http://www.incadat.com/ ref.: HC/E/AU 228
[10/10/1996; Full Court of the Family Court of Australia (Sydney); Appellate Court]
Laing v. Central Authority (1996) FLC 92-709

FAMILY LAW ACT 1975

FAMILY COURT OF AUSTRALIA, Sydney

BEFORE: Baker, Lindenmayer and Smithers JJ.

3, 4 July, 10 October 1996

BETWEEN

Laing

v.

Central Authority

REASONS FOR JUDGMENT

JUDGMENT:

This is an appeal from orders made by O'Ryan J on 20 February 1996 following a hearing of an application filed by the Director General of the Department of Community Services, pursuant to the provisions of the Convention on Civil Aspects of International Child Abduction (otherwise known as the Hague Convention) which has been given effect to in Australia by operation of the Family Law (Child Abduction) Convention Regulations.

The orders which the trial judge made and from which the wife now appeals, in precise terms are as follows:

> **(1) That upon the Central Authority being satisfied that the father has given undertakings to the Superior Court, Gwinnett County, Georgia that he will pay to he Central Authority sufficient moneys to enable the mother and the child J, born on 9 November 1993 to travel by air from Sydney to Atlanta, Georgia or paid to the Central Authority sufficient moneys to pay the cost of such air travel then the Central Authority shall, as soon as reasonably practicable on or after 15 March 1996 cause the child to be returned to the United States in the company of the wife.**
>
> **(2) That liberty is reserved to the Director-General of the Department of Community Services to apply to a single judge of this court for further directions for the implementation of order (1).**

Background facts

The husband was born on 12 August 1954 in Texas in the United States, while the wife was born in New Zealand on 11 November 1960. The parties married on 30 March 1991 in Australia and separated finally on 13 January 1995. The wife alleged that the parties had in fact separated on 12 March 1994.

There were two children born of the marriage, namely a daughter J, on 9 November 1993 and a son S, on 22 September 1995.

In the proceedings before the trial judge, the Director General sought only the return of the child J to the United States.

The parties met in Australia and were married in this country as we have said on 30 March 1991. The wife left this country on 10 July 1991 and thereafter, subject only to trips to and from Australia from time to time, the parties lived in the United States.

Early in 1994 the parties had discussions about the wife travelling to Australia with J in order to visit her family and friends. The husband was agreeable to the wife's visiting Australia for the stated purpose. The wife asserted that the parties had been having problems in their marriage and this does not appear to have been denied by the husband. The wife alleged that she had told the husband that she wanted to go to Australia "to stay". This was denied by the husband.

The trial judge found that the evidence in relation to precisely what was said in early 1994 was difficult for him to resolve. He was satisfied however that there had been difficulties in the marriage and that the parties had held discussions about the future of their relationship.

The trial judge found that prior to the wife's departure from the United States in March 1994 there had been conversations between the parties about the wife remaining in Australia. His Honour also found that the husband had not agreed to such a course at that time.

At all events, on 12 March 1994 the wife and child left the United States and travelled to Australia where they remained until late November 1994. At the time the wife entered this country in March 1994, J was about four months old and the trial judge found that the wife was the primary caregiver to the child in the period between November 1993 and March 1994.

The evidence in relation to what occurred in the period between March 1994 and November 1994 was confusing. The wife and J travelled to Australia on a return ticket, which, as the trial judge found, was contrary to any notion that the wife had left the United States in March 1994 with the agreement of the husband that she would remain permanently in this country. The wife did however, give evidence that she had said to the husband words to the effect, "Do you realise it could mean that J and I will reside in Australia permanently?" The trial judge concluded that the wife was simply foreshadowing the possibility that when she came to Australia she may then decide to remain permanently in this country.

The trial judge found that after the wife arrived in Australia, at first she did intend to return to the United States and, in fact, wrote to the husband from time to time in which letters she referred to her returning to that country. As has been referred to on p 8 of the appeal book, in such letters the wife said things such as, "When I get back", "See you in a few months", "See you in October", and "See you soon".

The wife stated in her evidence that in or about the end of April 1994 she telephoned the husband. During such conversation she informed him that the marriage was over and that she and the child would be residing permanently in Australia. The husband denied that the wife had ever said she was not going to return.

Notwithstanding his Honour's hesitation in accepting the wife's evidence concerning what she had said to the husband in April 1994, he was nevertheless satisfied that at such point in 1994, while the wife was in Australia, the parties agreed that the marriage was at an end. His Honour found that the wife did tell the husband that the marriage was in fact at an end. The wife alleged that she said to the husband, "The marriage is over", which was admitted by the husband. The issue was however whether or not J was going to remain in Australia.

In or about the month of April 1994, the wife commenced to receive social security and the husband sent money to her between the months of June and August 1994.

In May 1994, the wife's mother sustained a serious injury to her knee which required hospitalisation and care. The wife telephoned the husband and informed him that it was her intention to assist her mother in her rehabilitation. At this time, the parties also discussed the wife's return airline ticket, which had been made out for return to the United States for April 1994. The ticket was extended until the end of May 1994, whereupon the wife spoke to the husband and informed him that he could have the return ticket and that the wife would forward it to him for reimbursement. The husband informed the wife that he would try to obtain a refund. There was further evidence about the airline ticket and the obtaining of a refund which resulted in the trial judge being satisfied that in 1994 the wife did tell the husband that she was not returning to the United States.

The husband alleged that the wife kept changing her mind about returning to the United States and he tendered certain letters which he had received from the wife to which reference has already been made.

However, the trial judge found that the husband did not attach all the letters he had received, including a letter in which the wife informed him that she would not be returning. On p 10 of the appeal book his Honour expressed concern in relation to the selective nature of the evidence which the husband had adduced.

In or about August 1994, the wife forwarded a letter to the husband informing him that it would be better if they were to divorce. The husband asserted that he could not recall receiving this letter. The trial judge found however that the wife did send such a letter to the husband. At about this time the wife spoke to the husband's mother, informing her that the marriage was over, which information the trial judge found was communicated to the husband.

It appears that at least by the month of July or August 1994 the wife had settled in Australia and had no intention of returning to the United States. The husband took no steps to ensure the return of the child J to the United States. The question then arose as to whether the husband gave tacit consent to the child remaining in Australia.

On or about 18 November 1994 the wife was advised that the husband had suffered a heart attack. She thereupon spoke to the husband on the telephone, in the course of which conversation the husband informed her that he wished the wife to return as he wanted to see the child J. Thereafter there ensued discussions between the husband and wife as to the wife's return to the United States and the basis upon which it might occur. The trial judge found on p 10 of the appeal book that before the wife had left Australia the parties did discuss her return to this country. His Honour was satisfied that the husband accepted, albeit reluctantly, the prospect that the wife may return to Australia. His Honour declined to accept any inference that the wife would agree to return to Australia without the child.

The wife and J travelled to the United States at the end of November 1994, whereupon the parties attempted a reconciliation. Unfortunately however, that reconciliation attempt was unsuccessful and on 12 January 1995, without notice to the husband and without his consent, the wife left the United States with J, returning to Australia. The wife arrived in Australia on 15 January 1995, where she has since remained with the child.

The parties disagreed as to what had occurred during the period of some six weeks that the wife was in the United States with the child. During that period the wife fell pregnant and on 22 September 1995, the child S was born.

Following the wife's departure from the United States, the husband immediately commenced proceedings in the Superior Court of Gwinnett County, State of Georgia, in the course of which he filed a complaint for divorce. The husband's complaint for divorce having been filed on 17 January 1995, the court set the rule nisi for hearing on 21 February 1995, with a provision requiring the wife to return the minor child of the parties to Gwinnett County, Georgia, and to bring the said child to the court at the time of the hearing. The complaint for divorce alleged, inter alia, that the wife had left the country with the minor child of the parties and was currently residing with the child in Engadine, New South Wales and that the husband was subject to the jurisdiction of the court pursuant to OCGA Section 9-10-91(5).

On 20 January 1995 the court made interlocutory orders which have been reproduced on p 43 of the appeal book. The said interlocutory order provided, inter alia:

> **(1) joint temporary legal custody of the child be awarded to the husband and the wife until further hearing;**

(2) that the child shall be returned to the jurisdiction of the court for a hearing;

> **(3) that failure to return the child at that time may subject the violating parent to the terms and provisions of the Hague Convention 42 USC 1601 etc as well as to the other powers of the court.**

On 31 January 1995, the following documents were served upon the wife by Moira May Ryan, a solicitor, practising in Miranda, New South Wales:

(a) complaint for divorce;

(b) the standing order previously referred to;

(c) the mutual restraining order; and

(d) interlocutory order concerning child custody and jurisdiction over the

child.

At the wife's request, and by agreement of the parties, the rule nisi hearing scheduled for 21 February 1995 was postponed and on 22 February 1995, the court entered a rule nisi order setting the matter down for a rule nisi hearing on 5 April 1995, with all other orders continuing to be in full force and effect.

On 6 March 1995, counsel for the husband sent the wife a copy of the rule nisi order, rescheduling the hearing for 5 April 1995, by Federal Express addressed to the wife's mother in Engadine, New South Wales, where the wife was then living. On 9 March 1995 the said notice was received and signed for by the wife's mother.

The husband appeared in court on 5 April 1995 for the rule nisi hearing, but he wife failed to appear, nor did she bring the minor child J with her as had been previously ordered.

On 12 April 1995, the court entered its order, noting the wife's failure to appear or to have the child present in court, as previously ordered. The court noted that the wife failed to file defensive pleadings of any kind or nature in relation to the proceedings and the matter was set down for final hearing and trial on 24 April 1995, such date being more than 45 days following the filing of the acknowledgment of service and in full compliance with the law of Georgia. The wife and her solicitor in Australia, B A Swane, were notified of the setting of the case for final hearing and trial by counsel for the husband.

The husband appeared at the trial on 24 April 1995, but the wife failed to appear and failed to bring the child to the court, as previously ordered.

At the hearing on 24 April 1995, the court heard evidence from the husband and made the various findings of facts referred to on and from p 45 of the appeal book. At the conclusion of the findings of facts the court made the following conclusions of law:

1. Plaintiff has met the residency requirement of OCGA Section 19-5-2. Venue and jurisdiction lie in this court.

2. This court has jurisdiction to make child custody determinations herein pursuant to OCGA Section 19-9-43.

3. The bonds of the marriage are irretrievably broken as contemplated by OCGA Section 19-5-3(13).

The judgement and decree which the court then made are as follows:

Upon consideration of the evidence submitted and upon legal principles, the court grants a total divorce, a divorce a vinculo matrimonii, to plaintiff and defendant. The court orders and decrees that the marriage contract heretofore entered into between plaintiff and defendant, from and after this date, be set aside and dissolved as if no such contract had ever been made or entered into, and plaintiff and defendant, formerly husband and wife, in the future shall be held and considered as separate and distinct persons, altogether unconnected by any nuptial union or civil contract whatsoever.

Sole permanent custody of the minor child, [J], is hereby awarded to plaintiff. No child support is awarded. Defendant is granted no visitation at this time and shall have no visitation until further order of a court of competent jurisdiction.

Defendant is hereby ordered to immediately return the minor child to plaintiff.

The custody award above set forth is made in compliance with the provisions of the Uniform Child Custody Jurisdiction Act, codified in the State of Georgia as OCGA Section 19-9-40, etc. It is the intention of the court that this order be in compliance with and subject to enforcement pursuant to the Hague Convention, 42 United States Code 1601, etc.

Plaintiff shall remain the sole owner of the marital residence located at **, Georgia. Plaintiff shall be solely responsible for payment of all loans, liens and taxes regarding such property.

Plaintiff is awarded ownership of all furniture, furnishings, appliances and household goods located at the marital residence.

Plaintiff shall retain sole ownership of the 1982 Volkswagen automobile, the 1983 Plymouth automobile, the 1994 Chevrolet automobile and the 1984 Yamaha motorcycle currently titled in his name and he shall be solely responsible for payment of all loans, liens and taxes thereon.

Plaintiff shall retain sole ownership of all bank accounts in his name as well as the pension account of Honeywell Inc.

The cost of these proceedings are taxed against plaintiff.

So ordered this 9th day of May 1995.

On p 13 of the appeal book, the trial judge expressed the following opinion:

> **It is my view that Judge Bishop should only have made what we describe as interim orders. I find it difficult to accept that he was able to make a final order for custody unless his discretion was limited by the evidence which he had before him which of course I did not have the benefit of. I find it very difficult to accept how, even on an undefended basis, and knowing that an application would be made under the Hague Convention, Judge Bishop could possibly find that on a permanent basis, the husband could have custody of this child. The evidence clearly established that the husband had spent very little time with J. Further the purpose of a prompt return of a child is to enable the question of what the welfare of the child requires to be determined in the country to which the child is returned and in my view that has not yet happened in this case notwithstanding the final order made by Judge Bishop.**

It seems to us however, that what Judge Bishop did was no more than what any judge exercising jurisdiction under the Family Law Act in Australia might have done when faced with an application properly instituted, served in accordance with the Rules of Court and in respect of which there was no appearance at the time scheduled for the hearing and no documentation filed or evidence adduced in response by or on behalf of the wife.

On 22 March 1995, an application was filed by the wife in the Family Court pursuant to which she sought sole guardianship and custody of the child. There were apparently difficulties in effecting personal service upon the husband, culminating in an application for substituted terms, which was made on 7 June 1995.

On 6 May 1995, the husband completed an application for assistance under the Hague Convention. On 28 June 1995 an application was filed in the Family Court on behalf of the Director General of the Department of Community Services, who has become the Central Authority for the purpose of these proceedings. The application made by the Central Authority was heard by his Honour on 2 and 5 February 1996 and his Honour delivered written reasons for judgment on 20 February 1996. It is the orders which flow from his Honour's reasons from which the wife now appeals.

The reasons for judgment of the trial judge

His Honour, having recounted the history of the proceedings and of the parties' relationship, inter se, on p 17 of the appeal book, identified four issues which arose in the course of the proceedings, as follows:

> **1. Are regs 13 to 17 inclusive of the (Child Abduction Convention) Regulations a valid law of the Commonwealth of Australia?**
>
> **2. In what country was the child habitually resident when it is alleged that she was wrongfully removed from the United States, within the meaning of the Hague Convention?**
>
> **3. Was the child wrongfully removed from the United States?**
>
> **4. Are there any reg 16 defences applicable?**

It is necessary that we consider each of these issues and his Honour's findings in relation to them before we come to consider the grounds of appeal.

(1) Are regs 13 to 17 inclusive of the (Child Abduction Convention) Regulations a valid law of the Commonwealth of Australia?

The wife submitted that regs 13 to 17 were ultra vires in that they purported to vest judicial power of the Commonwealth upon a non-judicial officer, namely the Central Authority. His Honour found that the Authority was not exercising judicial power and that regs 13 to 17 were laws validly enacted by the Commonwealth. This issue was not raised before us during the hearing of the appeal and, in any event, the validity of the regulations appears to have been determined by the Full Court in McCall and State Central Authority; Attorney-General of the Commonwealth (Intervener) (1995) 18 Fam LR 307 FLC 92-551 and; In the Marriage of Hanbury-Brown (1996) 20 Fam LR 334 FLC 92-671. An application to the High Court for special leave to appeal in the former case was refused on 6 December 1994.

(2) In what country was the child habitually resident when it is alleged that she was wrongfully removed from the United States, within the meaning of the Hague Convention?

The trial judge found that the child was resident in the United States from the date of her birth until March 1994 and again from late November 1994 until the middle of January 1995. His Honour found that the child had never been of an age where, in her own right, she had formed or could form an intention as to where she would reside, the husband and wife being the sole persons who might jointly form the intention of changing or terminating the child's habitual residence.

The trial judge also found that as at March 1994, the child's habitual residence was in the United States. He then proceeded to deal with the issue of whether or not in the period March 1994 until November 1994, the husband gave his tacit consent to the child remaining in Australia, so that the habitual residence of the child J changed to this country.

Having recited Art 4 of the Convention, his Honour then considered various authorities in relation to the meaning of "habitual residence", and whether or not the husband had acquiesced in a change in the child's habitual residence.

On p 24 of the appeal book the trial judge found that the wife had chosen to remain permanently in Australia and that she had communicated this intent to the husband. His Honour also found that there was evidence which may establish that the husband gave his tacit consent to the wife and the child remaining in this country. However, his Honour was not satisfied that there existed clear and unequivocal words or conduct on the part of the husband amounting to acquiescence on his part to the child remaining permanently in Australia. For these reasons therefore, his Honour determined that the child's habitual residence did not change during the period March 1994 to November 1994. His Honour then went on to say however, that even if he were wrong in such a finding, he was nevertheless satisfied that the child was habitually resident in the United States in January 1995.

The specific findings which the trial judge made in relation to this aspect of the case appear in the following passage on p 25 of the appeal book:

> **I am not satisfied that there exists, in the circumstances of this case, clear and unequivocal words and conduct on the part of the husband which may amount to acquiescence on his part to the child remaining permanently in Australia. I am satisfied that the period March to late November 1994 was one of confusion, uncertainty and emotional turmoil culminating in the ill health of the husband. I am satisfied that the child's habitual residence did not change in the period March 1994 to November 1994. If I am wrong in so finding, it does not matter because I am satisfied that the child was habitually resident in the United States in January 1995.**

When the wife took the child back to the United States in November 1994 the parties attempted a reconciliation. The child was resident in the United States in the period November 1994 to January 1995. This period of residence was with the consent of both parties. I am not satisfied that the parties had reached a concluded agreement that if the reconciliation failed, then the wife could remove the child permanently from the United States. The parties lived together in the period November 1994 to January 1995. The wife lived with the husband voluntarily, although it was part of an attempt at reconciliation. In my opinion, the residence of the parties together was for a settled purpose. In the result, in my opinion, the child was habitually resident in the United States at the time of her removal by the wife in January 1995.

(3) Was the child wrongfully removed from the United States?

The trial judge found that the removal of the child from the State of Georgia was contrary to the husband's rights of custody within the terms of the law of Georgia. His Honour was satisfied that the husband did not agree on or about 10 January 1995 that the wife could remove the child from the United

States and that therefore the removal of the child was wrongful within the meaning of Art 3 of the Hague Convention, at least as regards the removal which occurred on or about 10 January 1995, as we have said.

(4) Are there any reg 16 defences applicable?

On p 26 of the appeal book, the trial judge concluded that as he had found that the wife's removal of the child from the United States was wrongful, he was then required to order her return to the United States unless the wife could satisfy him that she had defences available to her pursuant to reg 16.

In relation to the issues of consent and acquiescence, the trial judge made the following findings on p 27 of the appeal book:

> **I am unable to be satisfied, on the balance of probabilities, that the husband consented to the removal of J in January 1995. As I have said, the parties did not reach a concluded agreement about what would happen if the reconciliation failed. Further, the circumstances of the wife's departure from the United States in January 1995 lead me to the conclusion that the wife left in a clandestine way because she was aware that the husband would not agree to her taking J with her. Further, there is no issue about possible acquiescence by the husband subsequent to January 1995.**

With regard to any physical or psychological harm which might be occasioned to the child if an order were made that she be returned to the United States, his Honour, on and from p 27 of the appeal book considered various authorities and the evidence in particular of Professor Waters who prepared an Order 30A report. His Honour's findings in relation to this aspect of the case appear on pp 30, 31 and 32 of the appeal book and have been reproduced later in these reasons.

Under the heading, "Conclusion" on p 33 of the appeal book, the trial judge indicated that he proposed to make an order for the return of the child to the United States. He indicated nevertheless that there were some disturbing features in the case, including that neither the Central Authority nor the wife had put any proposals as to how the child would be returned to the United States and what would happen upon the child's arrival there. As a result, his Honour made an order that the child be returned after 15 March 1996, in order that the wife have an opportunity to apply to the Gwinnett Superior Court for orders in relation to the care of the child upon her arrival, expressing the opinion that such an order was not inconsistent with the integrity of the Hague Convention.

Fresh evidence

At the commencement of the hearing of the appeal, the appellant sought leave of the court to adduce fresh evidence. That evidence is identified in an affidavit sworn by BAS, on 25 June 1996. That evidence can be summarised as follows:

(a) a notarised statement of DSG dated 28 April 1996; and

(b) a notarised statement of A dated 27 April 1996.

The maker of the first statement is the sister-in-law of the husband. In that statement she alleges on the basis of statements made to her by her daughter A, that the husband sexually molested her daughter A when the child was eight years old. The second document is a statement by the daughter, A herself, in which she alleges that when she was aged eight, the husband, on one occasion, sexually molested her. Although the current age of A is not stated, it is clear that she is now an adult and that the event of which she speaks, if it occurred, occurred many years ago, perhaps as many as 20.

In the Marriage of Abdo (1989) 12 Fam LR 861 FLC 92-013 the Full Court reviewed the authorities as they then existed in relation to circumstances in which appellate courts should grant leave to adduce fresh evidence on the hearing of an appeal. Reference was made to a decision of the Full Court in ; In the Marriage of Mistilis (1988) 12 Fam LR 175 FLC 91-914. At Fam LR 870; FLC 77,322 of ; In the Marriage of Abdo, above, the Full Court said:

> **It is not suggested that the Full Court's discretion to receive further evidence may be arbitrary or uncontrolled. It must be exercised judicially for the purpose of avoiding injustice. One of the matters which will affect the exercise of discretion is the policy of the law centred on finality. The other aspect is that pointed out by Lord Pearson in Mullholland v Mitchell that "an appeal normally involves only a review of the judge's decision on the decision given at the trial" and that "a partial retrial with further evidence added is not a**

> **normal function of" the Full Court". As was pointed out in ; In the Marriage of Mistilis (1988) 12 Fam LR 175 FLC 91-914 the Full Court is not well placed to deal with disputed evidence particularly where questions of credibility may arise. Usually the admission of further evidence on appeal after a full trial will necessitate a further hearing and the decision on that hearing may itself become the subject of an appeal. As the cases in the Federal Court of Australia show, where the fresh evidence sought to be tendered relates to matters which occurred before the trial, considerations relevant to the exercise of the discretion include such questions as whether the evidence could have been obtained with reasonable diligence, or whether the further evidence has cogency in the sense that it is credible and would have been likely to affect the outcome of the case.**

In addition to the notarised statements of DSG and A, the wife also relied upon an affidavit of her mother, BL, sworn on 25 June 1996, in which she recounts what DSG told her of the alleged molestation of her daughter by the husband.

The difficulty with all of the above evidence is that, in its present form, it is all hearsay and, although the Evidence Act 1995 (Cth) may make some such statements admissible in some circumstances none of those circumstances are shown to exist in this case.

In any event, apart from BL, the appellant's mother, (whose evidence is second degree hearsay and adds nothing to the statements of the other two women) the only relevant witnesses are resident within the United States and it would therefore be impossible for any court in Australia to evaluate the evidence in the absence of DSG or A for cross-examination.

The ultimate difficulty for the appellant however, which in our view is insurmountable, is the fact that in her statement of 27 April 1996, A asserts, "I would like to start by saying that at no point will I appear in court. I would like no one at any time to contact me. I would like my location to be kept private." While it might be possible to compel her attendance to give evidence in proceedings in the United States, that is not possible in respect of these proceedings in this country.

Having regard to the seriousness of the matter alleged, her statement made in such circumstances with such a reservation lacks any probative value, and should be rejected under s 135 of the Evidence Act.

For all the above reasons therefore we refused leave to adduce the fresh evidence.

Grounds of appeal

The notice of appeal contains ten grounds. It is convenient if we deal with these grounds seriatim and make the appropriate comments and findings in relation thereto.

Ground (1): His Honour erred in law in determining that pursuant to Article 3 the child J was removed from the jurisdiction of the Central Authority, wrongfully or at all.

In her written submissions, Ms Farey, counsel for the appellant wife, claimed that the trial judge erred in law in determining that pursuant to Art 3 of the Convention, the child had been wrongfully removed from the United States to Australia, for the following reasons:

> **(a) At the time of the alleged wrongful removal the child was not under the jurisdiction of the Central Authority.**
>
> **(b) The provisions of the Convention are to be invoked with respect to every removal of a child. To understand what is meant by "removal" one must look at the Preamble, which clearly points to any removal which:**

(i) is contrary to the paramount importance of the interests of the child.

> **(ii) is necessary to protect the child from any harmful effects.**
>
> **(c) Here the paramount importance is that the child remain with its mother, the one and only significant figure in its life, (at appeal book p 8) rather than with virtual strangers. See In the Marriage of Regino (1995) FLC 92-587.**
>
> **(d) The uncontroverted evidence (at appeal book p 132) of the wife is that she lacks the means to prosecute a full custody hearing in Georgia. In fact, the evidence in this case goes even further: the wife is in fear of arrest and incarceration upon her return to Georgia. For**

the child to maintain any further physical contact with her mother, her sole caregiver since birth (at appeal book p 8) the wife will rely upon the largesse of the husband in providing the funds to enable the child to travel, with accompaniment, from Georgia to Australia.

(e) The events of this case do not disclose the kind of mischief for which the Convention was framed and against which it was intended to operate. The framers of the Convention can never have meant for it to apply to circumstances such as these.

(f) It would be grossly contrary to the interests of the child to apply the harsh and, in practical terms, irreversible, effect of the application of the Convention to the facts of this case.

(g) The appeal should be allowed and the application of the Central Authority dismissed.

In view of the above submissions, which in our view, have no relevance to the ground of appeal relied upon, it is necessary that we firstly record the relevant articles of the Convention and then give close consideration to the trial judge's findings in relation to them.

Article 1 states the object of the Convention to be:

(a) To secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) To ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

Article 3 provides that the removal or retention of the child is to be considered wrongful where:

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

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

Article 12 provides:

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

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:

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

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

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

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

Among the Family Law (Child Abduction Convention) Regulations the following are of particular relevance:

3(1) A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of removal, those rights:

(a) were actually exercised, either jointly or alone; or

(b) would have been so exercised but for the removal of the child.

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, or retained in, Australia; and

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

the Commonwealth Central Authority must take action under the Convention to secure the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention.

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; or**
>
> **(b) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force to:**
>
> **(i) stop, enter and search any vehicle, vessel or aircraft; or**
>
> **(ii) enter and search premises;**
>
> **if the person reasonably believes that:**
>
> > **(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and**
> >
> > **(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or**
>
> **(c) an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; or**
>
> **(d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under regulation 13; or**
>
> **(e) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention.**

16(1) Subject to subregulations (2) and (3), on application under regulation 14, a court must make an order for the return of a child:

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

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

16(2) A court must refuse to make an order under subregulation (1) if it is satisfied that:

(a) the removal or retention of the child was not a removal or retention of the child within the meaning of these Regulations; or

(b) the child was not an habitual resident of a convention country immediately before his or her removal or retention; or

(c) the child had attained the age of 16; or

(d) the child was removed to, or retained in, Australia from a country that, when the child was removed to, or first retained in Australia, was not a convention country; or

(e) the child is not in Australia.

16(3) A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:

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

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

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

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

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

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

16(4) For the purposes of subregulation (3), the court must take into account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.

16(5) the court to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return.

17(l) On application, a court may by order declare that:

(a) the removal of a child from Australia to a convention country; or

(b) the retention of a child in a convention country;

was wrongful within the meaning of Article 3 of the Convention.

17(2) The court may request a responsible Central Authority to arrange for the person, institution or other body making application in relation to the return of a child to a convention country, or the retention of a child in Australia, to obtain an order of a court, or a decision of a competent authority, of

the country in which the child habitually resided immediately before his or her removal or retention declaring that the removal or retention was wrongful within the meaning of Article 3 of the Convention.

20(1) Where an order is made under regulation 16, the responsible Central Authority shall cause such arrangements as are necessary to be made in accordance with the 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.

[History Reg 20(1) amended by SR 1995 No 296, r 19.]

20(2) If, within 7 days after the making of an order under regulation 16, the responsible Central Authority has not been notified that the order has been stayed in accordance with subrule 1(10) of Order 32 of the Rules of Court, the child shall be returned to the country in which he or she habitually resided immediately before his or her removal or retention.

