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FAMILY COURT OF AUSTRALIA

HARRIS & HARRIS ***[2010] FamCAFC 221***

FAMILY LAW - APPEAL – CHILD ABDUCTION – PROCEDURAL FAIRNESS – Whether the manner in which the proceedings were conducted denied the father procedural fairness – Where it was asserted the father received erroneous information from the Commonwealth and State Central Authorities – Proceedings conducted "on the papers" without cross-examination – Where initial advice from the Central Authority was erroneous and misleading – Whether the trial Judge erred in failing to enquire whether the father had been informed of his rights and had elected not to participate in the proceedings – Whether, in cases where the evidence regarding domestic violence is controversial, there is a duty on the trial Judge to go behind the application to ensure the unrepresented father's rights were fully protected – No procedural unfairness established – No merit in procedural fairness grounds.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Whether the trial Judge erred in approach to application by not considering the return of the child separate from return with the mother – Where it was the common expectation of the parties that if an order was made the mother would return to Norway and father only sought supervised contact – No error established.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Whether the trial Judge erred in making factual findings of domestic violence and abuse that were not supported on the evidence – Whether the trial Judge erred in making findings of fact that were based on inadequate or inconclusive corroborative evidence – Whether the trial Judge erred in accepting the mother's untested evidence relating to domestic violence while rejecting other parts of her untested evidence – Where trial Judge placed significant weight on the mother's evidence of domestic violence that was independently corroborated in accordance with approach endorsed in *Panayotides v Panayotides* (1997) FLC 92-733 – Where the status and weight afforded to hearsay statements improperly relied on by trial Judge did not impugn the balance of the finding of domestic violence – Where balance of trial Judge's conclusions were based on independently corroborated evidence of domestic violence – Where the inferences drawn by trial Judge were open to her Honour on the evidence – Whether the trial Judge failed to have appropriate regard to the standard of proof to be applied – Where trial Judge applied the standard of proof required by s 140 of the *Evidence Act 1995* (Cth) – No error in factual findings or standard of proof established.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Grave risk of physical or psychological harm to the child or placing the child in an intolerable situation – Whether the trial Judge erred in failing to properly consider conditions that could be attached to an order for the return of the child – Whether the trial Judge erred in finding that the mother would not be protected in Norway – Whether trial Judge failed to assess the distinct issue of the risk to the child of return

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– Recognition afforded to serious nature of domestic violence and its effect on the victim and actual or potential effect on the child – Trial Judge erroneously conflated psychological risk to the child with the risk of physical harm to the child – Where trial Judge considered separately the defence of intolerable situation – Where the trial Judge's findings that the mother and the child would be in an extremely vulnerable financial position, without emotional support and isolated if ordered to return to Norway were open to the trial Judge on the evidence – Where these findings supported the trial Judge's conclusion that the mother and the child would be in an intolerable situation if a return to Norway was ordered – No appealable error established.

FAMILY LAW - APPEAL – CHILD ABDUCTION – HAGUE CONVENTION – Whether the trial Judge failed to properly consider conditions that could be attached to an order for return – Where trial Judge extensively considered evidence of domestic violence, and support and protection available to the mother on return – Where conditions attached to orders would not overcome vulnerability of mother or result in satisfactory living arrangements – No appealable error established – Appeal dismissed.

FAMILY LAW - APPEAL – APPLICATION TO ADDUCE FURTHER EVIDENCE – Father sought to adduce evidence of correspondence with Commonwealth and State Central Authorities to support procedural unfairness ground – Correspondence admitted by consent – Balance of evidence sought to be adduced was contentious and would not affect the outcome of the appeal – Application allowed in part.

FAMILY LAW - APPEAL – HAUGE CONVENTION – Operation of convention in Australia – Discussion of role and responsibilities of Commonwealth and State Central authorities.

FAMILY LAW - APPEAL – COSTS – No order for costs – Each party to pay their own costs of and incidental to the appeal.

Convention on the Civil Aspects of International Child Abduction
Evidence Act 1995 (Cth), s 140
Family Law Act 1975 (Cth) ss 92, 111B(1), 117, 117AA
Family Law (Child Abduction Convention) Regulations 1986

Beazley v McBarron [2009] NZHC 37
C v C (Minor: Abduction: Rights of Custody) [1989] 2 All ER 465
CDJ v VAJ (1998) 197 CLR 172
Central Authority v Houwert [2007] ZASCA 88; [2007] SCA 88 (RSA)
De L v Director-General, New South Wales Department of Community Services (1996) 1
CLR 640
De Lewinski and Legal Aid Commission of New South Wales v Director-General, New S

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Wales Department of Community Services (1997) (1997) FLC 92-737
Department of Community Services & Frampton (2007) FLC 93-340
Director-General NSW Department of Community Services & JLM (2001) FLC 93-090
DP v Commonwealth Central Authority (2001) 206 CLR 401
Laing v Central Authority (1999) 151 FLR 416; 24 Fam LR 555; (1999) FLC 92-849
McDonald & Director-General, Department of Community Services (NSW) (2006) FLC
Murray v Director of Family Services ACT (1993) FLC 92-416
MW v Director-General, Dept of Community Services (2008) 39 Fam LR 1
Panayotides v Panayotides (1997) FLC 92-733
Pennello v Pennello [2003] ZASCA 147; [2004] 1 All SA 32 (SCA)
Quarmby & Anor v Director-General, Department of Community Services (NSW) (2005) 34 Fam LR 8
Re: F (A Minor: Abduction: Rights of Custody Abroad) (1995) 3 All ER 641
Re F (Hague Convention: Child's Objections) (2006) FLC 93-277
TB v JB (Abduction: grave risk of harm) [2001] 2 FLR 515
Warren v Coombes (1979) 142 CLR 531
Zafiropoulos & The Secretary of the Department of Human Services State Central Authority (2006) FLC 93-264

APPELLANT:	Mr Harris
RESPONDENT:	Ms Harris
FILE NUMBER:	SYC 3064 of 2009
APPEAL NUMBER:	EA 58 of 2010
DATE DELIVERED:	5 November 2010
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Bryant CJ, Finn & Boland JJ
HEARING DATE:	17 August 2010
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	13 April 2010
LOWER COURT MNC:	[2010] FamCA 261

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REPRESENTATION

COUNSEL FOR THE APPELLANT:	Mr Kearney with Ms Barnett
SOLICITOR FOR THE APPELLANT:	Barkus Doolan Kelly
COUNSEL FOR THE RESPONDENT:	Mr Simpson SC
SOLICITOR FOR THE RESPONDENT:	Watts McCray

ORDERS

(1) The appeal is dismissed.

(2) By consent the father's application to adduce further evidence filed 30 June 2010 is allowed in part.

(3) There be no order as to costs.

IT IS NOTED that publication of this judgment under the pseudonym *Harris & Harris* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

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THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal Number: EA 58 of 2010
File Number: SYC 3064 of 2009

Mr Harris
Appellant

And

Ms Harris
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. On 13 April 2010 Ryan J made orders dismissing an application brought by the Director-General, Department of Human Services NSW as the NSW appointee of the Commonwealth Central Authority ("the Commonwealth Central Authority") under the Family Law (Child Abduction Convention) Regulations 1986 ("the regulations") for the return of a child, ("the child") to Norway. The regulations give effect to Australia's obligations under the *Convention on the Civil Aspects of International Child Abduction* ("the Convention"). In these reasons we will refer to the Director-General, Department of Human Services NSW as "the State Central Authority".

2. The child, who has both Norwegian and Australian nationality, and was born in 2007, was almost three years old at the date of the trial Judge's orders. This appeal is an appeal by the child's father, Mr Harris ("the father"), against her Honour's orders.

3. On 19 March 2009 the father requested the Norwegian Central Authority to apply to the Commonwealth Central Authority for the return to Norway of the child. He asserted the child had been wrongfully removed by Ms Harris ("the mother") from Norway to Australia in November 2008 or wrongfully retained in Australia after 10 January 2009. Accordingly, at the direction of the Commonwealth Central Authority, the State Central Authority brought the application which was dismissed by Ryan J on 13 April 2010.

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4. Formally therefore, the father was not the applicant in the proceedings before the trial Judge. He is however a person affected by the orders of the trial Judge, and his appeal was brought on that basis. Thus it is without doubt that the father being a person with the requisite rights of custody in respect of the child, and being affected by the orders under appeal, has standing to commence and prosecute the appeal.

5. The State Central Authority is not named as a party to the appeal, and advised the Court that it did not wish to participate in the appeal. However, in the event that the Full Court allowed the appeal, re-determined the application and ordered the return of the child to Norway, the State Central Authority said it would assist in arrangements for the child's return.

6. The trial Judge found the prerequisite conditions for return prescribed in the regulations were satisfied. The child had been habitually resident in Norway at the time of his removal by the mother, or in the alternative wrongfully retained by her in Australia after 10 January 2009. Her Honour found the father had rights of custody in respect of the child at the time of his removal and wrongful retention. Her Honour went on to find that to return the child to Norway would expose him to a grave risk of physical and psychological harm and to an intolerable situation. Thus she dismissed the State Central Authority's application.

7. Unsurprisingly, no challenge is raised in the father's appeal to the trial Judge's findings as to the child's habitual residence and the father's rights of custody at the time of his removal, or to her Honour's findings in respect of the child's removal, or to her finding that the removal to, or retention in, Australia by the mother was wrongful. No cross-appeal was filed by the mother challenging these findings.

BACKGROUND

8. The background facts appear in the trial Judge's reasons at paragraphs 8 to 79. To give context to this appeal we repeat some of relevant paragraphs of her Honour's reasons:

> 9. The mother was born in Australia in 1971. The mother is an Australian citizen and her family lives in Australia.
>
> 10. The father was born in Norway on in 1972. He is a Norwegian citizen and his family lives in Norway.
>
> 11. The mother and father met in France in August 2005 which is when they commenced an intimate relationship. In her application filed on 24 December 2008 the mother said that she and the father began living together in August 2005. Thereafter they spent time in

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Norway and holidayed in Asia and Canada before returning to Norway in mid 2006. In August 2006 the mother and father separated. While the father remained in Asia, the mother returned to Australia. Not long after she arrived, the mother learned she was pregnant to him.

12. The father joined the mother in Australia in September 2006. The parties remained in Australia and in November 2006 they married.

13. In December 2006 the father and mother returned to Norway to live. The father and mother moved into the father's grandfather's house near [G]. Other than when they visited Australia, this is where they lived until November 2008.

…

15. During February 2007 the father and mother attended marriage counselling at the family centre in [G].

16. That same month the mother attended a crisis centre where she sought advice concerning domestic violence. The father said he wanted both of them to attend upon the domestic violence counsellor but in the end he spoke with the counsellor on the telephone and nothing further came of it.

17. The child was born in Norway in 2007…

18. Between 8 August 2007 and 14 September 2007, with the father's consent, the mother brought the child to Australia. The father remained in Norway for work.

19. In the later part of 2007 the father took about 26 weeks paternity leave. It seems likely this was between the child's two 2007 trips to Australia. Although the mother said the father was not involved in the child's care there is sufficient evidence to corroborate his evidence that he was. His two periods of paternity leave amplified his opportunity for significant, albeit secondary to the mother's, role in the child's care.

