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[14/03/1996; Full Court of the Family Court of Australia (Sydney); Appellate Court]
S. Hanbury-Brown and R. Hanbury-Brown v. Director General of Community Services
(Central Authority) (1996) FLC 92-671

FAMILY LAW ACT 1975

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

BEFORE: Ellis, Lindenmayer and Finn JJ

HEARD: 7-8 August 1995

JUDGMENT: 14 March 1996

Appeal No. EA 47 of 1995 / No. SY 4876 of 1995

IN THE MARRIAGE OF:

STEPHANIE SELINA HANBURY-BROWN

(Appelland/Wife)

-and-

ROBERT HANBURY-BROWN

(Respondent/Husband)

-and-

DIRECTOR GENERAL OF COMMUNITY SERVICES

(Central Authority)

REASONS FOR JUDGMENT

APPEARANCES

Mr Rayment of Queens Counsel with Mr Habib of Counsel (instructed by Gadens Ridgeway, Solicitors) for the Appellant/Wife.

Mr Bennett of Queens Counsel with Mr Richardson of Counsel (instructed by Barkus Pearson, Solicitors) for the Respondent/Husband.

Mr Mason of Queens Counsel (Solicitor-General for the State of New South Wales) with Mr O'Brien of Counsel (instructed by I.V. Knight, Crown Solicitor) for the Central Authority.

JUDGMENT:

INTRODUCTION

In this matter there are 2 appeals before the Court arising out of proceedings between R.H.B. ("the husband") and S.H.B. ("the wife"), to which proceedings the Director General of Community Services for the State of New South Wales ("the Central Authority"), as State Central Authority for New South Wales under the Family Law (Child Abduction Convention) Regulations ("the Regulations") was also a party.

The principal appeal is that of the wife against the order of Moss, J made on 9 June, 1995, whereby his Honour dismissed the application of the Central Authority, filed on 17 May, 1995, for an order for the return to the United

States of America, pursuant to the Regulations, of the 2 children of the marriage of the husband and wife. The wife had sought and been granted, by his Honour, leave to participate in those proceedings apparently on the basis that, rather curiously, she had been named by the Central Authority as a respondent to its application. We regard that as both curious and inappropriate, because the Central Authority, in bringing its application, was acting essentially on behalf of the wife, although formally on behalf of the United States Central Authority to whom the wife had made a request for assistance to secure the return of the children to the United States. It was, we believe, largely as a result of the direct involvement in the proceedings before his Honour of the wife, as a party, that everyone involved in those proceedings lost sight of the intended summary nature of the proceedings and both the husband and the wife (the latter of whom attended the hearing from the United States) were subjected to quite substantial cross-examination, as indeed were the deponents to two other affidavits read in the proceedings. As a consequence, the hearing extended over 2 full sitting days of the Court. This Court has said previously (e.g. in Gazi & Gazi (1993) FLC 92-341 at 79, 623) that in most cases arising under the Convention, cross-examination of deponents to affidavits is not appropriate. The Courts of the United Kingdom have adopted a similar approach: see In Re F (minor: abduction: rights of custody abroad) (1995) 3 All ER 641 at 647-8, per Butler-Sloss, LJ, citing In Re F (1992) 1 FLR 548 at 553-4. We do not regard this case as having warranted such a substantial departure from that general rule as in fact occurred.

The request of the wife to the United States Central Authority, and the subsequent application of the Central Authority to this Court, were based upon an alleged "wrongful removal" of the children from that country by the husband on 27 April, 1995. This appeal raises some fundamental issues about the interpretation of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") and of the Regulations, which have been made, pursuant to s.111B of the Family Law Act, to give effect to Australia's obligations under that Convention. It also raises a factual issue about the place of "habitual residence" of the children of this marriage, within the meaning of that expression as it is used in the Convention and the Regulations, immediately prior to their removal from the United States to Australia by the husband on 27 April, 1995.

The second and subsidiary appeal (although first in time) is that of the husband from an order made by Moss, J on 2 June, 1995, whereby his Honour dismissed an application of the husband for a permanent stay of the proceedings instituted by the application of the Central Authority for the return of the children to the USA. That application was based upon constitutional grounds, the contention being that the Regulations (specifically Regulation 13) invalidly confer judicial power upon the Central Authority to determine whether a removal to or retention in Australia of a child is "wrongful" within the meaning of the Regulations, and that the Regulations leave no power in the Court to review the Central Authority's determination of that question.

Because the contention of the husband as to the interpretation and effect of the Regulations involved "a matter arising under the Constitution or involving its interpretation", within the meaning of s.78B of the Judiciary Act 1903, his solicitors duly gave notice of that matter to the Attorneys-General for the Commonwealth and for the several States and Territories of Australia, as required by that section. No Attorney-General sought to intervene in the proceedings, either before Moss, J or before us on the hearing of the appeals, nor to seek the removal of the proceedings to the High Court under that Act. However, submissions supportive of the validity of the relevant regulations were put to Moss, J by Mr Anderson of counsel who appeared before him on 2 June, 1995 for the Central Authority on the instructions of the Crown Solicitor for New South Wales. At the hearing of the appeals, the Solicitor- General for the State of New South Wales, Mr Mason, QC (with Mr O'Brien of Counsel) appeared for the Central Authority and made submissions supportive of the validity of the Regulations, and otherwise in relation to their interpretation in relevant respects. We shall have occasion to refer to those submissions, as we shall to those of counsel for each of the parties, later in these reasons.

HISTORICAL BACKGROUND

The information in the following paragraphs of this section, as to the historical background to the proceedings culminating in these appeals, is taken from his Honour's judgment of 9 June, 1995, and therefore assumes the correctness of his Honour's findings of primary fact, none of which was challenged in these appeals.