The issues before the trial judge therefore were:

(a) Was the child habitually resident in the United States at the time of her removal to Australia?

(b) Was the removal in breach of rights of custody attributed to the husband;

(c) Were the husband's rights of custody actually exercised at the time of the removal or would they have been exercised but for the removal?

(d) Was there a grave risk that the return of the child to the United States would expose her to physical or psychological harm or otherwise place the child in an intolerable situation?

There can be no doubt that as at March 1994, the child's habitual residence was in the United States. This is because she had been born in the United States on 9 November 1993 and had lived in that country with her parents without interruption since that time.

It is always difficult for trial judges when dealing with factual issues if they do not have the benefit of hearing the parties themselves give oral evidence and be cross-examined. The decision which the trial judge made was based upon a reading of the affidavit evidence filed in the course of the proceedings and hearing submissions from counsel who appeared for the parties.

There is no dispute that the husband consented to the wife bringing the child to Australia for a holiday and to visit relatives, said to be for a period of not more than one month. At that time, both the wife and the child had return air tickets. There was evidence, as indeed the trial judge found, that the wife chose to remain permanently in Australia and that she communicated this intention to the husband. In addition, there was evidence which established that the husband himself took no steps at that time to ensure the return of the child to the United States or in relation to guardianship, custody or access.

The trial judge found that in spite of whatever intentions the wife may have had from time to time, and despite what she may have communicated to the husband as an expression of those intentions, the husband at no time either consented to or acquiesced in the child's remaining permanently in Australia.

Although the husband may have done nothing until November 1994 when he requested the return of the wife and the child to the United States following his heart attack, nevertheless, in our view, passivity alone, for such a period, cannot amount to acquiescence. His Honour found that the period from March to late November 1994 was one of confusion, uncertainty and emotional turmoil culminating in the husband's ill health. Those findings, in our view, were open to his Honour having regard to the evidence.

His Honour's finding therefore, on p 25 of the appeal book, "I am satisfied that the child's habitual residence did not change in the period March 1994 to November 1994", was a finding open to his Honour, having regard to the evidence, unsatisfactory though that evidence may have been in some respects.

Ground (2): His Honour erred in law in determining that the husband had any custody rights within the meaning of the said Article which the alleged removal could have breached.

The appellant wife argued that the husband had no custody rights at the time of the removal of the child from the State of Georgia and therefore Art 3 of the Convention has no application.

On p 26 of the appeal book, the trial judge concluded that he was satisfied that removal of the child from Georgia was contrary to the husband's rights of custody in terms of the law of the State of Georgia. He

apparently had before him some extracts from the relevant laws of Georgia, and in particular, the following passage which His Honour recorded on p 26 of vol 1 of the appeal book:

> **. . . there shall be no prima facie right to the custody of the child or children in the father or mother.**

However, it is important to record the complete passage which appears on p 109 of the appeal book, which is an extract from the Code of Georgia; Title 19. Domestic Relations: Chapter 9. Child Custody Proceedings: Article 1. General Provisions:

(a) In all cases in which the custody of any minor child or children is at issue between the parents, there shall be no prima-facie right to the custody of the child or children in the father or mother. The court hearing the issue of custody, in exercise of its sound discretion, may take into consideration all the circumstances of the case, including the improvement of the health of the party seeking a change in custody provisions, in determining to whom custody of the child or children should be awarded. The duty of the court in all such cases shall be to exercise its discretion to look to and determine solely what is for the best interest of the child or children and what will best promote their welfare and happiness and to make its award accordingly. In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he desires to live. The child's selection shall be controlling unless the parent so selected is determined not to be a fit and proper person to have the custody of the child. Nothing in this Code section shall be interpreted to deny the custodial parent the right to reasonable visitation determined by the court as in other cases. Joint custody, as defined by Code Section 19-9-6, may be considered as an alternative form of custody by the court. This provision allows a court at any temporary or permanent hearing to grant sole custody, joint custody, joint legal custody, or joint physical custody where appropriate. The court is authorised to order a psychological custody evaluation of the family or an independent medical evaluation.

In our opinion, all that provision means is that neither parent is in a preferred position as against the other when disputes arise concerning the right of custody. Further, the passage makes it clear that a party in the position of the husband in the present appeal does have specific rights of custody. In any event, the trial judge found that there was no issue before him that the husband had rights of custody in the terms of the law of Georgia, although as his Honour conceded, he did not have the complete extract of the relevant laws.

In our opinion however, as this was never raised as an issue in the court below, the appellant should not be permitted to raise it as an issue on appeal. (See Water Board v Moustakas (1988) 180 CLR 491 77 ALR 193).

Ground (3): His Honour erred in law in apparently determining pursuant to the said Article that any alleged custody rights of the husband were either actually exercised or would have been exercised but for the alleged removal.

This ground, in our opinion, flies in the face of the facts as found by the trial judge and in respect of which there was little dispute in the course of the trial.

At the time of the removal in January 1995, the child was living with the husband and wife in the husband's home in Georgia pursuant to an attempt at reconciliation. As the trial judge found, the parties lived together in the period November 1994 to January 1995, their cohabitation was voluntary and part of a reconciliation attempt. Their resumption of cohabitation was a result of a mutual agreement to reconcile and at the time of the removal the child was part of the household.

In our opinion, at the time of the removal the husband was exercising his custody rights as a parent including the right to determine the place of residence of the child and therefore this ground has no merit.

Ground (4): His Honour erred in law in determining within the meaning of Article 4 that the child J was habitually resident within the jurisdiction of the Central Authority at the time of the alleged breach of the husband's alleged custody rights.

In the passage on p 25 of the appeal book to which we have already referred, the trial judge was satisfied that the child's habitual residence did not change in the period between March 1994 and November 1994, that is to say that the child was at all material times habitually resident in the United States. What the wife's intentions were, in our opinion, is not the point. Although she may have informed the husband that she did not intend to return to Georgia, and although he may have accepted this assertion, at no time did he concede that the marriage was at an end, or that the child might remain permanently in Australia.

The question is whether the wife communicated those intentions to the husband, and whether or not he accepted or agreed to her proposal to remain permanently in Australia with the child. The trial judge found

that the wife had informed the husband by letter in August 1994 that it would be better if the parties divorced. There was no evidence however, to suggest that the husband at any time accepted that neither the wife nor the child would return to the United States irrespective of whether the marriage had broken down.

In our opinion, it was open to the trial judge to conclude that the child's residence did not change after her removal to Australia. If however, this is not so, then, as indeed his Honour indicated on p 25 of the appeal book, certainly by January 1995 the child had become habitually resident in the United States. The period that the wife and the child were in the United States, from November 1994 until January 1995, was six weeks and in our opinion was of sufficient duration and with a sufficiently settled intention on the part of the wife to establish habitual residence. During this period, the child was living with both parents within the one residence, with the parties (including the husband) exercising rights of custody. His Honour found as he was entitled to do, that there was no agreement between the parties that in the event that their reconciliation attempt failed the wife would be free to return with the child to live in Australia (cf Hanbury-Brown, above).

Ground (5): His Honour erred in law in finding pursuant to Article 13(a) that the husband had custody rights which he was actually exercising at the time of the alleged wrongful removal.

This ground would appear to be almost identical in terms to ground (3).

In our opinion this ground has no substance for the reason that at the time of the child's removal in January 1995 the parties were living together in their former home in Georgia with the child being part of the household. The husband was clearly exercising his rights as a parent during that period and therefore the trial judge's findings to this effect were correct.

Ground (6): His Honour erred in law in finding that pursuant to the said Article 13(a) the husband had not consented to the alleged wrongful removal.

It was conceded by Ms Farey that the husband's consent to the return of the child to Australia arises by way of constructive agreement and relies upon the following comment which the trial judge made on p 24 of the appeal book:

Further, there is evidence which may establish that the husband gave his tacit consent to the wife and J remaining permanently in Australia and I refer to the evidence about the sale of the wife's motor vehicle and the unsatisfactory nature of the response of the husband to some of the evidence of the wife.

It was further asserted that the wife did not agree or acquiesce over a period of time that her habitual residence and that of the child would change at the time that the parties' reconciled. It was further asserted that the parties covert intentions cannot detract from and overrule their overt agreement. Further, it was asserted that the visit to the United States in November 1994 by the wife and child was for a finite period which did not sever their habitual residence in Australia.

As Mr Anderson submitted on behalf of the Central Authority, the habitual residence of the child may be different from that of its custodian if that custodian had attempted unilaterally to change the child's residence by removing the child in breach of the other's parental rights. (See Re S (Minors) (Abduction: Wrongful Retention) [1994] FLR 70 at 82 ; Cooper and Casey (1995) 18 Fam LR 433 at 435 FLC 92-575).

As the trial judge said on p 23 of the appeal book, the habitual residence of a child is ultimately a question of fact. The child J was resident in the United States from the time of birth until March 1994 and again from late November 1994 until mid January 1995. Similarly, whether or not the husband had consented to the wrongful removal was a question of fact which the trial judge was called upon to decide. His Honour came to the conclusion that the husband had not consented to the child's remaining in Australia indefinitely and therefore the child's habitual residence never changed from the United States. He further found that, in any event by January, 1995, the child's habitual residence in the United States, if previously lost, had been re-established. There was no evidence that the husband consented to or acquiesced in the subsequent removal, and all the evidence points clearly to the contrary.

In our view therefore, and for all these reasons, this ground has no merit.

Ground (7): His Honour erred in law in finding that the wife had not established that the alleged return of the child would expose the said child to physical harm.

Ground (8): His Honour erred in law in finding that the wife had not established that the alleged return of the child would expose the said child to psychological harm.

Ground (9): His Honour erred in law in finding that the wife had not established that the alleged return of the child would place the child in an intolerable situation .

The essence of these grounds is that the trial judge's findings that the wife had not established the existence of a grave risk that the return of J to the United States would expose the child to physical or emotional harm, or otherwise place the child in an intolerable situation, within the meaning of reg 16(3)(b) of the Family Law (Child Abduction Convention) Regulations, were not reasonably open to him on the evidence before him. As these grounds are concerned essentially with questions of weight, regard must be had to High Court authorities as to the manner in which appellate courts must deal with and hear appeals from discretionary judgments.

In Lovell v Lovell (1950) 81 CLR 5l3 at 519 [1950] ALR 944, Latham CJ said:

The references in the various authorities on this matter to a failure to give sufficient weight to relevant considerations should not be understood in such a sense as to entitle an appellate tribunal to deal with an appeal from an order made in the exercise of a discretion in the same way as in the case of an appeal from any other order. If completely irrelevant considerations have been taken into account and they have really affected a decision the case is clear and the order though made in the exercise of a discretion should be set aside. Similarly, if relevant considerations are plainly ignored the same result follows. But when the appellate tribunal is considering questions of weight it should not regard itself as being in the same position as the learned trial judge. In the absence of exclusion of relevant considerations or the admission of irrelevant considerations an appellate tribunal should not set aside an order made in the exercise of a judicial discretion unless the failure to give adequate weight to relevant considerations really amounts to a failure to exercise the discretion actually entrusted to the court. The words used by the lordships in the House of Lords in this connection are not always easy to apply but they ought not to be read as denying the long established principle which indeed is expressly recognised in the cases in the House of Lords, that on an appeal from an order founded upon exercise of a discretion the appellate tribunal has no right to substitute its discretion for the discretion entrusted to the primary tribunal.

Of particular relevance to cases in the Family Court involving children's matters is the statement of principle expressed by Stephen J in the following passage from Gronow v Gronow (1979) 144 CLR 513 at 519 29 ALR 129 5 Fam LR 719 FLC 90-716:

The constant emphasis of the cases is that before reversal an appellate court must be well-satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well-established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal, can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight.

On and from p 27 of the appeal book the trial judge considered the risk of physical and/or psychological harm which may be occasioned to the child in the event that the child is returned to the United States. He referred to authorities, including Gsponer v Johnson (1988) 12 Fam LR 755 (1989) FLC 92-001; Re A (1988) l FLR 365 and ; Director-General of Family and Community Services and Davis (1990) 14 Fam LR 381 FLC 92-182.

His Honour then went on to consider the situation in which the wife would find herself if she were to return to the United States, the evidence from the Engadine Occasional Child Care Centre and from Professor Waters, who prepared an Order 30A report.

The trial judge's findings in relation to the allegations by the wife that removal to the United States would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation appear in the following passage on pp 30 to 32 of the appeal book:

In summary, I am satisfied that J is clearly attached and bonded to the mother. The mother has provided appropriate care for the child. I am satisfied that J is closely attached to her brother. I am satisfied that there is a risk of some psychological harm to J if I make the order sought by the director. I am concerned about the separation of the child from her brother and an environment in which she is settled and appears to be satisfactory for her welfare. I am also very concerned about the circumstances in which the child will be placed upon the child's arrival back in the United States if I make the order sought by the Authority. I am being

asked to make an order returning this child to the care of a person with whom who [sic] has had very little association.

However, notwithstanding my concerns, I am not satisfied that degree of harm as required by the authorities which I have referred to has been established. I have a great deal of sympathy for the wife and the child, however, it must be remembered that I am not considering the welfare of the child in the sense of making a determination as to where the child should live. I am only considering an application for the return of the child to the United States, in which country there will be a consideration of what the welfare of J ultimately requires. I accept that there will be some psychological harm to J caused by the order which I propose to make. However, this should be of short term duration because, hopefully, there will be a speedy determination in the United States of the welfare issues which I have identified. . .

The expert evidence in this case does not, in my opinion, establish that the return of J would expose her to the necessary degree of psychological harm. The expert evidence, even when considered with the other evidence, such as age of the child, time spent in the care of the wife, time spent in the care of the husband and separation from S does not enable me to reach the required conclusion. I have no doubt that it is a highly unsatisfactory and unsuitable situation so far as the welfare of J is concerned, however, regretfully, that is not what I have to consider. An example and perhaps the only reported example of circumstances where the defence of physical or psychological harm was established in the decision of the Court of Appeal in Re F (minor: Abduction: rights of custody abroad) (1995) All ER 641 at 647-549, 653; see also ; Re Bassi; Bassi and Director General, Dept of Community Services (1994) FLC 92-465.

The wife also alleged that there was some threat of physical harm to the child. The wife referred to the presence of guns in the household and things that the husband has said. Again, notwithstanding my disbelief that even a so called hunter would keep firearms in a suburban home, I am not satisfied that the wife has established the defence to the extent required by the authorities. I am not satisfied that the wife has established that there is any possible physical harm of a weighty or substantial kind.

The evidence in support of the existence of a grave risk of physical or psychological harm, or the placement of the child in an intolerable situation appears in the report of Professor Brent Waters, who, under the heading "Opinion" on p 156 of the appeal book, said:

> **I understand that the basis for the current application is that "there is a grave risk that the return of (the child) would expose (the child) to (physical or) psychological harm or otherwise place the child in an intolerable situation".**

My examination indicates that J is strongly and securely attached (bonded) to her mother. She is also strongly attached to her brother. I note that she is reported to show some anxiety when she stays overnight at her aunt's, and also shows some jealousy when her mother is occupied with her brother, but these are normal reactions for a well-adjusted two year old. Nevertheless, they do underscore that an abrupt and permanent separation from her mother would be associated with protest and extreme distress on behalf of the child. This distress would be associated with crying, withdrawal, lack of sleep, insecurity while in the care of the new carer, and probably appetite disturbance. However, provided that the new carers offered a warm, loving, attentive and responsive environment with minimal disruption to care and day-to-day routines, it is likely that J would adapt to the change and bond to the new carer. Nevertheless, there is a risk that the premature rupture of the bond with her mother may have the effect of making her somewhat less likely of establishing a secure bond with the next carer.

Based on the information available to me, I would not believe that there is any intrinsic reason for believing that the brother's psychiatric illness poses any risk to J.

Certainly the option presented by the father would need to be explored in more detail, because a combination of abrupt removal from the mother, placement with the father with whom she has virtually no relationship or recollection, and where the day-to-day care is largely provided by a neighbour who may not be in the child's life for very long and also may not be well qualified to be a carer, would be associated with significant risks, and may qualify as a grave risk of psychological harm or placement of the child in an intolerable situation.

Given the distance between the families, access to the mother would not significantly modify these risks. The benefit of access would be substantially in the area of maintaining the relationship with the mother, rather than protecting the child from the risks of being removed from a secure relationship and placed in a new carer relationship with an unfamiliar person or persons.

I would note that I did not have the opportunity to assess the father and his capacity to parent, nor to explore with him the detailed nature of the care he proposed to provide for his daughter.

Professor Water's opinion in summary reveals the following:

(a) that J is strongly and securely attached (bonded) to her mother;

(b) the child J is strongly attached to her brother;

> **(c) an abrupt and permanent separation from the mother would be associated with protest and extreme distress on the part of the child, which would be associated with crying, withdrawal, lack of sleep and insecurity while in the care of a new carer, and probably some appetite disturbance;**
>
> **(d) provided that any new carer offered a warm, loving, attentive and responsible environment with minimal disruption to care and day to day routine, it is likely that J would adapt to the change and bond to a new carer;**
>
> **(e) there is a risk that the premature rupture of the bond with her mother may have the effect of making the child somewhat less likely to establish a secure bond with the next carer;**
>
> **(f) the husband's proposals for the child's care in his custody would need to be explored in more detail because, on their face, they would be associated with significant risks and may qualify as a grave risk of psychological harm or placement of the child in an intolerable situation.**

His Honour in our opinion clearly considered all of this evidence and all the factors relevant to the child's welfare, under reg 16(3)(b) and concluded that the wife had not been able to establish that there was a grave risk of physical or emotional harm to the child, or that the child would otherwise be placed in an intolerable situation, by being the subject of an order for her return to the United States.

It must always be remembered that in most cases where an order is made by a court returning a child to its habitual place of residence, the order does not and is not intended to have the effect of returning the child to the custody or care of the other parent. What the order does is to require the Central Authority to return the child (often in the company of the abducting parent) to the country from which the child was wrongfully removed. It would be inconceivable that the judicial system of the State of Georgia in the United States would not be able to protect the child from any significant risk of physical and/or psychological harm arising from the implementation of this court's order. In addition, as indeed the trial judge found, the evidence was that the court in the State of Georgia having Jurisdiction in disputes relating to children applies the principle that the best interests of the child are the paramount consideration.

It was argued by the appellant that the trial judge failed to consider that the child was to be returned to the care of a person (the husband) who was in full time employment and absent for the greater part of waking hours, and who has known the child J effectively for a period of six weeks some twelve months ago and, prior to that, for a period of four months in the first four months of her life.

The difficulty with this, as with most, if not all, the submissions made by the appellant in relation to these grounds of appeal, is that they presuppose that the order which the trial judge made was that the child be returned to the husband rather than to the jurisdiction. Such submissions not only misconceive the order which the trial judge in fact made, but are a misunderstanding of the nature and effect of the Convention itself.

The purpose of the Convention is to protect children habitually resident in Convention countries from the harmful effects of their wrongful removal to or retention in another Convention country, by establishing a framework to ensure their prompt return to the State of their habitual residence. This is because countries which have signed the Convention recognise that disputes involving the custody of and access to children are best heard and determined in the place of their habitual residence, where the principle that the interests of children are of paramount importance will be applied.

The gravamen of the appellant's submission was however, that the trial judge erred in not finding that there was a grave risk that the child's return to the husband would expose her to physical or psychological harm, or otherwise place the child in an intolerable situation.

The meaning of the words, "grave risk", "physical or psychological harm", and "intolerable situation", as contained in reg 16(3)(b) have been referred to in a number of authorities. In Re F (minor: abduction: rights of custody abroad), above, the Court of Appeal was concerned with an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 which is reproduced in Sch 1 to the Child Abduction and Custody Act 1985 (UK). Article 13(b) of the Convention is in similar terms to reg 16(3)(b), with which we are concerned in relation to this appeal.

In concluding, having regard to the facts in that case, that there was a grave risk that the child's return would expose him to psychological harm and place him in an intolerable situation, Butler-Sloss LJ recorded the evidence which was before the trial judge in relation thereto in the following passage on p 649 of the report:

The extent to which the child has himself been drawn into the violence between his parents and the clear evidence of the adverse effect on him of his father's violent and intimidating behaviour would not in my view in themselves be sufficient to meet the high standard required in Art 13(b). The matters which I find most telling are: (1) the actual effect upon the child of the knowledge that he may be returning to Colorado together with the unusual circumstances; (2) that he would be returning to the very same surroundings and potentially the very same situation as that which has had such a serious effect upon him before he was removed. There has to be concern as to whether the father would take any notice of future orders of the court or comply with the undertakings he has given to the judge. How is a child of four to have any security or stability or from his perception come to terms with a return to his former home? I have come to the conclusion on the unusual facts of this case that the extreme reaction of the child to the marital discord and the requirement by Art 12 to return him on the facts of this case to the same house with the same attendant risks would create a grave risk that his return would expose him both to psychological harm and would place him in an intolerable situation.

The principle to be applied however was stated by Sir Christopher Slade on p 653 in the following passage:

> **As to the second head, I understand that the courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the courts' discretion under Art 13(b) are satisfied. They are in my view quite right to be cautious and to apply a stringent test. The invocation of Art 13(b), with scant justification, is all too likely to be the last resort for parents who have wrongfully removed their child to another jurisdiction.**

Millett LJ declared that the facts disclosed, "an exceptional case, where the intolerable situation is extreme and compelling".

Returning then to the present appeal, the evidence which the wife has given in support of her application is untested and, in any event, it is inconceivable that the courts in Georgia having the relevant jurisdiction would not protect both the wife and the child, or otherwise act in a manner consistent with the child's best interests. Indeed, we endorse similar comments made to the above effect in Murray and Director Family Services (ACT) (1993) 16 Fam LR 982 FLC 92-416 and ; Gsponer and Director General Department of Community Services (Vic), above.

We are not satisfied that the allegations which the wife has made and the evidence which she has adduced in support of her case, disclose a situation of such gravity or such exceptional circumstances as would require the court to intervene pursuant to reg 16(3)(b). His Honour refused to do so and, in our respectful opinion, he was correct.

The allegations of physical and psychological harm and sexual abuse which the appellant raises are not matters which could be conveniently dealt with in this country. The allegations are in respect of incidents said to have occurred within the State of Georgia. Therefore, in our opinion, the courts in that State are best equipped to hear and determine all those matters.

The matters referred to in reg 16(3)(b) are essentially questions of fact which a trial judge must decide, having regard to the evidence put before him. In the instant appeal, the trial judge carefully considered all the evidence which was before him at the time and concluded, for reasons which he gave, that no grave risk was present that the return of the child to the United States would expose her to physical or psychological harm, or otherwise place the child in an intolerable situation.

Further argument which Ms Farey raised in the course of her submissions was that once the child is returned to the United States the order of the Gwinnett Superior Court will immediately take effect and the husband will thereafter resume custody of his daughter. Indeed, the very purpose of the Convention is to respect the custody orders of the jurisdiction of the country from which the child was abducted which apply or have applied the best interests principle. There would appear however, to be nothing to prevent the appellant from applying to the Gwinnett Superior Court to set aside the orders previously made in her absence on the various grounds alleged before his Honour and before us in the course of the hearing of this appeal. While there may be some practical and procedural difficulties facing the wife in making and pursuing such an application, they are essentially of her own making. After all she chose, at her own risk to ignore the process of that court, with which she had been regularly and properly served, and it was clearly the court which provided the most appropriate forum for the resolution of the custody issue between these parties on its merits.

Ground (10): His Honour erred in law in not determining that the alleged return of the child would be in breach of fundamental principles relating to the protection of human rights and fundamental freedoms.

This ground has no substance in our view, for the reason that it implies that the Gwinnett Superior Court of the State of Georgia would not apply fundamental principles relating to the protection of human rights and fundamental freedoms.

There was no evidence before the trial judge to suggest that the Gwinnett Superior Court would not apply the paramountcy principle nor be capable of protecting human rights and fundamental freedoms of individuals. In any event, that aspect of the appeal was never argued before the trial judge and therefore he did not apply his mind to it in his reasons for judgment.

Summary and conclusions

The decision which the trial judge was called upon to make required him to consider all the evidence before him and make findings of fact in relation thereto. His Honour carefully considered the facts before him in a comprehensive and well reasoned judgment and in our opinion the findings which he made were all open to him having regard to the evidence.

Having made his findings of fact the trial judge then went on to consider the relevant law and, in particular, the various authorities to which he made reference in his reasons for judgment. In our opinion, his Honour correctly applied the law and we are therefore unable to find that any appellable error has occurred.

For all these reasons the appeal will be dismissed.

Costs

At the conclusion of the hearing of the appeal, we heard argument from the parties in relation to what order for costs should be made depending upon the result.

The appellant submitted that if the appeal were to succeed, she would be seeking an order for costs or, in the alternative, a certificate pursuant to the provisions of s 9 of the Federal Proceedings (Costs) Act 1981.

The respondent's counsel submitted that irrespective of the result, he would not be seeking costs on behalf of his client.

In the end result, as the appeal has not been successful, we do not propose to make any order for costs.

Order:

It is ordered:

(1) That the appeal be dismissed.

==========

Laing and The Central Authority [1999] FamCA 100 (9 February 1999)

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA Appeal No EA 39 of 1996

AT MELBOURNE File No SY 3981 of 1995

BETWEEN:

DEBORAH JOY LAING

Appellant Wife

- and -

THE CENTRAL AUTHORITY

Respondent

REASONS FOR JUDGMENT OF CHIEF JUSTICE NICHOLSON

CORAM: NICHOLSON CJ, FINN, KAY, MOORE,

and MAY JJ

DATE OF HEARING: 27 and 28 August, 14 September 1998

DATE OF JUDGMENT: 9 February 1999

APPEARANCES:

Dr Griffith, one of Her Majesty's Counsel, and Ms Eastman of Counsel, instructed by Bruce A Swane & Co., 89 Cambrai Ave, Engadine NSW 2233, appeared on behalf of the Appellant Wife.

Mr Basten, one of Her Majesty's Counsel, and Mr Anderson of Counsel, instructed by Crown Solicitors Office, GPO Box 25, Sydney NSW 2001, appeared on behalf of the Respondent Central Authority.

Name of Appeal

Laing v The Central Authority

Appeal Number EA 39 of 1996 from SY 3981 of 1995

Date of Appeal

Judgment in Issue 10 October 1996 (Baker, Lindenmayer and Smithers JJ)

Date of Appeal Hearing

Before Present Full Court: 27, 28 August and 14 September 1998

Decision Delivered: 9 February 1999

Coram Nicholson CJ, Finn, Kay, Moore and May JJ

Introduction

1. The application before the Court presents a range of significant issues and unusual circumstances. A specially constituted bench of five judges has been assembled to hear it. Before turning to identify the issues for resolution, it is convenient to first indicate how the matter comes before this Court.

2. The statutory basis of these proceedings is s111B of the Family Law Act 1975. Subsection 111B(1) is in the following terms:-

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

3. I shall return to detailed consideration of the Regulations in due course. For present purposes it should be noted that the Regulations were first promulgated as Statutory Rule 85 of 1986 ("the 1986 Regulations"). New Regulations in the form of Statutory Rule 296 of 1995 ("the 1995 Regulations") came into operation on 1 November 1995. According to the majority judgment of the High Court in in De L v Director-General, NSW Department of Community Services and Anor (1996) FLC 92-706, delivered subsequently to the decision of the Full Court in this case, where a Hague Convention application had been brought prior to the repeal of the 1986 Regulations, they continue to apply to such an application despite their repeal. In the present case, the 1986 Regulations were thus the relevant regulations that should have been applied.

4. The Hague Convention on the Civil Aspects of International Child Abduction ("the Convention)" came into force between Australia and the United States of America on 1 July 1988.

5. The case arises because the relevant application was made while the 1986 regulations were in force, in respect of a child "J" born 9 November 1993.

6. Without informing the father, the mother brought J to Australia on 12 January 1995 from the State of Georgia in the United States of America. The mother was pregnant when she brought J to Australia and gave birth to a boy S in Sydney on 22 September 1995. There has been no application under the Convention in respect of the child S by the father, nor could there have been. The father has remained in the United States of America since the time of J's removal and has made no application for residence or contact with either child in the Australian courts.

