[2005] FamCA 843 **FAMILY LAW ACT 1975**

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA **Appeal No EA 81 of 2005**

AT SYDNEY **File No SYF 2421 of 2005**

BETWEEN:

MQ

First Appellant

- and -

"A"

By her next friend

Second Appellant

- and -

DEPARTMENT OF COMMUNITY SERVICES

Respondent

REASONS FOR JUDGMENT

CORAM:	**Bryant CJ, Kay and Boland JJ**
DATE OF HEARING:	**25 August 2005**
DATE OF JUDGMENT:	**5 September 2005**

MQ and "A" (BY HER NEXT FRIEND) v DEPARTMENT OF COMMUNITY SERVICES
EA 81 of 2005
CORAM: **Bryant CJ, Kay and Boland JJ**
DATE OF HEARING: **25 August 2005**
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Catchwords: ***CHILD ABDUCTION – order for return of a 4 year old child to the United States of America at the suit of the Central Authority - earlier orders at the suit of the child's father set aside by Full Court on the basis that he had no standing to bring an application - Central Authority intervened in the earlier appeal foreshadowing an application to be substituted for the father - application abandoned - whether Central Authority estopped from bringing further application for the return of the child - Port of Melbourne Authority v Anshun (1981) 147 CLR 589 - whether Central Authority acted reasonably in electing to abandon its substitution application and commence separate proceedings once it had received a formal request from the USA to seek the child's return.***

CHILD ABDUCTION - application for return of child wrongfully removed from USA - 13 year old half sister of child seeks to have a contact order made in her favour - submits that the paramountcy provisions of s 65E of the Family Law Act 1975 (Cth) require the Court to give her contact application paramountcy over the Hague application - held that the Hague proceedings were to be disposed of within the confines of the Family Law (Child Abduction Convention) Regulations 1986 and the paramountcy provisions did not apply to them.

The matters before the Court concern two appeals brought against orders made by Steele J on 8 July 2005 requiring the return of a 4 year old child S to the United States of America pursuant to the provisions of the *Family Law (Child Abduction Convention) Regulations* 1986 ("the *Abduction Regulations*").

The appeals are brought by the child's mother and her 13 year old half sister A. Both of the appellants seek to have orders made resisting the return of S to the United States.

It is not in dispute that S was removed from the United States in March 2004 within the meaning of the *Abduction Regulations*. It is not argued that any defence to the mandatory return of the child had been established pursuant to Regulation 16.

There were two matters sought to be argued in the appeal, namely that the Central Authority was estopped from bringing the application and that issues arising out of the child A's application to have a contact order made in her favour allowing her to have contact with the child S brought into play the paramountcy provisions of s 65E of the *Family Law Act* 1975 (Cth) ("the Family Law Act") so as to require the Court to give those matters paramountcy over the orders that would require the return of S to the United States.

Background

The first appellant (the mother) was born in the Philippines but is an Australian citizen. The child, the subject matter of these proceedings, S was born in the United States in July 2001. Her father resides in the United States.

The parents became acquainted via the internet in 1998. At that time the mother already had two children, J born June 1987 and A born June 1992. They both resided with her in Australia.

The mother travelled to the United States in 2000 where she met the father in person for the first time. They agreed to marry. She returned to Australia, divorced her first husband, obtained the necessary visas and returned to the United States, accompanied by A. She married the father on 22 November 2000. The relationship did not last and by February 2004 the mother filed for divorce in the United States. She sought orders for custody and possession of S.

In March 2004 the mother, without the father's permission, took S and A from the United States to Australia. On 19 March 2004 the mother sought to have her suit for divorce dismissed. On 2 April 2004 the father brought his own proceedings in a

United States court.

On 6 April 2004 the father filed an application pursuant to the *Abduction Regulations* seeking an order that S be returned to the United States. An order was made to that effect by Halligan JR on 6 May 2004.

On 26 May 2004 the child A by her case guardian (her maternal grandmother) filed two applications. By one application she sought orders that she reside with the mother, that she have liberal contact to her brother J and her half sister S, and that the father and the mother be restrained from removing her from Australia. By her second application she sought leave to intervene in the abduction proceedings, that the orders of Halligan JR be quashed and that the father and the mother be restrained from removing S and herself from Australia.