The husband was born at Cheshire, in the United Kingdom on 1 December, 1956, whilst the wife was born at Bathurst, in New South Wales, on 26 December, 1956. Accordingly, they are both now aged 39 years. The husband migrated to Australia in 1962, and became an Australian citizen on 2 May, 1974, whilst retaining also his British citizenship.

The parties were married at Burwood in New South Wales on 30 December, 1978. Thereafter, they cohabited at various places in Australia, the United Kingdom and the United States until July, 1994, when they separated in the latter country.

There are 2 children of the marriage who are the subject of these proceedings. The elder child, A., was born in the United Kingdom on 11 August, 1988. He is therefore now aged 7. The younger child, H., was born in the United Kingdom on 7 December, 1990. She is therefore now aged just 5. Both children have dual British and Australian citizenship.

The parties (and in due course their 2 children) resided in London, continuously from 1982 to 1991. During that period the wife was employed as a futures broker in that city, initially by **, and later by *. In relation to the latter organisation, she was the London manager of its futures operations. During that period the husband held various positions of part-time and full-time employment until shortly after the birth of the elder child, A., in 1988. He ceased all**

paid employment at that time, and was thereafter occupied on a full-time basis with the care of, first A., and later both children. By contrast, except for periods of a few months maternity leave following the birth of each of the children, the wife was in full-time employment throughout the marriage.

In the course of her employment referred to in the immediately preceding paragraph, the wife worked very long hours such that she was absent from the home 5 days per week from approximately 5am to 6 or 7pm, and on some occasions until 11pm on 2 nights of each week. In addition, her work involved extensive international travel of between 8 and 10 weeks each year. Essentially, the roles which the parties adopted during their marriage after the birth of their children were the reverse of the traditional parental roles. The wife adopted the role of breadwinner, whilst the husband adopted the role of principal homemaker and parent.

In August, 1991, the parties with their children moved from London to the United States for the purpose of enabling the wife to take up a position with her then employer, *, in New York. The family thereupon took up residence in Connecticut, a state adjoining New York state. Either then, or later, the wife became the head of the International Private Banking Division of *** in New York. As such, she received and receives a very substantial salary and other benefits in the region of US$1,000,000 per annum.**

In late 1992 or early 1993 the husband and the children travelled to Australia, with the wife's consent, for a holiday, and also to look for a suitable residential property to purchase. As a consequence of that visit, a property was in fact purchased at *, Balgowlah (a suburb of Sydney) in 1993. It was purchased in the name of the wife as the parties considered that by doing so they would obtain the maximum taxation benefit arising from the negative gearing of the purchase.**

In early June, 1994, a conversation took place between the parties during which the wife expressed her wish to end the marriage, in response to which the husband said that, in that event, it would be best for him to return to Australia to live with the children as he had been their "primary carer since birth". The wife asked to be allowed to think about that.

There was then a further conversation between the parties, later in the same month, during which the husband again said that he wished to take the children to live with him in Australia, and the wife said that she would prefer both the husband and the children to stay in the United States.

On 28 July, 1994, the husband and the children returned to Australia where they took up residence in the Balgowlah premises. Although there was no issue that this was done with the consent of the wife, there was an issue before his Honour about the terms of that consent.

It was common ground that there were 2 further relevant conversations between the parties during June, 1994, prior to the departure of the husband and the children from the United States in July of that year. In the first of those conversations the husband informed the wife that he had sought legal advice and been advised that he would "almost definitely get custody" of the children if the parties "ended up in a custody battle". In the second (as his Honour found) the wife agreed that it would be best for the children to live with the husband in Australia, and suggested that he stay there with them when the parties returned to Australia in July for the wife's 20 year school reunion. The wife's version of this last conversation was to the effect that she agreed to the husband taking the children to Australia and remaining there with them only until the end of that year, at which time "some longer term arrangements" would have to be made. As we have indicated, however, his Honour rejected the wife's evidence in relation to that conversation and preferred that of the husband. Indeed, he made a general finding of credibility adverse to the wife and favourable to the husband in relation to all areas of conflict. Accordingly, he found (at Appeal Book p.14, in paragraph 18 of his judgment):- "... that the arrangement between the parties which led to the respondent coming to Australia in July, 1994, was to the effect that the respondent and the children would take up residence in the Balgowlah premises and that residence would continue unless and until the parties came to an agreement that the children would take up permanent residence elsewhere."

As at July, 1994, the wife was very undecided about her future plans, both as regards employment and place of residence. In another conversation with the husband during that month, and before his departure for Australia, she said that she might finish with * at the end of 1994, and then do contract work in the United States, or even move to Australia in January, 1995.**

After the arrival of the husband and the children in Australia, the wife also came here in August, 1994, to attend her school reunion. She stayed for about a week, during which she resided at the Balgowlah premises with the husband and children. Whilst she was here, the parties enrolled the child A. at the local primary school, and H. at a nearby pre-school. They also agreed that the wife would come to Australia, again in October and also in December, 1994 to visit the children.

In accordance with the parties' agreement the wife did again travel to Australia in October, 1994, to see the children. On this occasion she stayed for about 2 weeks.

The wife came to Australia again, in accordance with the agreement between the parties, on 15 December, 1994, and stayed until 22 December, 1994. On the latter date, she left Australia with the children for the United States for an agreed period of 5 weeks. At the end of that agreed period the children were then returned to Australia on the 25

January, 1995, in the care of a sister of the wife who had gone to the United States for that particular purpose. The reason for the agreement between the parties that the children be returned to Australia by that date was so that they could be prepared for the commencement of school and pre-school, respectively, at the end of January, 1995.

