FAMILY LAW ACT 1975

FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS 1986

IN THE FAMILY COURT OF AUSTRALIA
AT MELBOURNE

File No. ML 1481/97

IN THE MATTER OF THE CHILD:

Y ARDITO

BETWEEN:

STATE CENTRAL AUTHORITY

(Applicant)

AND

MS ARDITO

(Respondent)

CORAM: The Honourable Justice Joske

DATE OF HEARING: 24th, 27th, 28th and 29th October 1997

DATE OF JUDGMENT: 29th October 1997

JUDGMENT OF THE COURT

APPEARANCES:

Ms. Bennett of Counsel appeared for the State Central Authority.

Mrs. Fogarty of Counsel appeared for the respondent wife.

1. The application that has been before the Court is one filed on behalf of the State Central Authority seeking, as a final order, that, pursuant to Regulation 14 of the *Family Law (Child ` Convention) Regulations* 1986 ("the Regulations") that the child Y, born in February 1995, be returned to the State of New York, United States of America. The application was filed on 7th May 1997.

2. Statement of Agreed Facts was prepared by Miss Bennett, who appeared on behalf of the State Central Authority and Ms. Fogarty, who appeared on behalf of the respondent wife. The facts which I now set out, are largely taken from this document.

3. The requesting parent, Mr Ardito, was born in New York, United States of America, and is 41 years of age. He is a citizen of the United States. The respondent, Ms Ardito, was born in Melbourne in the State of Victoria, and is 33 years of age. She is an Australian citizen. She lived in the United States, however, from 1986 until 29th November 1996. Since 1st December 1996 the respondent has lived in Melbourne.

4. The requesting parent and the respondent married in Manhattan, New York in December 1992. There are two children of this marriage, X, born in January 1994, and Y, born in February 1995. Both children are United States citizens by virtue of their birth in the United States. In or about September of 1996, however, the children were granted Australian citizenship. It is alleged by the requesting parent that the children's Australian citizenship was arranged by the respondent without his knowledge or consent. The respondent, however, alleges that the requesting parent was fully informed in relation to this application, and indeed made independent enquiries in relation to it. It appears clear, however, that the acquisition of Australian citizenship in no way compromises the children's American citizenship, nor is it a matter that there is any bearing on these proceedings.

5. Following the marriage, the respondent and the requesting parent made their home in the United States. The requesting parent and the respondent, however, did travel outside the United States on various occasions including to Australia in 1994 / 95 and to the United Kingdom and Greece in May / June 1996. In addition, the respondent travelled to Australia with the child Y in June / July 1995. On 15th January of 1993 the respondent was granted a non-immigrant visa, which permitted her to make multiple applications for entry into the United States until the expiration of that visa, which was 14th January 1997.

6. On each occasion that the respondent re-entered the United States, she was accorded non-immigrant status and her Australian passport was stamped "leave to enter for six months - employment prohibited". In addition, on each occasion that she re-entered the United States, she was either accompanied by the requesting parent, who vouched for her, or alternatively she was in a position to state that she was married to and residing with the requesting parent, and that he was responsible for her financial support. It is agreed that the respondent's economic circumstances and medium term residential proposals have not in the

past ever proved prohibitive to her re-entry into the United States, although it is asserted by the respondent that at times, her re-entry status was scrutinised by the immigration authorities and on one occasion she was detained for a short time. There was never any compulsion on the respondent or upon the requesting parent to regularize the respondent's immigration status.

7. In early 1996, it was agreed between the respondent and the requesting parent that she should take Y to Australia for the following Christmas. It is asserted by the respondent that the agreement in fact related to her taking both children to Australia. This is denied by the requesting parent, who states that the agreement related solely to Y. It was agreed that the respondent and Y would travel to Australia in November 1996 and that they would be later joined by X and the requesting parent on an unspecified date, provided the requesting parent's work commitments permitted him to do so.