The mother also sought to review the orders made by Halligan JR.

On 10 June 2004 Coleman J ordered the return of S to the United States, granted leave to A permitting her to intervene in the abduction proceedings and refused to entertain A's application for parenting orders.

On 22 October 2004 the Full Court (Finn, May and Carmody JJ) allowed an appeal by A against the orders made for the return of S to the United States holding that the father did not have standing to apply under the *Abduction Regulations* for the order for the return of the child. In so doing it reversed its earlier decision in *Panayotides v Panayotides* (1997) FLC 92-733.

The Attorney-General for the Commonwealth of Australia intervened in the appellate proceedings as of right pursuant to s 91(1) of the Family Law Act. In its judgment in the appeal proceedings the Full Court noted as follows:

> "26. At the commencement of the hearing of the appeal Senior Counsel appearing for the Attorney-General informed us that he also appeared for the Commonwealth Central Authority established under the Regulations, and that the Central Authority also sought to intervene and be joined as a party to the

> proceedings. The purpose of such intervention and joinder would be to enable the Central Authority, in the event that this Court was to hold that the father had no standing to commence the proceedings under the Regulations, to be substituted for the father and to have orders made in its favour, effectively retrospectively, for the return of the child.
>
> 27. Given that no substantial argument was put on behalf of the appellant child, the respondent father, or the respondent mother, in opposition to the intervention and joinder of the Central Authority (as opposed to the substantive orders that the Authority would seek if the father was found to have no standing), we permitted the Central Authority to intervene and to be joined as a party."

The Commonwealth Central Authority had filed an Application in a Case seeking the following orders:

> "1. The Commonwealth Central Authority be joined as a party to this appeal.
>
> 2. The Commonwealth Central Authority be substituted for the Applicant / Father [YS] in proceedings (P) PAF1647 of 2004 determined by Judicial Registrar Halligan on 6 May 2004.
>
> 3. All steps previously taken by the Applicant Father [YS] in the proceedings before Judicial Registrar Halligan be deemed to be steps taken by the Commonwealth Central Authority in those proceedings.
>
> 4. The Commonwealth Central Authority be substituted for the First Respondent / Father [YS] in the Review Applications brought by [A] and [MQ] in proceedings PAF1647 of 2004 and determined by Coleman J on 10 June 2004.
>
> 5. All steps previously taken by the First Respondent / Father [YS] in the proceedings before Coleman J be deemed to be steps taken by the Commonwealth Central Authority in these proceedings."

In allowing the appeal the Full Court said further:

> "90. We indicated to Senior Counsel for the Central Authority at the hearing of the appeal that we had considerable reservations about the appropriateness of such orders, and in any event the other parties to the proceedings would have to be given the opportunity to respond to the application.
>
> 91. We propose, therefore, to include in our orders directions that within 14 days of the delivery of the judgment, the Central Authority should file with the Eastern Regional Appeals Registrar and serve on the other parties either written

> submissions in support of the application or written notice that it does not propose to pursue the application. In the event that the Central Authority proposes to pursue the application then the other parties will have 14 days to respond, with the Central Authority having a further 14 days to reply."

On 29 October 2004 the Commonwealth Central Authority served a notice indicating it would not pursue the application to be substituted. Orders were then pronounced by the Full Court on 22 November 2004 setting aside the orders of Halligan JR and Coleman J and dismissing the father's application under the *Abduction Regulations*.

On 24 February 2005 the United States Central Authority requested that the Commonwealth Central Authority commence proceedings under the *Abduction Regulations* for the return of S to the United States. The Director-General, Department of Community Services, being the State Central Authority for an Australian state, filed an application on 3 March 2005. The child A sought leave to intervene in the proceedings and the respondent mother filed an answer seeking the dismissal of the State Central Authority's application.

On 11 May 2005 Loughnan JR refused A's application for leave to intervene in the proceedings and made orders requiring the return of S to the United States.