Prior to the events referred to in the 2 immediately preceding paragraphs, there had been a telephone conversation between the parties during November, 1994, in which the husband had told the wife that he would bring the children to the United States during June, July and August of 1995, so that the wife could have further access to them there. Following the children's return to Australia on 25 January, 1995, there were some further discussions between the parties by telephone during February, 1995, in the course of which the wife made it clear that she was upset at being separated from the children, whom she was missing, and that she felt unable to work another year in New York without seeing the children earlier than June of that year. That prompted the husband to respond to the effect that he might be prepared to come to the United States earlier than June if that would help her. During a later conversation, also in February, 1995, the husband indicated that he was prepared to go to the United States earlier than June, and that he was prepared to stay there from that time until the end of 1995 when he and the children would return to Australia. The wife agreed to that proposal and thanked the husband for being "so sympathetic".

In other telephone discussions between the parties during February and March, 1995, they discussed the question whether the wife should accept a promotion by her employer to the position as head of international private banking which would involve, according to the terms of the employer's offer, a commitment to a further period of 3 to 5 years residence by her in the United States. In the later of those conversations, which occurred during March, 1995, the wife told the husband that she had decided to go ahead and take that position. When the husband expressed some surprise at that, and voiced his understanding that that would require her to give a 3 to 5 year commitment, the wife said: "Yes, but I have decided to go ahead for the job anyway".

On 30 March, 1995, the husband and children left Australia for the United States, arriving in New York on 31 March, 1995. At that time it was his intention to return with the children to Australia on or about 21 December, 1995, and he understood the wife to be in agreement with that course. At the time he arrived in the United States the wife knew that to be his understanding of their agreement.

The initial arrangement between the parties, prior to the husband's return to the United States at the end of March, was that upon his arrival there the wife would move out of the former matrimonial home at **Lane, Old Greenwich, Connecticut and take temporary residence elsewhere, to enable the husband and the children to move back into that home during their stay in the United States. However, that arrangement was changed soon after the arrival of the husband and the children in the United States. What was then agreed was that, once the husband had settled the children in the United States, he would return alone to Australia for personal reasons until about June, 1995, during which time the children would reside with the wife in the former matrimonial home at ** Lane. It was further agreed that the wife would engage a nanny to look after the children during the period that the husband was absent in Australia. Upon his return to the United States in about June of 1995, the previous arrangement of his living in the former matrimonial home with the children, and the wife residing in temporary rented accommodation elsewhere, would be reactivated.

Notwithstanding her knowledge that the husband had agreed to return to the United States with the children in March, 1995 only on the basis of her agreement that they could go back to live in Australia at the end of that year, the wife's intention, unknown to the husband, prior to their arrival in the United States, was to resile from that agreement once he and the children had arrived there. She informed the husband of her withdrawal from that agreement soon after his arrival in the United States with the children at the end of March. The husband, for his part, did not accept her repudiation of that agreement, and informed her that he would be taking the children back to Australia in December, as they had agreed.

Upon learning of the wife's intention to resile from their earlier agreement, the husband determined to take the children back to Australia without the wife's knowledge or consent. On 27 April, 1995, he collected them from the wife on the pretext of taking them out to dinner prior to his intended return (alone) to Australia for the period and the purpose previously referred to. However, rather than return the children to the wife the husband departed New York with them for Australia, via Europe, having arranged the children's travel under the surname "B." rather than "H.B.". He took pains to ensure that the wife had no prior notice of his intention so to remove the children from the United States and return them to Australia.

The husband and the children arrived back in Australia on 29 April, 1995. Almost immediately thereafter, namely on 1 May, 1995, the husband commenced proceedings for custody of the children in this Court. At or about the same time, the wife was commencing similar proceedings in the Superior Court for the State of Connecticut, Judicial District of Stamford/Norwalk, and on 5 May, 1995 obtained an order of that court granting her temporary custody of the children and that the husband immediately return them to her temporary care and custody.

On 17 May, 1995, the Central Authority commenced the proceedings in this Court pursuant to the provisions of the Convention pursuant to a request from the Central Authority of the United States. By his answer filed on 23 May, 1995, the husband sought the dismissal of the Central Authority's application and that the wife and the Central Authority pay his costs. Although the Appeal Book does not contain such a document, it appears that some time between the 23 May and the 2 June, 1995, the husband also filed an application for a permanent stay of the Central Authority's application, and it was that application which came before Moss, J on 2 June, 1995. His Honour dismissed that

application, and his order of dismissal is the subject of the husband's appeal, notice of which was filed on the same day as his Honour's order was made, namely 2 June, 1995.

The application of the Central Authority, in which the wife had been given leave by his Honour to participate (apparently on 31 May, 1995) was then heard by his Honour on 7 June, 1995. His Honour delivered his judgment dismissing that application on 9 June, 1995. It is that order of dismissal which is the subject of the wife's appeal, notice of which was filed on 16 June, 1995.

THE JUDGMENTS OF THE TRIAL JUDGE

His Honour's ex tempore judgment of 2 June, 1995, dismissing the husband's application for a stay of the proceedings instituted by the Central Authority, is reproduced in Volume 1 of the Appeal Book in relation to the husband's appeal at pp.6 and 7 thereof, and also in Volume 1 of the Appeal Book in relation to the wife's appeal, at the same page numbers. It is, understandably, a brief judgment, the effect of which is that his Honour rejected the submission made for the husband, based upon an hypothesis posed by Lindenmayer, J in Regino& Regino (1995) FLC 92-587 at 81,818-19, that the Regulations (and particularly Regulation 13 as it then was) invalidly purport to confer upon the Central Authority (rather than upon the Court) the power and responsibility to decide whether a removal to or retention in Australia of a child is "wrongful" within the meaning of the Convention and the Regulations.

The precise bases of his Honour's rejection of that submission are a little unclear from his judgment. Firstly, he referred to and quoted part of s.111B of the Family Law Act ("the Act"), which provides the necessary legislative fiat to the Governor General to make regulations which "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". His Honour then, after expressing the opinion that "that section must be seen as setting the ambit within which the Regulations are to be made and construed" (a view with which we think nobody would really disagree) added this:-

"... It seems to me that having regard to so much of the section as I have just read, there is nothing in it which would allow let alone require the construction of Regulation 13 in the manner contended for by the Respondent (i.e. the husband)."