20. Between 6 December 2007 and 8 February 2008, with the father's consent, the mother holidayed in Australia with the child. The father remained in Norway.

21. On 14 May 2008 the mother was treated in hospital for a fractured left ulna. It is the mother's evidence that the father broke her arm. There is no doubt the parents [sic] engaged in a physical altercation

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during which the mother's arm was broken. Each accused the other of being the aggressor. The mother gave a history of the injury to the hospital that she fell. At this initial consultation the father was present. Two days later the mother returned to hospital and informed a doctor she had not fallen and that her arm was broken when the father hit her. The treating doctor and attending nurse spoke to the mother about reporting the incident to the police. The mother indicated she wanted her information recorded but not reported to police. The father was not injured in this incident.

…

34. As they had planned, on 23 May 2008 the father, mother and child travelled together to Australia. In Australia they resided in a small flat at the mother's parent's home [in the western suburbs of Sydney].

35. On the evening of 22 June 2008 the mother refractured her left arm in the same place as her earlier injury. The mother and father give divergent accounts of an ugly dispute that evening which appears to have been about whether they would separate. Each accuses the other of being the aggressor and of physical aggression. The gravamen of the father's evidence was that to the extent there was a physical altercation that evening it was primarily instigated by the mother with the only physical aspects which may have resulted in the mother's arm being injured having occurred during the melee between her and her parents. The mother says her arm was broken when the father pushed her into a wall. The father agreed he pushed the mother. He was not injured in this incident.

36. The following morning the mother's mother took her to Westmead Hospital where her injury was treated by her arm being placed in a sling. The mother reported to Westmead Hospital that the father had previously broken her arm and was responsible for this injury. Upon the doctor's suggestion the mother accepted a referral to a hospital social worker. The father moved out of the […] flat for a few days and stayed in a motel.

…

39. The parents disagree about which of them instigated their resumption of cohabitation. Irrespective of who it was by no later than 29 June 2008 they were living together as a family at the [mother's parents'] flat.

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40. Together, the father, mother and child returned to their home in Norway on 25 – 26 August 2008. Once there, the father resumed full time employment with his former employer. According to the father upon their return to Norway with the child the parents understood the purpose of the rights of access agreement was spent. I accept this was the parents' intention when they entered into the agreement.

...

42. On 18 September 2008 the mother attended a casualty clinic where she was observed as 'showing signs of physical violence in the shape of haematoma on the left upper arm, haematoma around the right eye.' The mother gave a history of physical violence from the father which she said had commenced in February 2006. The mother was advised to report her situation to police but did not. The clinic also referred the mother to an attorney, who was [Mr O]. It is likely that to hide the bruise around her right eye that [S] saw the mother with 'strange make up' around her eye.

…

51. On 27 November 2008, without the father's knowledge, the mother departed Norway with the child. The child travelled on his Australian passport. Although the father knew the mother had the child's Australian passport he wrongly believed that absent his consent she would only be able to remove the child from Norway on his Norwegian passport. Accordingly and to prevent the child's removal not long before she departed for Australia the father removed the child's Norwegian passport from the mother's possession.

…

54. The mother and child arrived in Australia on 29 November 2008…

55. During a telephone conversation in mid December 2008 the father threatened to kill at least the mother and her parents. The mother said he said 'If you don't cooperate and do exactly what I want, then I will fly to Australia and kill you, [the child], your father and your mother.' The father said '…I completely lost my temper and screamed in despair that I wanted to kill her and her family. Of course I did not mean this and I have since apologized for this.'

…

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57. On 24 December 2008 the mother filed in the Family Court at Parramatta an Application for Final Orders and simultaneously an Application in a Case for interim orders…

…

60. On 23 January 2009 the father consulted a lawyer in Norway.

61. In January 2009 the father filed a child abduction complaint in Norway against the mother. Had the complaint been established the mother would have been subject to a possible term of imprisonment.

…

THE GROUNDS OF APPEAL

9. In his amended Notice of Appeal the father relies on nine grounds of appeal which contain various sub-grounds. The grounds were distilled by the father's counsel into five discrete topics:

- The first challenge asserted the manner in which the proceedings were conducted was procedurally unfair to the father because:
  - they were conducted on the papers without the father's knowledge of or consent to that procedure,
  - no challenge was raised by the State Central Authority to the admissibility of evidence relied on by the mother, and
  - findings of fact adverse to the father were made without him having an opportunity to ensure the mother was cross-examined on her evidence

  ("the procedural fairness challenge").
- Secondly, the father asserted error of approach by the trial Judge in considering the application on the basis that if the orders sought in the application were granted, the mother and child would be returned to Norway rather than, as the application and regulations required, considering separately the return of the child to Norway ("the challenge to the trial Judge's approach").
- Thirdly, that her Honour erred in making factual findings not supported by the evidence, or based on inadequate or inconclusive corroborative evidence, or erred in accepting the mother's untested evidence on the topic of domestic violence whilst rejecting other parts of her untested evidence. Encompassed in this challenge is an assertion that, although her

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Honour identified the correct standard of proof, she erred in failing to have appropriate regard to that standard ("the asserted factual finding errors").

- Fourthly, that the findings underpinning her Honour's conclusions that the child would be exposed to a grave risk of physical or psychological harm or otherwise placed in an intolerable situation if a return was ordered were not made out ("the asserted error in determining 'grave risk'").
- Fifthly, a failure by the trial Judge to properly consider appropriate conditions which could be attached to any orders for return of the child ("the conditions challenge").

10. We think the most convenient manner to address the father's appeal is to consider the topics in the order identified above.

11. As will shortly become apparent from our discussion of the further evidence admitted by consent, this appeal has raised issues about the role and responsibilities of the State Central Authority. It is unfortunate that the State Central Authority was instructed by the Commonwealth Central Authority not to participate in this appeal. We are however, satisfied that procedural fairness was afforded by us to the State Central Authority whose decision was taken after service of all relevant material on it, and we acceded to the request of the State Central Authority (and to which we later refer) that this Court receive a copy of an email from Ms P (a solicitor employed by the Department of Human Services, NSW (the State Central Authority)) to the father dated 6 July 2009.

12. As the father's procedural fairness challenge involved consideration of the provisions of legal representation to a person in the position of the father, and aspects of the role and operation of the Commonwealth Central Authority and the State Central Authority in proceedings under the regulations, we propose to discuss these issues before turning to that challenge.

THE PRACTICAL OPERATION OF THE CONVENTION IN AUSTRALIA

13. Unlike other countries which are signatories to the Convention, Australia has not directly incorporated the Convention into its domestic law, but s 111B(1) of the *Family Law Act 1975* (Cth) ("the Act") provides for the making of regulations to enable the performance of Australia's obligations under the Convention (Family Law (Child Abduction Convention) Regulations 1986 ("the regulations")).

14. Regulations 1 to 4 inclusive are essentially concerned with definitions.

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15. The powers, duties and functions of the Commonwealth Central Authority are set out in reg 5 as follows:

> (1) In addition to the other functions conferred on the Commonwealth Central Authority by these Regulations, the functions of the Commonwealth Central Authority are-
>
> (a) to do, or co-ordinate the doing of, anything that is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention; and
>
> (b) to advise the Attorney-General, either on the initiative of the Commonwealth Central Authority or on a request made to that Authority by the Attorney-General, on all matters that concern, or arise out of performing, those obligations, including any need for additional legislation required for performing those obligations; and
>
> (c) to do everything that is necessary or appropriate to give effect to the Convention in relation to the welfare of a child on the return of the child to Australia.
>
> (2) The Commonwealth Central Authority has all the duties, may exercise all the powers, and shall perform all the functions, that a Central Authority has under the Convention.
>
> (3) The Commonwealth Central Authority must perform its functions and exercise its powers as quickly as a proper consideration of each matter relating to the performance of a function or the exercise of a power allows.

16. Regulation 6 of the regulations, since its amendment in 2004, makes it clear that a person, institution or other body that has rights of custody may make an application for the return of a child (or other relief) under the regulations. That regulation provides as follows:

> **6 These Regulations do not affect other powers of, or rights of application to, a court**
>
> (1) These Regulations are not intended to prevent a person, an institution or other body that has rights of custody in relation to a child for the purposes of the Convention from applying to a court if the child is removed to, or retained in, Australia in breach of those rights.

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(2) These Regulations are not to be taken as preventing a court from making an order at any time under Part VII of the Act or under any other law in force in Australia for the return of a child.

17. Regulation 7 provides an immunity to the Commonwealth Central Authority and a State Central Authority against a costs order in performing its function (see also s 117AA of the Act).

18. Regulation 8 empowers the Attorney-General to appoint a person to be a Central Authority of the State for the purposes of the regulations.

19. The duties, powers and functions of a State Central Authority are set out in reg 9. That regulation provides as follows:

> Subject to subregulation 8 (3), a State Central Authority has all the duties, may exercise all the powers, and may perform all the functions, of the Commonwealth Central Authority.

20. Regulation 14 provides as follows:

14 Applications to court

(1) If a child is removed from a convention country to, or retained in, Australia:

(a) the responsible Central Authority may apply to the court, in accordance with Form 2, for any of the following orders:

(i) a return order for the child;

(ii) an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order, on conditions appropriate to give effect to the Convention;

(iii) an order for the issue of a warrant mentioned in regulation 31;

(iv) an order directing that:

(A) the child not be removed from a specified place; and

(B) members of the Australian Federal Police prevent the child being removed from that place;

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(v) an order requiring that arrangements be made (as necessary) to place the child with an appropriate person, institution or other body to secure the welfare of the child, until a request under regulation 13 is determined;

(vi) any other order that the responsible Central Authority considers appropriate to give effect to the Convention; or

(b) a person, institution or other body that has rights of custody in relation to the child for the purposes of the Convention may apply to the court, in accordance with Form 2, for an order mentioned in subparagraph (a) (i), (ii), (iii), (iv) or (v).

(2) If the responsible Central Authority, or a person, institution or other body that has rights of custody in relation to a child for the purposes of the Convention, has reasonable grounds to believe that there is an appreciable possibility or a threat that the child will be removed from Australia, the responsible Central Authority or person, institution or other body may:

(a) apply to the court, in accordance with Form 2, for an order for the issue of a warrant mentioned in regulation 31; or

(b) apply to the court for an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order, on conditions appropriate to give effect to the Convention.

(3) If a child is wrongfully removed from Australia to, or retained in, a convention country, the responsible Central Authority may apply to the court, in accordance with Form 2, for:

(a) an order that the responsible Central Authority considers necessary or appropriate to give effect to the Convention in relation to the welfare of the child after his or her return to Australia; or

(b) any other order that the responsible Central Authority considers appropriate to give effect to the Convention.

(4) If a copy of an application made under subregulation (1), (2) or (3) is served on a person:

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(a) the person must file an answer, or an answer and a cross application, in accordance with Form 2A; and

(b) the applicant may file a reply in accordance with Form 2B.

21. Thus it may be seen that an application for the return of a child wrongly removed to, or retained in Australia, may be made by a person or body whose rights of custody in respect of the child have been breached (Regulation 6), or by the relevant Australian Central Authority (Regulation 14).

