofar as it has been incorporated into Australian domestic law by s111B of the Family Law Act and the Regulations made under that section, for the reasons already discussed.

We now turn to Mr Rose's third and fifth arguments, namely that the matter should be regarded as an application made under the Court's "welfare" jurisdiction and thus subject to the paramountcy principle contained in s64(1)(a), or alternatively that the Regulations are inconsistent with that section and the section should prevail.

If the proceedings are correctly characterised as being brought in the Court's welfare jurisdiction, about which we express no concluded view, they are predicated, as we have said, upon the basis that the Hague Convention and the Regulations contemplate that it is in the best interests of the child for issues such as custody and access to be determined in the courts of the country of the child's habitual residence unless the exceptions referred to in regulation 16 are made out.

The issue in a Hague Convention application is purely one of forum, subject to those exceptions, and the paramountcy principle is accordingly not relevant.

The alternative argument may be disposed of shortly, in that it is merely a variation of the argument which he advanced in relation to the UN Convention, and as we have said, we do not think that there is any inconsistency between the Convention and the Regulations made under it and the paramountcy principle.

Finally, it was argued that his Honour was wrong in failing to find that the exception contained in Regulation 16(3)(b) applied, namely that there was a grave risk that the children's return to the applicant would expose the children to physical or psychological harm or otherwise place them in an intolerable situation.

In addition to the evidence to which we have already referred as to past violence and the propensity for violence on the part of the husband and his associates of the "mongrel mob", it was sought to introduce fresh evidence before us designed to reinforce this evidence and to confirm the danger in which, it was asserted, the wife would be in if she was to return to New Zealand.

Although it was not argued that the children would be in any direct danger, it was put that if their mother was to be subject to violence this would in turn have a grave effect upon their welfare.

Although we would normally be reluctant to permit fresh evidence of this type to be introduced on an appeal, we have decided to admit it, going as it does to an important issue in the case, but

we do not think that it in any way advances the proposition that his Honour was in error in finding that this exception had not been made out.

As the Full Court pointed out in Gsponer's case, supra, it must be remembered that the "applicant" for the purposes of the Regulations is not the husband, but the New Zealand Department of Justice and the children are proposed to be returned to it and not to the husband. Their disposition in New Zealand will be a matter for the New Zealand Courts if they are returned to that country, and if the wife's allegations are accepted it would appear unlikely that they would be returned to the husband.

Further, the evidence is almost entirely directed at the prospective threat to the wife of a return to New Zealand and more particularly to a return by her to Dunedin. We were informed by counsel that, if the appeal is dismissed, the wife will return to New Zealand with the children.

Whilst there is nothing that requires the wife to return to New Zealand, it is obviously desirable, from the point of view of the children, that she does so. However, there is no requirement imposed by this Court that she or they must return to Dunedin. It is open to her to return to another part of New Zealand where the danger to her may be less and it is, of course, open to her to seek orders from the New Zealand Courts, both for personal protection and interim and final custody immediately upon her arrival in New Zealand. She can also, if she wishes, seek leave from the New Zealand Court to take the children to Australia.

As his Honour pointed out, New Zealand has a system of family law and provides legal protection to persons in fear of violence which is similar to the system in Australia.

It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the Courts.

In our view and in accordance with the views expressed by this Court in Gsponer's case, the circumstances in which Regulation 16(3) comes into operation should be largely confined to situations where such protections are not available. Similar views have been expressed by the courts of other countries eg; Segal J in the Superior Court of New Jersey in Tahan v Duquette (24/6/92 unreported). In Re: A (A Minor) supra; Re: Evans (Court of Appeal England, 20/7/88 unreported).

For us to do otherwise, would be to act on untested evidence to thwart the principal purposes of the Convention, which are to discourage child abduction and, where such abduction has occurred, to return such children to their country of habitual residence so that the courts of that country can determine where or with whom their best interests lie.

These children are New Zealand citizens who have lived all their lives in New Zealand and it is for a New Zealand Court to determine their future. Orders

(1) The appeal is dismissed.

(2) The orders of the Judicial Registrar of 28 June 1993 are discharged and the wife's application is adjourned to a date to be fixed.

(3) Each party is at liberty to make written submissions as to the costs of the appeal within 28 days.

Finn J: I agree that the appeal should be dismissed for the reasons contained in the joint judgment of Nicholson CJ and Fogarty J. However, while I agree that the Hague Convention on the Civil Aspects of International Child Abduction is not inconsistent with the United Nations Convention on the rights of the child for the reasons given by their Honours, I would not express

any view on the status in Australian domestic law of any international convention which has been signed by Australia, but which has not been the subject of specific statutory enactment. I would say only that it seems unfortunate that when the Commonwealth incorporated the Hague Convention into Australian law, it did not do so either simply by incorporation of the Convention as a whole or at least in terms identical to the terms of the Convention.

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