7. On 19 August 1998, Knibbs JR made orders granting interim residence of S and interim sole responsibility for the day to day care, welfare and development of S to the mother.

8. The application for the return of J was the subject of proceedings in the Family Court of Australia at both first instance and in the Full Court. On 20 February 1996, the trial Judge, O'Ryan J, held that J should be returned and made orders in the following terms:-

"1. That upon the Central Authority being satisfied that the father has given undertakings to the Superior Court, Gwinnet County, Georgia that he will pay to the Central Authority sufficient moneys to enable the wife and the child J, born on 9 November 1993 to travel by air from Sydney to Atlanta, Georgia or paid to the Central Authority sufficient moneys to pay the cost of such air travel then the Central Authority shall, as soon as reasonably practicable on or after 15 March 1996 cause the child to be returned to the United States in the company of the wife.

2. That liberty is reserved to the Director-General of the Department of Community Services to apply to a single judge of this court for further directions for the implementation of Order 1."

9. The mother appealed from that decision to the Full Court and on 8 October 1996, Baker, Lindenmayer and Smithers JJ ordered that the appeal be dismissed (1996) FLC 92-709].

10. The mother has also attempted to bring the matter before the High Court by way of an application for special leave to appeal. Her application was brought in August 1998, well outside the time limits for such an application, because she went into hiding with the child for fourteen months following the dismissal by the Full Court of her appeal.

11. It was thus necessary for the mother to first apply for an extension of time in which to seek special leave. Both that application and an application to adjourn the application for an extension of time were dismissed by Gleeson CJ and McHugh J in the High Court of Australia on 7 August 1998.

12. In the normal course of litigation, the High Court's refusal would have left no further avenue to challenge the decisions below. However on 17 August 1998, another application was made by the mother. She sought an order pursuant to s21 of the Family Law Act 1975 in the inherent jurisdiction of the Court that the Full Court proceedings be re-opened and that: -

"(a) the order of the Full Court made the 10th October 1996;

and

(b) the order of Justice O'Ryan made at first instance the 20th February 1996

be set aside and that the matter be remitted for re-hearing before a single judge."

13. Her application relied on the following grounds:-

*** "...manifest error arising from the application by each of the courts of the Family Law (Child Abduction Convention) Regulations which came into force on 1 November 1997 (sic) after the application made Central Authority on 28 June 1995, rather than the applicable, now repealed, regulations, which should have been applied by reason of the decision of the High Court of Australia in DE L v Director General, Department of Community Services (NSW) (1996) 187 CLR 640 delivered the same day as the decision of the Full Court.**

*** ...that the above orders made by the Court should be regarded as vitiated by reason of the different relevant inquiry mandated by the applicable regulations from the inquiry and fact made by the above courts by reference to the inapplicable regulations.**

*** ...that by reason of the application of the non-applicable regulations, the appellant was shut out from making further relevant and material submissions as to why no order could and should be made in the matter reference to the applicable regulations and, in particular, from putting arguments that:**

*** (a) the property (sic) construction of the applicable regulations and their application to the circumstances of her case;**

*** (b) the order made was insupportable by reference to the terms of the applicable regulations, and**

*** (c) the applicable regulations were invalid by reference to the regulation making power under s111B of the Family Law Act**

*** ...that the applicable regulations were in any event beyond constitutional power in their application to the child, as an Australian citizen."**

14. On 11 September 1998, notice was given that leave of the court would be sought on 14 September 1998 to amend the application. The mother's application was ultimately treated as though the following paragraphs formed part of the application:-

"Further and alternatively that the order of Justice O'Ryan made on 20 February 1996 be declared spent and that the matter be remitted for further hearing before a single judge.

Further that an order be made pursuant to s68L of the Family Law Act 1975 that the child, ["J"], born 9 November 1993 be separately represented."

15. That application first came on for mention before me in Melbourne on 20 August 1998. Dr. Griffith QC appeared in person on behalf of the mother and Mr Anderson of Counsel appeared by telephone link on behalf of the Department of Community Services NSW as the Central Authority with responsibility for the matter ("the Central Authority").

16. The Central Authority took objection to the threshold issue of the existence of a power to re-open the Full Court proceedings. I referred that issue and the application generally to a Full Court for hearing on 27 August 1998. The Central Authority gave an undertaking not to implement the orders for the return of the child until such hearing.

17. The definition of "Full Court" in sub-s 4(1) relevantly provides that a Full Court comprises 3 or more Judges of the Family Court sitting together where a majority of those Judges are members of the Appeal Division. Subsection 21B(1) empowers the Chief Justice to *"make arrangements as to the Judge or Judges who is or are to constitute the Court, or the Full Court, in particular matters or classes of matters."*

18. In the circumstances of the case, I determined that a bench of five Judges should hear the matter. The factors which led to this decision were:-

*** the important legal questions raised by the case;**

*** the fact that the original appeal court was not readily available; and**

*** the fact that Dr. Griffith foreshadowed argument that two previous Full Court authorities had been wrongly decided.**

19. The solicitors for the mother gave notice to the Commonwealth and State and Territory Attorneys-General under s78B of the Judiciary Act 1903 that the present case may involve a matter arising under the Constitution or involving its intepretation. None elected to intervene.

20. The Court sat at the Melbourne Registry on 27 and 28 August 1998 and on 14 September 1998. Judgment was reserved. The Central Authority extended its undertaking in respect of not taking steps to return the child until this Court determined the mother's application.

21. I have had the benefit of reading the reasons for judgment in draft form prepared by Kay J. It will be convenient in the course of my reasons to refer to portions of his Honour's judgment where I adopt what his Honour has said. There are, however, aspects of the case circumstances, the submissions and the law which, with respect, I view differently.

Background

22. Under the headings of "Background", "Subsequent events" and "The High Court refuses to extend time to seek special leave to appeal", Kay J has provided a description of these aspects of the case and I adopt his Honour's account.

Approach to the Application

23. At the hearing, as a matter of convenience and with the agreement of the parties, we considered the questions of jurisdiction and power to reopen the matter, as well as discretionary considerations in the event that such jurisdiction and power existed. As will be seen at a later stage of this judgment, the particular facts of the matter are, as a matter of law, integral to the issue of reopening.

24. I turn first to the substantive issues.

The Validity of the Regulations.

25. Although Mr Basten did not concede this point, I consider it clear that both the trial Judge and the Full Court applied the 1995 Regulations rather than the 1986 Regulations. By accident, the correct Regulations, the 1986 Regulations, were quoted on one occasion by the trial Judge but it is obvious that he was otherwise referring to the 1995 Regulations.

a) Submissions

26. The nub of the submission for the mother was that the 1986 Regulations were invalid and could not be saved. Dr Griffith's argument emphasised that the regulations had only one source of power, the regulation-making power of s111B of the Family Law Act and that the power conferred by s111B only provided for regulations to give effect to the Convention. He argued that the 1986 Regulations failed to give such effect in a material way because they required the Court to consider making an order for the return of the child to the applicant. It was Dr. Griffith's submission that the Convention does not authorise the return of the child to the applicant and thus the Regulations are invalid. Alternatively, he said that if the Convention does envisage the return of the child to the applicant it is not confined to such a return and the Regulations therefore still do not give effect to the Convention which, he said, clearly envisages the return of the child either to the country of habitual residence or to the applicant, depending upon the circumstances and nature of the application.

27. In further support of this argument, he also referred to the fact that the 1986 Regulations had been substantially amended by Statutory Rule 296 of 1995. The 1995 Regulations no longer refer to the return of the child to the applicant but now make specific reference to *"return of the child to the country in which he or she habitually resided immediately before his or her removal or retention"* (para 14(1)(a) concerning applications and reg 15 concerning orders which refers to *"an application under regulation 14"*). In reg 16, concerning an *"order for the return of a child"*, reference is made to *"return" simpliciter* and, significantly, in the case of the "grave risk" exception contained in para 16(3)(b), *"return of the child to the country in which he or she habitually resided immediately before his or her removal or retention"*. This alternative argument may also suggest that the current 1995 Regulations are also invalid in that they similarly do not give effect to the Convention, because they do not also envisage the return of a child to the applicant parent. However, it is unnecessary to decide this point in this case.

28. To properly appreciate this argument as to validity, it is necessary to understand that Dr Griffith also argued that the prior Full Court decisions of Gsponer v Director General, Dept of Community Services, Victoria (1989) FLC 92 and Murray v Director, Family Services, ACT (1993) FLC 92-416 were wrong insofar as differently constituted Full Courts held that return of the child to the "applicant" means return of the child to the Central Authority of the jurisdiction which transmits the application.

29. The following passage from Gsponer at 77,159-60, to which the trial Judge in this case referred, is significant:-

"...the grave risk which Reg 16(3)(b) refers to is the risk arising from "the child's return to the applicant". The proceeding before the trial judge proceeded upon the assumption that "the applicant" in this case was the father and indeed that is reproduced in Order 1, where his Honour ordered the return of the child to "the custody of the husband in Switzerland". Regulation 2, to which we have referred, makes it clear that "applicant" means the person who has made the relevant application under Reg 13. In this case that was the Federal Office of Justice Switzerland, or its appropriate officer. Senior counsel for the wife, when he commenced his argument, briefly acknowledged this was so, although he submitted that it had no relevance to the submissions he was making.

Nevertheless it is an important matter both in this case and generally. Orders under the Convention are in reality directed to the return of the child to the other country, and this would be so as a matter of practical reality even if the "applicant" under Reg 13 is the other parent. This is made clear from the preamble to the Convention which speaks of the "prompt return (of the child) to the State of their habitual residence". Once the child has been so returned no doubt the appropriate court in that country will make whatever orders are

then thought to be suitable for the future custody and general welfare of that child, including any interim orders.

So understood, Reg 16(3)(b) has a narrow interpretation. It is confined to the "grave risk" of harm to the child arising from his or her return to a country which Australia has entered into this Convention with. There is no reason why this court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare. Indeed the entry by Australia into this Convention with the other countries may justify the assumption that the Australian Government is satisfied to that effect."

30. The impugned passage in Murray's case (at 80,259) is as follows:-

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

31. While not conceding that Gsponer and Murray were wrongly decided, Mr. Basten did not press the Court to uphold the meaning ascribed by those authorities. He disputed the proposition that the inclusion of the words *"to the applicant"* gave rise to invalidity and argued that the phrase should not be read in the precise and literal way submitted for the mother. He submitted that the phrase did not mean return to the physical presence or control of the applicant. While accepting that there is a difference in terminology between the 1986 and 1995 Regulations, it was his stance that no matter of substantive difference arises.

b) Findings

32. Like Kay J I, too, consider that Gsponer and Murray were erroneous as a matter of law to interpret the applicant as the Central Authority that made the application. I agree those decisions were wrongly decided: who is the "applicant" will be a question of fact in each case due to the multiple avenues available to make applications: see Article 8 of the Convention and reg 2.

33. While it is not an easy matter for decision, I have further reached the conclusion that the inclusion of the words *"to the applicant"* in the 1986 Regulations fundamentally failed to give effect to the Convention and gave rise to invalidity for relevant purposes.

34. The *"applicant"* as defined by reg 2 of the 1986 Regulations *"means a person who made an application referred to in regulation 11, 13 or 24 as the case requires;"*. Regulation 13 obliges the Commonwealth Central Authority to take action when it receives a proper application in respect of a child removed to Australia from a Convention country. Regulation 15 of the 1986 Regulations provides for the *"responsible Central Authority"* to apply for, *inter alia*, *"(d) an order for the return of the child to the applicant."* In contrast, the Preamble to the Convention refers to *"ensuring the prompt return of children to the State of their habitual residence"* and the articles of the Convention, and in particular Article 8, merely speak in terms of *"return of the child"*.

35. Further, when one looks to subreg 16(3) of the 1986 Regulations which concerns exceptions to the Convention obligation to return, it is apparent that the 1986 Regulations draw a distinction in respect of these bases. The "grave risk" exception in para (b) speaks in terms of return of the child *"to the applicant"*, whereas other paragraphs of subreg 16(3) merely speak of the child's *"return"*. The corresponding Convention articles 12 and 13 speak of *"return" simpliciter* for all exceptions.

36. I do not accept that these features of the 1986 regulations can be overlooked in order to find them valid within the specific power provided by s111B. The draftsperson has drawn a distinction between *"return"* and *"return...to the applicant"* that I do not think can be ignored. The issue to be determined by the Court when considering the "grave risk" exception of para 16(3)(b) is markedly different depending upon whether one is considering return to the Central Authority or a Contracting State, as compared with return to the person who is the applicant. I will consider subsequently the effect of this difference in relation to the facts of this case.

37. As a further consequence of such distinctions, I do not accept that the "blue pencil" test can be applied to the 1986 Regulations. I think that to delete the words *"to the applicant"* would change the meaning of the 1986 Regulations in a way that I consider would offend Harrington v Lowe (1996) FLC 92-668 where Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said (at 82,915):-

"As to the common law in Australia, the position, as established by the earlier decisions of this court to which we have referred appears to be that a valid operation for the subrules might be preserved after textual surgery

by operation of the `blue pencil' rule so that the valid portion could operate independently of the invalid portion, or, failing that, by treating the text as modified so as to achieve severance. But this latter step may be taken only where in so doing there is effected no change to the substantial purpose and effect of the impugned provision, and, in particular, there is not left substantially a different law as to the subject matter dealt with from what it would otherwise be."

38. In the present case, contrary to the views expressed by the Full Court in Gsponer and Murray, if the Regulations provided for the return of the child to the applicant and if the father was the person under consideration as the applicant, quite different considerations would apply than if the only issue related to the return of the child to the United States when considering para16(3)(b).

39. In my view, the passage by Professor Perez-Vera, cited by Kay J at para 77 of his judgment highlights the fact that the Convention envisages that where and to whom the child is to be returned will depend upon the facts of the case and circumstances of the application. Where the provisions in the 1986 Regulations speak of return to the applicant, those provisions confine the operation of the Convention and the inquiries afforded in the exercise of the discretion to order return.

40. The passage also underlines the difficulties which arise from the form in which the Convention was incorporated into Australian law. Other jurisdictions such as England did not attempt to re-write the Convention. Rather, the text of the Convention was incorporated wholly thereby leaving it to the decision-making body to determine where the child is returned. In this regard I would respectfully agree with Finn J's observation in Murray's case at 80,260 which was cited in argument by Dr Griffith, that: -

"it seems unfortunate that when the Commonwealth incorporated the Hague Convention into Australian law, it did not so either simply by incorporation of the Convention as a whole or at least in terms identical to the terms of the Convention."

If the Regulations are Valid

41. In the event that I am wrong on the question of validity and the "blue pencil test", there remains the issue of the effect of this Court's reconsideration of Gsponer and Murray. In my view it is clear that the trial Judge and the Full Court had regard to these decisions and the interpretations now impugned. The significance lies in the distinctly different approach to be taken to the question of whether, to use the language of para 16(3)(b) of the 1986 Regulations, *"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".*

42. Mr Basten's argument was that a different result would not have been reached if the meaning now ascribed to the phrase *"to the applicant"* had been relied upon. He argued that even if the 1986 Regulations read the applicant to be the Central Authority, the effect of considering whether to return the child to the United States rather than the applicant father reflected what is actually required by the Convention. On this argument, the right test would have been applied but for the wrong reasons.

43. In the course of the hearing before us, there was reference to passages in O'Ryan J's reasons for judgment that acknowledged that the Gwinnett County Superior Court order would have the effect of placing the child in the care of the father. It was said that, notwithstanding that Gsponer and Murray read "applicant" to mean "the Central Authority" his Honour contemplated an outcome whereby the child would be, in reality, returned to the father. Accordingly, Mr Basten said that the erroneous interpretation of those cases did not infect the actual decision and its effect.

44. The difficulty with Mr Basten's submission lies in my concern that the trial Judge and the Full Court approached the question of grave risk on the basis that return was to the Central Authority. If the 1986 Regulations were valid and the term applicant denotes the father, a much closer examination of the father was warranted.

45. It is convenient at this point to recite the pertinent passages from the trial judgment:-

"Professor Waters in his O 30A report said that the wife was very responsive to J "who appeared to be securely attached to her". Professor Waters expressed the opinion that his examination indicates that the child is strongly and securely attached (bonded to the mother and also is strongly attached to S. Professor Waters said:

"certainly the option presented by the father would need to be explored in more detail, because a combination of abrupt removal from the mother, placement with the father with whom she has virtually no relationship of recollection, and where the day to day care is largely provided by a neighbour who may not be in the child's life for

very long and also may not be well qualified to be a carer, would be associated with significant risks and may qualify as a grave risk of psychological harm or placement of the child in an intolerable situation"."

In summary, I am satisfied that J is clearly attached and bonded to the mother. The mother has provided appropriate care for the child. I am satisfied that J is closely attached to her mother. I am satisfied that there is a risk of some psychological harm to J if I make the order sought by the Director. I am concerned about the separation of the child from her brother and an environment in which she is settled and appears to be satisfactory for her welfare. I am also very concerned about the circumstances in which the child will be placed upon the child's arrival back in the United States if I make the order sought by the authority. I am being asked to make an order returning this child to the care of a person with whom who [sic] has had very little association.

However, notwithstanding my concerns, I am not satisfied that degree of harm required by the authorities which I have referred to has been established. I have a great deal of sympathy for the wife and the child, however, it must be remembered that I am not considering the welfare of the child in the sense of making a determination as to where the child should live. I am only considering an application for the return of the child to the United States, in which country there will be a consideration of what the welfare of J ultimately requires. I accept that there will be some psychological harm to J caused by the order which I propose to make. However, this should be of short term duration because, hopefully, there will be a speedy determination in the Unites [sic] States of the welfare decisions which I have identified.

In Regino and Regino (1995) FLC 92-587 Lindenmayer J had before him circumstances which are very similar to those which exist here, and he found that the return of the child would be likely to expose the child to some risk of psychological harm. However, Lindenmayer J was considering the exercise of discretion by the court in circumstances where a Reg 16(3)(a) defence had been made out and he was not considering reg 16(3)(b). The expert evidence in this case does not, in my opinion, establish that the return of J would expose her to the necessary degree of psychological harm. The expert evidence, even when considered with the other evidence, such as age of the child, time spent in the care of the wife, time spent in the care of the husband and separation from S does not enable me to reach the required conclusion. I have no doubt that it is a highly unsatisfactory and unsuitable situation so far as the welfare of J is concerned, however, regretfully, that is not what I have to consider. An example and perhaps the only reported example of circumstances where the defence of physical or psychological harm was established is in the Court of appeal in Re F (Minor: Abduction: Rights of Custody Abroad) (1995) All ER 641 at 647-649, 653; see also Re Bassi; Bassi and Director General, Dept of Community Services (1994) FLC 92-465.

The wife also alleged that there was some threat of physical harm to the child. The wife referred to the presence of guns in the household and things the husband has said. Again, notwithstanding my disbelief that even a so called hunter would keep firearms in a suburban home, I am not satisfied that the wife has established the defence to the extent required by the authorities. I am not satisfied that the wife has established that there is any possible physical harm of a weighty or substantial kind." (AB 30-32, emphasis added).

46. It is also relevant to note the following views expressed by the trial Judge concerning the orders made by the Superior Court of Gwinnett County in Georgia:-

`It is my view that Judge Bishop should only have made what we describe as interim orders. I find it difficult to accept that he was able to make a final order for custody unless his discretion was limited by the evidence which he had before him which of course I did not have the benefit of. I find it very difficult to accept how, even on an undefended basis, and knowing that an application would be made under the Hague convention, Judge Bishop could possible find that on a permanent basis, the husband could have custody of this child. The evidence clearly established that the husband had spent very little time with J. Further purpose of a prompt return of a child is to enable the question of what the welfare of the child requires to be determined in the country to which the child is returned and in my view that has not yet happened in this case notwithstanding the final order made by Judge Bishop." (AB 13-14).

47. I accept that the trial Judge appreciated that the child would be returned to the father's care. Indeed, his Honour went on to express concerns about such a situation. I am not, however, satisfied that the trial Judge examined the father as applicant in the manner which would follow from the meaning of *"applicant"* as now understood. The above extracts from O'Ryan J's judgment strongly indicate to me that matters going to the father were put aside from decision-making as to *"grave risk"* by the trial Judge on the basis that his task did not require an assessment of the father. Moreover, this approach was applied in circumstances where highly significant uncertainties were evident, such as:

*** the status of the orders made by the Superior Court of Gwinnett County in Georgia placing the child in the father's custody;**

*** his Honour's further assumption that *"there will be a speedy determination of the welfare issues which I have identified"* ;**

*** the concerns expressed by Professor Waters as accepted by O'Ryan J;**

*** the allegations of threat of physical harm to child.**

48. The trial Judge's concerns for the child were placed on the record but not factored into the grave risk assessment on the basis that return was to the applicant father. I find it difficult to imagine that these issues would not have taken on greater importance where a Judge understood his or her task to include assessing whether there would be grave risk in returning the child to the father in person.

49. My concerns equally apply to the Full Court's consideration of the appeal grounds directed to these matters: (1996) FLC 92-709 at 83, 509 - 83,514. Their Honours' review of the evidence and its analysis by O'Ryan J appears to me to be fundamentally framed by two aspects of their approach.

50. First, the Full Court proceeded on the basis that the grounds of appeal relevant to grave risk did not involve error of law and essentially concerned questions of weight. The Full Court said at 83,509-510:-

"The essence of these grounds [of appeal] is that the trial Judge's findings that the wife had not established the existence of a grave risk that the return of J to the United States would expose the child to physical or emotional harm, or otherwise place the child in an intolerable situation, within the meaning of Reg. 16(3)(b) of the Child Abduction Regulations were not reasonably open to him on the evidence before him. As these grounds are concerned essentially with weight, regard must be had to High Court authorities as to the manner in which appellate courts must deal with [and] hear appeals from discretionary judgments."

51. Their Honours then referred to well-known passages urging appellate restraint in Lovell v Lovell (1950) 81 CLR 513 at 519 per Latham CJ and Gronow and Gronow (1979) 144 513 at 519-20 per Stephen J. Those authorities concern trial judgments where there has <u>not</u> been *"exclusion of relevant considerations or the admission of irrelevant considerations"* [Lovell] and *"error of law or mistake of fact"* [Gronow]. It is quite clear that in considering the question of weight, their Honours were proceeding upon the basis that the principles stated in Gsponer and Murray were correct and were viewing the trial Judge's reasons for judgment in that light. I do not think the Full Court would necessarily have arrived at the same result if they had been considering the position of the father.

52. Secondly, and interconnected with the first issue, the Court considered the appeal on the basis that it was misconceived for the mother to argue the grave risk of returning the child to the father. At 83,513 the Full Court said:-

"The difficulty with this, as with most, if not all of the submissions made by the appellant in relation to these grounds of appeal, is that they presuppose that the order which the trial Judge made was that the child be returned to the husband rather than to the jurisdiction. Such submissions not only misconceive the order which the trial Judge in fact made, but are a misunderstanding of the nature and the effect of the Convention itself.""

53. Referring again to my earlier comments, I consider this assessment fails, on a proper construction of the 1986 Regulations, to correctly characterise the effect of the regulations.

54. Due to no fault of the trial Judge and the Full Court, it is an inescapable conclusion that the proceedings were decided on the basis of what were erroneous decisions as well as the wrong regulations.

55. Accordingly, applied to the present case, I do not accept Mr Basten's submission that reliance on the erroneous interpretation of "applicant" can be ignored.

56. Before leaving this matter, I should acknowledge that an approach that reads the *"applicant"* as including the fact of the other parent as applicant presents practical difficulties, given the purpose of the Convention and the imperative of prompt determination of applications. Assessment of the "grave risk" of returning a child to that person rather than a Central Authority can introduce additional factual arguments for resolution and evidentiary needs which could lead to additional delay in the bringing on of cases for hearing. However, it is apparent that the framers of the Convention considered that there were circumstances where a child who had been illegally removed to another country should nevertheless be permitted to remain in that country and the Court's duty is to give effect to that intention as expressed in the Regulations.

The Validity of the Order by O'Ryan J

57. A complementary argument to those raised in respect of the validity of the 1986 Regulations concern the terms of the order made by O'Ryan J that are set out at para 8 of my reasons. I was not persuaded by the arguments of Dr. Griffith in this regard. In light of my views concerning the regulations and my ultimate decision, it is unnecessary to consider this issue further.

Whether O'Ryan J's Order Is Spent and a Child Representative Should be Appointed.

58. Dr Griffith advanced a further alternative argument to the effect that the passage of time since O'Ryan J made his order should now lead to the view that the order is spent insofar the foundation for the order no longer exists. Re HB (Abduction: children's objections) [1998] 1 FLR 422 was cited in argument as an illustration of how radically changed circumstances can permit reconsideration of an order for return under the Convention.

59. I agree with Mr Basten that the factual circumstances of Re HB were wholly different in that it was the conduct of the applicant parent and its damaging impact on a 12 year old child's objections which led to reconsideration of the order.

60. So far as the appointment of a Child Representative is concerned, if this Court holds that the mother's application to reopen should be granted, I am mindful of the High Court's dicta in De L on the subject. While not expressly so limited, the Court was principally concerned with such representation where a child of sufficient maturity was expressing objections to return. Given the unusual circumstances of this case however, I would appoint a child representative.

Are Australian citizens excluded from return orders under the Convention

61. I refer to paragraphs 96- 98 of Kay J's reasons for judgment and respectfully agree with his reasons therein.

Special duties of the Central Authority

62. I refer to paragraphs 93 - 95 of Kay J's reasons for judgment and respectfully agree with his reasons therein save that I do not agree that the same result in this case would have been achieved if the 1986 Regulations had been applied.

63. However, I do consider that there was a special obligation upon the Central Authority to take action as a result of the High Court's decision in *De L* as to the correct regulations to be applied in this case.

64. To use the language of Marc Galanter `Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95, there are aspects of the legal system which involve claimants who have only occasional recourse to the courts and *"repeat players"* who are litigants in a range of similar cases. Organisations comparable to the Central Authority here are State and Territory child protection services, or, for example, to look to other 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.

Can completed proceedings ever be reopened?

67. The key issues for determination by this Court may be summarised as follows:-

*** Given the findings I have come to on the substantive issues which are advanced as a basis for reopening:**

*** Does the Full Court of the Family Court possess the inherent power to vary or set aside a perfected order?**

*** If such a power exists, in the circumstances of this case, should the Court exercise the discretion to apply that power?**

Core Submissions as to Power

68. Dr Griffith urged us to find that as a superior court, the Family Court of Australia has an inherent power to reopen completed proceedings. His written submissions relied upon De L v Director General, New South Wales Department of Community Services and anor (1997) FLC 92-744 and Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300 from which he identified three limbs to the test for the exercise of power:

*** there is some matter calling for review or if the interests of justice so require;**

*** the court has proceeded on a misapprehension as to the law where the misapprehension cannot be attributed solely to the neglect or default of the Appellant;**

*** the interests of justice so require.**

69. In the course of argument before us, Dr Griffith also drew attention to State Rail Authority of New South Wales v Codelfa Construction Pty Ltd (1982) 150 CLR 29 at 38, 45-6. He also referred to a number of subsequent decisions by the New South Wales Court of Appeal and the Full Court of the Federal Court of Australia (discussed below) which were said to illustrate the contemplation of the power to reopen being possessed by intermediate appellate courts notwithstanding that a judgment had been entered.

70. Mr Basten's submissions for the Central Authority conceded that a number of cases have accepted the power of a superior court to reopen proceedings where final orders have been made but not finally entered in the Court's records. Referring particularly to University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481 he submitted that although the High Court has on one occasion assumed that it has the power to vacate an order, notwithstanding that it had been perfected, the High Court has never actually held that it has such a power.