We are not quite sure what his Honour meant by the latter statement, as we see nothing in s.111B itself which militates either in favour of or against the construction of the Regulations contended for by the husband. It seems to us that the obligations of Australia under the Convention could as well be met by empowering an administrative body (such as a Central Authority) to make necessary determinations, as by empowering a Court to do so. In this respect, the use in the Convention of the expression "judicial or administrative authorities" and "judicial or administrative proceedings" (underlining added) throughout Chapters II and III (e.g. in Articles 7, 11, 12, 13, 14, 15, 16, 17 and 18) is significant. It is the local constitutional law of Australia, rather than the Convention, which may limit the capacity of the Executive Government to empower administrative bodies to make judicial determinations, but we are unable to see any such limitation as arising as a matter of construction from the words of s.111B itself.

His Honour then proceeded to note that in the portion of the judgment of Lindenmayer, J in Regino (supra) which the husband's counsel had effectively adopted in support of his argument, there was "no reference at all to s.111B nor to 15 (1)C (sic.) nor to 15(2) of the Regulations". (We take the reference to "15(1)C" as being an intended reference to Regulation 15(1)(c).) His Honour then concluded his reasons for rejecting the husband's submissions on this point with the following statement:- "In my opinion the content of those regulations, as well as regulation 17, has a considerable bearing together with section 111B on how regulation 13 is to be viewed. Therefore, for these brief reasons I hold that the construction contended for is simply not open. In my opinion, the regulation itself is incapable of being so read and I think the expression 'is satisfied', etcetera in the regulation, clearly means no more, for example, than the expression, 'it has reason to believe', which one finds in article 9."

Again, with respect, it is not clear what support his Honour drew for his construction of Regulation 13 from the provisions of s.111B, and from Regulations 15(1)(c), 15(2) and 17, to which he there referred. However, for present purposes it will suffice to note that his Honour arrived at his determination of this issue simply on the basis that the wording of the Regulations, construed in the light of the enabling legislation, did not support the construction contended for. Accordingly, for his Honour, no question of the constitutional validity of the Regulations arose. We shall return to these issues of construction and constitutional validity of the Regulations, later in these reasons.

His Honour's judgment of 9 June, 1995, on the substantive issues raised by the Central Authority's application, appears at pp.10 to 21 of the Appeal Book in relation to the wife's appeal. In numbered paragraphs 1 to 24 thereof (at Appeal Book pp.10-16) his Honour recited the relevant history of the proceedings and made necessary findings of fact in relation thereto. We have already summarised that history and those findings in paragraphs 2.2 to 2.24 of this judgment.

His Honour then turned his attention to the relevant principles of law, and their application to the facts as found by him, in paragraphs 25 to 40 of his judgment (at Appeal Book pp.16-21).

In paragraph 25 he recorded the terms of the substantive application made by the Central Authority, namely for an order:- "That (the wife) be permitted to remove the children from Australia for the purpose of returning them to the United States of America pursuant to the provisions of (the Convention)."

That application, itself, was in an unusual form, and not one which would seem to be contemplated by the provisions of Regulation 15 (as it then was) under which the application was clearly made. The more usual form of final order sought in such proceedings, and that contemplated by then Regulation 15(1)(d), was an order "for the return of the child to the applicant", and in that context the "applicant" has been held by the Full Court to be the relevant overseas Central Authority at whose behest the application has been made by the Local Central Authority: Gsponer v. Director-General, Department of Community Services, Victoria (1989) FLC 92-001 at 77,159-160.

His Honour then proceeded, in paragraph 26 of his judgment, to refer to what he described as "fundamental to the basis on which that order is sought, and without which such an order cannot be made", namely "proof of the further assertion contained in the said application that 'the habitual residence of the children immediately prior to the removal of the children was Connecticut, USA a Convention country'."

That is a reference by his Honour to the assertion which appeared in paragraph 2 on p.5 of the application, (at Appeal Book p.25) under the heading "Details concerning the children". That assertion was immediately followed by a further fundamental assertion numbered "3", namely:- "The children have been wrongfully removed from the country referred to in paragraph 2." 3.11 In paragraph 27 of his judgment, his Honour then identified the issue for his determination in the proceedings, namely whether the children's place of habitual residence on 27 April, 1995, was Connecticut, USA, or Balgowlah, Australia, and observed that if the latter be the case "then their removal by the respondent (from the USA on that date) cannot have been 'wrongful' within the meaning of Article 3 of the Convention."

In paragraph 28 of his judgment (at Appeal Book pp.16-17) his Honour referred to and quoted at some length from the judgment of Lord Brandon of Oakbrook, with which the other members of the House of Lords agreed, in C. v. S. (1990) 2 All ER 961. In the passage quoted by his Honour his Lordship made 4 "preliminary points" about the expression " habitually resident" as used in Article 3 of the Convention, which may be summarised thus:- (1) The expression, being undefined, "is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the 2 words which it contains".

(2) "The question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case."

(3) "There is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B", because "a person may cease to be habitually resident in country A in a single day" but "cannot ... become habitually resident in country B in a single day".

(4) Where a young child is in the sole lawful custody of one parent, his or her habitual residence will necessarily be the same as that of the parent.