22. Counsel for the father drew our attention to cases decided under the Convention in overseas jurisdictions where the applicant for return is the parent, and is the named party to the proceedings, and receives legal aid in the country in which the proceedings are conducted, or is a joint applicant with the Central Authority (see *Pennello v Pennello* [2003] ZASCA 147; [2004] 1 All SA 32 (SCA); *Central Authority v Houwert* [2007] ZASCA 88; [2007] SCA 88 (RSA) at paragraph 22, where Van Heerden JA noted that in that case the father was not joined as a co-applicant "as is usually the case when a return application under the Convention is instituted by the Central Authority". See also *Beazley v McBarron* [2009] NZHC 37 referring to an article by J Wademan 'The Hague Convention on International Child Abduction: the role of the Central Authority in Court proceedings' (2008) 6 *New Zealand Family Law Journal* 105, which article notes that the New Zealand Central Authority "performs a facilitative role rather than initiating proceedings as a party").

23. We note that absent the participation by the State Central Authority at the hearing of this appeal we were unable to have the benefit of submissions as to whether the regulations would permit concurrent applications by both the State Central Authority and the parent seeking return to be heard and determined by the Court and Australia's obligations, if any, under Article 25. As we will shortly explain in our observations about the role of the State Central Authority, and its duty to put *all* relevant evidence before a court and perhaps craft appropriate conditions sought on the return of a child, we accept that the interests of the State Central Authority and a parent seeking return may not necessarily coincide in all respects.

24. We think it sufficient for the purposes of this case to note that reg 14, on its face, does not, as it is drafted in the alternative, support the concept of concurrent applications by the State Central Authority and a parent. However, we express no concluded view.

25. We accept that there are inherent difficulties if proceedings are commenced by a parent with rights of custody for the return of a child, and subsequently the State Central Authority seeks to be substituted for that parent in circumstances where no request for return of the child has been made by the parent to the State Central Authority in the place of habitual residence (see *Quarmby & Anor*

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v Director-General, Department of Community Services (NSW) (2005) 34 Fam LR 8). But as presently advised we see no reason in practical terms why, if proceedings are commenced by a State Central Authority, that with the consent of the State Central Authority, the parent seeking return could be not substituted for the State Central Authority.

26. However, reg 14 may not rule out intervention under s 92 of the Act by a parent to proceedings instituted by the State Central Authority, but again in absence of submission by the State Central Authority, and as it was not a matter raised by counsel for the father, it is unnecessary we determine this matter.

27. We note that the authors of *International Movement of Children: Law Practice and Procedure* observe that "as far as [they] are aware Australia is the only Contracting State where the Central Authority applies as the applicant" (Nigel Lowe, Mark Everall and Michael Nicholls *International Movement of Children: Law Practice and Procedure,* Jordan Publishing, Bristol, UK, 2004 at 513).

28. We turn now to the role of the Central Authority. In *Re F (Hague Convention: Child's Objections)* (2006) FLC 93-277 the Full Court (Bryant CJ, Kay and Boland JJ) reviewed a number of decisions which discussed the role of the Central Authority, and the scope of its duties. The Full Court referred to the decision of an earlier Full Court in *Laing v Central Authority* (1999) 151 FLR 416; 24 Fam LR 555; (1999) FLC 92-849. Their Honours quoted from the judgment of Kay J in *Laing* where his Honour said:

> …There is weight in the submission that the Central Authority needs to act to some degree as an honest broker. Its role may be likened to that of a Crown Prosecutor who is required to put before the Court matters which might assist the accused as well as matters which might lead to a conviction. The Central Authority's obligation is not to secure the return of the child but to implement the requirements of the Convention.
>
> …
>
> [94] If in implementing the requirements of the Convention it obtains the return of a child who ought to be returned then it is carrying out its function. If it draws to the Court circumstances which might lead the Court to make an order other than the return of a child then it is also carrying out its function. (paragraph 77)

29. The Full Court also referred to the separate judgment of Nicholson CJ *Laing* where his Honour said:

> …Organisations comparable to the Central Authority here are State and Territory child protection services, or, for example, to look to other

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> jurisdictions, prosecutors in criminal matters and government departments in freedom of information applications.
>
> [65] In my view, the repeat involvement of such organisations in forensic disputes places them in a circumstance of greater awareness of decisions which are material to their routine work. That awareness brings responsibilities. In matters of law, the playing field is not even when repeat organisational players are in dispute with a party who lacks a similar familiarity to be informed and lacks the organisationally vested responsibility to be vigilant for the effect of decisions as to the law in the area of their mandate. I would therefore place at a more stringent level than Kay J, the obligation upon the Central Authority as to the applicable regulations and the question of preventing a perfected order discussed below.
>
> [66] A Central Authority is by design within a system of intelligence as to legal developments that cannot be deemed as equivalent to an individual respondent to an application under the Regulations. There are advantages in litigation that cannot be glossed over. As will become evident, such a view of the responsibilities which come from being a repeat player have bearing upon the question of how my findings to this point affect the view I have taken of the power to reopen. (paragraph 78)

30. The Full Court then described the role of the State Central Authority at paragraph 80 as follows:

> The State Central Authority is charged with the obligation to do anything that is necessary to enable the performance of the obligations of Australia under the Convention (Regulation 5(1)(a)). In our view not only does that obligation extend to the requirement to facilitate the return of a child where such an order has been made, but it also requires the Central Authority to actively partake in proceedings brought by it under the Regulations and to assist the Court in determining the proper application of the Regulations to the facts of any one case…

31. We endorse the observations set out in the earlier Australian authorities referred to above about the role and responsibilities of the Commonwealth and State Central Authorities. We would emphasise those responsibilities include a requirement that both the Commonwealth Central Authority and a State Central Authority exercise particular care in the preparation of, and conduct of, proceedings in the Court. We see this role as extending to encompass the making of proper enquiries from the requesting Central Authority about relevant domestic violence legislation in the requesting State when a reg 16 "defence" is raised by the "abducting" parent. We accept that, if the Commonwealth or a State Central Authority agrees to correspond directly with

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a parent seeking return of a child, any information provided to that parent (or to the requesting Central Authority) should be clear and unambiguous.

32. We take this opportunity to make some further observations about the operation of the Convention. Australia has not, as provided by Article 42 of the Convention, reserved its rights to "exclude" compliance with certain provisions of the Convention, although it has declared that the Convention shall extend to "the legal system applicable only in the Australian States and mainland Territories". We will return shortly to further discuss the question of reservation of rights.

33. The United Kingdom of Great Britain and Northern Ireland and the United States of America, as well as many other signatory countries, have by notification of a reservation, declared their country will not be bound by Article 26 of the Convention. It is noted by Beaumont and McEleavy (*The Hague Convention on International Child Abduction*, Oxford University Press, Oxford, 1999, at 249) that although the United Kingdom took up the reservation it has not implemented its reservation in respect of Article 26(3). It is useful at this point we set out both Article 25 and 26 of the Convention. They provide as follows:

> Article 25
>
> Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.
>
> Article 26
>
> Each Central Authority shall bear its own costs in applying this Convention.
>
> Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
>
> However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of

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> legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
>
> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

34. Regulation 30, which was amended effective from 24 July 2007, provides that the Central Authority may apply to the Court for an order that the person who retained or removed the child pay costs including the costs of the proceedings, and the costs and expenses of the return of the child. An "Article 3 applicant" may also make an application to the Court for legal costs of the proceedings and travel expenses. Regulation 30 does not appear to otherwise replicate the obligations in Article 25 and 26 of the Convention.

35. The differing approach to the practical application of the Convention is referred to by Beaumont and McEleavy at 248-256 of their publication. But the procedure adopted in countries such as New Zealand, where legal aid is provided to the parent to bring the application, is not the course adopted by the Australian Government to implement the Convention.

THE PROCEDURAL FAIRNESS CHALLENGE

36. We turn now to the specific grounds of appeal. At the commencement of our discussion of the procedural fairness challenge it is convenient that we refer to the further evidence sought to be adduced by the father and which was contained in affidavits filed 30 July 2010 and 16 August 2010.

37. The evidence, if accepted, was asserted to demonstrate that the father had been denied procedural fairness before the trial Judge because the proceedings had been conducted "on the papers" and without any cross-examination. The father asserted this occurred without his knowledge or consent. He also asserted he was denied the opportunity of putting evidence before the Court of the legal remedies, including domestic violence personal protection orders, available under Norwegian law which could be utilised to protect the mother if she returned with the child to Norway.

38. The mother's senior counsel did not object to paragraphs 1 to 18 of an affidavit sworn by the father and filed on 30 July 2010 ("the first affidavit") being admitted by way of further evidence, nor did he oppose an annexure to an affidavit of the father filed 16 August 2010 being adduced. That annexure was the email from Ms P dated 6 July 2009. It is the same document the State

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Central Authority requested be drawn to our attention. Senior counsel for the mother otherwise opposed the father's application to adduce further evidence. We do not propose to receive any further evidence other than that which is consented to, or not opposed. We will explain our reasons later.

39. In paragraphs 1 to 18 of his first affidavit the father deposed to communicating with both "the Norwegian and Australian Authorities" in respect of his legal representation in the proceedings. The father annexed to his affidavit an email from an officer of the Norwegian Ministry of Justice and the Police (Mr J) dated 10 June 2009 and a response of the same day from Mr S, Legal Officer, International Family Law Section of the Australian Attorney-General's Department as the Commonwealth Central Authority. Mr J's email included the following request for information:

> …
>
> Furthermore, the father is wondering whether he will be represented by an attorney in Australia. If so, does the Central Authority appoint an attorney on his behalf? As it seems to be several aspects that have to be assessed closely by the court in this matter, the father has great concerns as to how he can ascertain that his rights are safeguarded during the Hague proceedings.
>
> …

40. The father then annexed the chain of emails which are set out as follows:

> I would kindly remind you of my e-mail 10 June 2009.
>
> The father is very concerned about the further proceedings in this matter and whether he will be represented by an Australian attorney. Thus, I allow myself to remind you of this issue.
>
> …
>
> …
>
> [The father] will indeed be represented in Australian by an attorney. I am in close contact with [the father's] attorney. [The father's] attorney is extremely experienced in Hague abduction applications and admits that there are several aspects of the application which will be closely scrutinised by the court. It would be greatly appreciated if you could please inform [the father] that his attorney will, of course, act diligently and always in his interests.
>
> …

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41. On 22 June 2009 Mr J wrote to Mr S by email in the following terms:

> …
>
> Is it possible for [the father] to get in contact with his Australian attorney? Since there are several aspects that have to be closely considered I assume that it would be most practical if [the father's] Norwegian and Australian attorney get in direct contact with each other.
>
> …

42. By email dated 23 June 2009 Mr S responded to Mr J's email as follows:

> Thank you for the e-mail. I have spoken with [the father's] counsel and she is fine with me providing you her e-mail address. This can be passed on to [the father] and his Norwegian attorney.
>
> [The father's] counsel is Ms. [P]. Her e-mail address is [omitted]
>
> However, [the father] should be aware that instructions to his counsel have to come from the Australian Central Authority.
>
> …

43. The father deposed that he thereafter wrote to Ms P by letter dated 28 June 2009 (a copy of letter which was annexed to his affidavit) as follows:

> I am informed by the Norwegian authorities that you are representing me in the case of [the mother] abducting my son [the child].
>
> Im am very glad to get in contakt with you and have a few questions for you.
>
> First of all am I wondering what Mr. [S] ment in his mail by writing: 'However, [the father] should be aware that instructions to his counsel have to come from the Australian Central Authority.'
> Second I would like to know if I can only have limited contakt with you.
> Basically what rights do [the child] and I have and what you can do for us?
>
> I have been told that you are an experienced lawer. And that you have pointed at some holes in my paperwork. I am looking forward to hear more about what you think and am more than willing to answer any questions. I have a lot of material / proof . Please let me know what I can do to update you.