71. In respect of other superior courts in Australia, he relied upon Bailey v Marinoff (1971) 125 CLR 529 and Gamser v Nominal Defendant (1977) 136 CLR 145 as authorities against the existence of an intermediate appellate court's power to reopen completed proceedings which have been duly entered into the Court's records. In supplementary submissions concerning Dr Griffith's authorities, he further stressed the centrality of a finding that parties had not been heard where proceedings were reopened.

High Court Authority

72. The most recent authority on this matter is High Court's judgment in De L v Director General, New South Wales Department of Community Services and anor (1997) FLC 92-744. The Court there reviewed its previous decisions and confirmed the power of that Court to reopen its judgments or orders in circumstances where the order has not been finally entered into the Court's records. The following passage by the majority (at 84,034) highlights the rationale for the possession of such a power by the High Court and when it may exercise that power:-

"Reopening of a final order

The power of this court to reopen its judgments or orders is not in doubt. The court may do so if it is convinced that, in its earlier consideration of the point, it has proceeded "on a misapprehension as to the facts or the law" [*Autodesk Inc v Dyason* (No 2) (1993) 176 CLR 300 at 302 111 ALR 385], where "there is some matter calling for review" [Smith v New South Wales Bar Association (1992) 176 CLR 256 at 265 108 ALR 55] or where "the interests of justice so require". Autodesk Inc v Dyason (No 2)] It has been said repeatedly that a heavy burden is cast upon the applicant for reopening to show that such an exceptional course is required "without fault on his part" [Wentworth v Woollahra Municipal Council (1982) 149 CLR 672 at 684 43 ALR 240 cf State Rail Authority of New South Wales v Codelfa Construction Pty Ltd (1982) 150 CLR 29 at 38, 45-6 42 ALR 289, Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 181 CLR 134 at 168 121 ALR 577], ie without the attribution of neglect or default to the party seeking reopening[*Autodesk Inc v Dyason (No 2)* CLR at 303, ALR 385]. By such expressions of the power to reopen final orders, courts seek to recognise competing objectives of the law. On the one hand, there is the principle of finality of litigation which reinforces the respect that should be shown to orders, final on their face, addressed to the world at large and upon which conduct may be ordered reliant upon their binding authority. On the other hand, courts recognise that accidents and oversights can sometimes occur which, unrepaired, will occasion an injustice. In the case of a final court of appeal, such as this court, that injustice may be irremediable, unless the court itself, acting promptly, is persuaded to reopen its orders so as to afford relief in the exceptional circumstances of the case.

[*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302 111 ALR 385 *Wentworth v Rogers (No 9)* (1987) 8 NSWLR 388 at 394-5; *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 28-9]"

The Significance of "Perfection"

73. In *De L v Director General, New South Wales Department of Community Services and anor* (1997) FLC 92-744, the order in question had not been perfected. In a subsequent passage, however, the majority addressed this circumstance:-

"An important consideration is that the orders of this court, although publicly announced, were not perfected. That is, the formal entry of the orders in the court's records was not made before the present motion was filed. As a result of the motion, the registrar of the court, of his own initiative, has delayed the entry of the orders pending the outcome of these proceedings. Courts have always treated differently applications to reopen final orders which, although pronounced publicly, have not been finally entered in the court's records. Different considerations arise when this latter step has been taken. [*State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38 42 ALR 289 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 308, 317 111 ALR 385 *University of Wollongong v Metwally (No 2)* (1985) 60 ALR 68 at 70 59 ALJR 481 at 482-483]."

74. It is convenient at this point to extract what would seem the relevant portions of the previous authorities to which reference is made at the end of the above passage.

***75. State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 considered orders of the High Court which had not been passed and entered. At 38, Mason J (as he then was) and Wilson J said:-**

"Counsel for the Authority referred the Court to many cases to establish the jurisdiction of the Court to entertain the present application. We have no doubt that such a jurisdiction exists: *Rajunder Narain rae v. Bijai Govind Sing* [(1839) II Moo.Ind.App. 181; 18 ER 269]. See also *Vienkata Narasimha Appa Row v Court of Wards* [(1886) 11 App.Cas. 660]; In re Harrison's Share Under a Settlement [(1955) Ch. 620]. Nevertheless, it is a power to be exercised with great caution. There may be little difficulty in a case where the orders have not been perfected and some mistake or misprision is disclosed. But in other cases it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation. The circumstances that will justify a rehearing must be quite exceptional. In *Rae's Case*, Lord Brougham said, in words with the Authority claims are opposite to the present case [(1839) II Moo.Ind.App., at 220; 18 ER at 284]:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being doing by a Court of the last resort, where by some accident, without any blame, the party has not been heard, and an Order has been inadvertently made as if the party had been heard."

In *Venkata's Case* [(1886) 11 App.Cas. at 663-664], Lord Watson, delivering the opinion of the Judicial Committee of the Privy Council, referred to Lord Brougham's words in Rae's Case and continued:

"Even before report, whilst the decision of the Board is not yet res judicata great caution has been observed in permitting the rehearing of appeals. In the last case to which we were referred, that of *Hebbert v Purchas* [(1871) LR 3 PC 664], where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said: - `Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finalty "[sic]" of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused.' There is a salutary maxim which ought to be observed by all Courts of last resort - Interest reipublicae ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.""

76. In *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 482-483, the Court (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) said:-

"It may be assumed without deciding that the court has power to vacate its order of 22 November 1984, notwithstanding that it has been perfected. If such power exists, it must be exercised with great caution after weighing what might otherwise be irremediable against the public interest in maintaining the finality of litigation: see *New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38."

77. In *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 308, Brennan J (as he then was) said:-

"This Court has undoubted jurisdiction to recall a judgment which it has pronounced, at least prior to the formal entry of the judgment, if the judgment has been pronounced against a person who, without fault on the part of that person, has not had an opportunity to be heard as to why that judgment should not be pronounced [*State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684]. This jurisdiction is exercised sparingly for it is important to bring litigation to finality in this Court. The approach of Courts from which an appeal lies is not so strict, for it may be preferable to recall an unperfected but erroneous judgment rather than allow it to stand until it is quashed on appeal: see eg. In re *Harrison's Share under a Settlement* [1955] Ch.260 at 282-284]. Nevertheless, natural justice would be denied if, in a case in which the stated conditions are satisfied, the judgment were not vacated."

78. Dawson J at 317 said:-

"Whilst the Court has jurisdiction to entertain an application to vacate orders which it has made, at all events before those orders have been perfected by the entry of judgment [cf. *University of Wollongong v Metwally* [No.2] (1985) 59 ALJR 481 at 482; 60 ALR 68 at 70] (that not having occurred in this case), it is a jurisdiction to be exercised cautiously, bearing in mind the public interest in the finality of litigation [See *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45-46]. In *Wentworth v. Woollahra Municipal Council* [(1982) 149 CLR 672 at 684], the Court said:

"[T]he circumstances in which this Court will reopen a judgment which it has pronounced are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution. Generally speaking, it will not be exercised unless the applicant can show that by accident without fault on his part he has not been heard.""

79. Although not specifically referenced in the majority's judgment in *De L,* mention should also be made of how Gaudron J approached the question of reopening. Her Honour said at 328:-

"Having regard to the significance which currently attaches to computer technology and having regard to this Court's status as Australia's final court of appeal, it seems to me that the interests of justice would require that course if it were fairly arguable that the judgment involved a misunderstanding of the facts or misapplication of the law in relation to one or more of the issues on which the respondents now wish to put further argument."

80. One further authority cited by Dr Griffith is also pertinent here for its consideration of *Codelfa*. In *Wentworth v Rogers (No 9)* (1987) 8 NSWLR 388, Kirby P (as he then was) delivered the judgment of the New South Wales Court of Appeal in which there was an application to set aside a previous order by it which had dismissed an appeal. The Registrar had entered orders dismissing an appeal. At 394, the judgment described as "obvious" the reason for the cautious attitude towards reopening found in *Codelfa*:-

"It is stated by Mason and Wilson JJ in their judgment to be the public interest in maintaining the finality of litigation. Otherwise, a determined or wealthy litigant could postpone final judgment and exhaust the rights and funds of his opponent by continuously denying the finality of the judgment and seeking to reopen disputes which that judgment was designed to close, at least so far as the courts were concerned."

81. When *De L* is read with regard to these dicta concerning perfected judgments, the state of the law as I read it is that the High Court's power to reopen completed proceedings:-

*** is beyond doubt and has been exercised by the High Court where judgment has not been perfected;**

*** is assumed to be an exercisable power but has not yet been the ratio of a decision by the High Court where judgment has been perfected.**

Does the jurisdiction to reopen exist for an intermediate Appellate Court

82. The High Court has not specifically considered the position of the Full Court of the Family Court in respect to the jurisdiction to reopen. The High Court's decision in *CDJ v VAJ* (1998) FLC 92-828, delivered subsequent to argument in this matter, does however address the appellate jurisdiction of the Full Court in the course of its reasons for judgment concerning the receipt of further evidence by the Full Court. I shall return to *CDJ v VAJ* after examining authorities directly concerned with the jurisdiction to reopen.

<u>High Court Authority on the Jurisdiction to Reopen</u>

83. The key dicta relied upon by the Central Authority in its submission as to lack of power is Barwick CJ in *Bailey v Marinoff* (1971) 125 CLR 529. The New South Wales Court of Appeal had ordered that appeal books be filed within a certain time in default of which the appeal was to stand dismissed. The appeal books were not filed in time. Subsequently, the Court of Appeal granted leave to file out of time. That order was successfully appealed by leave to the High Court (Barwick CJ, Menzies, Owen and Walsh JJ, Gibbs J dissenting). Barwick CJ said at 530:-

"Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed."

84. Gibbs J. (in dissent) said at 539:-

"It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it: *In re Suffield and Watts; Ex parte Brown [(1888) 20 QBD 693] ; In re Swire; Mellon v. Swire [(1885) 30 Ch D 239] ; Preston Banking Co. v. William Allsup & Sons [[1895] 1 Ch 141] ; Woods v. Sheriff of Queensland [(1895) 6 QLJ 163] ; Ivanhoe Gold Corporation v. Symonds [(1906) 4 CLR 642] ; MacCarthy v. Agard [[1933] 2 KB 417] ; Arnett v. Holloway [[1960 VR 22].* The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court".

85. His Honour also said at 544:-

"The authorities to which I have referred leave no doubt that a superior court has an inherent power to vary its own orders in certain cases. The limits of the power remain undefined, although the remarks of Lord Evershed already cited suggest that it is a power that a court may exercise "if, in its view, the purposes of justice require that it should do so".... Where, however, the order has been made by the appellate court itself the position is different, since if the appellate court cannot grant relief, none is available. The fact that this Court would have power to grant special leave to appeal from the order of the Court of Appeal made on 10th February 1970 may be put aside, having regard to the established principles that govern the grant of special leave... I can see no reason in principle, and certainly none in justice or convenience, why an appellate court cannot vary the condition of an order dismissing an appeal, notwithstanding that the appeal has been dismissed before the variation is effected; the appeal may be at an end, but the power of the court remains, and an exercise of the power can reinstate the appeal."

86. The Central Authority placed further reliance upon *Gamser v Nominal Defendant* (1976) 136 CLR 145. The plaintiff suffered compensable injuries from a motor vehicle accident. His verdict was reduced by the NSW Court of Appeal and he appealed to the High Court. In the intervening period, his condition deteriorated and he was granted an adjournment to approach the Court of Appeal in respect of his worsened condition. The Court of Appeal held that it had no jurisdiction to set aside the verdict or reopen the matter. The plaintiff appealed to the High Court.

87. Mr Basten referred especially to the judgment of Aickin J with whom Barwick CJ and Stephen J agreed. His Honour said at 154:-

"As to the question of whether there was in the Court inherent jurisdiction to make the order sought, Glass J.A. took the view that the decision of this Court in *Bailey v. Marinoff* (1971) 125 CLR 529 was fatal to the argument. In that case this Court held that when an appeal has been finally disposed of in a court of appeal by an order duly entered it has no inherent power to reopen the case on an application made after the order has been entered. That general proposition is no doubt subject to the rule that a judgment apparently regularly obtained may be impeached upon the ground of fraud, and there would seem to be no reason why that rule should not also apply to judgments upon appeal, although it is difficult to visualize how a judgment of an appellate court could be obtained by fraud, other than in circumstances in which the original judgment which the appellate court had upheld had itself been obtained by fraud. The majority judgments in *Bailey v. Marinoff* appear to me to make it clear that there is no inherent power to set aside judgments by reason of changed circumstances on application made after the case has been finally disposed of. It is sufficient to quote what Menzies J said [(1971) 125 CLR 529 at pp. 531-532]:

"This appeal is not concerned with the power of a court to alter orders in pending litigation. It is concerned with the power of a court to make an order in litigation which, without any error or lack of jurisdiction, has

been regularly concluded and is no longer before the court. To recognise the problem is I think, to solve it. However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend [to] the making of orders in litigation which has been brought regularly to an end."

88. *Wentworth v Attorney-General for the State of New South Wales* (1984) 154 CLR 518 is an important High Court decision subsequent to *Bailey's case* and *Marinoff's case*. There, the High Court once again considered this aspect of the jurisdiction of the New South Wales Court of Appeal. The joint judgment of the Court held that in a case where the order in question regulated the procedure to be followed in the future conduct of proceedings and would, if carried out, ultimately result in a futility, it had been within the inherent power of that Court to set aside a previous order it had made. Gibbs CJ, Mason, Brennan, Deane, and Dawson JJ said at 525-526:-

"The second question that arises is whether the Court had power to set aside its previous order. Clearly, it had. Hutley J.A. held that Pt 42, r. 12(1) of the Supreme Court Rules (NSW) would have authorised an order for a perpetual stay. That sub-rule provides:

"A person bound by a judgment may move the Court for a stay of execution of the judgment, or for some other order, on the ground of matters occurring after the date on which the judgment takes effect and the Court may, on terms, make such order as the nature of the case requires."

The view of Hutley J.A. would appear to be correct, but in any case the inherent power of the Court was sufficient to justify the order which was made. Of course the general principle is that there is no inherent power to set aside a judgment by reason of changed circumstances (*Gamser v. Nominal Defendant* [(1977 136 C.L.R. 145] but the rule is subject to exceptions : see *Bailey v. Marinoff* [(1971) 125 C.L.R. 529, at pp. 531-532, 539-540] and *The Supreme Court Practice* 1982, (UK), 20/11/5, and cases there cited. It is unnecessary to attempt to discuss the various exceptional cases in which the rule does not apply. The order in question in the present case was not one by which the litigation was concluded; it was merely an order regulating the procedure to be followed in the future conduct of proceedings. It was an order which, if carried out, would ultimately result in a futility. The inherent power, where it exists, is not lightly to be exercised, but it extends to, and was properly exercised in, the present case."

<u>Intermediate Appellate Court Authority on the Jurisdiction to Reopen</u>

89. Some intermediate appellate courts have considered the question of their power to reopen. They have done so with regard to how such a power would be exercised in the circumstances of the case at hand. A review of those authorities indicates that these courts have approached the issue on the basis that none would have been disposed to exercise such jurisdiction in the particular cases before them but were prepared to proceed on the basis that such jurisdiction existed.

90. Kirby P (as he then was) has been a strong proponent of the existence of such a power.

91. In *Wentworth and Rogers (No 9)* (1987) 8 NSWLR 388, the New South Wales Court of Appeal (Kirby P, Hope and Samuels JJA concurring) suggested, but did not find it necessary to decide, that the power of an intermediate court to reopen extended to perfected orders. The Court's reasons included reference (at 394) to the fact that since the *Australia Act* 1986, there is no appeal as of right to Australia's final court of appeal, the High Court of Australia:-

"Since the Australia Act determined appeals as of right to Her Majesty in Council, and since appeals now lie to the High Court of Australia only by special leave of that Court, the function of this Court has changed. There is now no further appeal from this Court as of right. For most litigants, this Court is the final place of appeal or review. It may therefore be appropriate to apply to this Court the same principles as are stated in State Rail Authority of New South Wales v Codelfa Constructions Pty Ltd, though with the modification that ´irremediable injustice' is not inevitable because of the avenue which is always open to a disaffected litigant to seek special leave to appeal from the High Court."

92. His Honour further said:-

"It is not necessary in this case to explore the precise extent of and limits upon the power of the Court to vary or supplement orders made by it: cf *Bailey v Marinoff* (1971) 125 CLR 529 and *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd [1986] 7 NSWLR 319.* Clearly, to the extent that such a power exists, it would only be used in the most exceptional of cases. It would certainly not be used in the present case upon the ground advanced by the appellant. Accordingly, it is neither necessary nor useful to charter, in this case, the boundaries of the Court's residual discretion to correct or supplement orders made by it.

It may be assumed for the purposes of this judgment that such a discretion exists, as we incline to think it does and plainly ought to exist. But it is a discretion to be utilised with extreme care. Although not confined to such cases, it should normally be limited to dealing with technical or incidental changes to the form or content of orders but should not be used as a substitute for an appeal. It is, for example, entirely inappropriate that the finality of a simple order such as was made in the instant appeal should be disturbed by such a beneficial facility." (at 394-5).

93. In *Haig v The Minister Administering the National Parks and Wildlife Act* 1974, (1994) LGERA 143. Kirby P (as he then was) in the New South Wales Court of Appeal referred to *Wentworth v Rogers (No 9)*, and the fact that the High Court of Australia had refused special leave to appeal from that decision. His Honour reiterated his adherence to the views he there expressed, saying (at 152-3):-

"There is no doubt that the Court may correct unperfected orders, that is, those pronounced in Court at the time of the handing down of a decision before the entry of a formal order in the records of the Court. This course is adopted, for example, where it is established that a mistake has occurred in the Court's understanding of the matters in issue between the parties: see, eg. *Winrobe Pty Ltd v Sundin's Building Co Pty Ltd* [No.2] [1992] NSWJB 139; *New South Wales Medical Defence Union Ltd v Crawford* [No.2] [1994] NSWJB 68. In *Winrobe,* the Court, being convinced that an appeal had been decided on a basis not raised at the trial, withdrew its published orders. It did so although they had been formally pronounced in open court and supported by reasons which were then delivered. Subsequently, the Court published a judgment which came to a conclusion different from that earlier reached: see *Winrobe Pty Ltd v Sundin's Building Co Pty Ltd* [No.3] [1993] NSWJB 42. The Court emphasised the importance of intellectual honesty and the manifest integrity of its process. The same principles were emphasised in *Crawford* [No.2]. When, later, it was pointed out that one of the orders in *Crawford* [No.2] itself did not conform to the majority opinion of the judges expressed in their published reasons, the Court withdrew those orders. It announced new orders for the purpose of bringing the record of the Court into line with the decision of the judges: see *New South Wales Medical Defence Union Ltd v Crawford* [No.3] [1994] NSWJB 102.

In all of the foregoing cases, either by direction of the Court or by sensible arrangement between the parties, the formal orders of the Court were withheld. They were not perfected. There was therefore no impenetrable barrier to the correction of the orders. Yet, even in such cases, special circumstances must be shown before the discretion to set aside or alter orders which have been announced is enlivened The purpose of the jurisdiction is 'not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases' or 'simply for the purpose of giving a party the opportunity to present a case to better advantage': see *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 301, 312, 328; *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45f*; Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 683; 51 LGRA 212 at 220; *Permanent Trustee Co. (Canberra) Ltd v Stocks & Holdings (Canberra) Pty Ltd* (1976) 28 FLR 195 at 201. Special or 'very special' circumstances must be shown, amounting to a serious oversight or departure from due process or mistake. Otherwise, the orders pronounced must stand. In Australian courts other than the High Court of Australia, they must then be corrected, if at all, by appeal or by judicial review where available.

The question remains as to whether the jurisdiction to correct is available in the case of a perfected order. Whilst the Minister asserted that this Court had no such jurisdiction, at least in a case such as the present, it is my view that such a jurisdiction exists. It is confined to the most exceptional circumstances. It is true that earlier decisions doubt the existence of this jurisdiction, statute apart: see, eg, *Bailey v Marinoff* (1971) 125 CLR 529 at 531. However, later decisions have acknowledged the inherent jurisdiction in a court such as this to set aside a previous order in limited circumstances. As for example where the order did not conclude litigation but merely regulated procedure and where its execution would result in futility: see, eg, *Wentworth v Attorney-General for the State of New South Wales* (1984) 154 CLR 518 at 526. However, it has been emphasised that such inherent power, where it exists, "is not lightly to be exercised". It is truly exceptional.

In the case of the High Court of Australia, the jurisdiction to correct even perfected orders has certainly been acknowledged. It has been explained in terms of that Court's position "as a final court of appeal to prevent irremediable injustice being done by a court of last resort": see *Codelfa* (at 45). However, in *Wentworth v Rogers* [No 9] (1987) 8 NSWLR 388 at 394, this court pointed out that, since the termination of appeals to the Privy Council and the provision for appeals to lie to the High Court only by special leave of that Court, there is now no further appeal from this Court as of right:

"For most litigants, this Court is the final place of appeal or review. It may therefore be appropriate to apply to this Court the same principles as are stated in *State Rail Authority of New South Wales v Codelfa Constructions Pty Ltd*, though with the modification that "irremediable injustice is not inevitable because of the avenue which is always open to a disaffected litigant to seek special leave to appeal from the High Court."

In that last-mentioned case, it was unnecessary for this Court to "explore the precise extent of and limits upon the power of the Court to vary or supplement orders made by it". The Court accepted that: " ... to the extent that such a power exists, it would only be used in the most exceptional of cases."

The High Court of Australia refused special leave to appeal from that decision. So this Court has assumed that such discretion existed. It has expressed the view that :

"plainly [it ought] to exist. But it is discretion to be utilised with extreme care. Although not confined to such cases, it should normally be limited to dealing with technical or incidental changes to the form or content of orders but should not be used as a substitute for an appeal. It is, for example, entirely inappropriate that the finality of a simple order such as was made in the instant case should be disturbed by such a beneficial facility."

I remain of the view which I expressed in *Wentworth v Rogers [No 9]* with the concurrence of Hope and Samuels JJA and without disturbance by the High Court : see also *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 26; (1993) 82 LGERA 158 at 172. Neither the inherent power of the Court nor the power conferred by parliament under s23 of the *Supreme Court Act* 1970 (NSW) is unlimited. Neither permits the Court to undo basic principles of jurisprudence in the name of an undefined feeling that an injustice has occurred which the Court must correct: see also *University of Wollongong v Metwally* (1985) 59 ALJR 481 at 482.

To the extent that the Minister asserted that the Court was bound to dismiss Mr Haig's motion to re-open the appeal for a complete absence of jurisdiction to act thus, I would not accede to his argument. But that leaves the question whether, on the merits, a sufficiently exceptional case was made out by Mr Haig to permit or require the course which he urged."

94. Priestly JA proceeded on the basis that he assumed *"without expressing any opinion on the matter that there is power in the Court to permit such a re-opening".* (at 159). Handley JA assumed in favour of the applicant, the power to re-open the Court's perfected orders (at 159). Like Kirby P, neither would have exercised that power in the case.

95. A willingness to assume without deciding the existence of such a power is also manifest in the unreported decisions of the Full Court of the Federal Court in *Donkin v AGC (Advances) Ltd* (30 August 1995 per Black CJ, Davies and Whitlam JJ) and *Grace Pushpa Wati v Minister for Immigration & Multicultural Affairs* (3 October 1997 per Davies, Lindgren and Lehane JJ). The following extract from *Wati's case* considers both cases:-

"In *Donkin v AGC (Advances) Ltd* (Fed Ct/FC, 30 August 1995, unreported), an application was made for leave to institute proceedings to set aside a decision of a trial Judge and the judgment of a Full Court which had dismissed an appeal from the trial Judge's decision. The application was referred by the Chief Justice to a differently constituted Full Court. Davies J referred in some detail to the authorities and said (at 9) that he was prepared to assume that the Court could

`reopen a case if there were a truly exceptional circumstance apart from fraud which required a matter to be reopened in the interests of justice.'

Black CJ was prepared to make a similar assumption (at 2). However, his Honour pointed out that any such jurisdiction had to be exercised with great caution and having regard to the observations of the High Court in *Wentworth v Woollahra MC.*

Should the Matter be Reopened?

We are prepared to assume, without deciding, that the Court has jurisdiction to consider whether the orders made by Davies J should be set aside, notwithstanding that those orders have already been entered. We are also prepared to assume, without deciding, that the Court, as presently constituted, can exercise that jurisdiction, and can do so without the appellant filing documentation, other than the notice of appeal. Nonetheless, in our view, this is not a case in which the Court should set aside to modify the orders made by Davies J."

96. For the sake of completeness, mention should also be made of *Qantas Airways v Cameron* [1996] 715 FCA 1 where Davies, Lindgren and Lehane JJ accepted the power to reopen in respect of orders that had not been perfected.

97. Of particular relevance to the present application, is that in *Wati*, the Court that assumed the existence of power was differently constituted to the Court that had made the order in its appellate jurisdiction. It is also relevant that the orders in question had already been entered.

CDJ v VAJ

98. For the purposes of the present application, the facts in *CDJ v VAJ* are not important. In essence, the High Court, in deciding an appeal from the Full Court in respect of parenting orders made under the *Family Law Act*, was required *inter alia*, to consider the exercise of discretion by the Full Court with respect to the admission of further evidence pursuant to s93A(2) of that Act. In doing so, the Justices of the High Court made important observations as to the exercise of the Full Court's jurisdiction in cases concerning children that are, in my view, apposite to the present application.

99. The majority judgment of McHugh, Gummow and Callinan JJ (at 85,446-7) emphasised the importance to the exercise of discretion of the fact that a child is the subject matter of the proceedings and that the significance of the principle of finality is relevant but qualified in such cases:-

"104. In the exercise of the discretion conferred by a power such as s 93A(2), the critical factor is the subject matter of the proceedings with which the appeal is concerned. This is because the purpose of the power to admit further evidence is to ensure that the proceedings do not miscarry. Tests such as those stated in Wollongong Corporation based on the need for finality in litigation are therefore not necessarily applicable to cases in which the interests of third parties, such as children, are at stake[60], although factors such as finality, discoverability of the evidence and its likely effect on the orders made are usually relevant to the exercise of the discretion." (emphasis added, footnote omitted)

100. Next in that paragraph, their Honours contrast the position at common law with respect to the admission of further evidence. However, in doing so, they also make it clear that the distinction they draw refers not only to the issue of the reception of further evidence, and that guidelines may be developed by the Full Court:-

"In an application at common law to admit further evidence, the court applies principles, bordering on fixed rules. In an application under s 93A(2) and similar provisions, the Full Court or Court of Appeal weighs factors, although it may of course develop guidelines for weighing those factors and exercising the discretion." (emphasis added)

101. Kirby J, who dissented as to the outcome of the appeal but not for relevant purposes, had this to say about the principle of finality in proceedings concerning children and matters of public interest (at 85,465-6):-

"The law books are full of general statements about the interests of the public, and the long-term interests of litigants, in finality of judicial decision-making: interest reipublicae ut sit finis litium[144]. Such statements go back for centuries[145]. They have been repeated in recent times[146] and in the context of family law cases [147]. In a general sense, the principle has universal application. However, because of the peculiarities of family law, concerned as it often is with deeply felt human emotions from which it may be difficult or impossible for the parties to escape and from which money may not extricate them, some of the emphasis on finality needs to be qualified. Decisions affecting the welfare of children partake of the traditional parens patriae jurisdiction of the Crown's courts[148]. Necessarily, decisions on such questions have consequences for persons (namely the children) who are ordinarily not parties to the proceedings before the Court, even if today, in Australia, they are sometimes separately represented (as they were in this case). Such decisions also have consequences for the community, which has its own wider concern that the disruptive outcomes of incorrect or inappropriate decisions could have long-term consequences. Where the interests of others and of the public are affected, courts have for a long time treated the decisions which they must make in ways different from those made in ordinary civil litigation between parties of full capacity, represented and before the court[149]. This consideration (as I shall show) has sometimes affected the admission of fresh evidence in an appeal. It may distinguish such cases from the ordinary civil case.

...