On 18 May 2005 the mother filed an application seeking to review the decision of Loughnan JR. When that matter came on for hearing on 30 June 2005 an oral application was made for an extension of time to file an application for review on behalf of A.

Steele J heard both the mother's application for review as well as A's application for leave to be heard out of time. He dismissed both applications and ordered the return of S to the United States as soon as practicable.

As already indicated these appeals seek to challenge the order for S's return. It is argued firstly that the Central Authority was estopped from bringing the application by reason of the election it made in the first Full Court proceedings. Secondly it was

argued that A's application for parenting orders to be made in her own proceedings required the Court to provide paramountcy to her welfare rather than to deal with the abduction application as a first priority.

The trial judgment

After setting out the history of the matter Steele J said:

> "22. … The Mother now concedes that the return of the Child must be ordered unless it is established:-
>
> (i) That the Central Authority is estopped from bringing fresh proceedings because having become a party to the earlier Full Court proceedings in circumstances where it could have sought Final Relief, it chose not to do so. (The Anshun Principle)
>
> or
>
> (ii) That the operation of the Paramountcy Principle, pursuant to Section 65E makes Regulation 19 of the Regulations invalid to the extent that it requires the deferral of the hearing of the Application for Parenting Orders filed in the Parramatta Registry pursuant to which [A] seeks contact with [S] and her brother [J]. (The Paramountcy argument.) This, if correct would have the result that the Part VII proceedings could possibly be heard contemporaneously with the Hague Proceedings."

His Honour identified as procedural issues:

> "(i) Whether [A] should be granted an extension of time to file an Application for Review so that she may be heard separately on her Application to intervene in the Hague Proceedings and to have her Application for Parenting Orders heard at the same time in circumstances where she has not Filed an Application for Review within the seven days ordered by Loughan J.R.
>
> (ii) Assuming [A] overcomes the impediment referred to in paragraph (a) above, should [A] be given leave to intervene having regard to the following:-
>
> ♣ Section 65C and 69C sets out an exhaustive list of the persons who have

right to apply under Part VII. They include "any other person concerned with the care welfare or development of the child" That description may not include a thirteen year old sibling who clearly loves her sister but has no responsibility for her care, welfare or development.

- ♣ If [A] has no right to bring proceedings for contact then the making of a Hague Order would not adversely affect her rights

- ♣ [A] is apparently concerned to protect her rights to bring an Application for contact with her siblings [J] and [S].

- ♣ If it be the case that [A] has no "right " to protect then she should not be permitted to intervene, even if she overcomes the procedural difficulties, to pursue an argument which in the court's view must fail.

- ♣ The apparent capacity of the Mother to argue all the matters which [A] could argue."

In identifying the procedural issues his Honour referred to s 65C and s 69C of the *Family Law Act*. Section 64B of the *Family Law Act* defines the term "parenting order" as an order that deals with one or more of the following:

(a) the person or persons with whom a child is to live;

(b) contact between a child and another person or other persons;

(c) maintenance of a child;

(d) any other aspect of parental responsibility for a child.

Section 65C provides a parenting order in relation to a child may be applied for by:

(a) either or both of the child's parents; or,

(b) the child; or

(ba) a grandparent of the child; or

(c) any other person concerned with the care, welfare or development of the child.

Section 69C makes similar provision for the commencement of proceedings under the *Family Law Act* in relation to a child other than proceedings for parenting orders, maintenance and enforcement of orders.

The orders sought by A in her proceedings fell into three categories. Firstly, she sought orders concerning her, namely that she reside with the wife and that the husband and wife be restrained from removing her from the Commonwealth of Australia.

She next sought that she have liberal contact with her brother J each weekend, and finally she sought that she have liberal contact each day with and in the presence of S.

It could only be the final issue sought by A in those proceedings, namely her contact with S, that could have any bearing at all upon the outcome of the abduction proceedings. Nobody appeared to be opposing the proposal that A reside with her mother. The applicant father in the abduction proceedings was not seeking any order for the removal of A from Australia. No issues were being raised by any person about the amount of contact she should have with her brother J. That left for decision, if and when the issue appropriately arose, whether an order could be made at her request giving her contact to her half sister S and, if so, the priority between the proceedings for the return of S to the United States and A's application for contact.