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> I am very dependent of somone to take charge. So far I have not found anyone to do that.
> Looking forward to hearing from you. (original spelling and grammar)

44. The father corresponded directly to the Commonwealth Central Authority on 1 July 2009. The father wrote to an officer of the Commonwealth Central Authority, Ms M as follows:

> …
>
> I was informed that you are the new case officer of Australian Central Authority after [Mr S].
>
> If there are anything I can do for you. Papers you need, proof, questions etc. please don't hesitate to ask.
>
> I would like to make contakt with my counsel Ms. [P]. Her e-mail address that was sendt to me is: [omitted]
>
> I have sendt her an e-mail last Sunday, but I have not received any answer.
>
> … (original spelling and grammar)

45. The annexures to the father's first affidavit disclosed that on 3 July 2009 Ms M advised the father that she was the case officer working on his matter, that Ms P was "currently out of the office and will be returning early next week". Ms M concluded her email as follows:

> In the future, if you have any queries or questions regarding your matter, please communicate through the Norwegian Central Authority.

46. Mr J wrote to Ms M on 3 July 2009 pointing out that Mr S had given permission to the father and his then Norwegian attorney, Mr [O], to make direct contact with Ms P.

47. The father also sought to rely on his affidavit filed on 16 August 2010 ("the second affidavit"). He annexed to his affidavit an email forwarded to him by Ms P on 6 July 2009. As we have previously recorded, senior counsel for the mother objected to the affidavit but did not object to the annexure, the contents of which are as follows:

> I am sorry it took me a few days to respond to your e-mail.
>
> Although I am happy to communicate with you need [sic] to know that as the Central Authority for NSW my instructions come from the Australian Commonwealth Central Authority. The Convention is about an agreement

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between countries – here the agreement between Norway and Australia. I am not your lawyer although I am dealing with the application for the return of the child to Norway.

Yes I think you have a difficult case – although the mother's material under theses [sic] proceedings will be filed tomorrow I have seen her evidence in the parenting proceedings. The mother says that she has been subjected to violence and that includes a fracture to her arm – there are a lot of particularised details about the alleged violence. I know you reject strongly the contention that you have been violent to your child – but if there has been extensive violence to the mother and the child has witnessed the violence then it is arguable that the defence under article 13 is likely to be made out. Article 13 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-*(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.

Please discuss this with your Norwegian lawyer to see if there are any solutions you can put forward to negate this potential defence.

… (original emphasis)

48. At paragraph 16 of his first affidavit, the father deposed:

On 13 July 2009, …, the Higher Executive Officer at the Royal Ministry of Justice and the Police sent a letter to [Ms M]. **Attached and marked "8"** is a copy of the letter dated 13 July 2009. I had had discussions with the Norwegian authorities about my representation in the proceedings. I cannot recall if I was aware at the time that the letter had been sent. I was not provided with a copy of the letter at the time. (original emphasis)

49. Annexure "8" of his first affidavit, which is a facsimile transmission dated 13 July 2009, was forwarded by the Royal Ministry of Justice and the Police to the Commonwealth Central Authority. The facsimile includes the following:

…

Reference is made to previous correspondence in the above-mentioned case, latest your e-mail dated 9 July 2009.

Please be informed that [the father] has contacted us and requested information about finding an attorney in Australia.

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> We kindly ask you to provide us with the information necessary on legal aid in child abduction cases in Australia, including the procedure regarding a possible application for free legal aid in child abduction cases, and how to establish contact with an appropriate attorney in Australia.

50. The father also annexed to his first affidavit an email to him from Ms M dated 20 July 2009 which concluded as follows:

> …
>
> I would also like to confirm receipt of your fax dated 13 July 2009. I am currently drafted [sic] a response which with [sic] provide you with further information about the process in Australia.
>
> …

51. On 27 July 2009 the father forwarded an email to Ms P in the following terms:

> Can you please give me information about how the prosedure is in the courtroom.
>
> Are [the mother] allowed to com there?
> Should I bee there?
>
> Are you representing both [the mother] and me, or only me.
> Is the material going to be presented verbally in the court room. Who are doing that?
>
> Are you presenting only my material or both [the mother's] material and mine?
>
> … (original spelling and grammar)

52. By email of the same date, Ms P replied as follows:

> Dear [the father]
>
> Yes [the mother] will be present but generally she will not be able to talk. The judge will decide the case on papers filed by both sides. No you do not need to be in Australia – the other side have not asked and generally we do not ask the left behind parent to travel to Australia.
>
> I am not representing you but I will argue the case for the return. This application is brought by the Australian Govt as a result of the request by the Norwegian Govt – it is an obligation the [sic] both countries have under the Convention.

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> I have asked a very experience [sic] barrister to argue your case. She has all the paperwork and we are now waiting for your material.
>
> The barrister made the following observation on your case:
>
> It seems to me that if we are to have any chance of winning this case we must obtain an affidavit from the Central Authority in Norway setting out: (a) the law in relation to domestic violence, custody cases involving domestic violence, and payment of maintenance; (b) what facilities are available to a mother who is afraid of the father of her small child – e.g. refugee, DVO orders, police protection etc..
> (c) what funds would be available to assist the mother if she were living separately from the father, possibly in a different village.
>
> In short, we need some official answer to the things she states she has been told. It will not be enough for the father to deny any or all of the alleged incidents of violence, because her story has the ring of truth about it and I am unlikely to be able to make her resile from it to any great extent in cross examination
>
> I agree with the barrister's comments. I have just sent the barrister's comments to the Australian Commonwealth Central Authority and asked them to get a response from the Norwegian Central Authority. It will be helpful if you too can ask your Central Authority to address the issued [sic] identified by the barrister. (original emphasis)

53. The annexures to the father's first affidavit also disclose an email, in the Norwegian language, to his lawyer, Mr V, dated 28 July 2009 which includes the following English title "FW: Information about the court procedure…".

54. The balance of the father's first affidavit refers to events occurring after the hearing before the trial Judge. The evidence sought to be adduced by the father includes correspondence from the Ministry of Justice and the Police regarding remedies available in the Norwegian court system. Senior counsel for the mother objected to us receiving this evidence on the basis that it was readily available prior to the hearing before the trial Judge. We do not propose to admit this material as, if admitted, it would not affect the outcome of the appeal.

55. The father also sought, outside the time provided in the rules, to adduce evidence, being the affidavit of his Norwegian lawyer, Mr V, filed 13 August 2010 and his former lawyer, Mr O, sworn 16 August 2010. Objection was taken to each of these affidavits on the basis they were contentious and the mother was not able to test the evidence due to the late filing of the affidavits.

56. We accept the submissions of senior counsel for the mother that the evidence in affidavits of the lawyers, if adduced, is contentious and would result in a denial

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of procedural fairness to the mother who could not, in the short time available after filing of the father's material (13 and 16 August 2010), take reasonable steps to test the material, or to adduce evidence in response (see *CDJ v VAJ* (1998) 197 CLR 172). It is for this reason we do not propose to admit these two affidavits, or the second affidavit of the father save and except the annexure to that affidavit being the email from Ms P dated 6 July 2009.

57. In support of the procedural fairness challenge the submissions (oral and written) of Counsel for the father were:

- that the response from Mr S to the father's enquiry as to whether he would be represented in Australia was clear and unequivocal, but fundamentally wrong;
- the father should have been advised by the Commonwealth Central Authority from the outset the nature of its role, and the choice available to the father, if he thought it necessary, to protect his own rights and interests, to obtain his own representation and be heard in the proceedings;
- the father was not represented, and there was confusion created by the advice from the Commonwealth Central Authority and the State Central Authority as to whether he was represented, or could be represented (this was exacerbated because the father was a foreign person coming from a foreign (inquisitorial) system);
- that the advice in Ms P's email of 6 July 2009 to the father was inadequate to properly alert the father of his rights;
- being unrepresented the father was significantly disadvantaged in being denied the opportunity of instructing counsel to cross-examine the mother (it was readily conceded by the father's counsel that if he had been represented, and his counsel had chosen not to cross-examine the mother, the father could have no complaint);
- in a prosecutorial model involving a fundamental factual contest between the mother and the non-party father, the trial Judge needed to make an enquiry and be satisfied that the father had been informed of his rights and had elected not to participate in the proceedings by means of adducing oral evidence or cross-examination; and
- as the father was not represented he was denied the opportunity of counsel objecting to parts of the evidence, including an unsworn witness statement annexed to the mother's affidavit filed 8 July 2009.

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Discussion

58. At the commencement of our discussion it is instructive to note that, at a time when he was represented by Norwegian lawyers, the father's lawyer made an application on his behalf to the Norwegian Central Authority on 19 March 2009 requesting the authority to seek the return of the child to Norway.

59. We accept that the correspondence received by the father from the Commonwealth Central Authority dated 22 June 2009 was erroneous and misleading. The error was compounded by the further email dated 23 June 2009 sent to the father providing Ms P's details.

60. We are satisfied however that by 6 July 2009, as a result of Ms P's advice, the father had been made aware she was not personally representing him, that he had a difficult case, and his attorney's letter dated 13 July 2009 to the Commonwealth Central Authority confirms that the father was certainly aware he could obtain his own legal representation and that he sought to do so.

61. We are unaware whether the Commonwealth Central Authority replied to the attorney's letter of 13 July 2009. However, the father's later correspondence dated 27 July 2009 with Ms P implies that he was aware of the State Central Authority's role in the proceedings, and sought advice about how the State Central Authority would conduct the proceedings. We note Ms P's reply was forwarded to the father's attorney, and that the father could have, and perhaps did, thereafter receive advice from that attorney about retaining his own legal representation. These factors lead to an inference the father had determined at this point to rely on the State Central Authority to conduct the application.

62. Notwithstanding we accept the father did receive initially misleading and perhaps deficient information from the Commonwealth Central Authority, overall we are not satisfied that the advice received, taken as a whole, denied him procedural fairness. While we were initially concerned on the material originally filed that the procedural fairness ground was arguable, the contents of Ms P's email of 6 July 2009 clarified what might have otherwise been misleading.

63. Counsel for the father did not suggest a trial Judge's responsibilities required him or her to "go behind" the application in every case brought for return of a child under the Convention to ensure the rights of a parent seeking return of a child were fully protected. Rather, he sought to limit the duty to cases such as the present where the evidence about domestic violence was controversial, and where neither party before the trial Judge sought there should be cross-examination of the mother and or the father. In these circumstances, he submitted it was incumbent on a trial Judge, and where the "left behind" parent was not legally represented, to enquire whether that parent knew he or she, if represented, could seek to cross-examine the person who had removed or retained the child.

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64. We do not accept, as asserted by the father's counsel, that there is an obligation on a trial Judge to go beyond the case presented by the applicant, in this case the State Central Authority, and to independently require evidence that a "left behind parent" is aware that, if independently represented, he or she may instruct counsel to seek cross-examination of the party opposing return.