In paragraphs 29 and 30 of his judgment (at Appeal Book pp.17-18) his Honour then referred to, and quoted with approval from, decisions of this Court and of the English Courts in cases involving consideration of the concept of "habitual residence" under the Convention, and how it may be gained and lost by children in varying circumstances. In particular, he referred to the judgment of Nicholson, CJ (with whom Kay and Graham, JJ agreed) in Cooper v. Casey (1995) FLC 92-575 in which the Chief Justice quoted, with approval, a summary of relevant principles about the establishment of habitual residence enunciated by Waite, J in Re B (Minors) (Abduction) (No.2) (1993) 1 FLR 993 at 995. His Honour (Moss, J) picked up that summary, and then went on (in paragraph 30) to adopt a passage from the judgment of Butler-Sloss, LJ In re F (Minor) (Child Abduction) (1992) 1 FLR 548 at 555-6, which was also quoted with approval by the Chief Justice in Cooper v. Casey (supra) at 81,696. We think it unnecessary, for the purposes of this judgment, to set out any of those quotations at this point. Their inclusion by his Honour indicates his keen awareness of the relevant principles which he was bound to apply in deciding the key issue of the proceedings before him, namely the place of habitual residence of these children as at 27 April, 1995.

In paragraphs 31 to 33 of his judgment (at Appeal Book pp.18-19) his Honour then examined, in some detail, the facts and the decision of Wall, J in the Family Law Division of the High Court of Justice in England, in the case of In re S (Minors) (Abduction: wrongful retention) (1994) 1 FLR 82 (erroneously cited by his Honour as "(1994) FLR 70") the facts of which, his Honour said, "bear some resemblance to those before me". That was a case in which the Court found that Israeli children, who had been residing in England for 9 to 10 months, were nevertheless "habitually resident" in Israel within the meaning of Article 3 of the Convention, and that they were, accordingly, "wrongfully retained" in England by their mother.

The children in that case had come to England with their parents from Israel under an arrangement whereby the parents had agreed to remain in England for at least 1 year. The parents separated in England 3 months later. Six months later still, the father instituted proceedings in England for the return of the children to Israel, on the grounds that the mother had wrongfully retained them in England under Article 3 of the Convention. Wall, J held that if the mother's case had been that she intended to return the children to Israel at the end of the agreed year of residence in England "she would have had a complete defence" to the father's application, either because her retention of the children in England was not "wrongful", or under Article 13(a) of the Convention, because the father had consented to the retention of the children in England for a fixed term. However, as the mother had stated her intention not to return the children to Israel, even after the expiration of the agreed period, Wall, J held that her retention of them in England became "wrongful" upon the announcement of that intention.

In reaching that conclusion, Wall, J (at 94) made the following relevant statement of principle which his Honour in this case quoted and relied upon (at Appeal Book p.19):- "The retention can of course only be wrongful if the children were habitually resident in Israel immediately before they were wrongfully retained in England. I am in no doubt at all that the habitual residence of the children remains that of Israel. ... it seems to be plain that where both parents have equal rights of custody no unilateral action by one of them can change the habitual residence of their children, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence or custody."

In paragraphs 34 to 39 of his judgment (at Appeal Book p.19-20) his Honour then proceeded to apply the principles identified by him in the earlier paragraphs to the facts of the case as found by him. His Honour first found (in paragraph 34) that when the husband left the United States with the children in July, 1994 he had no intention of returning to live there permanently and had not formed such an intention at any time since. He also found that when the husband left the United States with the children intending to cease residence there and take up residence in this country, that had the effect of terminating what had been the children's habitual residence in the USA. He said that he reached that conclusion "given that there was no arrangement ... whereby the children were thereafter to resume permanent residence" in that country. Then, after a reference to the passage which he had earlier quoted from the judgment of Butler-Sloss, LJ in Re F (supra), the effect of which he summarised as being "that a court in a proceeding such as this should not be astute to find that relevant children have not acquired an habitual residence, because to do so removes such children from the protection given by the Convention", his Honour found that the children's residence with the husband in Australia from July, 1994 to March, 1995 "clearly establishes habitual residence on the part of the children at least by March, 1995 in Australia."

Next (in paragraph 35) his Honour found that once the husband and children took up residence in this country for an indefinite period, with the full knowledge and consent of the wife, the relevant provisions of the Family Law Act became applicable to the parties and children "so that each party became a guardian of the children and the parties had joint custody" of them, with the result that they had "equal rights and responsibilities in respect of the children". He subsequently noted (in paragraph 36) that all parties agreed, for the purpose of the proceedings, that the law applicable in Connecticut at all material times was not relevantly different from that which he had described under Australian law. He added (in paragraph 35) that the fact that the children "were living in this country with one only of their guardians and joint custodian, while the other chose to continue to live ... for an indefinite period, in the United States" strengthened his earlier conclusion that the children had ceased to be habitually resident in the United States and had acquired habitual residence in Australia by March, 1995.

In paragraph 37 of his judgment, his Honour made the following significant finding:- "If it is correct to find, as I have found, that as of March 1995, the children had acquired habitual residence in this country, the fact that their custodian in this country agreed to take them to the United States on a temporary visit to see their mother, as I find the arrangement was, could not have the effect of changing their status of habitual residence in this country."

In paragraph 38, after describing both the conduct of the wife (in deciding in advance of the husband's return to the United States pursuant to their agreement that she would attempt to prevent his return to Australia with the children as agreed) and the conduct of the husband ("in spiriting the children back to Australia in the way that he did") as "reprehensible", his Honour added:- "... neither her conduct or his could alter the fact that the only agreement between them referrable to the coming of the children to the United States was that that was to be on a temporary basis only."

In paragraph 39 of his judgment, his Honour further found, firstly, that the arrangement pursuant to which the husband brought the children to the United States (i.e. that they would remain there until the end of 1995) "was not a condition of the continuation of the agreement of the parties ... as to the continued Australian residence of the children" (by which we presume he means permanent Australian residence) and "did not relevantly bind him to stay in the United States with the children for the period indicated by him", even if the wife had stuck to the arrangement that the children were there only on a temporary visit. Secondly, he found that even if his first conclusion was incorrect, " there can be no doubt that once (the wife) repudiated her part of the relevant arrangement (the husband) was entitled to bring it to an end and she was not entitled to rely upon it as a basis for commencing relevant proceedings in the United States or to assist her case in the present proceedings".