The trial Judge appeared to deal with A's application on two bases. He held that it was subservient to the abduction application by reason of Regulation 19 which provides:

> "If an application for the return of a child is made, a court must not make an order, except an interim order, providing for the custody of the child, within the meaning of Regulation 18, until the application is determined."

In turn, Regulation 18 provides that the term “custody” includes:

(a) guardianship of the child; and

(b) responsibility for the long term, or day to day, care, welfare and development of the child; and

(c) responsibility as the person or persons with whom the child is to live.

It would seem anomalous that a person seeking orders concerning the day to day care, welfare and development of the child would have to await the outcome of the abduction proceedings but a person merely seeking contact with the child could interfere with the processes laid down under the *Abduction Regulations*. Clearly the greater encompasses the lesser and any proceedings relating to contact with the child would have to await the outcome of the proceedings relating to the Convention application. Only once the determination of the issue as to whether or not S should be returned to the United States had been made could the Court then turn to determine what contact orders, if any, should be made in favour of A. As a consideration of what if any order should be made for such contact would depend upon the outcome of any proceedings in the United States concerning the custody and place of residence of S, it would be appropriate to decline any attempt by A to intervene in the abduction proceedings and certainly appropriate to refuse her leave to bring a review application out of time.

The trial Judge also rejected A’s application to extend the time for leave to review the Judicial Registrar’s decision on the basis that A did not fit within the description of being a person “concerned with the care, welfare and development” of S. He said:

> “25 … I accept that [A] has a close loving relationship with [S]. Nonetheless, it appears to me that the words in Section 65C and 69C refer to a person who has or proposes to accept a degree of responsibility for the care, welfare or development of the child. In circumstances where [S] lives with her Mother and Grandmother, and of course [A], it is my view that [A] does not fit within the description contained in the two sections.”

We think it appropriate to comment that there may be many circumstances in which a sibling can bring an application for a parenting order and accordingly do not wish to be seen to endorse the view expressed by Steele J that A could not be a person concerned with S's care, welfare and development. However as already discussed, A's right to bring such an application could not effect the outcome of the abduction application, and as such it was appropriate for Steele J to refuse to extend time to allow her to review the Judicial Registrar's decision.

In the course of refusing the child's application for leave to extend the time to review the Judicial Registrar's decision and her application to intervene in the hearing before Steele J, his Honour also dealt with submissions put on behalf of the mother that r 19 was ultra vires the regulation making power conferred by s 125 of the *Family Law Act* in that it was said that the regulation was inconsistent with the provision of s 65E of the *Family Law Act* which provides that:

> "In deciding whether to make a particular parenting order in relation to a child, the court must regard the best interests of the child as the paramount consideration."

His Honour dismissed that submission saying:

> "25 … In De L v The Director General 187 CLR 640 at 658 the majority confirmed that Section 111B of the Family Law Act confers a Regulation making power which is separate and distinct from that conferred by Section 125 of the Act. Unlike Section 125 it is not subject to the requirement that Regulations be consistent with the Act, but even if it were there could be no question of inconsistency so long as the Regulations conform to the terms of Section 111B. It follows that the argument put by counsel for the Wife that Regulation 19 is Ultra Vires the Act has no substance."

His Honour then turned to the arguments under what was said to be the "*Anshun* principle".

The argument mounted before Steele J on behalf of the appellant mother and supported by the child A was that the failure by the Commonwealth Central Authority to seek to be substituted as applicant for a return order in the first appeal estopped it from

bringing any fresh proceedings. This was said to be so by application of principles discussed by the High Court in *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589 where their Honours applied a line of authorities including *Henderson and Henderson* (1843) 3 Hare 114 where Wigram VC said:

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward the whole of their case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which may have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

Steele J dealt with the submissions relating to the application of what he described as the "*Anshun* principle" as follows.