65. A trial Judge may independently determine that he or she requires cross-examination of a party or witness. It is to be remembered the proceedings in the Court are adversarial. It is not a requirement, nor could it properly be a requirement, for a trial Judge to engage in an independent or inquisitorial exercise to determine what might be the knowledge of a party who has requested the assistance of the Central Authority of his or her State to seek an order for the return of a child.

66. Nor do we accept, as submitted on behalf of the father, that Ms P's advice of 27 July 2009 was such to lead the father to believe there would be cross-examination of the mother, notwithstanding the extract from counsel's advice to her contained in her email. Ms P's advice was clear – the case would be conducted "on the papers", and cross-examination of the mother was unlikely to cause her to depart from her evidence in chief.

67. The father's counsel raised, but did not strongly press in his oral submissions, a submission that it was incumbent on the trial Judge to have required cross-examination because of the contradictory evidence of the parties regarding incidents of domestic violence.

68. At paragraph 80, the trial Judge explained how the proceedings had been conducted and the approach she intended to apply as follows:

> Prior to *MW v Director-General, Dept of Community Services* (2008) 39 Fam LR 1 the general approach to Abduction Convention hearings was that they tended to be undertaken without cross-examination. Post *MW v Director-General, Dept of Community Services* where parties seek to test the evidence through cross-examination it is usually permitted. Nonetheless and notwithstanding the conflicted nature of the parties [sic] evidence, they elected to conduct this hearing without cross-examination. The Central Authority submitted that where there is conflict in the evidence I would prefer the evidence given by the father in preference to the mother's. While I accept there are internal inconsistencies in aspects of the mother's evidence her evidence is not so compromised that I would be prepared to adopt this approach. I have applied the approach adopted by Jordan J, which was cited with approval by the Full Court in *Panayotides v Panayotides* (1997) FLC 92-733 per Fogarty and Baker JJ (with whom Finn J agreed), namely:
>
>> The first thing to observe is that there is much conflict in the evidence. These are summary proceedings and issues must be determined on the papers. This often presents the Court with

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> difficulties. It would generally be inappropriate to absolutely reject the sworn testimony of a deponent (see, *Re F* [1992] 1 FLR 548). As was submitted by counsel for the Central Authority, I simply must do the best I can. I look to the versions of each of the parties, I find the common ground, and I note the areas of conflict. I can look to the inherent probabilities. Of course, when one is talking about the intent of parties, where this is a matter of some conjecture, one looks to the conduct of the parties, and any documentary or corroborative evidence which may help to determine that issue.

69. Although her Honour's statement in paragraph 80 about the general approach adopted in Convention cases before the decision of the High Court in *MW v Director-General* is perhaps somewhat widely stated, having regard to decisions such as *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640 and *Director-General NSW Department of Community Services & JLM* (2001) FLC 93-090, we are not satisfied that her Honour fell into appealable error by not requiring cross-examination. It must be remembered that both parties before her Honour were represented by counsel experienced in the jurisdiction. Both counsel made a forensic decision that the matter should be conducted on the papers. Counsel for the State Central Authority determined to run the case without testing the mother's evidence. In so concluding we are mindful of the observations of Gummow, Heydon and Crennan JJ in *MW v Director-General, Department of Community Services* at paragraphs 45 and 46 and that her Honour could, if she thought essential, have required the mother and father to be available for cross-examination.

70. Before us the father's counsel submitted that not only did the forensic decision not to cross-examine result in procedural unfairness to the father, but the failure of counsel for the State Central Authority to object to certain documents annexed to the mother's affidavit was also prejudicial to him, it being asserted that the documents would have been challenged had he been represented. We will deal with this complaint when discussing the grounds in respect of "factual finding errors".

71. In summary we find no merit in the procedural fairness challenge.

THE APPROACH CHALLENGE

72. The father's counsel submitted the trial Judge had erred by approaching the matter on the basis that, if the orders sought in the application were granted, the mother and child would be returned to Norway rather than, as the application and regulations required, considering separately the return of the child to Norway ("the challenge to the trial Judge's approach). He drew our attention to the application itself which required the return of the child (but not the mother) to Norway, and the wording of reg 14.

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73. We accept both the application made to the Norwegian Central Authority and the Commonwealth Central Authority, and reg 14, refer to the return of a child, and not the return of the mother (or father) and child.

74. The father's counsel relied on a letter from the father's Norwegian Attorney, Mr [V], to Ms P dated 28 July 2009 in support of his assertion that the child should be returned to Norway without consideration of his return with the mother. The relevant passage from Mr [V's] letter is as follows:

> On behalf of [the father] I ask the court to order the following :
>
> 1. [The child] should be returned to Norway without an unnecessary delay.
>
> 2. If [the mother] does not return [the child] in spite of a court order, [the father] should have the right to bring [the child] to Norway, if necessary by the assist [sic] of the Australian authorities.
>
> …

The trial Judge's approach to the application

75. Her Honour's discussion of this topic is understandably brief. That is explicable when regard is had to the outline of case relied on by counsel for the State Central Authority at page 21 which was in the following terms:

> 4. The father has proposed a regime whereby he have supervised contact with the child pending the determination by a court of the appropriate residence and contact arrangements for the child in the long term. The father's mother has offered the respondent a flat to live in and she has repeated this offer. [footnote omitted]

76. Although the mother opposed the return order, at no time was it her case that she would not return to Norway if an order was made for the return of the child.

77. At paragraph 180, her Honour commenced her discussion of the Norwegian domestic law by saying "I turn next to consideration of what may happen were the child returned to Norway". At paragraph 189 of her reasons, the trial Judge explained that on return to Norway the mother would be likely to seek police protection.

78. There was no serious dispute in this case that the mother had been the primary carer of the child in Norway and that he was a toddler when taken to Australia in November 2008. He was almost three years old at the date of the orders of the trial Judge. The father did not propose that the child should be returned to his care unless the mother failed to comply with an order of the Court to return

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to child to Norway. Rather, as is clear from his material, he proposed that he exercise supervised contact to the child. Thus, the case proceeded on the basis it was the common expectation of the parties if an order for return was made, the mother would return to Norway.

79. In these circumstances we think it would have been artificial for the trial Judge to determine the application on the basis the child should be returned independently from consideration of his return with the mother.

80. We consider the facts in this case distinguish it from those cases where, for whatever reason, a parent who has removed a child from his or her habitual residence determines that he or she will not return with the child to the place of habitual residence, and seeks to rely on a defence of physical or psychological harm to the child, or otherwise placing the child in an intolerable situation because of the absence of the primary caregiver in the place of habitual residence. Thus observations such as those of Butler-Sloss LJ in *C v C (Minor: Abduction: Rights of Custody)* [1989] 2 All ER 465 at 471 where her Honour said:

> The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him ... Is a parent to create the psychological situation, and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the convention, at least in respect of applications relating to young children.

have no application to the facts of this case. We see no merit in this ground.

THE ASSERTED ERRORS IN FACT FINDINGS CONCERNING GRAVE RISK

81. While the father's counsel provided detailed submissions about this topic, those submissions may be summarised as asserted errors by her Honour in making factual findings which were not supported by the evidence, or based on inadequate or inconclusive corroborative evidence, or that the trial Judge erred in accepting the mother's untested evidence on the topic of domestic violence whilst rejecting other parts of her untested evidence. Counsel for the father also asserted that, although her Honour correctly identified the standard of proof to be applied, she erred in failing to have appropriate regard to that standard.

82. In order to examine this complaint, it is necessary we refer to the trial Judge's reasons which ultimately led to her Honour's conclusion of grave risk to the child of physical and psychological harm if returned to Norway. As we have already explained, it was common ground between the parties that the

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proceedings would be heard "on the papers" and without cross-examination of any witness. In her recitation of the evidence under the heading "Background facts" and later in her reasons when considering "the defences" her Honour set out the history of alleged injuries sustained by the mother and occasions when the parties and/or the mother sought counselling assistance which the mother relied on to support her contention of grave risk.

83. The findings which ultimately led to her Honour's conclusion of grave risk to the child of physical and psychological harm if returned to Norway are found in paragraph 173 of the trial Judge's reasons. These findings are important and we set them out in full:

> In summary, in relation to the mother's allegations of verbal abuse and physical violence I am satisfied that the father:
>
> - Between December 2006 and February 2007 was verbally abusive and physically violent towards the mother which prompted her to seek assistance from a domestic violence counsellor in February 2007.
> - In March 2007 using a closed fist punched the mother in the face.
> - On 20 November 2007, in the course of an argument, jabbed his finger in her eye which resulted in an eye injury and the mother requiring treatment at hospital.
> - On 14 May 2008 broke the mother's arm.
> - On 22 June 2008 pushed the mother into a wall which caused her arm to be re-broken.
> - Attempted to strangle the mother which resulted in bruises to her face and 'red strangling marks around her neck' as observed at the crisis centre.
> - On 18 September 2008 physically assaulted the mother as a result of which he blackened her right eye and bruised her left upper arm, which injuries were observed at a casualty clinic.
> - On 15 December 2008 threatened to kill the mother.

84. At paragraph 174, her Honour referred to other evidence of the mother as follows:

> While the mother, as I have already found, gave evidence of more pervasive violence, I have been unable to conclude that this more pervasive violence occurred. However, even without the additional matters deposed to by the mother being taken into account, the mother has satisfied me she has been the victim of severe violence inflicted upon her by the father.

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85. The conclusions about grave risk which the trial Judge drew, based on her factual findings, are found in paragraphs 175 to 190 of her Honour's reasons. We will refer to those conclusions in greater detail when we examine the grave risk defences.

86. At the commencement of her reasons, the trial Judge, at paragraph 80, referred to the state of the evidence before her. It is useful we again repeat the salient portion of that paragraph:

> … The Central Authority submitted that where there is conflict in the evidence I would prefer the evidence given by the father in preference to the mother's. While I accept there are internal inconsistencies in aspects of the mother's evidence her evidence is not so compromised that I would be prepared to adopt this approach. …

87. Her Honour discussed the way the proceedings were conducted at paragraph 143 of her reasons where she noted:

> For reasons best known to them, the parties adopted the course of deciding against cross examination. This has made resolution of this case and analysis of these risk issues very difficult. The father's concession put it beyond dispute there has been verbal and physical violence between the parents and behaviour which would almost certainly have been psychologically harmful to the child.

88. The trial Judge indicated the specific approach she intended to take to the voluminous evidence relied on by the State Central Authority and the mother by noting:

> ... It would not aid the adjudication of these matters to recite in their entirety the various allegations and denials. The approach I have determined upon is to recount some key elements which give the flavour of the disputed evidence as well as to highlight where concessions were made, **unchallenged evidence and otherwise disputed facts which were corroborated by compelling evidence**. (paragraph 140) (our emphasis)

89. Her Honour then went on to say she proposed to deal with the evidence adopting the approach used by Jordan J in *Panayotides & Panayotides* which we have set out in paragraph 68, having regard to the comments of the Full Court in that case when the matter was subject of an appeal.

90. Also relevant to this discussion is her Honour's explanation in paragraph 82 of her reasons. There she said:

> Fortunately in relation to a number of factual disputes there is independent evidence available to which it is appropriate to attach significant weight. There is also a considerable amount of evidence from the parties close friends and family members filed in support of their respective cases.