"The statutory power in the case of the Family Court is similar to that afforded to the Full Court of the Federal Court of Australia[155]. The latter was a nearly contemporaneous creation of the Parliament. The Federal Court, in a series of decisions, has developed a jurisprudence (which it is inappropriate here to analyse or to question) under which it is ordinarily necessary to establish that a special case exists before further evidence will be received on an appeal[156]. However, in the Federal Court, it has been recognised that a wider approach is appropriate where the interests of persons other than the parties, or where the public interest, may be affected by the determination of the appeal in question[157]. Thus, a greater willingness to receive further evidence on appeal has been evidenced in a case involving bankruptcy affecting the interests of

creditors generally[158], and another in which the status of an industrial organisation was involved[159]. Obviously, a case concerned with the status, welfare, residence and other rights of children bears close similarity to the last-mentioned cases." (emphasis added, footnotes omitted).

Conclusions as to the Jurisdiction of the Full Court of the Family Court to Reopen

102. Having regard to the above decision and to *Haig's case*, and other intermediate appellate authorities that I have discussed, I do not consider that *Bailey's case* and *Gamser's case* determine the issue of jurisdiction of this Court.

103. It is not, I consider, a point in favour of the Central Authority's argument on the question of power to reopen, that intermediate appellate courts have assumed or accepted but not actually exercised such power. Such approaches, in fact, refute the contention that jurisdiction is lacking for if it were otherwise, those Courts need not have contemplated the cases which raised the question. The unwillingness of those courts to reopen completed proceedings is referable to the nature of the particular cases in question. In any event, those cases did not concern children as the subject matter, a distinction of importance highlighted by the High Court in *CDJ v VAJ*.

104. The receptiveness of other intermediate appellate courts to the jurisdiction in issue is a matter that also relates to Dr Griffith's argument on the basis of Kirby P's judgment in *Haig's case* - that the systemic environment for the administration of justice has changed significantly since *Bailey's case* and *Gamser's case*.

105. In circumstances where there is no binding authority against the existence of such a power, the matter must be approached as one of principle. There is also a practical issue to consider, namely; the relatively few cases in which the High Court grants special leave to appeal and the fact that potentially meritorious arguments are precluded from being pursued by virtue of this fact.

106. Mr. Basten also submitted that the decision was one that should be made by the High Court and not this Court. A different view is that it is the responsibility of this Court to correctly characterise the state of the law and determine, until otherwise guided by the High Court, the extent of this Court's powers. I consider the latter to be the correct position.

107. This is a specialist court and very few of its decisions are in fact considered by the High Court of Australia. It would be an abrogration of responsibility for this Court to refuse to act either because the High Court has not yet given guidance, or because other intermediate appellate courts have not found it necessary to decide the issue. Indeed, the High Court has on many occasions recognised the specialist nature of the Family Court of Australia, its Full Court, and its subject matter in refusing special leave applications.

108. Dr Griffith's reliance on Kirby P's consideration of the *Australia Act 1986*also has relevance here on the question of assumption or conferral of jurisdiction. This development is a further reason why I consider it is unnecessary to wait for conferral and confirmation by the High Court of a jurisdiction that is rarely exercised.

109. In circumstances where I consider that this Court possesses the necessary power, and that it is appropriate that this Court determines that issue for itself, it is necessary now to identify against what criteria a particular case such as the present application should be evaluated. This necessarily involves consideration of the application of the appropriate principles to a judgment that has been perfected, as this one has. To the extent that this entails the development of what might be described as guidelines for Full Court matters of discretion such as the present application, I consider doing so to be in conformity with the anticipation of the majority in *CDJ v VAJ* in the passage cited at para 100 of this judgment.

The Requirements for Exercise of the Power to Reopen

110. An equivalent inherent power to reopen a decision of an intermediate appellate court would necessarily be in conformity with the principles that have been enunciated by the High Court for itself. I have already considered these principles.

111. From the authorities discussed I would apply the following principles

*** That by exercising the power to re-open final orders, courts seek to recognise the following competing objectives of the law:**

*** the principle of finality of litigation which reinforces the respect that should be shown to orders, final on their face, addressed to the world at large and upon which conduct may be ordered reliant upon their binding authority;**

*** a recognition that accidents and oversights can sometimes occur which, unrepaired, will occasion an injustice which may be irremediable, unless the court itself, acting promptly, is persuaded to reopen its orders so as to afford relief in the exceptional circumstances of the case.**

112. Finally, I would further distil the following discretionary considerations for the exercise of power to reopen:-

*** A heavy burden is cast upon the applicant for reopening to show that such an exceptional course is required without fault on his [or her] part, ie without the attribution of neglect or default to the party seeking reopening.**

*** Whether oversight of the legal or factual subject matter in question occurred by accident.**

*** Whether the court addressed specific questions on the legal or factual subject matter to the parties.**

*** Whether the point raised is one of importance for the meaning and application of a federal law, potentially one of general application, and whether it is desirable that the position of the parties and of the law should be clarified.**

*** Whether there is utility in reopening the court's orders.**

*** Whether, in the particular circumstances of the case, reopening the order would safeguard against the risk of injustice that could flow from an order on its face apparently contrary to the requirements the relevant legislation.**

Additional Matters Where the Order Has Been Perfected

113. In considering what has been said concerning perfected judgments, it is not apparent that any specific additional considerations arise. Naturally, the High Court majority's observations in *De L* that *"different considerations will arise"* in cases where judgments have been perfected, is intended to carry substantive meaning. However on my reading of the authorities, their Honours have identified certain circumstances where appropriate use of power has arisen, rather than establishing particular criteria for the exercise of power.

114. In my view, a particular core concern associated with perfected orders relates to *"the due administration of justice"* identified by Barwick CJ in *Bailey's case*. This factor takes on greater ramifications where judgment has been entered, not the least because it may be that a party to the proceedings or a third party has relied upon an order addressed to the world at large to his or her detriment.

115. The Full Court's decision in this case was handed down on the same day as the High Court handed down its judgment in *De L*. As discussed elsewhere herein, it must have been then apparent to the Central Authority, which was a party to *De L*, that this case had proceeded on the footing that the wrong Regulations had been applied. This would not necessarily have come to the attention of the legal advisers of the wife. I think that it was incumbent upon the Central Authority to indicate to this Court before the order was perfected, that this error had occurred. The Central Authority did not do so and I consider that it does not lie well in the mouth of the Central Authority to now seek to rely upon on the fact that the order was "perfected" as an argument against setting it aside.

116. In any event, I think that there is a certain artificiality about relying on whether an order was perfected or otherwise in a case of this sort, particularly having regard to the fact that there is a child involved as the subject matter of the litigation. I turn now to this aspect of the case and the fact that the proceedings concern an application under the Hague Convention.

a) This is a Case Concerning a Child

117. It is highly significant that the subject matter of the application in question is a child. This is a feature of the present case that distinguishes it from past cases where the issue has been considered. *CDJ v VAJ* makes it clear, in my view, that this distinction is a major factor.

118. The principle that the best interests of the child are paramount does not apply to applications under the Regulations. Issues of forum for decision-making about children wrongfully removed or retained from their jurisdiction of habitual residence are the subject matter. That is not, however, to say that a court should ignore a child's best interests where the core basis of the Court's jurisdiction is an application under the Convention. I do not read the extracts from *CDJ v VAJ* cited above to exclude such attention.

119. In these reasons I see it as highly relevant that the subject matter of the ultimate order is a child rather than the reinstatement of an appeal dismissed by self-executing order with costs for want of prosecution (*Bailey's case*) or the quantum of damages following an accident (*Gamser's case*). By taking this view, I do not depart from the long-standing recognition that applications under the Convention are determinative of the forum in which a child's interests are decided rather than determinative of where or with whom the child should live to give effect to those interests. The unavoidable fact remains, however, that a child is the direct subject of the disputed order and, in my view, this approach is in conformity with the dicta in *CDJ v VAJ*.

b) The Case Concerns a Hague Convention Application

120. Although the nature of the subject matter under litigation is a child, it is significant to take account of the fact that the instant proceedings concern a child who is alleged to have been wrongfully removed and that an application had been lodged in accordance with a multilateral treaty which promises rapid determination of the question of the forum in which the child's best interests are to be determined.

121. There have been significant delays in the implementation of this decision, not all of which are the fault of the mother, and the public interest in finality of orders might not be thought to be as great in a case such as this.

122. There is at least one English case where a child has refused to be returned to the country of origin despite the Court's order and the Court was required to re-think the matter: see *Re HB (Abduction: Children's Objections)* [1998] 1 FLR 422. Although at para 59 I did not accept that *Re HB* was factually applicable to the present case, it stands, in my view, as an illustration of the concern expressed by the High Court in *CDJ v VAJ* that family law proceedings be understood as disputes involving peculiarly vulnerable third parties.

Should the Power to Reopen be Exercised in This Case

123. I have previously set out what I consider to be the mandatory threshold pre-condition for exercising the power to reopen. I consider the mother has satisfied the requirement that the Court hold a conviction that it has proceeded on a misapprehension of the law calling for review. Moreover, as a cumulative, rather than alternative factor, the interests of justice require the matter to be reopened.

a) Misapprehension as to the law

124. The majority judgment of the High Court in *De L* determined that where an application had been brought prior to the repeal of the 1986 Regulations, that repeal did not affect the continuation and completion of an application made under them. Accordingly, the application ought to have been proceeded under the 1986 Regulations and not the 1995 Regulations.

125. In this case the wrong Regulations, namely the 1995 Regulations, were relied upon by the trial Judge and, in dismissing the appeal, by the Full Court. It is also clear from the reasons for judgment delivered by the Full Court that it determined the appeal in accordance with the 1995 rather than 1986 Regulations.

126. Furthermore, both the trial Judge and the Full Court purported to apply the test set in *Gsponer* and *Murray* which treats return of the child to the *"applicant"* as return of the child to the Central Authority of the jurisdiction which transmits the application.

127. In my view, to decide a matter applying the wrong legislation and based upon incorrect principles derived from wrongly decided cases clearly establishes a *"conviction"* that the Court has proceeded under a misapprehension as to the law. In this regard, it is pertinent to note that Kirby J in *CDJ v VAJ* said (at 85,465):-

"..so important are such decisions for the life of the child and its relationships with the parents, siblings and other family members, that is proper that the courts should take special pains, so far as they can, to avoid decisions impermissibly distorted by factual or legal error, by error of principle or by giving weight to irrelevant considerations." (emphasis added)

128. His Honour was speaking in that case of parenting orders under the *Family Law Act*, not applications under the Regulations made pursuant to the Hague Convention. However, in my view, notwithstanding the different nature of applications pursuant to the Hague Convention, that difference is of no moment because a child's right to have matters concerning him or her determined without error of law or principle lies at the heart of the issue and extends to questions of the jurisdiction which will be seized of substantive questions in the dispute over the child.

129. The next question that has to be asked is whether misapprehension as to law made any difference. Mr. Basten argued that it did not and that the Court would have come to the same conclusion whichever regulations it relied upon.

130. For reasons that I set out earlier I do not accept the same result would have necessarily been reached.

b) The Relevance of the High Court's Refusal of Special Leave

131. Much was made at the hearing before us of the mother absconding with the child following the Full Court's delivery of judgment. It is a significant factor but is relevant only to the exercise of discretion. It was a determinative factor in the High Court's refusal to extend the mother's time in which to apply for special leave to appeal.

132. Had the High Court, when hearing the special leave application on 7 August 1998, held the mother's arguments concerning the regulations and the *Gsponer / Murray* test to be without substance, then that would have been an end of the matter. As I see it, however, their Honours determined the threshold question that the mother's arguments as to the decisions below should not be permitted to be heard out of time. Their Honours did not extend an indulgence to the mother in view of her actions. They did not expressly refute the potential validity of her arguments. They elected, for perfectly understandable reasons, not to grant the indulgence sought by the mother.

133. The proceedings before this Court are quite different. What is being put is that a decision made by it proceeded upon a misapprehension of the relevant law. While the factors that affected the High Court are also relevant to issue of the exercise of discretion, I do not believe that they operate to preclude this Court from considering this matter.

The Guiding Principles

134. The certainty of a final order in this case based on the application of what has been found by the High Court in *De L* to be the wrong law, would seem a pyrrhic outcome in a sensitive matter concerning a child. Seen in terms of the principles to be balanced, such an outcome serves neither the interests of justice for the persons affected nor the reputation of the justice system.

135. Further, the consequences of reopening an order in respect of a child do not involve the same considerations which are obviously of significance in financial matters, particularly where, as in this case, the order, although perfected, has not been carried out. Again, I refer to *CDJ v VAJ* as authority for the validity of distinguishing matters concerning a child.

Discretionary Considerations for the Exercise of Power to Reopen

136. It is convenient to consider these matters *seriatum*.

137.

*** A heavy burden is cast upon the applicant for reopening to show that such an exceptional course is required without fault on his [or her] part, ie without the attribution of neglect or default to the party seeking reopening.**

138. It is undoubtedly true that the applicant was seriously in default in relation to this matter. In normal circumstances that would be the end of the matter. Tempering factors are the fact of default on the part of the Central Authority, to which I have previously referred.

139. More important, is the fact that the subject matter of the application is a child who has spent the greater part of her life in this country with her mother and who will, if the order is put into effect, be effectively split from her younger sibling. I think that *CDJ v VAJ* reinforces my view that she must also be considered in this case despite the default of her mother.

140. It is true that the mother's actions have effectively separated the child from her father and this may have been to her detriment, but there can be no doubt that the carrying out of this order will have a serious effect upon her. If it was made as a result of misapplication of the law then I consider that her interest outweighs any default on the part of the mother.

141. In argument before us, Dr. Griffith highlighted certain aspects of the chain of events in the case in order to put into a broader context of delays, the effect of the mother's absconding on the delay in determining the

application. His argument also addressed the significance of the mother giving birth to a second child of the marriage while in Australia. I turn to these matters now.

Delay

142. It was Dr Griffith's contention that of the 45 months the child has been in Australia, only fourteen months are due to the mother going into hiding. As I understand his argument, this perspective to the case bears upon our discretion, if we find a power exists, to reopen the appeal. If that point is reached, Dr Griffith urged us to question whether we should find that the orders of O'Ryan J have been spent or require revisiting in light of how circumstances have changed due to the birth of a sibling and the time J has spent in Australia.

143. Dr Griffith first placed emphasis on the fact that upon discovering J had been taken to Australia, the father commenced proceedings in the Superior Court of Gwinnett County in Georgia for custody of the child rather than proceedings under the Convention. The matter came on for hearing before Judge Bishop with orders then made on an undefended basis on 9 May 1995 with the effect that the father has an order for sole custody of the child with no contact to the mother and all property settled in his favour (see Application of the Central Authority filed 28 June 1995).

144. Dr Griffith next stressed the fact that the father's application under the Convention was made on 5 June 1995, some six weeks after the local orders had been obtained. While this is still within the twelve month period envisaged by the Convention and the Regulations, this fact was said to have contributed to the delay in determining whether the child should be returned.

145. Dr Griffith then pointed to the fact that the substantive hearing of the application did not take place until 2 and 5 February 1996, a little over twelve months after J left Georgia. He took us to the chronology filed on behalf of the Central Authority. At page 2, it shows the following matters:-

"5 June 1995 Application by father to Central Authority under Hague Convention.

28 June 1995 Application filed by Australian Central Authority in Family Court of Australia at Sydney.

5 July 1995 Directions made for hearing by Johnston JR.

5 September 1995 Matter listed for hearing before Cohen J, adjourned due to imminent confinement of the mother.

22 September 1995 Child of the mother and father born in Sydney and named "S" by the mother.

24 January 1996 Order 30A Report prepared by Professor (as he then was) Brent Waters for the rescheduled hearing.

2 February 1996 Matter heard before Justice O'Ryan.

and

5 February 1996"

146. Dr Griffith underlined the requirement in reg 19 of the 1986 Regulations which was in the following terms:-

"Where an application is made under regulation 15, the day fixed by a court for the hearing of the application shall be a day not later than 7 days after the date of the filing of the application."

147. It was therefore Dr Griffith's argument that the circumstances of the mother and child by the time O'Ryan J made his orders were also attributable to the father and systemic delays. While Dr Griffith conceded that the mother's absconding had compounded the matter, he said her actions were not the main cause of the situation which now presents.

148. I think that there is some substance to these arguments, albeit that they do not excuse the mother's own default following the Full Court order.

The Birth of a Sibling

149. The argument concerning delay was also important to a particular feature of the case, namely that the mother was pregnant at the time she left Georgia although apparently not aware of the pregnancy. It was said

that if the matter had been proceeded more rapidly, and it had not due to the father and the system, the second child S would not have been born in Australia prior to the determination of the application.

150. The relevance of these matters lies in what Dr Griffith argued to be an impossible position for the mother; given the existing Superior Court of Gwinnett County order, she would risk her rights with respect to the second child if she returned with him to contest the order concerning J. He also highlighted the fact that the mother has no right to return to live and work in the United States of America and that the second child is beyond the reach of the Convention to argue the practical likelihood that the siblings would be split by the second child and the mother remaining in Australia and that these matters should affect the exercise of this Court's discretion.

151. I consider these matters are of substance in favour of the exercise of the discretion.

152.

*** Perfection of the order.**

153. I have already commented upon the artificiality of this test, particularly in proceedings involving a child. In circumstances where the order has not been carried out, for whatever reason, I do not think that this factor should weigh heavily in this case.

154.

*** Whether oversight of the legal or factual subject matter in question occurred by accident**

155. It is clear that the application of the wrong regulations occurred by accident and that both parties, and the trial Judge and the Full Court failed to detect the error. It is of interest to note that a differently constituted Full Court and another trial Judge made the same error in *De L.* It is difficult therefore to be critical of anyone. However if any criticism does lie, it lies more heavily with the Central Authority for the State of New South Wales which has the responsibility for bringing proceedings such as these, and was in fact a common party in both *De L* and the present case. However its real default, as I have said, was its failure to notify the Court of the error once the decision in *De L* was given by the High Court.

156.

*** Whether the court addressed specific questions on the legal or factual subject matter to the parties.**

157. I do no think that this factor is relevant to this case for the reasons just stated.

158.

*** Whether the point raised is one of importance for the meaning and application of a federal law, potentially one of general application, and whether it is desirable that the position of the parties and of the law should be clarified.**

159. The question of whether the Full Court of the Family Court of Australia can reopen its decisions is obviously one of considerable importance. That issue is not, however the "point" to which this consideration is addressed. It is addressed to the substantive arguments to be decided if the power to reopen is exercised.

160. As a result of the change effected by the 1995 Regulations, the question of whether *Gsponer* and *Murray* were correctly decided is now of no great importance other than to the parties in this case. Similarly the interpretation of and validity of the 1986 Regulations is only significant for the parties. In a sense, this is an argument in favour of the applicant, since it is unlikely that the High Court would regard these issues as substantial enough to grant leave to appeal from this decision, which means that this Court stands much more in the position of a final court of appeal.

161.

*** Whether there is utility in reopening the court's orders.**

162. If the wrong law was applied, as I have found it was, then in circumstances where the order has not been executed or carried out, there is obvious utility in reopening the matter in order to avoid a possible injustice.

163.

*** Whether, in the particular circumstances of the case, reopening the order would safeguard against the risk of injustice that could flow from an order on its face apparently contrary to the requirements the relevant legislation.**

164. I have endeavoured to look at this matter from the perspective of an ordinary member of the public who is fully informed as to what has occurred. I should have thought that such a person would find it an astounding proposition that the public interest in preserving the finality of the orders of the Court would operate to preserve an order made upon the basis of the wrong piece of legislation, and relying on cases that are now found to have been wrongly decided, particularly if the correct application of the correct piece of legislation might have made a difference to the result.

165. I can think of nothing more calculated to bring the law into disrepute than such an outcome and I do not believe that it is one that this Court should countenance, particularly in proceedings related to a child. In this regard I refer again to the remarks of Kirby J in *CDJ v VAJ* cited previously concerning "*wider concern that the disruptive outcomes of incorrect or inappropriate decisions could have long-term consequences."* (at 85,466)

Conclusion as to reopening the present proceedings

166. For the above reasons, the proceedings should be reopened.

167. I have had regard to the dicta of the High Court in *CDJ v VAJ* concerning the avoidance of new hearings of matters concerning children. If this court were to order that the proceedings be reopened, regrettably, in my view, such a course could not be avoided. Furthermore, in the peculiar circumstances of the case, particularly the amount of time which J has lived in Australia, I would order the appointment of a Child Representative.

Proposed Orders

168. The orders that I would make are as follows: -

1. That the orders of the Full Court made on 8 October 1996 be set aside.

2. That the mother's appeal against the decision of O'Ryan J be allowed and the orders made by his Honour on 20 February 1996 be set aside.

3. That the matter be set down for retrial before a single Judge of this Court.

4. That a Child Representative be appointed.

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA Appeal No. EA 39 of 1996

AT MELBOURNE File No. SY 3981 of 1995

BETWEEN:

DEBORAH JOY LAING

Appellant Wife

- and -

THE CENTRAL AUTHORITY

Respondent

REASONS FOR JUDGMENT OF

THE HONOURABLE JUSTICE FINN

CORAM: Nicholson CJ., Finn, Kay, Moore and May JJ.

DATE OF HEARING: 27 and 28 August, 14 September 1998

DATE OF JUDGMENT: 9 February 1999

Appearances:

Dr Griffith, one of Her Majesty's Counsel and Ms Eastman of Counsel (instructed by Bruce A Swane & Co., 89 Cambrai Ave, Engadine NSW 2233) on behalf of the appellant wife.

Mr Basten, one of her Majesty's Counsel, and Mr Anderson of Counsel (instructed by Crown Solicitors Office, GPO BOX 25, Sydney NSW 2001) on behalf of the respondent.

THE FACTUAL BACKGROUND TO THIS APPLICATION

1. The applicant mother in these proceedings, D.J.L. (who was born in New Zealand in 1960, but who became an Australian citizen in 1964), married L.L.S. in Australia on 30 March 1991 and in July of that year left Australia to reside with him in Georgia in the United States of America. In November 1993 a daughter, J, was born to the couple in Georgia.

2. On 12 March 1994 the applicant travelled to Australia with J, then aged 4 months. The applicant claims that she intended to remain permanently in Australia from that time. However, in November 1994 she returned to the United States with J (then aged 12 months) for the purpose, she claims, of attempting a reconciliation with her husband but not with a settled intention of remaining permanently in the United States.

3. The attempted reconciliation was not successful, and on 12 January 1995 the applicant, without the husband's knowledge or consent, returned with J to Australia where she and the child have remained ever since. During the attempted reconciliation period the applicant became pregnant again to the husband, with a son, S (who was born in Australia on 22 September 1995).

4. On 17 January 1995 the husband commenced divorce proceedings in the Superior Court of Gwinnet County, Georgia. Those proceedings were apparently heard ex-parte on 24 April 1995, and subsequently on 9 May 1995 the Superior Court made orders including orders dissolving the parties' marriage, awarding the husband "sole permanent" custody of J with no "visitation" rights to the applicant without further order of a court, and awarding the matrimonial home and contents to the husband.

5. On 6 May 1995 the husband signed what was apparently the necessary application form to initiate proceedings for the return of the child, J, pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention").

6. Presumably as a consequence of the husband's application, the Crown Solicitor for New South Wales acting on behalf of the Director General of the Department of Community Services, being the NSW State Central Authority for the purposes of the Commonwealth Family Law (Child Abduction Convention) Regulations, filed an application in the Sydney Registry of the Family Court of Australia on 28 June 1995 seeking an order that the husband be permitted to remove the child, J, from Australia for the purpose of returning her to the United States of America, pursuant to the provisions of the Convention. Certain ancillary orders were also sought in that application.

7. It is important to note at this point that the regulations made pursuant to section 111B of the *Family Law Act* 1975 for the purpose of enabling "the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under" the Convention, which were in force on 28 June 1995 (the date of filing of the Central Authority's application) were in their original form S.R. No. 85 of 1986 - although they had by that time been subject to various amendments which are not relevant for present purposes. However, on 19 October 1995 substantial and presently relevant amendments to the regulations were made by S.R. No. 296 of 1995. Those new regulations commenced on their gazettal which was on 26 October 1995. (See the Commonwealth of Australia Gazette No. S413, Thursday 26 October 1995)

8. On 2 and 5 February 1996 the Central Authority's application (which was opposed by the applicant) was heard by O'Ryan J. At an early stage of that hearing, Counsel for the Central Authority informed his Honour that the regulations had then been recently amended and his Honour enquired as to what was "the effect or thrust of the amendments". In response, Counsel for the Central Authority briefly outlined the changes made at least to certain of the regulations by S.R. No. 296. There was no discussion of the date from which the new regulations would apply to any particular case.

9. In his judgment delivered on 20 February 1996, O'Ryan J. made no express reference to which form of the regulations he was applying. In the course of his judgment he quoted regulations 3, 4 and 13 in their form following the amendments of October 1995, but he quoted regulation 16 in its form prior to the October 1995

amendment, although he appears to have applied that regulation in its amended form. But whatever the basis of his Honour's decision, his order made on 20 Feb 1996 was in the following terms:

"1. That upon the Central Authority being satisfied that the father has given undertakings to the Superior Court, Gwinnet County, Georgia that he will pay to the Central Authority sufficient moneys to enable the wife and the child J, born on 9 November 1993 to travel by air from Sydney to Atlanta Georgia or paid to the Central Authority sufficient moneys to pay the cost of such air travel then the Central Authority shall, as soon as reasonably practicable on or after 15 March 1996 cause the child to be returned to the United States in the company of the wife."

10. On 8 May 1996 O'Ryan J. granted the applicant leave to appeal out of time his order of 20 February 1996, and on 10 May 1996 a Notice of Appeal was filed on her behalf. The grounds of appeal contained in the Notice of Appeal and apparently as argued before the Full Court on 3 and 4 July 1996 were limited essentially to challenges to O'Ryan J.'s findings concerning the wrongful removal of the child from the United States, the husband's failure to consent to that removal, the husband's rights of custody in relation to the child, and his exercise of those rights; and to his Honour's conclusion that the applicant had not established that the return of the child to the United States would expose the child to physical or psychological harm or to an intolerable situation.

11. The Full Court (Baker, Lindenmayer and Smithers JJ.) delivered judgment on 10 October 1996 dismissing the appeal. In their judgment their Honours made no express mention of the amendment to the relevant regulations in October 1995, but they quoted and would seem to have applied where necessary, regulations 3, 13, 14, 16, 17 and 20 in their form following the amendments of October 1995.

12. On the same day as the Full Court delivered its judgment in this case, the High Court delivered judgment in another case arising under the Convention, *De L v. Director General New South Wales Department of Community Services* (1996) 187 CLR 640. In that decision the majority of the High Court (at 653) held that the effect of s.50 of the *Acts Interpretation Act* 1901 is that where an application for the return of a child had been filed under the Convention regulations, that application must be determined by the court under the regulations in their form as at the date of filing of the application. This means that the present case should have been determined according to the regulations as they stood at 28 June 1995, and not, as was apparently done by O'Ryan J. and the Full Court, according to the regulations after the amendments of October 1995.

13. Following the Full Court decision in this case, the applicant did not apply for special leave to appeal to the High Court within the prescribed time; nor did she seek at that time to re-open the matter before the Full Court; rather she went into hiding with the child, J.

14. A warrant was issued on 25 November 1996, and over twelve months later on 9 January 1998 the police located the applicant and J in southern New South Wales. The child was apparently initially taken into care but shortly thereafter returned to the applicant. Various proceedings followed in, and orders were made by, the Family Court concerning the care of the child and the arrangements for her return to the United States.

15. On 9 April 1998 an application for special leave to appeal to the High Court (and also apparently for leave to do so out of time) was lodged on behalf of the applicant. These applications were heard by the High Court on 7 August 1998.