> "28. In Bryant v Commonwealth Bank of Australia (1995) 57 FCR 287 the Full Court of the Federal Court dealt with what it described as the " extended notion of estoppel " spelt out in Port of Melbourne Authority v Anshun (1981) 147 CLR 589. The Full Federal Court emphasized the significance of unreasonableness as an essential element in the operation of the Anshun principle. So much was said by the High Court in Anshun at 602 where Gibbs, Mason and Aitkin J.J. said:-
>
> > 'we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it.'
>
> The element of unreasonableness was again the criterion applied in Ling v Commonwealth (1996) 68 FCR 180@195.
>
> 29. In this case the Central Authority enunciated the claim but did not argue in support of the claim when the court directed it to elect one of two courses. It did that. The Mother and the Intervenor were not heard to object to that course (Full Court judgment paragraph 91).
>
> 30. The Central Authority has an obligation under Regulation 13 to take action

once a request in accordance with the Convention has been made. Such a request was made on 21st February 2005. The only course open was to file an Application, which it did. This was consistent with the obligation of the Central Authority under the Regulations to give effect to Australia's obligations under an International Convention. Such conduct could not be said to be unreasonable.

31. The Conduct of the Central Authority in failing to pursue its Application to be substituted could not in the circumstances be said to be unreasonable. It was at least arguable that the Central Authority was not entitled to pursue the Application because it had received no request from anyone in conformity with Regulation 13 asking it to secure the return of the Child. That fact is not in dispute. In this respect the Mother's counsel has argued that Regulation 14 is a separate source of power and that the Central Authority therefore had power by virtue of Regulation 14. The better argument it seems to me is that Regulation 13 provides the source of power and Regulation 14 sets out the ways in which the power may be exercised and is not itself a separate source of power. If that be correct then in the absence of a request in conformity with Regulation 13 the power to commence proceedings was not triggered.

32. In those circumstances, it is my view that the Central Authority may have been unable to pursue the Application, and if that be so it could not be said that the conduct of the Central Authority was unreasonable and no Anshun type estoppel can run against the Central Authority."

At the time of the earlier proceedings before the Full Court, Regulations 13 and 14 then provided:

"13. (1) If the Commonwealth Central Authority:

(a) receives an application in relation to a child who has been removed from a convention country to Australia ; and

(b) is satisfied that the application is in accordance with the Convention and these Regulations;

the Commonwealth Central Authority must take action to secure the return of the child under the Convention.

(2) The Commonwealth Central Authority may refuse to accept an application received by it if it is satisfied that the application is not in accordance with the Convention.

(3) As soon as possible after the Commonwealth Central Authority refuses under subregulation (2) to accept an application, it must inform the applicant, or the Central Authority through which the application was made to the Commonwealth Central Authority, of the refusal and of the reason for the refusal.

(4) For the purposes of subregulation (1), action that must be taken by the Commonwealth Central Authority includes seeking:

(a) an amicable resolution of the differences between the applicant and the person opposing the child's return;

(b) the voluntary return of the child;

(c) an order under Part 3.

14. (1) In relation to a child who is removed from a convention country to, or retained in, Australia, the responsible Central Authority may apply to a court in accordance with Form 2 for:

(a) an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; …"

Steele J found that the Commonwealth Central Authority received the request under the Convention for the return of the child to the United States on 21 February 2005. His Honour concluded that Regulation 13 provided the source of power for the Central Authority to bring an application and Regulation 14 set out the ways in which the power might be exercised but was not itself a separate source of power. His Honour concluded that it was not unreasonable for the Commonwealth Central Authority to have declined the opportunity to seek orders in the appeal and to then commence these proceedings afresh, especially as there was no evidence to suggest that it had received any application to seek the return of the child at the time of the appeal.

His Honour then made orders for the return of the S to the United States, dismissing the review application and the application for extension of time by A to file an application for the review.

The appeals

As already noted the appeals have proceeded on two bases, namely the status of A's proceedings and the relevance of the paramountcy principle when dealing with the application for the return of S under the *Abduction Regulations* and, secondly, whether by reason of the conduct of the Central Authority in the first appeal it was estopped from bringing the subsequent proceedings for the return of the child.