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> Unless stated differently this evidence is not sufficiently independent that it would be appropriate to attach to it the degree of weight which would be required to resolve disputed evidence.

91. It is clear from her Honour's explanation in paragraph 82 she rejected as having sufficient probative weight to determine the serious issue of physical and psychological abuse much of the evidence relied on, particularly by the father, which evidence included statements from his family members and others who had seen him interact with the child.

92. Her Honour commenced her consideration of grave risk of physical or psychological harm, or placing the child in an intolerable situation, at paragraph 138 of her reasons. Having been referred to the relevant authorities on the burden of proof and the construction of reg 16 as expounded by the High Court in *DP v Commonwealth Central Authority* (2001) 206 CLR 401, her Honour further particularised the parties' evidence of the incidents of domestic violence and, at paragraph 142, noted the father's denial of the majority of the mother's allegations. In respect of this evidence her Honour said:

> ... If his evidence were accepted the mother would be found to be the aggressor in their verbal and physical altercations and he the victim of numerous rapes. He said she was a martial arts expert and that as well as being violent to him, the mother threatened to harm the child on several occasions. It was his evidence that: 'On some occasions [the mother's] aggression has resulted in all out brawls in which we both suffered bodily injuries'. For example, he gave evidence he had twice suffered a black eye inflicted by the mother.

93. At paragraph 145, the trial Judge set out the father's account of the first domestic dispute between the parties and noted that the mother denied that evidence.

94. The trial Judge recorded that the mother asserted the father repeatedly threatened to kill her if she went to the police or told a doctor. The father denied the allegation. The father's mother and sister denied the mother informed them of these threats, or that they heard the father make the threats.

95. At paragraph 157, the trial Judge dealt with the mother's interaction with the father's mother. Her Honour observed the following about the father's mother's evidence:

> … I have no difficulty accepting her denial and accept that she tried to find a way, within the privacy of the family, to help the parents resolve their marital discord but not at the expense of personal safety. The father agreed that the parents discussed the violence in their marriage with his mother and that she advised him he must not, no matter what hit the mother.

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96. Commencing at paragraph 160, her Honour discussed in detail the evidence concerning the incident on 14 May 2008 when the mother's arm was broken.

97. At paragraph 162 of her reasons, the trial Judge recorded "there is no dispute that the mother's arm was broken and that the injury occurred during a violent altercation between her and the father". Her Honour observed that although the father said the mother pushed and attacked him, that contrary to other incidents, he gave no evidence of the manner of attack or being afraid. Her Honour noted the father was not injured, and it was only the following morning that he took the mother to hospital and remained with her when she informed the doctor her arm was broken in a fall.

98. Having referred to the hospital notes of 16 May 2008, which her Honour set out in full, at paragraph 164, her Honour concluded:

> … The evidence does not demonstrate that the father actions were in any way proportionate to the level of aggression, which, if his evidence was accepted, had been initiated by the mother. His actions were disproportionate to the situation and are very troubling.

99. At paragraph 166 and following, the trial Judge dealt with the incident on 22 June 2008 when the mother's arm was re-broken. Having set out both the mother and father's versions of the incident her Honour concluded:

> … Again although some of the surrounding circumstances are in dispute there is no dispute that during an argument the father pushed the mother, which is how she said she was injured. I am satisfied this is how the mother's arm was re-broken.

100. Her Honour then went on to deal with the mother's evidence about the father's asserted aggression on the parties' return to Norway, including her evidence that the father had struck both herself and the child. Having recorded that the father denied ever assaulting the child her Honour said, at paragraph 170:

> … The frequency and the severity of beatings which the mother said the father inflicted upon the child suggests that one at least of the numerous witnesses would have seen signs of physical abuse on the child. That there are none persuades me that on this matter the mother's evidence warrants considerable caution.

101. In dealing with the incident in which the mother attended a casualty clinic on 18 September 2008 when she suffered a black eye and bruising to her arm, the trial Judge noted the clinic notes did not record the mother as having disclosed the father was also beating the child. Again the trial Judge found, having regard to the father's denial, and lack of corroborative evidence in relation to the child, she was not satisfied that the father had assaulted the child.

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102. After the mother's arm was broken in May 2008 the trial Judge explained, at paragraph 150, that the mother had again consulted the crisis centre. The statement from a Ms B at the Norwegian crisis centre included her hearsay evidence that one of her colleagues had witnessed bruises to the mother's face and "red strangling marks around her neck". Of Ms B's evidence the trial Judge observed:

> … [Ms B] is independent of the parents and her evidence warrants reasonable weight. It corroborates the mother's evidence of physical abuse of her and her concern that the father's verbally abusive behaviour was also directed to their son. This evidence of the mother's complaint and injury well prior to separation tends to undermine the suggestion made by the Central Authority of in effect recent invention by the mother of the father's mistreatment of her and the child. (paragraph 150)

103. In his written summary of argument, counsel for the father submitted there were a number of difficulties with the reliance placed by the trial Judge on Ms B's evidence. He referred to the fact that her statement was an unsworn document, that the father's evidence disclosed no notes were maintained by her organisation, the generality of the matters in her statement, a lack of reporting by the mother of the injuries reported by Ms B's colleague, and asserted failure to link the assertions of the mother to the corroborative evidence of Ms B. It was submitted (father's submissions, paragraph 112, p 27) that the trial Judge erred in relying upon and giving "reasonable weight" to the statement of Ms B.

104. Ms B's evidence was not contained in an affidavit. Her signature was not witnessed. The "evidence" was a statement annexed to the mother's affidavit and read as follows:

> …
>
> [The mother] contacted [G crisis centre] early 2007.
> I spoke with her on several occasions, she told me about the physical abuse she was exposed to from her husband
> She also spoke of the psychological abuse both she and her son [the child] experienced.
> How she planned the day to keep [the child] and herself safe, when her husband was at home she would walk the streets and not return until she knew he had left for work.
> One of my colleges […], witness [sic] bruises on her face and red strangling marks Around her neck
> She told me about the concern she had that one day he would go to [sic] far and the damage would be fatal.
> Do not hesitate to contact me for any further information.
> …

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105. We observe the following concerning the statement:

- the statement contains a hearsay statement of observations of another worker at the crisis centre; and
- the statement is non specific as to the dates when the mother attended the crisis centre although it does refer to the mother contacting the centre in early 2007.

106. While we accept Ms B's statement, if admissible, gives some corroboration to the mother's allegations of violence between December 2006 and February 2007 we have been unable to locate any primary evidence of the mother which Ms B's evidence purports to corroborate that the father attempted to strangle the mother which resulted in "bruises on her face and 'red strangling marks [a]round her neck'". We do however observe that the evidence of the mother's friend Ms T, who was on affidavit, said during a two week visit in 2007 that the father "attacked her [referring to the mother] again, trying to strangle her".

107. We see some inconsistencies in the father's submissions in respect of his challenge to Ms B's statement. First, material in the State Central Authority case, and on which the father sought to rely in the appeal, included another unsworn statement by Ms B annexed to his affidavit. Secondly, the information in the letter from the Royal Ministry of Justice and the Police dated 3 August 2009 (annexed to an affidavit of Ms P filed 5 August 2009) indicates affidavits "do not apply" in Norway. This suggests to us, as Norway is not a common law country, the importance of Ms B's evidence being set out in an affidavit drafted in admissible form would be unknown in that country, although we accept the mother's Australian solicitors were aware of the requirements for admissibility in Australian proceedings. Thirdly, as we have noted, very experienced counsel appeared on behalf of the State Central Authority before the trial Judge, and although objections were noted in the case outline to parts of the evidence in the mother's case, no objection was sought to be taken to this annexure to the mother's affidavit.

108. Notwithstanding these matters, we accept even if Ms B's statement was admissible before her Honour, that reliance on the hearsay statement in it was unsafe. This is particularly so when the mother does not depose to any incident in her affidavit of the father causing bruising to her face and causing red strangling marks around her neck.

109. Our concern about the status and weight which should have been afforded to Ms B's evidence causes us some disquiet as to the weight afforded to the finding reached by her Honour in paragraph 173 that the father had attempted to strangle the mother resulting in bruises to her face and red strangling marks around her neck. However, as we will shortly explain in greater detail, we do not think reliance on this evidence has vitiated the balance of her Honour's

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factual findings in respect of domestic violence perpetrated by the father on the mother.

110. It is timely at this point that we should repeat the caution sounded by the Full Court in *De Lewinski and Legal Aid Commission of New South Wales v Director-General, New South Wales Department of Community Services* (1997) (1997) FLC 92-737 (at 83,941) about the way applications are prepared, particularly when in many cases the application will be dealt with without cross-examination.

111. The father also seeks to challenge the trial Judge's consideration of the events in March 2007 when the mother asserted the father attacked her in the car. Having detailed the matters which her Honour referred to in accepting the mother's evidence on this basis, the father's written submissions criticise her Honour's determination to accept the mother's evidence without proper regard for the father's assertion that the mother made up incidents and the unspecified nature of other incidents which the trial Judge appears to have accepted. It is asserted "that there is no compelling evidence justifying the rejection of the sworn denial of [the father] on this point".

112. Counsel for the father also complained that the trial Judge erred in considering as relevant the fact the father did not, in his affidavit evidence, refer to an incident on 20 November 2007 when the mother asserted she suffered an injury to her eye and the father's mother took her to an outpatient clinic.

113. At paragraph 118 of his submissions (p 28), counsel for the father differentiated between the drawing of inferences in proceedings in Australia and those which pertain to a person in circumstances such as the father from an overseas inquisitorial system. Counsel for the father referred to inferences drawn by her Honour about the incident when the mother's arm was broken in May 2008.

114. Counsel for the father also submitted that the trial Judge's conclusion in relation to the re-breaking of the mother's arm was "not a safe, necessary or compelling conclusion that on the evidence that [the father] was responsible for breaking the [mother's] arm". Reference was made to the absence of evidence from the mother's father in respect of this incident. Like the earlier challenges, these challenges were all directed to the assertion that the inferences drawn by the trial Judge were not open to her Honour.

115. Complaint was also addressed by counsel for the father to the trial Judge's acceptance of the mother's evidence in respect of an assault on 18 September 2008 in circumstances where, on the father's case presented by the State Central Authority, there was a fundamental factual conflict which it is asserted was not resolved by her Honour. It is submitted that the mother's evidence should have been rejected by the trial Judge.

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116. It is unnecessary for us to traverse each and every matter raised in the meticulous and detailed submissions by counsel for the father. It is important to bear in mind these proceedings were not the final hearing of the parenting dispute. No doubt in the parenting proceedings which the mother has commenced in this Court, all of the relevant evidence will be fully tested. The complaints about the trial Judge's disregard for certain aspects of the voluminous evidence, such as the mother's possible selection in the wrestling championship, or her Honour's findings that the father's response to the domestic violence was disproportionate, are without merit given the nature of these proceedings in which the opportunity for testing of evidence is limited. We think it is important to record however that a number of the submissions deal with incidents other than those detailed in paragraph 173 of the trial Judge's reasons, and the dissection of individual incidents and parts of the evidence of those incidents without examination, as her Honour did, of the cumulative effect of all of the evidence does not accurately reflect the reality of the domestic violence, which on the corroborated evidence, the trial Judge found to be serious and concerning.