8. It was the respondent's hope that the family's visit to Australia would result in a permanent move from the United States and that the respondent, the requesting parent and the two children would settle in Melbourne, where the respondent's family resides. The requesting parent contends that such a move was never contemplated by him. It is, however, agreed that when the respondent and the requesting parent made arrangements for the trip to Australia for Christmas 1996, there was no agreement on the part of the requesting parent that the family or any member of it would cease to live in the United States and relocate to Australia.

9. Australian visas were granted for each of the children in London on 7th June 1996. These visas entitled each child to enter Australia on multiple occasions until the expiration of the visa which, it is noted on Y's passport, was 7th June 1997. The visas did not permit employment and entitled the children to remain in Australia for three months from the date of their arrival. A visa, in the same terms, was sought and granted to the requesting parent.

10. During 1996, and indeed for the majority of the marriage, the family resided at S Street, New York. The requesting parent holds some qualifications and has previously practised as a professional in the United States. The respondent was engaged in some employment during the marriage. The respondent asserts that the requesting parent was to provide financial support for herself and the children whilst they were in Australia.

11. The respondent alleges that tickets were booked for the respondent and the children to travel to Australia on 20th November 1996. She further alleges that on approximately 24th November 1996 the requesting parent advised her that he would not permit her to take X (then aged two years and ten months) to Australia, but she could still take Y (then aged one year and nine months). It is asserted by the respondent that the requesting parent said he would bring X out to Australia for the festive season, but this was conditional upon his work being finished.

12. The respondent alleges that the requesting parent arranged for the airline tickets to be re-issued for the respondent and Y with a return journey booked for 15th January 1997. The requesting parent alleges that the respondent was responsible for all of the bookings. It is at least common ground that the respondent and Y left the United States on 29th November 1996 and arrived in Melbourne on 1st December 1996.

13. Neither the requesting parent nor X travelled to Australia. The respondent alleges that prior to 15th January 1997 the requesting parent advised her that he would not be bringing X to Australia or making the trip himself. Furthermore, that he would not be finding alternative accommodation for the family in New York. In this context he said, "I don't care if you stay (in Australia) for a year" and, in addition, "don't come back - the marriage is over". The requesting parent denies that this is what he said and alleges that the respondent told him that she would not be returning to the United States. He responded by saying, "I don't care how long you stay there for, but Y has to come back". He also alleges that during the course of telephone conversations with the respondent he pleaded for the return of his daughter. He also alleges that the respondent, intentionally withheld service of Court documents upon him and failed to advise him of the whereabouts of the child and the nature of illnesses from which she suffered.

14. The respondent did not return Y to the United States on 15th January 1997. The requesting parent asserts (and it is not denied) that on 1st February 1997 the respondent told him by telephone that she and Y would not return to the United States.

15. For the purpose of these proceedings, it is agreed that a wrongful retention in relation to the child Y occurred on or about 1st February 1997, within the meaning of Regulation 13 of the Regulations.

16. On 23rd January 1997, the respondent filed an application under Part 7 of *The Family Law Act* 1975 seeking an order for residence in respect of both Y and X. The application and affidavit in support were prepared by the respondent herself. She subsequently appeared in person before Judicial Registrar Nikakis on 24th January 1997, when *ex parte* orders were made *(inter alia)* that until further order Y reside with the respondent and that the requesting parent be served with the respondent's applications (Form 7 and Form 8) together with her affidavit in support, by pre-paid post. This order for residence, however, has no bearing on these proceedings (see Regulation 18, *Family Law (Child Abduction Convention) Regulations.)*

17. On 21st March 1997, the requesting parent made an application to the Department of State, Bureau of Consular Affairs, Office of Children's Issues, in its capacity as the United States Central Authority for the Hague Convention on the Civil Aspects of International Child Abductions, for the return of Y to the United States. On 30th April, and in anticipation of filing an application pursuant to the Regulations this jurisdiction's State Central Authority and the respondent consented to certain holding orders in relation to Y.