Further evidence

At the commencement of the hearing we dealt with an application for the appellants to adduce further evidence, namely documents held by the Commonwealth Attorney-General's Department and the Commonwealth Central Authority concerning the commencement of these proceedings by the Commonwealth Central Authority. We granted leave to rely upon those documents. They disclose that late in November 2004 the Attorney-General's Department was in email contact with the Office of Children's Issues, US Department of State seeking directions from the United States as to the process it thought would be appropriate to follow in the case given the outcome of the first Full Court proceedings. A reply was received back from the United States on 1 December 2004 indicating that the Americans had "no objection to the father's lodging the application directly with your office". They also indicated that it would be useful if the father could assemble other documents, such as marriage and birth certificates and the like, and provide them to the United States State Department who could "formerly send them forward to you with the 'official US Central Authority' request for return".

The Commonwealth Central Authority then wrote to the father's solicitor as follows:

> "I have discussed [YS's] case briefly with the relevant federal US agency (Office of Children's Issues, US Department of State) and we have agreed on the following course which, hopefully, will reduce some of the time usually associated with the processing of applications between the USA and Australia.
>
> The US agency has no objection to [YS] lodging the application directly with the Australian office. To assist you lodge a new application, please find attached an

> electronic copy of the application form prepared for you by your Australian solicitor for lodgement with the Family Court of Australia. It contains the necessary information for you to prepare a new Form 1 for sending to us…"

The further material tendered does not deal with any other delays that might have occurred before the formal request was received by the Commonwealth Central Authority on or after 24 February 2005.

Whilst we agreed to accept the further material into evidence, it does not appear to assist the appellants' case in suggesting that the finding by the trial Judge of lack of unreasonable behaviour on behalf of the Commonwealth Central Authority was in any way erroneous. There is no evidence to suggest that the Commonwealth Central Authority received any request from either the father or the United States Central Authority to bring an application for the return of the child prior to or during the course of the proceedings before the first Full Court. At its highest the correspondence concerns itself with the manner in which the proceedings could go forward in light of the aftermath of the first Full Court proceedings.

Discussion

Australia is a signatory to the *Convention on the Civil Aspects of International Child Abduction* signed at The Hague on 25 October 1980 ("the Hague Convention"). Under s 111B(1) of the Family Law Act the Commonwealth is empowered to make regulations necessary or convenient to enable the performance of the obligations of Australia under the Hague Convention. The preamble to the Hague Convention speaks of a desire to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access. The Hague Convention mandates that each contracting state shall designate a central authority to discharge the duties imposed by the Hague Convention. Federal states are empowered to appoint one or more central authorities.

In 1986 the Commonwealth promulgated the Family Law (Child Abuduction Convention) Regulations. The Regulations appointed a Commonwealth Central Authority and enabled its powers to be delegated to State Central Authorities. Regulation 13, in force at the time of the first Full Court appeal, set out above mandated the obligations of a Commonwealth Central Authority upon receiving an application in relation to a child who had been removed from a Convention country or retained in Australia so as to secure the return of the child to the country in which he or she had habitually resided immediately before his or her removal or retention.

As can be seen from the provisions of Regulation 13(4) as it then was a number of options were then open to the Central Authority, namely seeking:

(a) an amicable resolution of the differences between the applicant and the person opposing the return of the child;

(b) the voluntary return of the child; or

(c) an order under Part 3.

Regulation 14, which falls under Part 3, permitted the Central Authority to apply to a court for an order for the return of the child. Following the decision of the first Full Court in this case Regulation 14 was amended in December 2004 to include amongst the persons who could apply to a court for an order for the return of the child, not only the Central Authority, but also "a person, an institution or another body that has the rights of custody in relation to the child for the purposes of the Convention…"

In support of the mother's appeal, counsel for the appellants argued that Steele J's finding that it was arguable that the Central Authority could not seek to be substituted for the father in the proceedings because it had not received a request under the then Regulation 13 was erroneous. He further argued that Regulation 14

provided an independent power for the Central Authority to bring proceedings.