16. At the outset of that hearing, Counsel for the applicant, Dr Griffith QC, informed the Court that in the course of his preparation for the hearing, two matters had become apparent to him. First, that in this case both the primary judge and the Full Court had applied the regulations which were in existence at the time the matter was heard by the primary judge rather than those in existence at the time of the application, which according to the majority decision of the High Court in *De L*, were the regulations which should have been applied. And secondly, that the original regulations which should have been applied were in any event *ultra vires* the regulation making provision in s.111B of the *Family Law Act* 1975 (allegedly because contrary to the terms of the Convention they required a return to the applicant parent rather than to the country from which the child was wrongfully removed).

17. Dr Griffith therefore sought an adjournment of the application for an extension of time to apply for special leave in order that he could draw a proper notice of the further grounds, which would be constituted by these two matters. However, that application was opposed by the Central Authority and the High Court refused the application for the adjournment of the application for an extension of time.

18. Dr Griffith then proceeded to argue the application for an extension of time. In so doing, and against the background of the principles in *Gallo v Dawson* (1990) 93 ALR 479, he submitted that it was necessary in this case to weigh the personal default of the applicant against the issues of justice and of public interest, and also

the likely prospects of success, which existed in this case, not only because of the three matters enumerated in the special leave application (which related to the concepts in the Convention and/or Regulations, of "habitual residence", "grave risk of psychological harm" and "the protection of human rights, and fundamental freedoms"), but also because of the application in this case of the wrong regulations and of the alleged invalidity of the applicable regulations. Dr Griffith also placed reliance on the fact that "the principal party" in this case was a child, and on the uncertainties regarding the applicant's rights or ability to remain in the United States for the purpose of pursuing custody proceedings in relation to the child.

19. Notwithstanding all these matters put by Dr Griffith in support of the application for an extension of time to bring an application for special leave, the High Court refused the application. In giving the brief reasons of the court for refusing the application, Gleeson CJ. said:

"The Court is of the view that the explanation that has been offered of the delay in question is not such as to warrant the extension of time..."

THE PRESENT APPLICATION

20. On 17 August 1998 an application to the Full Court of this court was filed on behalf of the applicant in which the following orders were sought on the following grounds:

"1. ON THE HEARING of the application to the Full Court on behalf of the Appellant [D.L.], pursuant to section 21 of the Family Law Act 1975 and in the inherent jurisdiction of the Court for orders that the appeal is re-opened and that:-

a) the order of the Full Court made the 10th October 1996; and

b) the order of Justice O'Ryan made at first instance the 20th February 1996

be set aside and that the matter be remitted for re-hearing before a single judge.

2. ON THE GROUNDS of manifest error arising from the application by each of the Courts of the Family Law (Child Abduction Convention) Regulations which came into force on 1 November 1997 (sic) after the application made by Central Authority on 28 June 1995, rather than the applicable, now repealed, regulations, which should have been applied by reason of the decision of the High Court of Australia in De L v Director General, Department of Community Services (NSW) (1996) 187 CLR 640 delivered the same day as the decision of the Full Court.

3. ON THE FURTHER GROUND that the above orders made by the Court should be regarded as vitiated by reason of the different relevant inquiry mandated by the applicable regulations from the inquiry in fact made by the above Courts by reference to the inapplicable regulations.

4. ON THE FURTHER GROUND that by reason of the application of the non applicable regulations, the Appellant was shut out from making further relevant and material submissions as to why no order could and should be made in the matter reference to the applicable regulations and, in particular, from putting arguments that:

a) the property (sic) construction of the applicable regulations and their application to the circumstances of her case;

b) the order made was insupportable by reference to the terms of the applicable regulations; and

c) the applicable regulations were invalid by reference to the regulation making power under section 111B of the Family Law Act.

5. ON THE FURTHER GROUND that the applicable regulations were in any event beyond constitutional power in their application to the child, as an Australian citizen.

6. ON A FURTHER APPLICATION that the orders made for the child, [J], to be returned to the United States be stayed until the final hearing and determination of this application or further order."

21. Subsequently on 14 September 1998 during the hearing by this Full Court of the application filed 17 August 1998, the applicant was permitted to make submissions in support of the following further or alternative orders:

"7. FURTHER AND ALTERNATIVELY that the order of Justice O'Ryan made 20 February 1996 be declared spent and that the matter be remitted for further hearing before a single judge.

8. FURTHER that an order be made pursuant to s68L of the Family Law Act 1975 [that] the child, [J], born [9 November 1993] be separately represented."

22. In considering the application for these orders, I propose first to address the issues of whether there is power in this Full Court to re-open the decision of an earlier Full Court, and if there is such a power, whether it should be exercised in this case. I foreshadow at this point that my conclusion in relation to the second of these issues will make it unnecessary for me to express any concluded view on any other issue raised in this case.

THE POWER OF APPELLATE COURTS TO RE-OPEN EARLIER ORDERS

23. The power of the High Court to re-open its judgments or orders would seem now not to be in doubt. In *De L v. Director General, New South Wales Department of Community Services* (No.2) (1997) 190 CLR 207, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. said (at 215):

"The power of this Court to reopen its judgments or orders is not in doubt. The Court may do so if it is convinced that, in its earlier consideration of the point, it has proceeded "on a misapprehension as to the facts or the law" [Autodesk Inc v Dyason [No 2] (1993) 176 CLR 300 at 302], where "there is some matter calling for review"[Smith v NSW Bar Association (1992) 176 CLR 256 at 265] or where "the interests of justice so require" [Autodesk Inc v Dyason [No 2] (1993) 176 CLR 300 at 322.]. It has been said repeatedly that a heavy burden is cast upon the applicant for reopening to show that such an exceptional course is required "without fault on his part" [Wentworth v Woollahra Municipal Council (1982) 149 CLR 672 at 684; cf State Rail Authority of NSW v Codelfa Construction Pty Ltd (1982) 150 CLR 29 at 38, 45-46; Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 181 CLR 134 at 168], ie without the attribution of neglect or default to the party seeking reopening [Autodesk Inc v Dyason [No 2] (1993) 176 CLR 300 at 303.]. By such expressions of the power to reopen final orders, courts seek to recognise competing objectives of the law. On the one hand, there is the principle of finality of litigation which reinforces the respect that should be shown to orders, final on their face, addressed to the world at large and upon which conduct may be ordered reliant upon their binding authority. On the other hand, courts recognise that accidents and oversights can sometimes occur which, unrepaired, will occasion an injustice. In the case of a final court of appeal, such as this Court, that injustice may be irremediable, unless the Court itself, acting promptly, is persuaded to reopen its orders so as to afford relief in the exceptional circumstances of the case [Autodesk Inc v Dyason [No 2] (1993) 176 CLR 300 at 302; Wentworth v Rogers [No 9] (1987) 8 NSWLR 388 at 394-395; Logwon Pty Ltd v Warringah Shire Council (1993) 33 NSWLR 13 at 28-29.]." **(Underlining added)**

24. Later in relation to the discretionary considerations which attend the exercise of the power to re-open, their Honours said (at 223):

"Even if the foregoing conclusions, which require the dismissal of the application, had been different, a question would remain whether, in the exercise of its discretion, the Court should vacate its earlier order. It is one thing to permit reopening of the orders to allow consideration of a matter accidentally overlooked so that it may be taken into account. It is another to provide relief where the party seeking it has, by its own confession, not done all that might have been done to raise the point when it was timely and appropriate to do so. Especially in this Court, judges are entitled to look to the parties, at least where they are legally represented, to defend their own interests and to alert the Court to any claimed immunities which rest upon legal provisions. That was not done here." **(Underlining added)**

25. However, the power of the intermediate courts of appeal in this country to re-open their judgments or orders (at least once perfected) is not so clear.

26. In *Haig v. Minister Administering the National Parks and Wildlife Act* 1974 (1994) 85 LGERA 143 Kirby J., then as President of the New South Wales Court of Appeal, held (at 154-6) that there was such a power in that appellate court. However, he described the power as a "limited, special and wholly exceptional jurisdiction", and he stated that he did not favour its exercise in that case for a range of reasons. Those reasons included the fact that no adequate explanation had been given to indicate why the argument then sought to be advanced before the Court of Appeal had not been raised at the earlier hearing (and it should be noted that in *Haig* the applicant seeking a re-opening had appeared for himself at the earlier Court of Appeal hearing, although he had been legally represented at first instance); and the obligation which exists on the appellate court to take into account the principle of finality of litigation.

27. In *Haig* Priestly J.A. agreed with Kirby P.'s reasons for refusing to permit the re-opening of the earlier appeal. In so doing, his Honour assumed "without expressing any opinion on the matter, that there is a power

in the Court to permit such a re-opening" (at 159). Similarly Handley J.A. was prepared to assume in the applicant's favour that the Court of Appeal "has power to re-open its perfected orders to permit an appeal to be re-argued", but his Honour was also not prepared to exercise the power in that case (at 159-160).

28. Subsequent to the decision in *Haig,* the question of the power of an intermediate Court of Appeal to re-open its previous orders was considered by the Full Court of the Federal Court in *Donkin v. AGC (Advances) Ltd.* (unreported, Black CJ., Davies and Whitlam JJ., 30 August 1995, No QG 107 of 1989). All members of that Full Court were prepared to assume that it had the power to re-open its previous orders, including perfected orders, but none were prepared to exercise that power in that case. In regard to the exercise of the power,Black CJ. said "It is clear, however, that any such jurisdiction is to be exercised with great caution, having regard to the importance of the public interest in the finality of litigation". (See also *QANTAS v. Cameron* (Davies, Lindgren and Lehane JJ. (1996) 715 FCA 1 (14 August 1996); *Wati v Minister for Immigration and Multicultural Affairs* (1997) 1052 FCA (3 October 1997).)

29. For the purpose of deciding the present case, I would be prepared to assume without deciding the question, that there is a power in this Full Court to re-open the orders of a previous Full Court. I would also be prepared to assume, and indeed there seems little contest about the matter, that O'Ryan J. and the previous Full Court applied the wrong regulations in their determinations of this case. Furthermore, I would be prepared to assume, but again without deciding the question, that the earlier regulations under which the case should have been determined are invalid (if necessary, for all of the reasons advanced by Dr Griffith) and that they cannot be saved by any severance technique.

30. However, even if all these assumptions were to be made in favour of the applicant, I would not ultimately support the exercise in her favour of the discretion to re-open the order of the previous Full Court. I take this view for the following reasons.

THE EXERCISE OF THE DISCRETION TO RE-OPEN

31. While the High Court in *De L* (No.2) was concerned with its own discretionary power to re-open its previous orders, the considerations which their Honours referred to as relevant in that case to the exercise of that discretionary power must also, in my opinion, be applicable to the exercise of the same or similar discretionary power by an intermediate Court of Appeal, such as this court.

32. As will be seen from passages already quoted from the majority decision in *De L* (No.2), the majority there stressed the need for there to be no neglect or default on the part of the applicant for a re-opening and for the applicant to have done all that he or she might have done to raise the point (sought to be argued on the re-opening) when "it was timely and appropriate to do so".

33. In this case it was open to the applicant to have filed an application for special leave to appeal the order of the Full Court within the prescribed month following the handing down of the Full Court's decision on 10 October 1996. However, rather than do so, the applicant chose to go into hiding with the child in defiance of the existing orders for the child's return to the United States. Only when the applicant was located by the police, did she seek to avail of her right to make an application for special leave to appeal (although by that time, an extension of time was required to make that application). Although it is of course only speculation, it would seem likely that had an application for special leave been made by the applicant within the prescribed time or even indeed an application to the Full Court to re-open, the defects in relation to the regulations now sought to be relied upon by her, may well have been exposed at that time. But by going into hiding the applicant denied herself that opportunity.

34. Before us some issue was made of the fact that it was Counsel for the Central Authority who misled O'Ryan J. in relation to the applicable regulations for the determination of this case. Similarly, it was asserted that once the Central Authority and its legal advisers became aware of the operation of section 50 of the *Acts Interpretation Act* 1901 as pointed out by the High Court majority in *De L* (No.1), then it fell to the Central Authority to bring to the attention of all concerned in this case, the error that had been made by the trial Judge and the Full Court in relation to the applicable regulations for the determination of this case.

35. However, even if it is the Central Authority and its legal advisers who bear the greater share of responsibility for the error made by the trial Judge and the Full Court in this case, some responsibility must also lie with the applicant's then legal advisers. I say this because once the fact of a recent amendment to the regulations was mentioned in the course of the proceedings before O'Ryan J., one would have thought that those representing the applicant (who was confronted with the prospect of an order requiring the return of her child to the United States) would have explored every legal point available to her, and in so doing investigated thoroughly and properly what was the applicable law governing the application

36. Reliance was also placed in the applicant's submissions before us on the fact that this case was ultimately about the future of a child and that this consideration would justify a re-opening of the matter given the serious issues raised by the applicant. However, it can be argued with equal force that the interests of all children will best be served by their parents obeying court orders, especially in cases arising under the Convention. Those interests are certainly not served by a parent, who is dissatisfied with a court order concerning the child, absconding with that child. Indeed it seems to me that if the discretion to re-open (if it exists) were to be exercised in favour of the applicant in this case, encouragement would be given to every parent dissatisfied with an order, particularly an order made in Convention cases, to go into hiding, in the hope that eventually there will be some change in, or some elucidation of, or even indeed a declaration of invalidity of, the law which will permit the original order to be overturned, or will render that order nugatory.

37. The importance of the principle of the finality of litigation in the context of applications to re-open was referred to by the High Court in *De L* (No.1). The relevance of that principle to the exercise of the discretion to re-open was stressed by Kirby P. in *Haig* and by Black CJ. in *Donkin*. The importance of that principle must of necessity be somewhat diluted in cases involving future arrangements for children as has recently been recognised by the High Court in *CDJ v. VAJ* (1998) FLC 92-828 (at 85,447 and 85,465-6). Nevertheless, in my opinion, it must also be recognised that the finality principle may well be of benefit to children in ensuring certainty and stability for them once a court order is made, particularly in Convention cases.

38. Finally, in any consideration of whether the discretion to re-open should be exercised, it is not without significance, in my view, that prior to bringing this application to this Full Court, the applicant had already been to the High Court seeking that that Court exercise its discretion to extend the time for the applicant to seek special leave to appeal the order of the Full Court of 10 October 1996. In seeking to persuade the High Court to exercise that discretion in the applicant's favour, Dr Griffith drew their Honours' attention to many of the matters on which he sought to rely before us - although he did not of course have the opportunity to expand on them. Those matters include principally the apparent application of the wrong regulations by the primary judge and by the original Full Court in their determinations of this case; the possible invalidity of the regulations which should in fact have been used to determine this case; and the fact that this case is ultimately concerned with the interests of a child.

39. However, none of those factors was apparently considered by those members of the High Court who heard the application, to be of sufficient weight to warrant an exercise of the discretion to extend time for the making of a special leave application. For my part, I have difficulty in seeing why those same matters, or any or them, should now cause this court to exercise, particularly in the factual circumstances of this case, what has been described as "the limited, special and wholly exceptional jurisdiction to re-open" the earlier Full Court order.

40. For these reasons, I would not exercise such jurisdiction as may exist, to re-open the order of the Full Court, and accordingly I would dismiss the application.

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA Appeal No EA 39 of 1996

AT MELBOURNE File No SY3981 of 1995

BETWEEN:

DEBORAH JOY LAING

Appellant Wife

- and -

THE CENTRAL AUTHORITY

Respondent

REASONS FOR JUDGMENT OF JUSTICE KAY

CORAM: NICHOLSON CJ, FINN, KAY, MOORE

and MAY JJ

DATE OF HEARING: 27 and 28 August, 14 September 1998

DATE OF JUDGMENT: 9 February 1999

APPEARANCES: Dr Griffiths, one of Her Majesty's Counsel, and Ms Eastman of Counsel, instructed by Bruce A Swane & Co., 89 Cambrai Ave, Engadine NSW 2233, appeared on behalf of the Appellant Wife

Mr Basten, one of Her Majesty's Counsel, and Mr Anderson of Counsel, instructed by Crown Solicitors Office, GPO Box 25, Sydney NSW 2001, appeared on behalf of the Respondent.

1. On 17 August 1998 an application was made to the Full Court of the Family Court of Australia seeking an order that pursuant to s21 of the *Family Law Act* 1975 in the inherent jurisdiction of the Court the appeal herein be reopened and that -

"(a) the order of the Full Court made the 10th October 1996; and

(b) the order of Justice O'Ryan made at first instance the 20th February 1996

be set aside and that the matter be remitted for re-hearing before a single judge."

2. On 11 September 1998 notice was given that leave of the court would be sought on 14 September 1998 to amend the application to seek additionally as follows:

"Further and alternatively that the order of Justice O'Ryan made on 20 February 1996 be declared spent and that the matter be remitted for further hearing before a single judge.

Further that an order be made pursuant to s68L of the *Family Law Act* 1975 that the child, J. Surgeon, born 9 November 1993 be separately represented."

3. Whilst we were never formally moved to grant the amended application, submissions were made in respect of it by both parties and I am content to treat that amended application as being properly before us.

4. The Grounds relied upon in support of the original application are as follows:

*** "...manifest error arising from the application by each of the courts of the Family Law (Child Abduction Convention) Regulations which came into force on 1 November 1997 (sic) after the application made Central Authority on 28 June 1995, rather than the applicable, now repealed, regulations, which should have been applied by reason of the decision of the High Court of Australia in *DE L v Director General, Department of Community Services (NSW)* (1996) 187 CLR 640 delivered the same day as the decision of the Full Court.**

*** ...that the above orders made by the Court should be regarded as vitiated by reason of the different relevant inquiry mandated by the applicable regulations from the inquiry and fact made by the above courts by reference to the inapplicable regulations.**

*** ...that by reason of the application of the non-applicable regulations, the appellant was shut out from making further relevant and material submissions as to why no order could and should be made in the matter reference to the applicable regulations and, in particular, from putting arguments that:**

*** (a) the property (sic) construction of the applicable regulations and their application to the circumstances of her case;**

*** (b) the order made was insupportable by reference to the terms of the applicable regulations, and**

*** (c) the applicable regulations were invalid by reference to the regulation making power under s111B of the *Family Law Act***

*** ...that the applicable regulations were in any event beyond constitutional power in their application to the child, as an Australian citizen."**

Background

5. The background facts to this application are set out in a judgment of the Full Court (coram Baker, Lindenmayer and Smithers JJ) at (1996) FLC 92-709; 21 Fam LR 24. That judgment was delivered on 10 October 1996. On the same day, the High Court delivered its judgment in *De L v Director-General, NSW Department of Community Services and Anor* (1996) 187 CLR 640; (1996) FLC 92-706; 20 Fam LR 390.

6. On 12 January 1995 the mother of the child, J, born 9 November 1993 departed the United States of America and came to Australia bringing J with her. That action was subsequently found by O'Ryan J and confirmed by the Full Court to amount to a wrongful removal of the child from the United States of America within the terms of the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), as incorporated into Australian domestic law by the Family Law (Child Abduction Convention) Regulations.

7. On the 5 June 1995 J's father applied to the United States Central Authority seeking a return of the child to the United States of America. That application was conveyed by the United States Central Authority to the Australian Central Authority and on 28 June 1995 an application was filed by the relevant Australian Central Authority (the NSW Director-General, Department of Community Services) in the Family Court of Australia seeking inter alia an order:

"That the father, Lance Lynn Surgeon is permitted to remove the child from Australia forthwith for the purpose of returning her to the United States of America pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction."

8. That application was heard before O'Ryan J on 2 February 1996. By Statutory Regulation 296 of 1995, several parts of the then existing Family Law (Child Abduction Convention) Regulations ("the former regulations") were repealed and replaced by a new set of regulations ("the revised regulations"). The repeal took effect from 1 November 1995. In his reasons for judgment, O'Ryan J made reference to and quoted from various regulations. For the most part, it appears his Honour quoted from the revised regulations, although when dealing with the defences available to a Hague Convention application, his Honour set out the former Regulation 16.

9. His Honour identified the proceedings before him in the following manner:

"In this matter the Central Authority has made an application under Reg.14 [of the amended regulations] to the Family Court of Australia for the return of a child to the United States being a Convention country in which it is alleged the child habitually resided immediately prior to her removal. I am being asked to make an order for the return of the child.

There are four issues which arise in these proceedings:

1. Are Regs 13 to 17 inclusive of the (Child Abduction Convention) Regulations a valid law of the Commonwealth of Australia?

2. In what country was the child habitually resident when it is alleged that she was wrongfully removed from the United States within the meaning of the Hague Convention?

3. Was the child wrongfully removed from the United States?

4. Are there any Reg 16 defences applicable?"

His Honour held that the regulations were valid laws of the Commonwealth of Australia. He found as a matter of fact that the child was habitually resident in the United States of America prior to her removal to Australia by her mother in January 1995. He found that the removal from Georgia was contrary to the husband's rights of custody within the terms of the laws of the State of Georgia. He found that the removal was wrongful within the meaning of Article 3 of the Hague Convention and Regulation 2(1). His Honour then determined that he was unable to be satisfied on the balance of probabilities that the husband had consented to the removal of the child in January 1995.

10. Under the heading of "Physical or Psychological Harm", he said:

"The wife relies upon sub-reg 16(3)(b) as a defence to the application by the Director."

11. Regulation 16(3)(b) of the former regulations read as follows (emphasis added):

"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."

12. Regulation 16(3)(b) of the revised regulations provides:

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

....

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

13. As can be observed, the former regulation spoke of "the child's return to the applicant" whilst the revised regulation speaks of "the return of the child to the country in which he or she habitually resided immediately before the removal or retention". Otherwise both regulations focus on the issue of whether such a return creates a grave risk of exposure to physical or psychological harm or otherwise places the child in an intolerable situation.

14. O'Ryan discussed a passage from the decision of the Full Court in *Gsponer v Johnstone* (1989) FLC 92-001 at 77,158 - 9; 12 Fam LR 755 at 766-7 and of Norse LJ in the Court of Appeal in *Re A* (1998) 1 FLR 365 at 372, and of Nygh J in *Davis* (1990) FLC 92-182 at 78,227; 14 Fam LR 381 at 385, concerning what was required to in fact satisfy that defence.

15. His Honour set out the following passage from *Gsponer*, supra, at 767:

"The first is that the grave risk which Reg 16(3)(b) refers to is the risk arising from "the child's return to the applicant". The proceeding before the trial judge proceeded upon the assumption that "the applicant" in this case was the father and indeed that is reproduced in Order (1), where his Honour ordered the return of the child to "the custody of the husband in Switzerland". Regulation 2, to which we have referred, makes it clear that "applicant" means the person who has made the relevant application under Reg 13.-Nevertheless it is an important matter both in this case and generally. Orders under the Convention are in reality directed to the return of the child to the other country, and this would be so as a matter of practical reality even if the "applicant" under Reg 13 is the other parent. - So understood, Reg 16(3)(b) has a narrow interpretation. It is confined to the "grave risk" of harm to the child arising from his or her return to a country which Australia has entered into this Convention with. There is no reason why this court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare. Indeed the entry by Australia into this Convention with the other countries may justify the assumption that the Australian Government is satisfied to that effect."

16. His Honour noted that the husband had orders made in his favour in Georgia providing him with all of the assets of the parties located in the United States. He noted the evidence that the child was securely attached to the wife and closely attached to her younger brother. He was satisfied that there was a risk of some psychological harm to the child if the child was sent to America, and he said:

"...notwithstanding my concerns, I am not satisfied that degree of harm as required by the authorities which I have referred to has been established."

His Honour concluded that any psychological harm caused to the child -

"should be of short term duration because, hopefully, there will be a speedy determination in the United States of the welfare issues which I have identified."

17. The orders made by O'Ryan J were in the following form:

"1. That upon the Central Authority being satisfied that the father has given undertakings to the Superior Court, Gwinnet County, Georgia that he will pay to the Central Authority sufficient moneys to enable the wife and the child J, born on 9 November 1993 to travel by air from Sydney to Atlanta, Georgia or paid to the Central Authority sufficient moneys to pay the cost of such air travel then the Central Authority shall, as soon as reasonably practicable on or after 15 March 1996 cause the child to be returned to the United States in the company of the wife.

2. That liberty is reserved to the Director-General of the Department of Community Services to apply to a single judge of this court for further directions for the implementation of Order 1."

18. The wife appealed the making of those orders, and that appeal came on for hearing on 3 July 1996. As already stated, judgment was delivered on 10 October 1996.

The Full Court proceedings

19. The first of the Grounds of Appeal argued before the Full Court asserted that there had been no wrongful removal pursuant to Article 3 of the Hague Convention. The Full Court held that the finding as to the child's habitual residence at the time of the removal was open to the trial Judge and did not interfere with it.

20. In their reasons for judgment, when dealing with the first Ground of Appeal the Full Court said, (at FLC 83,504; Fam LR 34):

"In view of the above submissions, which in our view, have no relevance to the ground of appeal relied upon, it is necessary that we firstly record the relevant articles of the Convention and then give close consideration to the trial judge's findings in relation to them."

21. Articles 1, 3, 12 and 13 were set out as portions of regulations 3, 13, 14, 16, 17 and 20 of the revised regulations. The Full Court clearly relied upon the revised regulations rather than the former regulations.

22. The second Ground of Appeal challenged the finding as to the husband's rights of custody in Georgia. The Full Court rejected that Ground of Appeal on the basis that it was not at issue before the trial Judge.

23. The third Ground challenged a finding by the trial Judge that the husband was actually exercising his custody rights. The Full Court accepted that the facts clearly supported the trial Judge's finding.

24. The fourth Ground challenged the finding as to habitual residence of the child. The Full Court held that on the facts it was open to the trial Judge to make the findings that he did.

25. The fifth Ground was said to be in identical terms to the third Ground, namely a challenge as to the facts as to whether the husband was actually exercising his parental rights at the time the child was removed from Georgia.

26. The sixth Ground challenged the finding that the husband had not consented to the removal. The Full Court concluded that that ground had no merit.

27. Grounds 7, 8 and 9 were dealt with collectively by the Full Court. They asserted that the trial Judge had erred in finding that the wife had not established that the return of the child would expose the child to physical harm, psychological harm or place the child in an intolerable situation.

28. Their Honours commenced dealing with these grounds as follows (emphasis added):

"The essence of these grounds is that the trial judge's findings that the wife had not established the existence of a grave risk that the return of J to the United States would expose the child to physical or emotional harm, or otherwise place the child in an intolerable situation, within the meaning of reg 16(3)(b) of the Family Law (Child Abduction Convention) Regulations, were not reasonably open to him on the evidence before him. As these grounds are concerned essentially with questions of weight, regard must be had to High Court authorities as to the manner in which appellate courts must deal with and hear appeals from discretionary judgments."

29. Their Honours set out the trial Judge's findings and the evidence of Professor Waters on the effect of the child being removed from her mother and said (emphasis added):

"His Honour in our opinion clearly considered all of this evidence and all the factors relevant to the child's welfare, under reg 16(3)(b) and concluded that the wife had not been able to establish that there was a grave risk of physical or emotional harm to the child, or that the child would otherwise be placed in an intolerable situation, by being the subject of an order for her return to the United States.

It must always be remembered that in most cases where an order is made by a court returning a child to its habitual place of residence, the order does not and is not intended to have the effect of returning the child to the custody or care of the other parent. What the order does is to require the Central Authority to return the child (often in the company of the abducting parent) to the *country* from which the child was wrongfully removed. It would be inconceivable that the judicial system of the State of Georgia in the United States would not be able to protect the child from any significant risk of physical and/or psychological harm arising from the implementation of this court's order. In addition, as indeed the trial judge found, the evidence was that the court in the State of Georgia having jurisdiction in disputes relating to children applies the principle that the best interests of the child are the paramount consideration.

It was argued by the appellant that the trial judge failed to consider that the child was to be returned to the care of a person (the husband) who was in full time employment and absent for the greater part of waking hours, and who has known the child J effectively for a period of six weeks some twelve months ago and, prior to that, for a period of four months in the first four months of her life.

The difficulty with this, as with most, if not all, the submissions made by the appellant in relation to these grounds of appeal, is that they presuppose that the order which the trial judge made was that the child be returned to the husband rather than to the jurisdiction. Such submissions not only misconceive the order which the trial judge in fact made, but are a misunderstanding of the nature and effect of the Convention itself.