18. The State Central Authority's application pursuant to Regulation 14 sub-regulation 1 of the Regulations was filed on 7th May 1997 and served upon the respondent. This application asserted that on 1st February 1997 the respondent had wrongfully retained Y in Australia.

19. On 8th May 1997, the respondent consented to an order which provided *(inter alia)*:

> The child [Y], born … February 1995, be returned to New York in the United States of America at such time and on such conditions as may be agreed between the applicant State Central Authority, the husband and wife and in the absence of agreement, as may be ordered by the Court on the adjourned date. ("the order").

20. The proceedings were otherwise adjourned until 23rd May 1997. The respondent was represented by a solicitor on 8th May 1997 and has continued to be legally represented. The respondent did not resist the application. There was no determination on the merits of the State Central Authority's application. No application or affidavit material was filed, or sought to be filed, by the respondent prior to the order being made.

21. On 16th May 1997, the State Central Authority wrote to the requesting parent advising him of the various conditions sought by the respondent on her return to the United States. These requests were:

1. That the respondent accompany Y back to the United States.
2 That the requesting parent pay air fares for herself and Y.
3. That before the respondent and Y depart for the United States the requesting parent do all necessary things and pay any necessary costs to enable the respondent to obtain valid "permanent resident status" in the United States.
4. That the requesting parent arrange suitable accommodation at his expense for the respondent, at which the children could also be accommodated, to enable the children to have ongoing contact with both parents.
5. That the requesting parent place sufficient funds in the respondent's nominated bank account to cover her reasonable living expenses (which were not specified or estimated).
6. That the requesting parent not seek any orders against the respondent for the costs of these proceedings.

22. There was no positive response from the requesting parent in relation to requests numbered 2, 4, 5 and 6 of the respondent's requests. He agreed with request numbered 1 that the respondent accompany Y back to the United States, but indicated that whilst he would pay for any costs relating to the child, he would not pay the costs of the respondent's air fare. He further stated that he would sign any document submitted to him by the respondent to enable her to re-

enter the United States. Subsequently, it was resolved that the respondent's requests would be negotiated via the United States Central Authority rather than attempting to deal directly with the requesting parent.

23. On 23rd May 1997, the State Central Authority's application was adjourned to 29th May 1997, and it was noted:

> "That the purpose of the adjournment is for the respondent, the husband and the State Central Authority to investigate the respondent's eligibility to re-enter and remain in the United States of America."

24. On 29th May 1997 the proceedings were once more adjourned to 16th June 1997, and it was ordered *(inter alia)* that the respondent file and serve any applications or material upon which she proposed to rely in relation to her ability to return to the United States in the company of Y or otherwise. On 16th June 1997, the proceedings were yet again adjourned, following which they were subsequently adjourned on a number of other occasions. All adjournments were obtained to permit further time in which either the requesting parent could respond to the respondent's requests for certain conditions to be agreed upon in relation to the child's return, or for the respondent to obtain information from the United States immigration officials as to her eligibility to re-enter the United States, or for this jurisdiction's State Central Authority to make its own enquiries or to verify information received by the respondent as to her immigration status.

25. No agreement was reached, nor was there any Court order as to the conditions (if any) upon which the child Y was to be returned to the United States. On 28th July 1997, the respondent informed the Court, through her Counsel, that, if she could not return to the United States with Y, she wished to appeal against the order of 8th May 1997, which provided that she should return.

26. On 31st July 1997, the respondent filed a Notice of Appeal. This appeal came on for hearing on 15th September 1997 before a Full Court comprising Fogarty, Kay and Hannon JJ. The appeal was determined on that day, and the following orders were made:

1. That the fresh evidence (in relation to the respondent's inability to enter the United States) be admitted into evidence.
2. The appeal is allowed.
3. That there be a re-trial of the application of the State Central Authority at the Melbourne Registry of the Family Court with priority.
4. That the respondent take all steps necessary to apply for all relevant visas and other forms of entry into the United States within 7 days.