117. Senior counsel for the mother addressed each of the assertions made in counsel for the father's detailed written submissions orally.

118. Senior counsel for the mother submitted that her Honour's reasoning was fully exposed in her judgment. He further submitted that the trial Judge avoided "the error of treating adverse credit findings on other issues as necessarily determinative" (transcript, 17 August 2010, p 62). He went on to note that the evidence given by the mother had not been accepted by the trial Judge in some instances, but rather her Honour had adopted a course of making findings "determined by the existence of corroborative evidence" (transcript, 17 August 2010, p 63).

119. Thus he submitted that her Honour had determined the issue applying an appropriate standard of proof in dealing with each of the injuries suffered by the mother, that the mother's injuries had been observed by medical professionals, and there was no dispute, notwithstanding his apology, that the father admitted the threat made on 15 December 2008 to kill the mother.

120. In respect of the corroborating evidence, particular emphasis was placed by senior counsel for the mother on the clinical notes of the social worker to whom the mother was referred at Westmead Hospital. We agree that the history reported to the social worker by the mother and the social worker's observations of the mother, made at a time prior to the parties' reconciliation and return to Norway, was cogent corroborative evidence of the domestic violence and its effect on the mother and the trial Judge was entitled to place significant weight on that evidence.

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121. Senior counsel for the mother referred us to the statement of principle in *Warren v Coombes* (1979) 142 CLR 531. We accept the submissions of the mother's senior counsel that the inferences drawn by the trial Judge were open to her on the evidence.

122. We do not accept the submission of counsel for the father that there was a disjunction between her Honour's recounting of the evidence of incidents of domestic violence and the summary of findings which appeared in paragraph 173 of her Honour's reasons and that each of them, albeit in different categories, was not without some deficiency.

123. It is apparent to us that her Honour placed significant weight on incidents of domestic violence which were independently corroborated in accordance with the approach endorsed in *Panayotides* and applying the standard of proof required by s 140 of the *Evidence Act* 1995 (Cth), having regard to the seriousness of the allegations made. In so concluding we consider that her Honour's acceptance of the mother's evidence of domestic violence in 2007 was corroborated by her attendance at the crisis centre, and her findings in respect of the incident of 20 November 2007 were corroborated by hospital notes and to an extent by the father's mother's evidence. The serious incident of 14 May 2008 which resulted in the fracture of the mother's arm was corroborated by the hospital records, as was the mother's version of the second injury to her arm. Similarly the evidence of the incident of 18 September 2008 was corroborated by hospital notes. The father's threat to kill the mother, the child and her parents was not denied by the father. While we accept the corroborative evidence relied on to support the attempted strangulation of the mother and bruising to her face was hearsay evidence and deserving of no or little weight, we do not think the inclusion of that injury in paragraph 173 of her Honour's reasons should be considered to impugn the balance of her findings.

124. As we have already observed, the task which her Honour undertook was to evaluate, and where appropriate, draw inferences from the evidence before her.

125. The chronology of the independently corroborated violence considered overall led her Honour to the conclusions she reached. As we have already noted the inferences drawn by the trial Judge were open to her. Thus we are satisfied the grounds asserting error in findings of fact and the standard of proof applied have no merit.

GRAVE RISK TO THE CHILD OR PLACING THE CHILD IN AN INTOLERABLE SITUATION

126. The gravamen of the father's complaint is the trial Judge, having found comparable protections under the law in both Norway and Australia, then had

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no basis for finding the mother would not be protected in Norway, and thus the child would not be subject of grave risk of physical or psychological harm.

127. Counsel for the father pointed out to us that although while in Australia the mother had been given advice by the social worker from Westmead Hospital she had not taken up that advice. He submitted, as a result of the trial Judge's approach in considering the return of both the mother and child to Norway, she had failed to assess as a distinct issue the risk to the child of return. Counsel went on to submit, at paragraph 159 of his written submissions:

> The findings of Her Honour are submitted to impermissibly have regard to the possibility of exposure of the child to harm not as a consequence of the child's return, but rather as a consequence *"of that which might emerge at a future time, if after return an unsatisfactory situation is allowed to persist without alteration"*: see *Zafiropoulos and Central State Authority* (2006) FLC 93-264 at 80,490. (father's submissions, p 36)

128. At paragraph 175 of her reasons, the trial Judge recorded the contention made on behalf of the State Central Authority that:

> … 'At its highest, the mother's case must be that if she and the father lived together in the future, the child might be at risk of witnessing or being caught up in domestic violence. As the father has indicated that he has no wish to resume the relationship, and has suggested minimising contact between the parents, there is no risk of harm to the child.'

129. Although, at paragraph 178, the trial Judge explained she had not accepted the mother's evidence that the father was physically violent to the child, she went on to note there had been serious verbal and physical violence between the parents following the child's birth while he was in their care. Her Honour went on to record that:

> … While the child probably did not see the father injure the mother, the likelihood is that he overheard some perhaps all. Even though he was not directly involved, his presence in the home during violent altercations between his parents placed him in a highly risky situation. … (paragraph 178)

130. Her Honour thus concluded:

> … Because the child was so young and dependant upon the mother (from whom he had never been separated) as his primary carer, that she was so seriously abused and injured within his hearing was psychologically abusive of him. (paragraph 178)

131. Her Honour went on to note that the type of violence was such that it could easily occur in a situation "into which the child was drawn".

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132. Having made these findings, her Honour then turned to consider what might happen if the child returned to Norway. There is no dispute that her Honour correctly recorded the provisions of the relevant Norwegian legislation, nor is there any challenge to her conclusion that Norway has "a well structured legislative and community framework for dealing with family law cases which involve allegations of domestic violence" (reasons, paragraph 181).

133. The trial Judge, having referred in some detail to the protections available in both Norway and Australia, noted that, up until the date of the hearing, there had been no reporting to relevant authorities of the abuse in Norway, and in Australia reporting by the social worker from Westmead Hospital had been ineffective. Her Honour's findings on this topic are found at paragraph 189 which we now set out in full:

> Although on return to Norway the mother would be likely to seek police protection and orders which on their face would protect her and the child from the father and keep the child safe, I am not satisfied the orders would achieve their intended effect. For the child, the reality would be that he would primarily be reliant upon a personally isolated primary carer who historically has been unable to protect him from the risk of harm discussed earlier. The mother's personal isolation increases the gravity of risk of harm to the child. This is because her isolation would mean that there would be few people intimately involved in her and the child's life who could themselves intervene if her will to take further necessary action failed her. The evidence suggests that the violence which the father inflicted upon the mother ceased primarily because the mother moved to another country. There is a real risk that the type of violence which the father may inflict is not amenable to the type of constraints which the interim orders and the criminal law would impose. In this regard it is noteworthy that even after the mother had removed herself and the child from Norway the father's threats to her continued. His threat to kill her is a threat with the potential of the gravest consequences to her and the child. I am not confident that the father's apology and his failure to act in accordance with the threat, means it has abated.

134. Her Honour's crucial findings on the topic are found at 190. After referring to her concern about the ability of the father's family to provide appropriate support for the mother her Honour concluded:

> … In short, the totality of the evidence persuades me that if the child returned to Norway with the mother there exists a grave risk of grave physical harm to the mother and a risk of commensurate severity of physical and psychological harm to the child. While in Australia domestic violence has rarely been found to bring this defence into play (see *Murray v Director of Family Services ACT* (1993) FLC 92-416, *Zafiropoulos and the Secretary of the Department of Human Services State Central Authority*

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(2006) FLC 93-264) I am persuaded that this is one of those rare occasions where the facts support such an outcome. (paragraph 190).

135. Her Honour thereafter considered whether the father's family would be able to provide the necessary emotional and practical support for the mother and found they would not.

136. At her commencement of discussion of "Grave risk of harm or an intolerable situation" at paragraph 139 and following of her reasons, the trial Judge had set out the principles enunciated by Gaudron, Gummow and Hayne JJ in *DP v Commonwealth Central Authority*, at paragraphs 40 to 43 of their reasons. We now set out those paragraphs and think it is also appropriate to include paragraphs 44 and 45:

> 40. So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that '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'. If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might *otherwise* have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.
>
> *'Narrow construction'?*
>
> 41. In the judgment of the Full Court of the Family Court which gives rise to the first of the matters now under consideration (*DP v Commonwealth Central Authority*) it was said that there is a 'strong line of authority both within and out of Australia, that the reg 16(3)(b) and (d) exceptions are to be narrowly construed'. Exactly what is meant by saying that reg 16(3)(b) is to be *narrowly* construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in 'an intolerable situation'. That requires some prediction, based on the evidence, of

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what *may* happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

42. Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that there is a risk which warrants the qualitative description 'grave'. Leaving aside the reference to 'intolerable situation', and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would *expose* the child to harm.

43. Because what is to be established is a *grave* risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.

44. These considerations, however, do not warrant a conclusion that reg 16(3)(b) is to be given a 'narrow' rather than a 'broad' construction. There is, in these circumstances, no evident choice to be made between a 'narrow' and 'broad' construction of the regulation. If that is what is meant by saying that it is to be given a 'narrow construction' it must be rejected. The exception is to be given the meaning its words require.

45. That is not to say, however, that reg 16(3)(b) will find frequent application. It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return. (footnotes omitted, original emphasis)

137. The principles clearly set out how the grave risk and intolerable situation defences are to be considered, and paragraph 45 emphasises the limitations on reliance on those defences.

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138. We accept the submission made on behalf of the father that the authorities both in Australia and overseas on the question of grave risk or intolerable situation do not readily admit a clear statement of principle but rather tend, understandably, to turn on the facts before a trial Judge dealing with a return application.

139. In *Zafiropoulos & The Secretary of the Department of Human Services State Central Authority*, Kay, Coleman and Warnick JJ conducted an extensive review of the cases dealing with the grave risk exception to return and concluded, at 80,507:

> …ultimately the final decision appears to come back to the words of Gleeson CJ in *DP* v *Cth Central Authority* (2001) 206 CLR 401, 407-408, at par 9 that:
>
> > "The meaning of the regulation is not difficult to understand. The problem in a given case is more likely to be found in making required judgment. That is not a problem of construction, it is a problem of application."

140. The problem of application is that it may often involve a careful balancing of relevant considerations having regard to the purpose for which the Convention was established, and the giving due recognition of the systems and protections afforded by the country from which the child was removed or wrongfully retained. Appropriate recognition must be afforded to the serious and invidious nature of domestic violence, its effect on the victim and the corresponding actual or potential effect on a child, or the consequences of requiring the returning child (and perhaps a primary care giver) being isolated and living in impoverished circumstances until parenting proceedings are determined.

141. In these circumstances, we see little utility in discussing cases where a return has been refused on the basis of grave risk of physical or psychological harm and those where, notwithstanding evidence of domestic violence, grave risk has not been found or, if found, the discretion to dismiss the application has not been exercised. We note those cases range from extreme domestic violence perpetrated on both a mother and child such as in *Re: F (A Minor: Abduction: Rights of Custody Abroad)* (1995) 3 All ER 641 to facts such as found in *Zafiropoulos*.