The purpose of the Convention is to protect children habitually resident in Convention countries from the harmful effects of their wrongful removal to or retention in another Convention country, by establishing a framework to ensure their prompt return to the State of their habitual residence. This is because countries which have signed the Convention recognise that disputes involving the custody of and access to children are best heard and determined in the place of their habitual residence, where the principle that the interests of children are of paramount importance will be applied."

30. After discussing some decisions concerning the test to be applied in determining whether there was a grave risk to the child by ordering its return their Honours said at FLC 83,513; FamLR 46:

"Returning then to the present appeal, the evidence which the wife has given in support of her application is untested and, in any event, it is inconceivable that the courts in Georgia having the relevant jurisdiction would not protect both the wife and the child, or otherwise act in a manner consistent with the child's best interests. Indeed, we endorse similar comments made to the above effect in *Murray and Director Family Services (ACT)* (1993) 16 Fam LR; 982 FLC 92-416 and *Gsponer and Director General Department of Community Services (Vic)*, above.

We are not satisfied that the allegations which the wife has made and the evidence which she has adduced in support of her case, disclose a situation of such gravity or such exceptional circumstances as would require the court to intervene pursuant to reg 16(3)(b). His Honour refused to do so and, in our respectful opinion, he was correct.

The allegations of physical and psychological harm and sexual abuse which the appellant raises are not matters which could be conveniently dealt with in this country. The allegations are in respect of incidents said to have occurred within the State of Georgia. Therefore, in our opinion, the courts in that State are best equipped to hear and determine all those matters.

The matters referred to in reg 16(3)(b) are essentially questions of fact which a trial judge must decide, having regard to the evidence put before him. In the instant appeal, the trial judge carefully considered all the evidence which was before him at the time and concluded, for reasons which he gave, that no grave risk was present that the return of the child to the United States would expose her to physical or psychological harm, or otherwise place the child in an intolerable situation.

Further argument which Ms Farey raised in the course of her submissions was that once the child is returned to the United States the order of the Gwinnett Superior Court will immediately take effect and the husband will thereafter resume custody of his daughter. Indeed, the very purpose of the Convention is to respect the custody orders of the jurisdiction of the country from which the child was abducted which apply or have applied the best interests principle. There would appear however, to be nothing to prevent the appellant from applying to the Gwinnett Superior Court to set aside the orders previously made in her absence on the various grounds alleged before his Honour and before us in the course of the hearing of this appeal. While there may be some practical and procedural difficulties facing the wife in making and pursuing such an application, they are essentially of her own making. After all she chose, at her own risk to ignore the process of that court, with which she had been regularly and properly served, and it was clearly the court which provided the most appropriate forum for the resolution of the custody issue between these parties on its merits." (emphasis added).

31. The final Ground of Appeal relied upon was that the return of the child would be in breach of fundamental principles relating to the protection of human rights and fundamental freedom. The Full Court said that this was not a matter that had been argued before the trial Judge and that there was no evidence to suggest that the Gwinnett Superior Court would not apply the paramountcy principle nor be capable of protecting human rights and fundamental freedoms of individuals.

The wrong regulations considered

32. It is clear from the Reasons for Judgment given by the Full Court that they determined the appeal in accordance with the revised regulations.

33. On the very day that the Full Court delivered its judgment, the majority judgment of the High Court in *De L*, supra, indicated that such an approach was in error and that where a Hague Convention application had been brought prior to the repeal of the former regulations, that repeal did not affect the continuation and completion of an application made under them. The Full Court said at CLR 653; FLC 83,452; Fam LR 397:

"... the new reg 16 took as its subject matter an application under the new reg 14. The new reg 16 was expressed to operate upon an "application under regulation 14". The application before the primary judge was in Form 2 required not by the future reg 14 but by the then operative reg 15(1A). Accordingly, even if the changes effected by the 1995 amendment be construed as procedural, the new reg 16, in terms, was not directed to the pending application before the primary judge. Moreover, the repeal of the former regs 14, 15 and 16 did not affect the continuation and completion of that pending application."

34. Kirby J was not convinced that the previous form of the regulations applied. He said at CLR 674; FLC 83,464; FamLR 414:

"I have read the opinion of the other members of the court to the effect that the new form of reg 16(3) did not apply to this case because it did not attach to the initiating application as one "[made] under subregulation (1) [of reg 16]" in its revised terms. The contrary was assumed by the Full Court of the Family Court and by the arguments of all parties in this court. I am not convinced that the previous form of the regulations applied. The words in the new subregulation would ordinarily be given an ambulatory meaning in keeping with its procedural character."

Subsequent events

35. After the Full Court handed down its judgment in October 1996, attempts were made to trace the mother and the child J. She could not be found. In November 1996 a warrant was issued to take possession of the child. It was not until January 1998 that the mother and child were located and detained by the Federal Police on the south coast of NSW. The child was then placed in foster care and subsequently returned to the mother's care on condition that the mother report daily to and co-operate with officers of the NSW Department of Community Services.

36. On 2 February 1998 Knibbs JR made orders that the Central Authority cause the child J to be returned by air from Sydney to Atlanta, Georgia in the company of the mother in accordance with Order 1 of the orders of O'Ryan J dated 20 February 1996 upon the Central Authority being satisfied that an appropriate visa had been issued by the United States and that the father had given certain undertakings to the Supreme Court of Gwinnett County, Georgia concerning the provision of return air tickets for the wife and children, provision of funds to the wife and children's support in the United States, and making arrangements not to interfere with the wife's care and control of the children pending a further determination by the Georgian Court.

37. On 9 April 1998 the mother made an application for special leave to appeal to the High Court of Australia. On the same day, Ellis J made orders requiring the mother to apply for a business/tourist visa to enable her to travel to the United States together with the child J and -

"to remain in the United States of America for a sufficient time to enable her to make an application to a court of competent jurisdiction in George, United States of America for custody of the said child."

Ellis J further ordered that upon the giving of certain undertakings to the Australian Central Authority in like form to the undertakings that the father had previously indicated he would give to the Georgian Court, that the Australian Central Authority was then to cause the child J to be returned from Sydney to Georgia in the company of the mother in accordance with Order 1 made by O'Ryan J on 20 February 1996.

38. It is apparent that the requirement that the undertakings be given to the Australian Central Authority became appropriate because the Georgian court would not accept an undertaking as there were no proceedings pending before it. It was agreed in the proceedings before Ellis J that the appropriate repository of the undertaking would be the Australian Cental Authority, even though it would appear that such an undertaking would be unenforceable and of use mainly to ensure a visa would issue. The making of the undertaking in that form was acceded to by counsel for the wife before Ellis J when she said:

"We accept undertakings to the Central Authority would be a sensible substitute, your Honour."

39. It would appear from the discussion that took place before Ellis J that the requirement for the granting of the undertakings appeared to be necessary to maximise the chances that the American authorities would grant a visa to the mother. Counsel said:

"Your Honour, apparently the undertakings by the father must precede the application for the visa...

ELLIS J: Look, I am sure if your client made an application for a visa and at the same time the undertakings, the Central Authority advised the American authorities that the undertakings had been given, that would suffice would it not?

MS MERKEL: As a practical solution, yes, your Honour."

The High Court refuses to extend time to seek special leave to appeal

40. The application for special leave came on before the High Court on 7 August 1998. As the application was out of time it was treated first as an application for an extension of time in which to file an application for special leave to appeal. Dr Griffith QC, who appeared for the mother, commenced by submitting that the true subject matter of the application was the child. McHugh J observed that it was:

"...not in the interests of children for parents to take off when adverse orders are made, take the child into hiding and then think they can come to this Court more than twelve months out of time and ask for a special leave application or for an extension after they have been apprehended."

41. Dr Griffith QC then submitted that there was a clearly identifiable error made by the trial Judge and the Full Court in that they had relied upon the wrong set of regulations. It was further submitted that the regulations that the Court ought to have relied upon were invalid. Dr Griffith QC then outlined a series of other areas where he sought to challenge the findings of the trial Judge and the rulings of the Full Court on the appropriate interpretation of whatever the relevant regulations might be.

42. The High Court dismissed the application in the following terms:

"The Court is of the view that the explanation that has been offered for the delay in question is not such as to warrant the extension of the time and the application for an order that complies with Order 69A rule 3 be dispensed with is refused."

Can completed proceedings ever be reopened?

43. In *De L*, supra, an order was made by the High Court that the Central Authority pay the costs of the appeal to the High Court. Subsequently, the High Court's attention was drawn to the provisions of Regulation 7 of the Family Law (Child Abduction Convention) Regulations which provided for the Authority to be immune from orders for costs when performing its proper functions. The matter was the subject of a further judgment in *De L v Director-General, New South Wales Department of Community Services and anor (no 2)* (1997) FLC 92-744; 21 Fam LR 432.

44. Toohey, Gaudron, McHugh, Gummow and Kirby JJ (Brennan CJ and Dawson J dissenting) said at FLC 84,034; FamLR 437:

"Reopening of a final order

The power of this court to reopen its judgments or orders is not in doubt. The court may do so if it is convinced that, in its earlier consideration of the point, it has proceeded "on a misapprehension as to the facts or the law" [*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302 111 ALR 385], where "there is some matter calling for review" [Smith v New South Wales Bar Association (1992) 176 CLR 256 at 265 108 ALR 55] or where "the interests of justice so require".[*Autodesk Inc v Dyason (No 2)*] It has been said repeatedly that a heavy burden is cast upon the applicant for reopening to show that such an exceptional course is required "without fault on his part" [*Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684 43 ALR 240 cf *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45-6 42 ALR 289 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 168 121 ALR 577], ie without the attribution of neglect or default to the party seeking reopening[*Autodesk Inc v Dyason (No 2)* CLR at 303, ALR 385]. By such expressions of the power to reopen final orders, courts seek to recognise competing objectives of the law. On the one hand, there is the principle of finality of litigation which reinforces the respect that should be shown to orders, final on their face, addressed to the world at large and upon which conduct may be ordered reliant upon their binding authority. On the other hand, courts recognise that accidents and oversights can sometimes occur which, unrepaired, will occasion an injustice. In the case of a final court of appeal, such as this court, that injustice may be irremediable, unless the court itself, acting

promptly, is persuaded to reopen its orders so as to afford relief in the exceptional circumstances of the case. [*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302 111 ALR 385 *Wentworth v Rogers (No 9)* (1987) 8 NSWLR 388 at 394-5; *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 28-9]"

45. In determining whether or not to exercise this exceptional jurisdiction their Honours said at FLC 84,305; FamLR 439:

"An important consideration is that the orders of this court, although publicly announced, were not perfected. That is, the formal entry of the orders in the court's records was not made before the present motion was filed. As a result of the motion, the registrar of the court, of his own initiative, has delayed the entry of the orders pending the outcome of these proceedings. Courts have always treated differently applications to reopen final orders which, although pronounced publicly, have not been finally entered in the court's records. Different considerations arise when this latter step has been taken. [*State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38 42 ALR 289 *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 308, 317 111 ALR 385 *University of Wollongong v Metwally (No 2)* (1985) 60 ALR 68 at 70 59 ALJR 481 at 482-323]

The oversight of reg 7 occurred by accident. The focus of submissions was, naturally enough, upon the substance of the contest, in which there were several points of difficulty. The court did not address specific questions on costs either to counsel for the Director-General or counsel for the Attorney-General, intervening. Even assuming that the general costs discretion applied, it has been exercised without regard to the possible application of reg 7 and the purposes for which the regulation was made. For economy and efficiency, the Director-General, sensibly enough, left most of the argument of the appeal to the Solicitor-General, appearing for the Attorney-General. The application to vacate the costs order was made promptly. No relevant disadvantage could be shown by Mrs De L save for the costs of the motion. The court was informed that those costs would, in the circumstances, be borne by the Commonwealth. The point raised is one of importance for the meaning and application of a federal law. It is also potentially one of general application. It is desirable that the position of the parties and of the law should be clarified.

Save, therefore, for the question of the utility of reopening the court's orders, now to be addressed, and any relevant residual matters of discretion affecting the provision of relief, we would favour, in the particular circumstances of this case, reopening the costs order to safeguard against the risk of injustice that could flow from the unconsidered making of an order on its face apparently contrary to the requirements of reg 7. [*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 303 111 ALR 385]."

Since reserving our judgment in this matter, the House of Lords has dealt with this issue in its decision *In Re Pinochet* delivered 15 January 1999. In that case a panel of five Law Lords heard an appeal concerning whether General Pinochet, a former Head of State in Chile, could be detained and extradited to Spain to be tried for crimes committed in Chile against Spanish nationals. One member of the Court, Lord Hoffman, had close links to Amnesty International which links were not made public until after the hearing. Amnesty International had been a strident critic of the Pinochet regime. The House of Lords were invited to set its previous decision aside once these links became known. Lord Browne-Wilkinson, with whom Lord Goff of Chievely, Lord Nolan, Lord Hope of Craighead and Lord Hutton agreed, said (emphasis added):

"In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co. Ltd. v. Broome (No. 2)* [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."

Does this jurisdiction exist for an intermediate Appellate Court?

46. In *Bailey v. Marinofff* (1971) 125 CLR 529, the High Court dealt with a case where a Full Court of the Supreme Court of NSW had ordered that appeal books be filed within a certain time in default of which the appeal was to stand dismissed. The appeal books were not filed in time. Subsequently, the Supreme Court granted leave to file out of time. That order was the appealed to the High Court.

Barwick CJ said at 530:

"Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed."

Menzies J said at 531:

"...However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend the making of orders in litigation that has been brought regularly to an end...

Nor do I think a court from which no appeal lies, or continues to lie, has greater inherent power to recall a judgment than has a court from which an appeal, for the time being, does lie. The extent of the inherent jurisdiction of a court to revive proceedings cannot depend upon whether its decisions are appealable or not, or whether or not the appropriate steps to appeal have been taken. The point can be illustrated hypothetically. Let it be supposed that the judgment of the Court of Appeal dismissing the appeal to it in this case were given in respect of a sum at issue of $10,000. From that judgment an appeal as of right could have been brought to this Court. When the time for giving notice of appeal had passed, an appeal would lie to this Court only by special leave. Can it be that, while there was an appeal as of right to this Court, the Court of Appeal had no inherent jurisdiction to make an order to revive the appeal which had been dismissed, but that court became endowed with power to recall the appeal to itself when the time for appealing as of right to this Court had passed?

Finally, in my opinion, the decision of Kitto J. and of the Full Court of this Court in *Goodwin v. Southern Tablelands Finance Co. Pty. Ltd.* (1968) 42 ALJR 309 is decisive that the order now under appeal was wrongly made. This appeal can be allowed only if the decision in that case is overruled. There it had been ordered by this Court that an appeal should stand dismissed in default of compliance with an order to lodge appeal books by a date stated. There was no such compliance. Subsequently an application was made to Kitto J. to extend the time for lodging appeal books. This application was dismissed. Kitto J. said,

`There is no pending appeal in this Court in which I can act. The appeal stands dismissed by order of the Full Court and that being so I cannot revive it and I do not think the Full Court could revive it." An appeal to the Full Court was dismissed, the Court saying, with respect to the earlier order of the Full Court, "It is not within the power of this Court to vary that order. Once the appeal was dismissed that was an end of the matter."'

This decision, which was not brought to the attention of the Court of Appeal, is authoritative and, in my opinion, is correct."

Walsh J said at 534:

"...the question is not whether the Court of Appeal ought to have a reserve power which would enable it (to repeat a phrase used by that Court) "to intervene in order that justice may be done". It is whether, as a matter of law, the Court has an inherent power to deal further with an appeal which by its formal order, not being at variance with its intended order, has already been dismissed."

And at 537:

"At all events the decision of the Court in *Goodwin's Case* (1968) 42 ALJR 309 must be regarded, in my opinion, as a direct authority for the proposition that there is no inherent power to vary an order by which an appeal stands dismissed in a case such as the present one in which the order was formally drawn up and entered before any application to vary it was made and in which, therefore, no question arose as to the power of the Court to vary an order of that kind if the order, although it was or has become an unconditional order for the dismissal of an appeal, has not yet been taken out."

Gibbs J. (in dissent) said at 539:

"It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it: *[references omitted].* The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court."

And at 544:

"The authorities to which I have referred leave no doubt that a superior court has an inherent power to vary its own orders in certain cases. The limits of the power remain undefined, although the remarks of Lord Evershed already cited suggest that it is a power that a court may exercise "if, in its view, the purposes of justice require that it should do so".... Where, however, the order has been made by the appellate court itself the position is different, since if the appellate court cannot grant relief, none is available. The fact that this Court would have power to grant special leave to appeal from the order of the Court of Appeal made on 10th February 1970 may be put aside, having regard to the established principles that govern the grant of special leave... I can see no reason in principle, and certainly none in justice or convenience, why an appellate court cannot vary the condition of an order dismissing an appeal, notwithstanding that the appeal has been dismissed before the variation is effected; the appeal may be at an end, but the power of the court remains, and an exercise of the power can reinstate the appeal."

47. In *Gamser v. Nominal Defendant* (1977) 136 CLR 145, the plaintiff suffered compensable injuries. After his verdict was reduced by the NSW Court of Appeal, his condition deteriorated and he sought to re-open his appeal hearing. The refusal to entertain that application was the subject matter of an unsuccessful appeal to the High Court. At page 147, Gibbs J. stated:

"I regard it as unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it. It is of course a most important principle, based on sound grounds of policy, that there should be finality in litigation. However, exceptional cases may arise in which it clearly appears from further evidence that has become available that a judgment which has been given rested on assumptions that were false and that it would be manifestly unjust if the judgment were allowed to stand. In my opinion it is desirable that the Court of Appeal should have a discretion - however guardedly it might have to be exercised - to reopen its judgments in cases such as that in which the needs of justice require it. I agree, however, that the decision in *Bailey v. Marinoff* (1971) 125 CLR 529 shows that the Court of Appeal lacks that inherent power."

48. Aickin J, (with whom Barwick CJ and Stephens J agreed) said at page 154:

"As to the question of whether there was in the Court inherent jurisdiction to make the order sought, Glass J.A. took the view that the decision of this Court in *Bailey v. Marinoff* (1971) 125 CLR 529 was fatal to the argument. In that case this Court held that when an appeal has been finally disposed of in a court of appeal by an order duly entered it has no inherent power to reopen the case on an application made after the order has been entered. That general proposition is no doubt subject to the rule that a judgment apparently regularly obtained may be impeached upon the ground of fraud, and there would seem to be no reason why that rule should not also apply to judgments upon appeal, although it is difficult to visualize how a judgment of an appellate court could be obtained by fraud, other than in circumstances in which the original judgment which the appellate court had upheld had itself been obtained by fraud. The majority judgments in *Bailey v. Marinoff* appear to me to make it clear that there is no inherent power to set aside judgments by reason of changed circumstances on application made after the case has been finally disposed of."

49. Notwithstanding the strong words of the High Court in these cases, Dr Griffith QC submitted that since the abolition of appeals as of right to the High Court, the Full Court of the Family Court of Australia should consider itself to be an ultimate Court of appeal for the purposes of exercising inherent power to correct its own errors. Reliance was placed on dicta of Kirby P (as he then was) in *Haig v The Minister Administering the National Parks and Wildlife Act 1974*, Court of Appeal (NSW), (1994) LGERA 143 at 153.

50. Kirby J said:

"There is no doubt that the Court may correct unperfected orders, that is, those pronounced in Court at the time of the handing down of a decision before the entry of a formal order in the records of the Court. ...Yet even in such cases, special circumstances must be shown before the discretion to set aside or alter orders which have been announced is enlivened The purpose of the jurisdiction is 'not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases' or 'simply for the purpose of giving a party the opportunity to present a case to better advantage': see *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 301, 312, 328; *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45f*; Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 683*;* 51 LGRA 212 at 220; *Permanent Trustee Co. (Canberra) Ltd v Stocks & Holdings (Canberra) Pty Ltd* (1976) 28 FLR 195 at 201. Special or 'very special' circumstances must be shown, amounting to a serious oversight or departure from due process or mistake. Otherwise, the orders pronounced must stand. In Australian courts other than the High Court of Australia, they must then be corrected, if at all, by appeal or by judicial review where available."

51. His Honour went on to say that the jurisdiction to correct a perfected order is available to an intermediate appellate Court in "the most exceptional of circumstances".

52. The other members of the Court in *Haig,* supra, (Priestley and Handley JJ) held that if such a power existed, it ought not be exercised in that case.

53. In *Grace Pushpa Wati v Minister for Immigration & Multicultural Affairs* [1997] 1052 FCA (3 October 1997), the Full Court of the Federal Court (coram Von Doussa, Moore, and Sackville JJ) examined the issue of its power to reopen one of its own orders as follows:

"The [Federal Court Rules] provides for the setting aside of judgment or orders of the Court. Order 35, r 7 provides:

"7(1) The Court may vary or set aside a judgment or order before it has been entered.

7(2) The Court, where it is not exercising its appellate or related jurisdiction under Division 2 of Part III of the Act, may if it thinks fit vary or set aside a judgment or order after the order has been entered where:

(a) the order has been made in the absence of a party;

(b) the order was obtained by fraud;

(c) the order is interlocutory;

(d) the order is an injunction or for the appointment of a receiver;

(e) the order does not reflect the intention of the Court; or

(f) the party in whose favour the order was made consents."

It will be seen that O 35, r 7(2) applies only where the Court is not exercising its appellate jurisdiction: cf *R D Werner & Co Inc v Aluminium Products Pty Ltd* (1988) 18 FCR 389 (Fed Ct/FC), at 396, per Woodward and Foster JJ.

There is considerable authority on the scope of powers analogous to those conferred on the Court by FCR, O 35, r 7(1) (that is, in relation to setting aside a judgment or order before it has been entered). The High Court, in a series of cases, has accepted that it has jurisdiction to entertain an application to set aside orders made by it. In *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd (No 2)* (1982) 150 CLR 29, Mason and Wilson JJ expressed no doubt that the jurisdiction existed, but said (at 38) that the power is to be exercised "with great caution" and that the "circumstances that will justify a rehearing must be quite exceptional". Brennan J in the same case cited (at 45-46) comments made by Lord Brougham *in Rajunder Narain Rae v Bijai Govind Sing (1839)* 2 Moore Ind App 181, at 220; 18 ER 269, at 284, that the "indulgence" to allow a case to be reheard "is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, whereby some accident, without any blame, the party has not been heard, and an Order has been inadvertently made as if the party had been heard."

In *Wentworth v Rogers (No 9)* (1987) 8 NSWLR 388 (S Ct NSW/CA), the Registrar had entered orders dismissing an appeal. Kirby P, delivering the judgment of the Court, explained (at 394) that the reason for the cautious attitude of the High Court in *SRA v Codelfa Constructions*

`is obvious. It is stated by Mason and Wilson JJ in their judgment to be the public interest in maintaining the finality of litigation. Otherwise, a determined or wealthy litigant could postpone final judgment and exhaust the rights and funds of his opponent by continuously denying the finality of the judgment and seeking to reopen disputes which that judgment was designed to close, at least so far as the courts were concerned.

Since the Australia Act determined appeals as of right to Her Majesty in Council, and since appeals now lie to the High Court of Australia only by special leave of that Court, the function of this Court has changed. There is now no further appeal from this Court as of right. For most litigants, this Court is the final place of appeal or review. It may therefore be appropriate to apply to this Court the same principles as are stated in State Rail Authority of New South Wales v Codelfa Constructions Pty Ltd, though with the modification that ´irremediable injustice' is not inevitable because of the avenue which is always open to a disaffected litigant to seek special leave to appeal from the High Court.'

In the circumstances of that case it was considered (at 395) clearly inappropriate to disturb the finality of the "simple order" previously made by the Court.

In *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, the High Court again addressed the question. Dawson J said this (at 317):

`Whilst the Court has jurisdiction to entertain an application to vacate orders which it has made, at all events before those orders have been perfected by the entry of judgment (that not having occurred in this case), it is a jurisdiction to be exercised cautiously, bearing in mind the public interest in the finality of litigation. In Wentworth v Woollahra Municipal Council [(1982) 149 CLR 672, at 684], the Court said:

"[T]he circumstances in which this Court will reopen a judgment which it has pronounced are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution. Generally speaking, it will not be exercised unless the applicant can show that by accident without fault on his part he has not been heard.'" [Some citations omitted.]

See also at 301-303, per Mason CJ; at 328, per Gaudron J; *Australian Fisheries Management Authority v P W Adams Pty Ltd (No 2)* (1996) 66 FCR 349 (Fed Ct/FC), at 354-355.

The observations of Kirby P in *Wentworth v Rogers* imply that an intermediate court of appeal has power to set aside or vary its own orders, even where they have been entered, albeit in very limited circumstances. *In Haig v Minister Administering the National Parks and Wildlife Act* 1974 (1994) 85 LGERA 143 (NSW S Ct/CA), his Honour specifically addressed the issue. He said this (at 153-154):

`The question remains as to whether the jurisdiction to correct is available in the case of a perfected order. Whilst the Minister asserted that this Court had no jurisdiction, at least in a case such as the present, it is my view that such a jurisdiction exists. It is confined to the most exceptional circumstances. It is true that earlier decisions doubt the existence of this jurisdiction, statute apart: see, eg, Bailey v Marinoff (1971) 125 CLR 529 at 531. However, later decisions have acknowledged the inherent jurisdiction in a court such as this to set aside a previous order in limited circumstances. As for example where the order did not conclude litigation but merely regulated procedure and where its execution would result in futility: see, eg, Wentworth v Attorney-General for the State of New South Wales (1984) 154 CLR 518 at 526. However, it has been emphasised that such inherent power, where it exists, ´is not lightly to be exercised'. It is truly exceptional.

In the case of the High Court of Australia, the jurisdiction to correct even perfected orders has certainly been acknowledged. It has been explained in terms of that Court's position ´as a final court of appeal to prevent irremediable injustice being done by a court of last resort': see Codelfa (at 45). However, in *Wentworth v Rogers [No 9]* at 394, this court pointed out that, since the termination of appeals to the Privy Council and the provision for appeals to lie to the High Court only by special leave of that Court, there is now no further appeal from this Court as of right....

I remain of the view which I expressed in *Wentworth v Rogers [No 9]* with the concurrence of Hope and Samuels JJA.... Neither the inherent power of the Court nor the power conferred by parliament under s 23 of the Supreme Court Act 1970 (NSW) is unlimited. Neither permits the Court to undo basic principles of jurisprudence in the name of an undefined feeling that an injustice has occurred which the Court must correct.'

In *Donkin v AGC (Advances) Ltd* (Fed Ct/FC, 30 August 1995, unreported), an application was made for leave to institute proceedings to set aside a decision of a trial Judge and the judgment of a Full Court which had dismissed an appeal from the trial Judge's decision. The application was referred by the Chief Justice to a differently constituted Full Court. Davies J referred in some detail to the authorities and said (at 9) that he was prepared to assume that the Court could

`reopen a case if there were a truly exceptional circumstance apart from fraud which required a matter to be reopened in the interests of justice.'

Black CJ was prepared to make a similar assumption (at 2). However, his Honour pointed out that any such jurisdiction had to be exercised with great caution and having regard to the observations of the High Court in *Wentworth v Woollahra MC.*

Should the Matter be Reopened?

We are prepared to assume, without deciding, that the Court has jurisdiction to consider whether the orders made by Davies J should be set aside, notwithstanding that those orders have already been entered. We are also prepared to assume, without deciding, that the Court, as presently constituted, can exercise that jurisdiction, and can do so without the appellant filing documentation, other than the notice

of appeal. Nonetheless, in our view, this is not a case in which the Court should set aside to modify the orders made by Davies J."

See also *Qantas Airways v Cameron* [1996] 715 FCA 1.