27. The return airline tickets held by the respondent for herself and Y have lapsed and can no longer be used. The respondent did not surrender these tickets nor gain any financial benefit. The agreed estimated cost of returning the child to New York on a one way direct Qantas flight in the company of the respondent

is $2,741, being $1,100 as the child's fare and $1,641 as the respondent's fare. Y is too young to fly as an unaccompanied child. The requesting parent asserts that United Airlines will permit Y to travel without charge. This, however, is denied by the respondent. The requesting parent contends that the respondent has the means and ability to fund her own travel. He is, however, unable to identify an ascertainable fund from which the cost of the fares may be met. The requesting parent is prepared to pay for the respondent's fare if the Court orders him to do so. He is also prepared to travel to Australia, collect and return Y to the United States at his own expense.

28. The respondent on the other hand, asserts that the requesting parent has the means and ability to fund the travel for herself and Y to return to the United States. She, however, is unable to identify any ascertainable fund from which the cost of the fares may be met.

29. There is no impediment in existence in respect of the child Y re-entering the United States. However, had the respondent departed from Australia with Y as booked on 15th January 1997, and upon the assumption that neither the respondent nor the requesting parent had at that time formed the intention to divorce, upon her arrival in the United States, she would have been required to apply to the United States Immigration and Naturalisation Service (INS) immediately to regularize her legal status from non-immigrant to immigrant. In these circumstances, she may have been refused entry. This problem would have been compounded by the fact that her non-immigrant visa had expired on 14th January 1997.

30. A further means that may have been available to the respondent to have entered the United States was an application by the requesting parent for the respondent's immigration. This is called an Immigrant Visa Petition for an Alien Relative. This course, however, is no longer open to the respondent. On 8th July 1997, the United States Central Authority wrote to this jurisdiction's State Central Authority, which (omitting formal parts) is in the following terms:

> "We understand and share your concerns that Mrs. Ardito should be fully represented in any Court proceedings regarding child custody. However, you may not be aware of the fact that Mr. Ardito has already filed for divorce. I regret to inform you that under these circumstances, it is unlikely that the Immigration and Naturalisation Service would allow Mr. Ardito to file an Immigrant Visa Petition on behalf of Mrs. Ardito. In addition, the detention, retention and / or withholding custody of a child are grounds for a determination of a non-immigrant visa eligibility. If Mrs. Ardito is unable to obtain a visa and subsequent entry into the United States she may wish to retain an attorney in the United States to represent her interests in any future custody proceedings.
>
> Mr. Ardito has informed us that he is prepared to travel to Australia to bring Y back to the United States."

31. Exhibit C to the requesting parent's affidavit sworn 10th September 1997 is a copy of the requesting parent's Action for Divorce issued in the Supreme Court of the State of New York on 27th July 1997. Presumably, the requesting parent must have informed the United States Central Authority of his intention rather than the fact of what had actually taken place. The effect, however, is unchanged.

32. On 16th August 1997, the United States Central Authority wrote to this jurisdiction's State Central Authority (omitting formal parts) in the following terms:

> "I have assured Mr. Ardito that I would address Mrs. Ardito's request that 'Mr. Ardito do all necessary things and pay such costs as are necessary to enable Mrs. Ardito to obtain valid permanent resident status in the U.S.A. U.S. immigration law permits an American citizen to file an Immigrant Visa Petition on behalf of an alien spouse only if they have a valid, ongoing marital relationship. This obviously is not the case between Mr. and Mrs. Ardito. If Mr. Ardito were to file the petition on behalf of Mrs. Ardito, under these circumstances, he would face severe penalties for committing marriage fraud and / or submitting false information."

33. On 11th September 1997, the United States Central Authority wrote a further letter to this jurisdiction's State Central Authority (omitting formal parts) in the following terms:

> "There is a specific visa ineligibility for an alien who withholds an American citizen abroad from a U.S. court ordered custody, but an exception is made when the alien is a national of a country that is a party to the Hague Convention, as long as the child is actually in that country. The exception would certainly apply to Ms. Ardito. A left behind parent in the United States may choose to pursue criminal charges against a taking parent since international parental child abduction is a Federal offence in the United States. However, the Office of Childrens Issues recommends that left behind parents exhaust all possible civil remedies before considering criminal action."