In our view the submission is ill-founded. There is no doubt that Regulation 14 as it stood at the time of the proceedings before the original Full Court would have enabled the Central Authority to bring an application to a court seeking a return of the child to the United States once it received a proper request to do so. The Central Authority does not, however, retain a roving brief to bring proceedings for the return of any child when it is of the belief that a child may or may not have been wrongfully removed from another Convention country. It may only act upon a request made to it by a person or body properly interested.

The obligation of the Central Authority is to be found in Regulation 5 which reads as follows:

"Commonwealth Central Authority — duties, powers and functions

(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."

In turn, that Regulation empowers the Commonwealth Central Authority to perform all the functions that the Central Authority has under the Convention. Article 7 of the Convention provides obligations on central authorities as follows:

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application. "

The Convention itself provides in Article 8 that applications can be made by any person, institution or other body claiming a child has been removed or retained in breach of custody rights to the Central Authority of the child's habitual residence or the Central Authority of any contracting State. The Central Authority of the State to which the child has been taken is mandated by Article 9 to take appropriate measures to obtain the voluntary return of the child once the Central Authority receives such an application. Absent, however, the trigger of a request or application, there does not appear to be any obligation upon central authorities to generally ensure the children who may or may not have been wrongfully removed from their State of habitual residence become the subject matter of applications for return.

There was nothing in the material before Steele J nor before us that would indicate that at the time of the first Full Court hearing the Commonwealth Central Authority had been requested by any person to take steps to ensure the return of S to the United States. In those circumstances, in so far as it could be argued that the Commonwealth Central Authority was unreasonable in not pursuing its foreshadowed application to the first Full Court, we would agree with the finding of Steele J that absent any request for it to exercise any power it could not be said to be acting unreasonably by refusing to elect to pursue the application it had foreshadowed.

The application it foreshadowed was fraught with a number of serious problems. It is by no means clear whether the *Family Law Rules* 2004 ("the Rules") of themselves would enable the substitution of an applicant at trial level, let alone appellate level. It may be that power could be found within the confines of Rule 1.09 which gives the Court a general power to make such orders as it considers necessary if a doubt exists or a difficulty arises in relation to a matter of practice and procedure. It could further be said that because of an insufficiency in the Rules that s 38 (2) of the Family Law Act could have brought the High Court Rules 1952, which were then in

operation, into play. Order 16 Rule 3 of the High Court Rules provided:

> **"Proceeding in name of wrong plaintiff**
>
> Where a proceeding has been commenced in the name of the wrong person as plaintiff, or it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Justice, if satisfied that:
>
> (a) it has been so commenced through a *bona fide* mistake; and
>
> (b) it is necessary for the determination of the real matter in dispute so to do;
>
> may order another person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as are just."

In *Farley & Lewers Ltd v Attorney-General* [1963] SR (NSW) 814 at 822 the Court of Appeal discussed difficulties associated with substituting a plaintiff in a suit that was a nullity because the original plaintiff lacked authority to bring the suit. The issue of the capacity of the Central Authority to bring any application absent a request made of it was clearly something that concerned Steele J and may well have explained why the Central Authority's decision not to proceed with its foreshadowed application was entirely reasonable. The fact that a valid proceeding would certainly have lain at the suit of the Central Authority, had it been requested to commence proceedings, would not necessarily have given the Full Court an appropriate basis for substituting the Central Authority as the applicant in the proceedings that were before it, at a time when no such request had been made. The doubts surrounding the validity of the procedure to be substituted as applicant in a suit that was brought by a person shown to lack standing were sufficient to make it reasonable for the Commonwealth Central Authority to abandon that course and then simply bring a fresh action.

It is appropriate that the 'Anshun principle' be restrictively applied. As   Wilcox J observed in *Ling v Commonwealth of Australia* (1996) 68 FCR 180:

> "The principle applied by the High Court of Australia in *Port of Melbourne Authority v Anshun Proprietary Limited* (1981) 147 CLR 589 is designed to minimise the burden of litigation. It enables courts to ensure that parties put their

> whole case forward at one time, thereby eliminating duplication of effort and expense and reducing the opportunity for a party to harass a weaker opponent with repeated suits. However, these benefits come at a price. The result of a court applying the principle is to shut out a claim or defence that a party wishes to pursue, without determination of its intrinsic merit, on the ground that it ought to have been raised in earlier litigation. As the Judicial Committee of the Privy Council pointed out in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* (1975) AC 581 at 590, this is a serious step, a power not to be exercised except "after a scrupulous examination of all the circumstances". If the *Anshun* principle is too readily applied, there is a possibility of serious injustices."