There is no power to reopen

54. In my view, the state of the authorities is such that *Bailey v Marinoff,* supra, and *Gamser v Nominal Defendant,* supra, remain the correct expositions of the law in Australia. Absent a clear statutory power, or an established exception such as fraud or a denial of natural justice, an intermediate appellate court cannot reopen proceedings which have been completed and duly entered into its records. I am in complete accordance with the views of Gibbs J in *Gamser*, supra, that such a power ought be available to be utilised sparingly and in exceptional circumstances. Clearly, where a decision has been made in ignorance of the appropriate statute or a binding decision, and an injustice is caused as a result of the making of that decision, then there ought to be an opportunity to re-examine it without the necessity of making a Special Leave application to the High Court, especially in children's cases.

Exercising discretion to reopen if power exists

55. Even if I am wrong about the existence of the power, I would not exercise it in these circumstances. As will be seen from matters discussed later, I do not perceive there has been any injustice caused by reason of the trial Judge and the previous Full Court making reference to the wrong set of regulations or any references made by them to the parts of the judgments in *Gsponer*, supra, and *Murray v Director, Family Services, ACT* (1993) FLC 92-416; 16 Fam LR 982, which I will demonstrate were erroneous. Certainly, if there was any injustice caused by such errors, then that may well have been capable of being remedied by prompt action on behalf of the appellant once the error identified in *De L,* supra, became known. An application could have been made to the Full Court before its orders had been perfected. An application for Special Leave to the High Court could have been made within time.

56. The reasons that I hold there was no injustice in considering the wrong regulations are that I am firmly of the view that the former regulations were valid or were capable of being read down to ensure their validity. I am firmly of the view that the issue presented to the trial Judge and argued at the appellate level, and the orders made had nothing to do with any difference in the wording of either set of regulations.

57. The error made by the trial Judge and the Full Court in applying the wrong regulations (if indeed it was an error) would have been known to those advising the appellant as soon as the *De L* judgment entered the public arena. No attempt was made to approach the Full Court at that time. Just as the High Court has refused an extension of time to appeal in this case because of the unilateral actions of the mother in going into hiding once a ruling had been made against her, this Court should be loathe to grant her such an indulgence now.

58. I am conscious that this case involves the welfare of a child. I am conscious that the Hague Convention is aimed at ensuring a prompt return of a child who has been wrongfully removed and to that end requires "continuity of judicial management' to effectively implement the Convention (see *Re HB (Abduction: Children's Objections)* [1998] 1 FLR 422 at 427).

59. I am conscious that time has elapsed which makes the prompt return of this child impossible and that such a return may have far-reaching implications for the child, her mother and her brother. At the same time, I am conscious that any further delay will also have far reaching consequences for the child and her father.

60. Because of the unilateral and unlawful actions of her mother, this child has so far been denied an opportunity to have an appropriate court examine what the nature of her future relationship with her father should be. In my view, it is important to ensure the integrity of the judicial process and not be seen to reward those who seek to evade the rule of law unless the dictates of justice clearly demand otherwise. Notwithstanding the passage of time, I am not persuaded that J's interests demand that her mother be given another hearing on issues that were fully resolved against her.

Why should the Full Court's decision be reopened?

61. Dr Griffith QC submits that because the trial Judge and the Full Court inadvertently applied the wrong regulations, the mother was denied a valid appeal. Had those advising her been conscious of the correct regulations to be applied then the validity of those regulations could have been challenged or at very least, the orders made by the trial Judge could have been examined in light of the correct regulations.

62. As to the first of those submissions, it was open to the mother's legal advisers to have discovered the point prior to the first appeal. The fact that it was a point missed by many judges and lawyers, both in this case and in the *De L* case at trial and on appeal before the Full Court, is not to the point. As the High Court said in *University of Wollongong v Metwally* (No 2) [1985] 59 ALJR 481 at 483:

"It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

Were the former regulations valid?

63. The submission is that the former regulations were invalid as they required the Court to consider the making of "an order for the return of the child to the applicant". Further, the only proper interpretation of those words would mean that it applied to the husband in this case and to no other person. To the extent that in *Gsponer*, supra, and in *Murray* ,supra, the Full Court had held that the words "to the applicant" meant "to the applying Central Authority", then it is submitted that those decisions were wrong. It is further submitted that the trial Judge and the Full Court followed clearly incorrect decisions and that those clearly incorrect decisions led the Full Court to fail to properly consider the arguments raised by the appellant at her original appeal.

64. Whilst there is merit in the submission that *Gsponer*, supra, and Murray, supra, were incorrect in their interpretation of the former regulations, there is nothing in O'Ryan J's judgment nor that of the Full Court that suggests that the error in anyway affected the outcome of this case.

65. The passage in *Gsponer,* supra, said to be in error is as follows (at FLC 77,159; FamLR 767):

"The first is that the grave risk which reg 16(3)(b) refers to is the risk arising from "the child's return to the applicant". The proceeding before the trial judge proceeded upon the assumption that "the applicant" in this case was the father and indeed that is reproduced in order (1), where his Honour ordered the return of the child to "the custody of the husband in Switzerland". Regulation 2, to which we have referred, makes it clear that "applicant" means the person who has made the relevant application under reg 13. In this case that was the Federal Office of Justice, Switzerland, or its appropriate officer."

The passage from *Murray*, supra, is at FLC 80,259; FamLR 1001 and is as follows:

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

66. In each case the Full Court was explaining the effect of an order made for the return of a child in circumstances where it was alleged the child would suffer harm if returned to the other parent. The Full Court in each case interpreted the relevant regulation as not requiring that the child be so returned to the other parent. It did so by interpreting the words "to the applicant" as meaning "to the authority that made the application for the return of the child".

67. In both *Murray's* case, supra, and *Gsponer's* case, supra, the Full Court held that "the applicant" is the authority that had made the relevant application.

68. This approach makes some sense in that the preamble to the Convention makes it clear that orders for the return of children made pursuant to the Convention, are orders to return the child to the State of their habitual residence, not to the parent from whom they were wrongfully removed or retained.

69. There is a problem however with this line of reasoning. Article 8 of the Convention states that any "person, institution or body claiming that a child has been removed... may apply to the Central Authority...".

70. Article 9 requires that upon receipt of an application by a Central Authority that has reason to believe the child is in another contracting State, the Central Authority "shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the Applicant, as the case may be".

71. Regulation 2 of both the former and the revised Family Law (Child Abduction Convention) Regulations defines "applicant" as a person who has made an application referred to in regulation 11, 13 and 24 as the case requires.

72. Regulation 11 (which was not revised) sets out that a person claiming to have rights of custody to a child removed from Australia can apply to the Commonwealth Central Authority who vets the application then, if appropriate, transmits it to another Convention country's central authority to be acted upon.

73. Regulation 13 of each set of Regulations requires the Commonwealth Central Authority to act upon the receipt of applications transmitted from overseas.

74. Regulation 24 of each set grants rights to persons claiming rights of access to apply in writing to a Central Authority to assist in enforcing those rights.

75. A Central Authority is powerless to act unless and until someone claiming rights of custody makes an application to it. The Convention gives the person who was exercising custody rights prior to the wrongful removal or retention the choice of either applying to the Central Authority of the child's habitual residence, who then transmits the application to the Central Authority of the other country (in which case, the first Central Authority to which the person applied may be the loosely termed 'the applicant'), or alternatively, the person can apply directly to the Central Authority of the Contracting State to which the child was removed (in which case, it cannot be said that the Central Authority of the country from which the child was removed was the applicant).

76. The finding in *Gsponer's* case (supra) and *Murray's* case (supra) that the Central Authority is the "applicant", as the phrase is used throughout the former regulations, is in error. When the regulations speak of making orders for the child's "return to the applicant" they do not speak of the child being returned to the requesting Central Authority. What they do require is for the child to be returned to a jurisdiction where questions relating to the place where the child may reside will be more appropriately determined than the jurisdiction to where the child has been wrongfully removed or within which it has been wrongfully retained.

77. The Convention when finalised was accompanied by an explanatory report by E. Perez-Vera, entitled `Hague Conference on Private International Law', Actes et documents de la Quatorzieme session, vol. Ill, 1980, p. 426. The report discussed the obligation of a State to order the return of the child in the following passage:

"110 One problem common to both of these situations was determining the place to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence."

78. Whilst the Preamble to the Convention speaks of "ensuring the prompt return of children to the State of their habitual residence", the operative articles merely speak of ordering or arranging the return of the child without stating where or to whom the child is to be returned.

79. In my view, any challenge to the validity of the former regulations based on the inclusion in them of the words "to the applicant" after the words "return of the child" must fail. The regulations need to be read in light of the purpose for which they were promulgated, namely to give effect to Australia's obligations under the Hague Convention. Their constitutional validity has been confirmed by the High Court in *De L*, supra, and by this Court in *McCall and State Central Authority; Attorney-General (Cth) (Intervener)* (1995) FLC 92,551;18 Fam LR 307 (the High Court refusing special leave to appeal that decision).

80. Section 111B of the Family Law Act 1975 states:

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

81. As Kirby J stated in *De L*, supra, "...the regulations are not required simply to incorporate the Convention". Section 111B states that the regulations will be valid in so far as they are "necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention".

82. When the Regulations are read in context, the phrase "return the child to the applicant" means no more than to return the child to an appropriate jurisdiction as discussed by Professor Perez-Vera in his report referred to above (almost always their habitual residence).

Severance is a remedy if needed

83. If mine be an overgenerous reading of the former regulations, then in my view the offending words "to the applicant" can be severed without radically changing the nature of the regulations.

84. In Harrington *v Lowe* (1996) FLC 92,668; 20 Fam LR 145, the High Court discussed the doctrine of severance of invalid subordinate legislation. In a joint judgment Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said at FLC 82,915; FamLR 154:

"Reference was made in argument to s 46(1)(b) of the Interpretation Act. This states:

`(1)Where an Act confers upon any authority power to make, grant or issue any instrument (including rules, regulations or by-laws), then:

...

(b) any instrument so made, granted or issued shall be read and construed subject to the Act under which it was made, granted or issued, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power.'

This provision has its counterpart, as regards legislation in excess of constitutional power, in s 15A of the Interpretation Act. Section 15A was added by the Acts Interpretation Act 1930 (Cth) and that in turn had its precursor in (2) of the Navigation Act 1912 (Cth). The operation of (2) was identified as follows in the joint judgment of this court in *Newcastle and Hunter River Steamship Co Ltd v Attorney-General (Cth):*

`We think this provision is a legislative declaration of the intention of parliament that, if valid and invalid provisions are found in the Act of parliament, however interwoven together, no provision within the power of parliament shall fail by reason of such conjunction, but the enactment shall operate on so much of its subject matter as parliament might lawfully have dealt with.'

This involved the enactment of that which Higgins J had found (by analogy with the principles saving partly defective exercise of powers of appointment) was the position under the general law. 27 It has been dubbed `the relative invalidity doctrine' 28 whereby the provision in question may be `applied distributively so that it is read as covering those applications within power'. But, as decisions upon s 15A, *including Re Dingjan; Ex parte Wagner* illustrate, the doctrine is not without limitations in its application. It was not accepted as representing the common law by the majority of this court in decisions including *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co, 30 Owners of SS Kalibia v Wilson* and *Waterside Workers' Federation of Australia v JW Alexander Ltd*, and more recently was rejected by the House of Lords.

...

As to the common law in Australia, the position, as established by the earlier decisions of this court to which we have referred appears to be that a valid operation for the subrules might be preserved after textual surgery by operation of the `blue pencil' rule so that the valid portion could operate independently of the invalid portion, or, failing that, by treating the text as modified so as to achieve severance. But this latter step may be taken only where in so doing there is effected no change to the substantial purpose and effect of the impugned provision, and, in particular, there is not left substantially a different law as to the subject matter dealt with from what it would otherwise be."

85. In the dream sequence in "Fiddler on the Roof", Tevye sings "we haven't got the man we had when we began". In my view, absent the words complained of, we still would have the regulations we had when we began and I would, if necessary simply delete the offending words.

Is the decision of the Full Court in anyway affected by the error in *Murray* and *Gsponer*?

86. Whilst *Gsponer*, supra and *Murray*, supra, are referred to by the trial Judge and the Full Court, the error contained therein did not in any way appear to influence the outcome of the trial or the appeal. Neither the trial Judge nor the Full Court took the view that the order that was made was an order that would have the effect of keeping the child out of the care of the husband because it was mistakenly intended to be an order for

the return of the child to the United States Central Authority. Nor was the trial Judge or the Full Court under the impression that the regulations in some way required return of the child to the husband.

87. They were both clearly conscious that an order for the return of this child to Georgia would mean, at least temporarily, a return of the child into the father's physical possession because of the operation of the orders of the Superior Court in Georgia. They were equally both conscious of the proposition that the judicial authorities of Georgia would appropriately make orders to advance the welfare of the child. Whether those orders meant that the child stayed with the mother who had removed her from America or stayed with the father from whose society she had been withdrawn would be a matter for the Court in the appropriate forum.

88. If the Full Court had refused to order the return of the child because it thought the regulation mandated a return to the father rather than to a more suitable jurisdiction, the father could properly have complained that the requirement under the Convention and under the Regulations as properly interpreted was a requirement to return the child to the jurisdiction where the father was rather than to the father himself. I have difficulty in understanding how the mother can complain that the order that was made at first instance was made in reliance upon the wrong regulation and that somehow she was disadvantaged by that error.

89. The regulation relied upon did not mention the concept of returning the child to the father. The Full Court recognised that the practical effects of its order would be to temporarily place the child in the father's care but still upheld the primary Judge's exercise of discretion. There is nothing to suggest that the result might have been any different if the Court had applied the correct regulations. There is nothing to suggest that somehow the application of the incorrect interpretation of the regulations made in *Gsponer*, supra, and in *Murray*, supra, in any way affected the outcome.

90. Neither the trial Judge nor the Full Court sought to justify the order that was made because of the wording of the regulation. Rather, the result was arrived at because Georgia was clearly the proper forum, there had been a wrongful removal and it was not established that returning the child to Georgia, and even placing her in the husband's care, amounted to a defence under the regulations or the Convention.

Other matters

92. Several other grounds argued deserve particular attention.

Special duties of the Central Authority

93. It was submitted that it was incumbent upon the Central Authority to have the matter reopened once it was apparent that the wrong Regulations had been considered. 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. The duties of the Central Authority are more particularly described in Reg. 5 as follows

"5. (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."

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.

95. Here it must have become immediately apparent to the Central Authority that the Court might have been directed to the wrong set of regulations albeit that there may be, as Kirby J observed, no substantive difference between the two sets. With hindsight, the Central Authority should have at least ensured that the mother's legal advisers were aware of the existence of the decision in *De L,* supra, as soon as it came to hand. However in light of the order that was made by the trial Judge, and for the reasons given above, I cannot see how any other result would have been achieved if the correct regulations had been considered.

Are Australian citizens excluded from return orders under the Convention?

96. The next matter requiring consideration is the submission that the provisions of the Hague Convention and the Regulations which might have the effect of requiring an Australian citizen to leave Australia offend one of the most basic rights of all Australian citizens namely the right to live in Australia. It is submitted that absent the clearest intention of any law to abrogate such a right, that right remains. There is no suggestion that this proposition has ever found favour with the judicial authorities of any of the countries that are signatories to the Convention.

97. It is clearly competent for the Australian government to enter into agreements with other countries on a multinational or bilateral basis which require citizens to be taken, by force if necessary, from their State of citizenship to another place. Clearly the best known example of this power are the various extradition treaties. Whilst I accept that the right of citizens to a peaceful life within their own country is a right that ought to be interfered only if the law properly provides for such interference, in my view, there is sufficient evidence of such power given by way of the Hague Convention. In my view, there is nothing so abhorrent in the application of the Hague Convention that the right to remain behind the borders of one's country of citizenship takes precedence over one's obligation as a citizen of this country to be bound by the provisions of a multinational treaty entered into by the duly elected government and properly made part of the municipal law of the State.

98. In any event, in this particular case the child J is a citizen of both the United States and Australia. There is no reason advanced as to why her basic right to live in Australia is any more significant or worthy of protection than her basic right to not be wrongfully removed from the United States.

Is the order requiring the mother to accompany the child beyond power?

99. The last matter advanced concerned inherent faults within the order itself. The mother complains that the order extends beyond the power of the Court in that it obliges her to travel with the child and effectively expels her from Australia. The inclusion of the mother in the order came about as a result of the mother's evidence that she would accompany the child if the child was obliged to return to Georgia. The words in the order referring to the mother are facilitative and not mandatory. They allow, rather than compel, the mother to accompany the child. These are orders frequently made and are designed to advance the welfare of the child. Should the mother decide that the child should travel without her then the orders can be easily varied under the liberty to apply.

Relevance of the error in *Gsponer* and in *Murray*

100. The fact that those decisions wrongly decided the narrow point as to the meaning of the term "the applicant" in the former regulations does not affect either the validity of the regulations nor the outcome of these proceedings. Whilst *Gsponer,* supra, and *Murray,* supra, were both referred to by the trial Judge and the Full Court, they were in no way decisive of the issue that had to be determined. Neither the trial Judge nor the Full Court took the view that the order that was being made or required to be made was an order that would have the effect of keeping the child out of the care of the husband. They were both conscious that an order for the return of this child to Georgia would mean, at least temporarily, a return of the child into the father's physical possession because of the operation of the orders of the courts of Georgia. They were equally both conscious of the proposition that the judicial authorities of Georgia would appropriately make orders to advance the welfare of the child. Whether those orders meant that the child stayed with the mother who had removed her from America or stayed with the father from whose society she had been withdrawn would be a matter for court of appropriate forum.

101. In my view the father might have had cause for complaint if the Full Court had said "The meaning of the Regulations is that the child has to be returned to the father. We think that returning the child to the father would cause grave risk to the welfare of the child and therefore we refuse to exercise our discretion." It did not

say that. The requirement under the Convention and under the Regulations as properly interpreted was a requirement to return the child to the jurisdiction where the father was rather than to the father himself. It is then a matter for the local jurisdiction to determine into whose care the child is placed.

102. It is difficult to see how the mother can complain of the order that was made at first instance and of the consideration given by the Full Court to the issues before it and the issues of grave risk because the court recognised that the practical effects of its order would be to temporarily place the child in the father's care. Neither the trial Judge nor the Court of Appeal felt compelled to achieve that result because of the wording of the Regulation. But rather, they felt compelled to achieve that result because Georgia was clearly the proper forum and there had been a wrongful removal and it was not established that returning the child to Georgia, and even placing her in the husband's care, amounted to a defence under the Regulations or the Convention.

103. The grounds sought to be argued as to the validity of the Regulations or their constitutional limitations were grounds that were not argued before the Full Court and in my view, in accordance with *Metwally,* supra, can not now be argued as a basis for challenging afresh the previous decision of the Full Court. If there is a basis for reopening the decision, it can only be that the Full Court applied the wrong law in a manner which, if it applied the right law may well have led it to some other conclusion. I am not persuaded that this is so.

104. Further, it ought to have been apparent to the wife's legal advisers on the day that the judgment was handed down, or very shortly thereafter, on a reading of *DeL,* supra, that both courts had been mistaken as to the relevant Regulations. It was open to the wife to move within time a High Court to challenge the Full Court's decision or to move the Full Court, for that matter, to set aside its own order before it had been validly entered. Instead she chose to go into hiding. I adopt the approach of McHugh J that it hardly behoves her to now come to the Court to seek an indulgence.

105. Assuming however, that the Court has the power to reopen the matter, it has to then determine the question of whether the reopening of the matter would achieve anything. This means that the Court would need to look to the appropriate regulations and to determine whether an application of the appropriate regulations would have made any difference. It is suggested that the appropriate regulations were invalid because they provided for the Court to make orders for the return of the child to the applicant whilst the Convention made no such provision. The limitations of s111B are such that the regulations could only be made in aid of the Convention. This matter is dealt with by Kirby J in *DeL,* supra, on the basis that there is capacity to mould the regulations to local practice. In any event, it is not clear that a return to the applicant is inconsistent with the regulations if the phrase "to the applicant" is meant as something other than to the physical possession of the applicant but is more of a geographic description. Indeed, it makes more sense in light of the Perez-Vera Report than do the current regulations which require the return of the child to the country from whence it was abducted. It is incumbent, in my view, upon the Court to try to make the regulations to work and this is consistent with the Act's Interpretation Act. To the extent that it is necessary in my view, it is convenient in this case to simply remove the words "to the applicant" by blue penciling them, and thus bring the regulations back within the power, if they exceed the power, and I do not concede that they do exceed the power. I do not view that making such change has any substantiative effect upon the regulations to convert them into something other than they have always been, namely regulations designed to give effect to Australia's obligation under the Convention. It is necessary to set out in detail the definitions relating to the applicant to demonstrate why *Gsponer,* supra, and *Murray*, supra, are incorrect.

106. The next leg in the journey is to examine, in passing, two other grounds, namely that it was incumbent upon the Agency to have the matter reopened once it was apparent that the wrong regulations had been applied. I think there is weight in the submission that the Agency needs to act to some degree as an honest broker in proceedings in a manner not dissimilar to that of the Crown Prosecutor. Its obligation is not to secure the return of children but to implement the requirements of the Convention. If in implementing the requirements of the Convention it obtains the return of a child who ought to be obtained 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. Here it must become immediately apparent to the Central Authority that the court had at least been directed to the wrong set of regulations albeit that there may be, as Justice Kirby observed, no substantive difference between the two sets. In light of the order that was made, it is difficult to see how another result would have been achieved under either set of regulations.

107. Finally there is the submission that it is contrary to the basis rights of Australian citizens to be deported. This is a novel proposition that has never before seen the light of day. It is clearly competent for the Australian government to enter into agreements with other countries on a multinational or bilateral basis which require citizens to be taken, by force if necessary, from their state of citizenship to another place. Clearly the best known example of this is extradition. It is clear that a right of a citizen to a peaceful life within their own country is a right that ought to be interfered only if the judicial and executive are expressly empowered to do so. In my view, there is sufficient evidence of such power given by way of the Hague Convention. In my view,

there is nothing to me that is abhorrent in the application of the Hague Convention to the principles espoused in the right of a citizen to remain peacefully and quietly within its own borders.

Summary

1. The Full Court of the Family Court lacks inherent power to vary or set aside a perfected order regularly obtained.

2. Even if such a power exists, in the circumstances of this case the power ought not be exercised.

3. Insofar as *Gspon*er, supra, and *Murray,* supra, decided that the expression "the applicant" referred to in the former Child Abduction Regulation 16(3) meant the requesting Central Authority, then those decisions were made in error.

4. The requirement that an order be made for the return of a child to the applicant does not require the order to actually return the child to the applicant's care, but rather requires the return of the child to the forum more appropriately associated with the applicant.

5. If such a requirement was ultra vires s.111B of the Family Law Act then the words "to the applicant' wherever appearing in the previous regulations may be severed.

6. If there is a fundamental right in an Australian citizen to remain within Australia unless there is a clear legislative intention to provide for their removal, then the Family Law (Child Abduction Convention Regulations) evince such a clear intention.

7. The order that the child be accompanied by her mother is an order which enables rather than requires the mother to accompany the child when she is returned to the United States.

The application should be dismissed.

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA Appeal No EA 39 of 1996

AT MELBOURNE File No SY 3981 of 1995

BETWEEN:

DEBORAH JOY LAING

Appellant Wife

- and -

THE CENTRAL AUTHORITY

Respondent

JUDGMENT OF THE HONOURABLE JUSTICE MOORE

CORAM: NICHOLSON CJ, FINN, KAY, MOORE,

and MAY JJ

DATE OF HEARING: 27 and 28 August, 14 September 1998

DATE OF JUDGMENT: 9 February 1999

APPEARANCES:

Dr Griffith, one of Her Majesty's Counsel, and Ms Eastman of Counsel, instructed by Bruce A Swane & Co., 89 Cambrai Ave, Engadine NSW 2233, appeared on behalf of the Appellant Wife.

Mr Basten, one of Her Majesty's Counsel, and Mr Anderson of Counsel, instructed by Crown Solicitors Office, GPO Box 25, Sydney NSW 2001, appeared on behalf of the Respondent Central Authority.

I agree with the reasons given by the Chief Justice and with the orders he proposes.

I certify that this page is a true copy of the judgment handed down by the Honourable Justice Moore.

Associate:

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA Appeal No EA 39 of 1996

AT MELBOURNE File No SY3981 OF 1995

BETWEEN:

DEBORAH JOY LAING

Appellant Wife

- and -

THE CENTRAL AUTHORITY

Respondent

REASONS FOR JUDGMENT OF JUSTICE MAY

CORAM: NICHOLSON CJ, FINN, KAY, MOORE AND MAY JJ

DATE OF HEARING: 27 AND 28 August, 14 September 1998

DATE OF JUDGMENT: 9 February 1999

APPEARANCES:

Dr Griffith, one of Her Majesty's Counsel, and Ms Eastman of Counsel, instructed by Bruce a Swane & Co., 89 Cambrai Ave, Engadine NSW 2233, appeared on behalf of the Appellant Wife.

Mr Basten, one of her Majesty's Counsel, and Mr Anderson of Counsel, instructed by Crown solicitors Office, GPO Box 25, Sydney NSW 2001, appeared on behalf of the Respondent Central Authority.

1. I have had the benefit of reading the Reasons for Judgment prepared by the Chief Justice, Finn J and Kay J. I agree with the reasons of Finn J and her ultimate conclusion. I also agree with the conclusions of Kay J to which I specifically refer.

2. In addition, I agree with the Chief Justice that there must be a category of cases as described in the authorities when this Court should exercise its discretion to set aside orders made by the Full court and by a trial judge. However, in my view, this case does not fall within that category.

3. It is clear from the authorities referred to in the judgment of the Chief Justice and Kay J that there must be "a misapprehension as to the facts or the law" and that such "acts and/or oversight unrepaired will occasion an injustice." The principles were summarised by the High Court in *De L v Director-General, New South Wales Department of Community Services & Anor (No 2)* 1997 190 CLR 207 at p 215:

`The power of this Court to re-open its judgments or orders is not in doubt. The Court may do so if it is convinced that, in its earlier consideration of the point, it has proceeded "on a misapprehension as to the facts or the law", where "there is some matter calling for review" or where "the interests of justice so require". It has been said repeatedly that a heavy burden is cast upon the applicant for reopening to show that such an exceptional course is required "without fault on his part", ie without the attribution of neglect or default to the party seeking reopening. By such expressions of the power to reopen final orders, courts seek to recognise competing objectives of the law. On the one hand, there is the principle of finality of litigation which reinforces the respect that should be shown to orders, final on their face, addressed to the world at large and upon which

conduct may be ordered reliant upon their binding authority. On the other hand, courts recognise that accidents and oversights can sometimes occur which, unrepaired, will occasion an injustice. In the case of a final court of appeal, such as this Court, that injustice may be irremediable, unless the Court itself, acting promptly, is persuaded to reopen its orders so as to afford relief in the exceptional circumstances of the case.'

4. It is clear that the judgment of the trial judge referred, without discrimination, to both the former and revised regulations. Though various references are made to "the applicant" and to "the country" each is in the context of considering the "grave risk" defence which is contained in both sets of regulations. It has not been shown that more precise attention to the different terminology would have produced any different result. As Kay J at paragraph 56 of his judgment puts it:

"...the issue presented to the trial Judge and argued at the appellate level, and the orders made had nothing to do with any difference in the wording of either set of regulations."

5. Although I agree that the Central Authority had a `special duty' in this case, there is nothing in the judgments of either the Full Court or the trial judge to suggest that had the Full Court been immediately notified upon application by the Central Authority the outcome would have been different.

6. The present argument in relation to validity of the former regulations was not argued before the trial judge or the Full Court. The power to reopen does not allow a party the opportunity to raise contentious matters which could have previously been argued. The fact that the regulations have already been held to be valid, is enough to justify a refusal to reopen on that ground.

Summary

1. The Full Court of the Family Court has power in exceptional circumstances to set aside a perfected order.

2. In the circumstances of this case the power ought not to be exercised.

3. I adopt those parts of the judgment of Kay J in relation to Gsponer's Case and Murray's Case, particularly at paras 63-64; 76, 86-90: 100 and 101 and his response to the argument in relation to Australian citizens commencing at paragraph 96.

4. I would dismiss the application.