34. The requesting parent asserts that accommodation can be made available to the respondent in a property owned by his family. Furthermore, the United States Central Authority has stated that it will use its endeavours to find a *pro bono* lawyer for the respondent. The respondent, for her part, asserts that the accommodation offered by the requesting parent is uninhabitable and not available for her use. In addition, she requires financial support. Furthermore, there is no guarantee that the respondent can be represented by a legal practitioner. In any event, such representation would be of little value if the respondent (as is the case) is refused admission into the United States.

35. Pursuant to the orders of the Full Court, the respondent made an application for a non-immigrant visa on 18th September 1997. This application was made to the Consular General of the United States of America at 553 St. Kilda Road,

Melbourne. The respondent was unsuccessful in her application. The respondent exercised her right to a personal interview with a consular officer, which took place on 19th September 1997. This interview did not result in the respondent acquiring any form of visa.

36. On 2nd October 1997, Vice Consul of the Office of the Consular General of the United States of America (Melbourne, Australia) wrote to the respondent's solicitors (omitting formal parts) in the following terms:

> "Thank you for your enquiry of 30th September 1997 regarding the application of [Ms] Ardito (nee …) for a U.S. traveller's visa.
>
> Our records show that Ms. Ardito was refused a visa under Section 214(b) of the United States Immigration and Nationality Act. To qualify as temporary visitors, applicants must have a residence abroad, that they do not intend to abandon. Furthermore, their circumstances must show that they do not intend to perform skilled or unskilled labor while in the United States or otherwise violate the terms of their visa. The burden of proof is on the applicant. Our records show that Ms. Ardito applied via drop off on September 18 and was found ineligible under Section 214(b). Our records also show that she was accorded an interview with a consular officer on 19th September, and again found ineligible under Section 214(b). It is of note that Ms. Ardito had previously been in contact over issues of working in the United States with the Consular General in Sydney, had previously lived in the United States for three years, apparently without legal status, and had declared an intent to work in the United States to support herself. Ms. Ardito requested a full oral and written explanation of her refusal and was informed that no other avenue existed for her to pursue travel to the United States at this time.
>
> I regret that our response can not be more favourable. Please be assured that Ms. Ardito's application has received every consideration consistent with U.S. law and regulation."

37. It is conceded by Counsel for the State Central Authority that there is no way in which the respondent can gain entry into the United States so as to be heard and participate in custody proceedings in that country.

38. Regulation 16(1) of the Regulation reads:

> 16(1). Subject to sub-regulation (3) a court shall order the return of a child pursuant to an application made under sub-regulation 15(1) if the day on which that application was filed is a date less than one year after the date of the removal of the child to Australia.
>
> (3) A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that - ...

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

39. Ms. Fogarty, who appeared for the respondent, contended by way of defence, that there was a grave risk that the child's return to the applicant would (a) expose her to psychological harm; (b) or otherwise place the child in an intolerable situation.

40. I was asked first to deal with the defence that the return of the child would place her in an intolerable situation. If the respondent was unsuccessful in this defence, then, it was agreed, that I should proceed to deal with the defence involving psychological harm

41. Fundamentally, it was Ms. Fogarty's contention that the return of Y to the applicant would place the child in an intolerable situation by reason of the fact that the mother was unable to re-enter the United States to be heard in custody proceedings in that country.