Finally, (in paragraph 40) his Honour reverted to what he had earlier identified (in paragraph 27) as the central issue in the case for determination by him, and stated his ultimate resolution of it in these terms:- "The finding that at the date of the removal of the children by the Respondent from the United States in April 1995 their habitual residence was Australia means that there can be no question of such removal having been wrongful within the meaning of the Convention and that the application must be dismissed."

THE APPEALS

Notwithstanding that the husband's appeal from his Honour's orders of 2 June, 1995 dismissing his application to permanently stay the wife's application was first in time, the appeals were heard together and conducted by all counsel on the basis (at least implicitly) that the wife's later appeal from the dismissal of her application was the more significant and should be argued (and perhaps decided) first. As the effect of our rejecting the wife's appeal would be to render the husband's appeal largely academic, we consider it appropriate to deal with the appeals in the reverse order of their institution, beginning with the wife's.

Before dealing with either appeal, however, we think it appropriate to refer to, and in some cases set out verbatim, relevant provisions of the Regulations, as they existed at the time of the hearing before his Honour, because they have since been substantially amended, but these appeals fall to be determined upon the Regulations as they stood at the time of the orders appealed from. All future references in these reasons to the Regulations are references to them as they stood at that date. It is also appropriate that we set out some relevant provisions of the Convention which are picked up by the Regulations or have some bearing upon the construction of the Convention itself, an aspect of which arises in the consideration of the wife's appeal.

Firstly, it is not disputed that each of Australia and the United States of America is, and at all relevant times was, a "Convention Country" as defined by the Regulations. It is also not disputed that the Central Authority is, and at all material times was, the State Central Authority for New South Wales appointed pursuant to Regulation 8, and that it acted in the proceedings in accordance with its obligations under Regulation 5 as applied to it by Regulation 9.

Regulation 2(1) defines the meaning, in the Regulations, of certain expressions "unless the contrary intention appears". It seems to us that amongst the expressions there defined, the following are relevant to these appeals:-

"'applicant' means a person who has made an application referred to in regulation 11, 13 or 24, as the case requires;

'Convention' or 'Convention on the Civil Aspects of International Child Abduction' means the Convention on the Civil Aspects of International Child Abduction referred to in section 111B of the Act, a copy of the English text of which is set out in Schedule 1;

'removal', in relation to a child, means the wrongful removal or retention of a child within the meaning of the Convention;

'rights of custody' has the same meaning as in the Convention, and includes rights arising by the operation of law or by reason of a judicial or administrative decision or by an agreement having legal effect under a law in force in a convention country."

Amongst the Regulations, it appears to us that the following are those of particular relevance to these appeals:- "13 Where the Commonwealth Central Authority receives an application in respect of a child removed from a convention country to Australia and is satisfied that the application is an application to which the Convention applies and is in accordance with the requirements of that Convention, the Commonwealth Central Authority shall take action under the Convention to secure the return of the child to the applicant.

15(1) The responsible Central Authority may, in relation to a child removed to Australia, apply to a court having jurisdiction under the Act for - (a) an order for the issue of a warrant for the apprehension or detention of the child; (b) an order directing that the child not be removed from a place specified in the order; (c) 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 in order to secure the welfare of the child pending the determination of an application under regulation 13; or (d) an order for the return of the child to the applicant.

15(2) A court may, in respect of: (a) an application made under subregulation (1); or (b) an answer, or an answer and cross application, made under subregulations 91B); make an order mentioned in subregulation (1) or any other order that the court thinks fit.

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

16(2) Subject to sub- regulation (3), a court shall order the return of a child pursuant to an application for an order of the kind referred to in paragraph 15(1)(d) if the date on which that application was filed is a date that is at least one year after the date of the removal of the child, unless it is satisfied that the child is settled in its new environment.

16(3) A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that - (a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal; (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; (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.

17(1) A court having jurisdiction under the Act may, if requested by a responsible Central Authority, by order declare that the removal of a child from Australia to a convention country was wrongful within the meaning of Article 3 of the Convention.

17(2) A court hearing an application for an order of the kind referred to in paragraph 15(1)(d) in relation to the removal of a child from a convention country to Australia may request the applicant to obtain an order of a court, or a

decision of a competent authority, of that country, declaring that the removal was wrongful within the meaning of Article 3 of the Convention.

20(1) 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 sub-rule 1(10) of Order 32 of the Rules of Court, the child shall be returned to the applicant."

In relation to the Convention itself, the following appear to us to be the provisions which are relevant to this appeal:-

The preamble, which provides:- "The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

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

Article 1, which provides:- "The objects of the present Convention are - (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 State."

Article 3, which provides:- "The removal or the retention of a child is to be considered wrongful where - (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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

Article 4, which provides:- "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

Article 5, which provides:- "For the purposes of this Convention - (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

Article 12, which 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, which 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."

Article 15, which provides:- "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual

residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State.