142. We think the problems which confront a judge such as confronted the trial Judge in this case were eloquently explained by Hale LJ (as her Ladyship then was) in her dissenting judgment in *TB v JB (Abduction: grave risk of harm)* [2001] 2 FLR 515 at paragraphs 43 & 44 and 57 & 59 as follows:

> [43] … when the Hague Convention was first drafted, the paradigm abductor was not the children's primary carer, but the other parent who 'snatched' them away from her. Hence a deliberate distinction was drawn

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between rights of custody and rights of access. Summary return was not the remedy to protect mere rights of access. Now, however, in 72% of cases, the abductor is the primary carer: the parent who has always looked after the children, upon whom the children rely for all their basic needs, and with whom their main security lies. The other parent is using the Hague Convention essentially to protect his rights of access. He can do this because "rights of custody" include the right to veto travel abroad, and most such parents now enjoy that right. But return to the home country may be a sledge hammer to crack a nut, because however much the children need contact with the other parent, they need a secure happy home with a competent and caring parent even more. There is often good reason to believe that the home country will allow them all to emigrate. It is therefore regarded as a real risk by the Hague Conference that spurious Art 13(b) defences will be raised in such cases: there is equally a real risk that the courts of the requested states will either succumb too readily to such defences, out of the kindness of their hearts and a natural reluctance to do anything which does not appear to them to be in the best interests of the children, or alternatively become unsympathetic and fail to recognise those few which should succeed.

[44] It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it…

…

[57] But it cannot be the policy of the Convention that children should be returned to a country where, for whatever reason, they are at grave risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems…

…

[59] … It would require more than a simple protection order in New Zealand to guard the children against the risks involved here…

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143. While we are not troubled by the overall findings of her Honour in respect of domestic violence, we are less than satisfied her Honour's conclusion of grave risk of physical and psychological harm to the child, which her Honour found in paragraph 190, was open to her. Her Honour had rejected the mother's evidence that the father had physically harmed the child. The evidence was that the parties would not be living together in Norway, nor was there evidence that the father had ever breached a domestic violence order which could have led to a conclusion such an order would not adequately protect the mother and child.

144. While we readily accept that if future violence occurred in the presence of the child it could be psychologically damaging to him, her Honour did not separately assess that risk and the risk of physical harm to the child but rather conflated those risks. Although our conclusion may seem semantic the risk of either physical or psychological harm (or both) to the child which must be established by the person opposing return, as indicated in paragraph 55 in *DP v Commonwealth Central Authority*, and at paragraph 57 of Hale LJ's reasons in *TB v JB (Abduction: grave risk of harm)*, are qualified by the adjective "grave".

145. As will be shortly seen, notwithstanding our conclusions that her Honour's conflated finding of grave risk of physical and psychological harm to the child was unsafe, her Honour went on to consider separately the defence of intolerable situation.

146. The trial Judge dealt with the intolerable situation defence commencing at paragraph 191 of her reasons. Her Honour recited the support which the father proposed to give to the mother, which included paying the rent on an apartment for one month and support for the mother and child in the sum of NOK 4,000.00, together with ongoing support of NOK 4,000.00 each month for the child until an administrative or court decision determined his level of ongoing child support. The trial Judge then discussed the evidence from the Royal Ministry of Justice and the Police and concluded that the mother would not be eligible for financial support as she had not been resident in Norway for three years prior to making application for such support.

147. The trial Judge noted the father's contention that the mother could support herself by getting work in Norway. However, her Honour concluded that she was not satisfied the work the mother previously undertook in Norway would provide her with sufficient supplementary income to bridge the gap between her approximate rental costs and what the father said he would pay.

148. Having referred to the fact that the mother was in receipt of social security benefits in Australia, the trial Judge said she accepted the mother's evidence she had few financial supports and "that she and the child would be in a financially extremely vulnerable position were the child ordered to return to Norway" (reasons, paragraph 194).

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149. Her Honour set out her conclusions on intolerable situation at paragraph 195 of her reasons as follows:

> I am persuaded that the child and the mother if the child were to be ordered to be returned to Norway, would be placed in an intolerable situation. That is, from the child's perspective, not only without provision of basic essentials but reliant upon the mother as his primary carer who would almost certainly be isolated and terrified. In short, there is compelling evidence the mother genuinely and reasonably believes her life is at risk from the father if she returns to Norway. The seriousness of the past domestic violence and abuse discussed above when combined with his threat to kill her would place her in an intolerable situation. Because of the child's reliance upon her for the entirety of his physical and psychological needs, these factors add to my satisfaction that a return order would also place him in an intolerable situation.

150. We conclude that findings which underpinned her Honour's conclusion that the mother and child would be placed in an intolerable situation if a return to Norway was ordered were well open to her on the evidence. We also think it is of significance that the State Central Authority, after having the benefit of her Honour's reasons, determined not to file an appeal.

151. Her Honour then, having found the defences were made out, considered whether, in the exercise of her discretion, a return should be ordered. Having considered the ability of the father to participate in the parenting proceedings in Australia commenced by the mother and considered the child's present living arrangements, her Honour concluded as follows:

> ... Until the father arrives in Australia the risk of harm to the mother and child from his domestic violence is virtually non-existent. While upon his arrival the risk increases, that the mother and child reside with her parents moderates this risk... (paragraph 199)

152. The learned authors Beaumont and McLevy refer to the intolerable situation defence at p 151-154 of their monograph. Although we accept the cases cited therein (and bearing in mind the book was published in 1999 and reprinted in 2004 such that it does not contain discussion of more recent decisions), generally concluded where social security benefits were available in the place of habitual residence, that although children's standard of living may be reduced, that reduction could not be said, of itself, to constitute an intolerable situation, the facts in this case were different in that social security benefits were not available to the mother in Norway.

153. We do not discern any error in the exercise of discretion by the trial Judge in the circumstances of this case. It was open to her Honour to find on the evidence the mother was not eligible for social security benefits in Norway, and based on her past employment unlikely to be able to meet her housing and

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other expenses, notwithstanding the receipt of child support by the father, and that she would be in a vulnerable financial situation.

154. Given the past attitude of the father's family we are satisfied her Honour was correct in finding the mother would be without necessary support emotionally, and would be isolated. Corroboration for that finding had earlier been made by the trial Judge in her reference to the social worker's notes.

155. The task in which the trial Judge engaged was that averted to by Gaudron, Gummow and Hayne JJ in *DP v Commonwealth Central Authority* at paragraph 41, that is, the task her Honour engaged in was the making of "some prediction, based on the evidence, of what *may* happen if the child [was] returned" (original emphasis). Further, as noted by Gaudron, Gummow and Hayne JJ, that did involve some consideration of the interests of the child. We discern no error by the trial Judge. Accordingly, this ground which challenges the intolerable situation "defence" is without merit.

CONDITIONS

156. Counsel for the father submitted that the trial Judge had failed to adequately consider the undertakings offered by the father and failed to adequately consider conditions which would afford appropriate protections to the mother on her return to Norway.

157. Counsel for the father submitted that the trial Judge could have prevented, until the Norwegian courts were seized of the matter, any contact between the father, mother and child.

158. Although counsel for the father referred us to the dissenting judgment of Kirby J in *DP v Commonwealth Central Authority* at paragraphs 147 and 148, we think it is also important to consider the comments of the majority at paragraph 40 of the same judgment where their Honours said "[e]nsuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be voluntarily or, if not met voluntarily, can readily be enforced" (see also the comments of the Full Court in *McDonald & Director-General, Department of Community Services (NSW)* (2006) FLC 93-297 and *Department of Community Services & Frampton* (2007) FLC 93-340).

159. We think the comments of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in *De L v Director-General, New South Wales Department of Community Services* at 662 are particularly relevant to this matter. Their Honours, after referring to Canadian and English decisions, explained:

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> 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. (footnote omitted)

160. There is no suggestion that the trial Judge's recording of the father's proposals for financial support on the mother's return were anything but accurately recorded by her Honour.

161. Her Honour's conclusion on the question of conditions is set out in paragraph 200 of her reasons as follows:

> As must be clear from my findings made in consideration of the defences I am not satisfied that it is possible to construct enforceable conditions for the child's return which would moderate the gravity of the risk of harm to the child to a level which would reasonably address his safety needs or place him in anything other than an intolerable situation.

162. Prior to reaching these conclusions her Honour had extensively canvassed the evidence in relation to the incidents of domestic violence, and legal and other support which would be available to the mother on her return. We have already discussed her Honour's conclusions that the mother would be in a financially vulnerable position notwithstanding the offers of support made by the father.

163. We are satisfied her Honour thoroughly canvassed and took into account the availability of protective orders which could be made in favour of the mother in Norway. We accept her Honour's conclusion, that she could not craft conditions which would overcome the vulnerability suffered by the mother as a result of the prior domestic violence, or which would result in satisfactory living arrangements for the mother and the child where the mother who had no access to social security benefits and would be isolated with lack of family support, was open to her on the evidence. Accordingly we satisfied this complaint is not established.

164. We think it important that we again emphasise in dealing with this ground that the State Central Authority chose not to appeal her Honour's orders, nor did they participate in the appeal. Thus we did not have the benefit of any submissions on the type of conditions, if any, which could have alleviated risk of harm to the child or the child being placed in an intolerable situation. We may infer the State Central Authority too found her Honour's reasoning on intolerable situation, and lack of conditions which could overcome that situation, satisfactory.

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165. No ground of appeal having been established, the father's appeal must be dismissed.

COSTS

166. At the conclusion of the appeal we sought submissions from each party in respect of costs. Senior counsel for the mother sought, in the event the appeal was dismissed, that the father pay the mother's costs. Senior counsel for the mother advised us the mother was on legal aid, a relevant factor for us to take into account.

167. The father's counsel sought if the appeal was dismissed that no order for costs should be made having regard to the circumstances of the case and the nature of the issues agitated.

168. Section 117AA of the Act deals with costs in respect of proceedings under the regulations. We did not have the benefit of argument as to whether this section applies in the case of an appeal or only at first instance. However, as we will now explain, that consideration is irrelevant to our determination. Section 117AA provides as follows:

> (1) In proceedings under regulations made for the purposes of Part XIIIAA, the court can only make an order as to costs (other than orders as to security for costs):
>
> (a) in favour of a party who has been substantially successful in the proceedings; and
>
> (b) against a person or body who holds or held an office or appointment under those regulations and is a party to the proceedings in that capacity.
>
> (2) However, the order can only be made in respect of a part of the proceedings if, during that part, the party against whom the order is to be made asserted a meaning or operation of this Act or those regulations that the court considers:
>
> (a) is not reasonable given the terms of the Act or regulations; or
>
> (b) is not convenient to give effect to Australia's obligations under the Convention concerned, or to obtain for Australia the benefits of that Convention.
>
> (3) In proceedings under regulations made for the purposes of section 111B, the court can also make an order as to costs that is:

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(a) against a party who has wrongfully removed or retained a child, or wrongfully prevented the exercise of rights of access (within the meaning of the Convention referred to in that section) to a child; and

(b) in respect of the necessary expenses incurred by the person who made the application, under that Convention, concerning the child.

169. Whether we were determining costs under this provision or the costs under s 117 of the Act, we are satisfied in the circumstances of this case that there should be no order for costs, and each party should pay their own costs of and incidental to the proceedings.

I certify that the preceding one hundred and sixty nine (169) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court delivered on 5 November 2010

Associate:

Date: 5 November 2010

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