42. I turn first to the case of Gsponer v. the Director General, Department of Community Services (Vic.) (1989) LC 92-001. One of the issues that arose in that case was whether the "grave risk" related to "intolerable situation" of which physical harm and psychological harm were merely examples or whether the paragraph was to be read disjunctively. At page 77,159 of the joint judgments of Fogarty, Frederico and Joske JJ, it was said in relation to this matter:

> "In our view the three categories are to be read separately and to that extent we agree with the submissions of Senior Counsel for the wife. However, it needs to be emphasized that there must be a 'grave risk' of the occurrence of one or more such events. Further, it is impossible to ignore the existence of the words 'or otherwise'. The consequence of those words is to link the quality which each of the first two categories must have to the emphatic words which describe the third category ('an intolerable situation'). That is, it is not the grave risk of any physical or psychological harm that would satisfy the first two aspects of this sub-paragraph. The physical or psychological harm in question must be of a substantial or weighty kind."
>
> This accords with the view of the Court of Appeal in re. A (*supra.)* where at p.372 Nourse LJ said this:
>
> > "I agree with Mr. Singer, who appears for the father, that not only must the risk be a weighty one but it must be one of substantial and not trivial psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'. It is unnecessary to speculate whether the *ejusdem generis* rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words can not be ignored in deciding the degree of psychological harm which is in view."

We should add that there is no significance in the circumstance that in this passage his Lordship referred to only psychological harm; in that case the issue related to that as distinct from suggested physical harm."

It is next necessary to distinguish the facts of the present case from the decision of C. v. C (1989) 2 All ER 465, a decision of the Court of Appeal. In that case, the mother was an English national and the father an Australian national. Following the breakdown of the parties' marriage, the Australian Family Court made an order granting custody of the parties' son to the mother and granting injunctions, joining each of them from removing the child from Australia without the consent of the other party. The mother, wrongfully removed the child, then aged 6 years, from Australia to England, both of which were Convention countries. In proceedings taken under the Hague Convention in England, the mother asserted that she would not return with the child to Australia and, that in consequence, the child would be harmed by his separation from her. At first instance the High Court found that the mother's defence of grave risk of psychological harm to be sustained, and dismissed the father's application. On appeal, however, Lord Donaldson MR, Neill and Butler-Sloss LJJ reversed this decision, and at p.471, Butler-Sloss LJ said:

> "The Convention does not require the Court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is the parent to create the psychological situation and then rely upon 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 upon 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. I, for my part, cannot believe that this is in the interests of international relationships. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny his contact with his other parent."

43. This passage from C. v. C (supra) was approved by the Full Court of the Family Court, (Nygh, Strauss and Rowlands JJ) in Director General of Family and Community Services v. Davis (1990) FLC 92-182. In that case, the wife asserted that she would not return with a 4 year old child to the United Kingdom where her other two children aged 12 and 8 years respectively resided. The wife

did not succeed in persuading the Court to refrain from making an order for the return of the child.

44. This present case, however, is very different. The wife has not deliberately refused to return to the United States and thereby endeavoured to create a defence of grave risk psychological harm or an intolerable situation. On the contrary, on the day following the issue of the State Central Authority's application (7th May 1997) she consented to an order to escort the child back to the United States. Following this, I am satisfied that the respondent has taken all reasonable steps in an endeavour to re-enter the United States. This includes seeking financial assistance from the requesting parent which he had declined to provide.

45. I am satisfied, that the respondent's inability to procure a visa to enter the United States is not attributable to any unilateral act on her part, either before or after the wrongful retention. Furthermore, the requesting parent's inability to petition for the wife's residence as an alien relative is directly attributable to his having instituted divorce proceedings in the Supreme Court of New York on 27th July 1997.

46. The purposes of the Convention are well explained in the observations of Kirby J in de L. v. Director General NSW Department of Community Services (1996) FLC 92-706, at 83,466, a decision of the High Court of Australia:

> "Central to (the purposes of the Convention) is the intention that, save in the most exceptional cases, a child should ordinarily be returned quickly to the jurisdiction of habitual residence from which the child was abducted. Disputes about custody and access should be determined in that jurisdiction. Save in exceptional cases, the procedures for return under the Convention should not be transformed, effectively, into a hearing about the custody of the child. Whenever that happens, the fundamental objective of the Convention will be defeated. The abducting parent then secures the fruits of conduct which not only offends international law, but is usually highly disruptive to the welfare of the child involved and its relationship with the other parent. The objective of deterring international child abduction is also defeated. International comity and co-operation, so necessary for the implementation of the Convention, are defeated. The purpose of the Government and legislature of the requested state in adhering to the Convention and incorporating it into municipal law is defeated."