The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 20, which provides:- "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

THE WIFE'S APPEAL

Introduction

The wife's Notice of Appeal, filed on 16 June, 1995, contains 12 separate grounds of appeal, which appear at pp.2-4 of the relevant Appeal Book. However, in arguing the appeal within the framework of those grounds, the wife's Senior Counsel, Mr Rayment, QC, advanced 3 essential propositions which may be summarised as follows:- (1) His Honour made a fundamental error in construction of the Convention (and hence of the Regulations, which adopt the Conventions definitions of "wrongful removal" and "rights of custody") in that he (in common with almost every Court in the English speaking world which has been called upon to interpret and apply the Convention) construed the Convention as applying only to a removal of a child from his or her country of habitual residence at the time (being a convention country) to another convention country, and that in such a case the Convention mandates an order for the return of the child to the country of his/her habitual residence from which he/she was so removed. The contention for the wife was that, upon its proper construction, the Convention applies not to a removal of a child from a country but from a custodian, and mandates a return of the child not to a country but to the custodian whose custodial rights were breached by the removal. That contention was subject, of course, to the proviso that the child was habitually resident in a convention country at the time of the removal and that the removal of the child from the custodian's control was in breach of his/her custody rights under the law of that country, and to the further proviso that the application is brought in a convention country where the child then is. Thus it was contended that his Honour erred in regarding as critical to the outcome of the proceedings the determination of the question whether the children were habitually resident in Australia or the United States on 27 April, 1995, since in either event the husband's removal of them from the United States contrary to the wife's wishes was a breach of her custodial rights (the law of Australia and the United States being the same in this respect) and both Australia and the United States are convention countries.

(2) In any event, his Honour erred in finding that the children were habitually resident in Australia on 27 April, 1995, and ought to have found that they were then habitually resident in the United States. Alternatively, he ought to have found that the children were habitually resident in both Australia and the United States at that time. In either event, on the generally accepted construction of the Convention (and that applied by his Honour) his Honour ought to have ordered the children's return to the United States as the or a country of their habitual residence from which they were "wrongfully removed" by the husband in breach of the wife's "rights of custody".

(3) Upon the proper construction of the Regulations, his Honour had no jurisdiction to determine whether or not the husband's removal of the children from the United States was wrongful, that question having been decided (in the affirmative) by the Central Authority, to whom it was committed for decision by Regulation 13. The Central Authority signified its satisfaction that the application was one to which the Convention applied (and therefore one involving a "wrongful removal" of the children from the United States) by bringing an application under Regulation 15 for the return of the children, upon the hearing of which, by Regulation 16(1), the Court was obliged to order their return unless one of the exceptions provided by Regulation 16(3) was found to be established. In this case, it was not contended for the husband that any of those statutory exceptions to mandatory return applied. Accordingly, his Honour was obliged, as a matter of law, to order the return of the children to the United States. The only available means of obtaining a judicial determination that the husband's removal of the children from the United States was not " wrongful", within the meaning of the Convention, would be either by application for a prerogative writ against the Central Authority, or by application to the Federal Court for judicial review of the Central Authority's determination, which could be transferred to the Family Court under s.18A of the Administrative Decisions (Judicial Review) Act 1977. Such judicial review proceedings would be limited to questions of law, and would not extend to matters of fact found or exercises of discretion by the Central Authority.

Having thus outlined in summary the 3 main contentions of the appellant wife, it is appropriate that we deal with each of those contentions separately.

The Construction of the Convention

Because Regulation 2(1) defines "removal" in relation to a child, for the purposes of the Regulations, as meaning the "wrongful removal or retention" of the child " within the meaning of the Convention", and Regulations 13, 15 and 16 all refer either to a child who has been "removed" to Australia, or to circumstances involving the "removal" of a child to Australia, it is necessary, in applying the Regulations, to construe the Articles of the Convention which define or give meaning to the expression "wrongful removal". In support of his submission that the trial Judge, in considering whether the husband's removal of the children from the United States was a "wrongful removal" within the meaning of the Convention, misconstrued the Convention in the way outlined in sub-paragraph (1) of paragraph 5.1 above, Senior

Counsel for the wife took us to various parts of the Convention and to the travaux preparatoires to the Convention, copies of which, in 2 substantial volumes, were made available to us.

In relation to the Convention itself, counsel took us through the various relevant Articles and pointed out that nowhere in any of those Articles is there any specific requirement that, for a "removal" of a child to be "wrongful" it must involve a removal from the child's country of habitual residence, or that the "return" of a child for which the Convention makes provision must be a return to its country of habitual residence, or indeed any place. He submitted that all that the Articles of the Convention require is a removal of a child to or retention in one contracting state in breach of the custody rights of the applicant judged by the law of a contracting state which was the state of habitual residence of the child at the time of the removal or retention, irrespective of the place (be it a contracting state or otherwise) from which that removal occurred. Thus he posed the hypothesis of 2 parents with equal custody rights habitually resident in a convention country (e.g. Australia) holidaying with their children in a non-convention country (e.g. Indonesia), and one parent (without the consent of the other) removing the children from that country to a convention country (whether Australia or some other, e.g. New Zealand). He submitted that in those circumstances the Convention would apply and the wronged parent could apply under the Convention to a court in whichever convention country the children happened to be, even if it be Australia, for an order for the return of the children to him or her either in Australia, or indeed in any other convention country to which he or she may have travelled. That, he submitted, is because Article 3 of the Convention is not a choice of forum provision but only a choice of law provision. Its purpose and effect is to ensure only that the question of the wrongfulness or otherwise of a particular removal or retention of a child is to be determined by the law of the place of the child's habitual residence immediately before the removal or retention, and not by the law of any other place such as the country to which the removing parent may choose to take the child. In short, it was submitted that the Convention is not a convention about the determination of custody disputes between residents of different states, nor even about the how the forum for the determination of such disputes should be chosen, but only a convention to protect custodians from having the choice of forum for such disputes determined by the wrongful act of another person, even one with equal custodial rights.

It must at once be acknowledged that, as counsel for the wife submitted, there is nothing specific in any of the Articles of the Convention to require an interpretation of them other than that contended for on the wife's behalf. In particular, there is nothing to require that a relevant "removal", in order to be "wrongful" under the Convention, must be a removal from the child's country of habitual residence. However, there is the statement in the preamble to the Convention, that the signatory states:- "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, ...

Have resolved to conclude a convention to this effect".