In the first proceedings the Commonwealth Central Authority was not a party to the application when the matter was heard at first instance and only joined in the suit at the appeal so that consideration might be given to substituting it as the applicant. It ultimately declined to make that application. In our view Steele J could not be said to have erroneously concluded that it was not unreasonable for the Central Authority to decline the opportunity given to it by the Full Court to make submissions on the issue as to whether it should be substituted as the applicant in the earlier proceedings. Nor was it unreasonable for the Central Authority to wait until it received a request to commence the proceedings afresh and upon receiving such request to actually commence them.

In the second leg of his argument in support of the application of the *Anshun* principle counsel for the appellants, anticipating what might be discovered on the return of the subpoena from the Central Authority, submitted that if the request which ultimately came had been engineered by the Commonwealth Central Authority in an attempt to bolster its forensic position, then any discretion that may have vested in the Court to determine whether or not its behaviour was reasonable or otherwise ought be exercised adversely to the Commonwealth Central Authority. Having read the additional material, we could not conclude that the request which was ultimately received by the Commonwealth Central Authority was "engineered" by it in "an attempt to bolster its forensic position". It is clear from the correspondence that by late November 2004 the father's solicitor and the Department discussed the manner in which the case could proceed. There were then appropriate communications

between the Commonwealth Central Authority and the United States Central Authority to clarify, as a matter of protocol, whether or not the Commonwealth Central Authority should act on a direct request from the father and it would appear that ultimately a formal request was forthcoming from the United States. Nothing in any of the material tendered to us would indicate any inappropriate behaviour on behalf of the Commonwealth Central Authority in the circumstances. It sought to clarify the views of the father and the United States Central Authority and then acted upon them once they were made known to it. Once it received the request under Regulation 11, which came into force on 23 December 2004, it was required to give effect to it.

Ultimately this case is about selecting the forum in which it is appropriate that issues relating to S's future residence be determined. The Hague Convention and the *Abduction Regulations* mandate that in the circumstances of this case, the child having been wrongfully removed from the United States, the appropriate forum is a court in the United States. The issues of contact raised by A in relation to her ongoing relationship with her sister will no doubt be matters that will be properly considered in the United States in relation to any application brought by the mother for a residence order and permission to bring the child to live in Australia. These are, however, matters appropriate for determination by the American court. The quantum of contact that will be appropriate between A and S will be dependent upon the living arrangements ultimately determined for the child S. As S is the subject of the orders sought in A's application any orders made must focus on S's best interests rather than A's if there is any conflict in those interests.

The matters that the Court needed to consider in determining whether or not S should have been returned to the United States were all to be found within the confines of Regulation 16. Issues concerning the relationship between S and A and the effect that it might have on S to return her to the United States in circumstances where A was likely to remain in Australia were issues that would have been properly

considered under the provision of Regulation 16(3)(b) namely whether the return of S would have created a grave risk of the exposure of S to psychological harm or otherwise place her in an intolerable situation. It was not sought to argue before either Steele J or before the Full Court that firstly the return of S would necessarily have meant that S and A would be separated nor was it sought to argue that the separation that would occur as a result of a return of S to the United States would bring the child S within the exceptions contained in Regulation 16(3).

This is a very clear case for the prompt return of a child wrongly removed from its place of habitual residence. Unfortunately, there have been four trials and two appeals to achieve that result. As already indicated, the issues that surrounded the future of the child were issues appropriate to be dealt with by the United States courts. The prompt return of the child to the United States is now required so that the courts of that country can decide on a course of action that is most likely to advance her welfare. Accordingly we order that the appeals be dismissed.

Orders

The appeals be dismissed.

I certify that the preceding paragraphs are a true copy of the reasons for judgment delivered by this ***Honourable Full Court.***