47. Clearly however, all this must be predicated upon the fact that after the child or children have been returned to the jurisdiction of their habitual residence the issue of custody must be decided only after a fair trial.

48. Jeffrey A. Flick, in his book "Natural Justice - Principles and Practical Application" (Butterworths, 2nd Edition, 1984 at p.68) said:

> "One of the two fundamental requirements of the rules of natural justice is that a party whose rights, property, or legitimate expectations may be

affected by an administrative adjudication has the right to be heard: *audi alteram partem.*

49. Sykes, Lanham, Tracer and Esser, in "General Principles of Administrative Law" (4th Edition, Butterworths, 1997) at p.194, say:

> "The preceding chapter was concerned with legislative control over the procedures to be observed by authorities in the performance of their statutory function. In addition to these legislative controls there exists a set of common law controls known collectively as the principles of natural justice. There are two rules: the *audi alterem parum* rule and the *rule nemo debit esse judex in propria causa*. The former requires that persons be given an adequate opportunity to present their case to an authority and the latter directs that the authority be unbiased."

(See also Salemi v. Mackellar No. 2 (1997) 137 CLR 396.)

50. In my view, the fact that the respondent is unable to gain entry into the United States for the purpose of appearing in these proceedings, amounts to what can only be described as a serious denial of natural justice. The right to be heard is a fundamental requirement of natural justice. Even if the U.S. Central Authority was able to procure *pro bono* representation for the wife, such representation would avail her little if she is unable to be present and participate in the proceedings. In any event, there is no guarantee that such representation will eventuate. This is no criticism of the United States system of justice, but rather the trite finding that no system of justice is satisfactory where one side is denied the right of appearance. Accordingly, I am of the opinion that the fact that the respondent is denied entry into the United States constitutes a grave, or in this case an almost certain risk, that the child Y will be placed in an intolerable situation.

51. Although the matter was not argued before me, I regard it as probable that the matter also falls within the ambit of Section 16(3)(d):

> "The return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms."

52. Once it has been established that there is a grave risk of the child being placed in an intolerable situation I have a discretion to refuse to make an order returning the child to the United States. In the circumstances of this case, there is nothing to indicate that the requesting parent would be denied entry into Australia. So far as funds are concerned, he has offered to fly to Australia to pick up the child Y and take her back to the United States.

53. I also take into account the matters set out in the report of Ms. D, a Court counsellor.

54. Fundamentally, however, I regard it as quite wrong and contrary to all concepts of fairness that the question of the custody of Y should be conducted in circumstances where the wife is denied the right to appear.

55. Accordingly, I make the following orders:

IT IS ORDERED:

(1) That the application of the State Central Authority pursuant to the *Family Law (Child Abduction Convention) Regulations* 1986, filed 7th May 1997, be dismissed.

(2) That all orders made in the proceedings between the State Central Authority and the respondent wife be and are hereby discharged AND IT IS DIRECTED that the passport in the name of Y, born … February 1995, presently held by the Registrar of the Family Court at Melbourne in the State of Victoria pursuant to paragraph 6 of the Orders of this Court of 8th May 1997, be returned to the wife forthwith.

IT IS ORDERED:

(3) That the solicitors for the State Central Authority be responsible for service of a sealed copy of this Order upon the Australian Federal Police and the appropriate immigration authority.

(4) That there be no order as to costs.

IT IS CERTIFIED

(5) That pursuant to Order 38 Rule 13 (1)(a)(i) of the Family Law Rules this matter reasonably required the attendance of Counsel for the State Central Authority and the respondent wife.