Since a person can return or be returned to a place only if he or she has at one time been there and subsequently left or been removed from it, the reference in that statement to establishing procedures to ensure the prompt return of children "to the state of their habitual residence" strongly suggests that what the Convention aims to achieve is the prompt return of children to the state of their habitual residence from which they have previously been removed. In addition to that statement in the preamble, there are some decisions of the Courts of highest authority (including the House of Lords in England in In re H (minors) (abduction: custody rights) (1991) 2 AC 476) which run directly counter to the submissions of the wife's counsel on this point. He therefore sought to persuade us, by reference to the travaux preparatoires previously referred to, that the preamble, which was added to the Convention after the relevant parts of it had been agreed to, does not accurately reflect the intent of the Convention, and cannot prevail over the clear intent expressed in the Articles themselves. He also sought to persuade us that the decision of the House of Lords In re H (supra) should not be followed as it was reached by their Lordships without reference to the travaux preparatoires, consideration of which should and would have led to a different conclusion.

Before going to the submissions of Mr Rayment, QC, (and those in response of Mr Bennett, QC, for the husband and of the Solicitor General for the Central Authority) on the travaux preparatoires and their impact upon the interpretation of the Convention, a preliminary question arises as to the extent to which and circumstances in which this Court may have regard to these documents for the purpose of assisting in the interpretation of the Convention. Although no party to the appeal submitted that in the circumstances of this case some regard may not be had to those documents for that purpose, there was some difference in emphasis upon the weight to be given to that extraneous material in the performance of that exercise in the context of this case, and there was considerable disagreement about the outcome of the exercise. In those circumstances it is probably as well to consider, at the outset, the relevant principles of law which govern the use of such extraneous materials in the construction of the relevant provisions of the Convention.

In Fothergill v. Monarch Airlines Limited (1981) AC 251, the House of Lords considered the use which may be made by the courts of the United Kingdom of the travaux preparatoires in interpreting international conventions (such as that with which the House was concerned in that case, namely the Warsaw Convention, as amended at the Hague 1955, "For the unification of certain rules relating to international carriage by air") when such conventions have been given the force of law in the United Kingdom by statute. Somewhat differing views were expressed on that question by their Lordships in that case.

Lord Wilberforce said (at 276) that there is "little firm authority in English law supporting the use of travaux preparatoires in the interpretation of treaties or conventions". However, after noting (at the same page) that

"International Courts and Tribunals ... do in general make use of travaux preparatoires as an aid to interpretation", he added: "This practice is cautiously endorsed by the Vienna Convention on the law of treaties (1969) ...

Article 32". Then, after noting that in the instant case the House was "concerned with what is in effect a private law convention likely to be litigated primarily in municipal courts", his Honour proclaimed:- "In the interest of uniformity of application we ought, in considering whether to use travaux preparatoires, to have regard to the general practice applied, or likely to be applied, in the courts of other contracting states".

His Lordship then proceeded to examine some writings on the subject of statutory interpretation in civil law countries by Professor A. Dumon (the then First Advocate-General of the Cour de Cassation of Belgium and the Benelux Court of Justice) and some pronouncements upon and instances of the use of travaux preparatoires to interpret conventions by courts in the United States and France. Having done so, he concluded his discussion of this topic thus (at 278):- "My Lords, if one accepts that this reflects a recognition on the part of French law that in the interests of uniformity with English tendencies ... the use of travaux preparatoires in the interpretation of treaties should be cautious, I think that it would be proper for us, in the same interests, to recognise that there may be cases where such travaux preparatoires can profitably be used. These cases should be rare, and only where 2 conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux preparatoires clearly and indisputably point to a definite legislative intention."

In the same case, Lord Diplock (at 282) said:- "... international courts and tribunals do refer to travaux preparatoires as an aid to interpretation of treaties and this practice as respects national courts has now been confirmed by the Vienna Convention on the Law of Treaties (Cmnd. 4140), to which Her Majesty's Government is a party and which entered into force a few months ago. It applies only to treaties concluded after it came into force and thus does not apply to the Warsaw Convention and Protocol of 1955; but what it says in articles 31 and 32 about interpretation of treaties, in my view, does no more than codify already-existing public international law." His Lordship then proceeded to quote articles 31 and 32 of the Vienna Convention on the Law of Treaties, to the text of which we shall subsequently refer. He then observed that the delegates to the conference at which the Warsaw Convention was concluded "may be taken to have known that 'the preparatory work of the treaty and the circumstances of its conclusion' could be taken into consideration in determining the meaning of the Convention where the actual terms, even when read in their context and in the light of the treaty's object and purpose, leave the meaning still ambiguous or obscure." Having said that, and having referred to a particular example of that awareness, his Lordship concluded his discussion of this topic thus (at 283):-

"Accordingly, in exercising its interpretative function of ascertaining what it was that the delegates to an international conference agreed upon by their majority vote in favour of the text of an international convention where that text itself is ambiguous or obscure, an English court should have regard to any material which those delegates themselves had thought would be available to clear up any possible ambiguities or obscurities. Indeed, in the case of Acts of Parliament giving effect to international conventions concluded after the coming into force of the Vienna Convention on the Law of Treaties (Cmnd. 4140), I think an English court might well be under a constitutional obligation to do so. By ratifying that Convention, Her Majesty's Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts."

In the same case, Lord Fraser of Tullybelton said (at 287) rather cautiously:- "It may be ligitimate for English courts, when construing an Act of Parliament which gives effect to an international agreement, to make cautious use of the travaux preparatoires for the purpose of resolving any ambiguity in the treaty."

Lord Scarman, in his speech in that case, dealt with this question of the correct approach to be taken by the municipal courts of the United Kingdom to the interpretation of international treaties at some length. Having first referred (at 290) to the " growing importance of the task", and having expressed the view that if those courts are to undertake it successfully "they will have to achieve an approach which is broadly in line with the practice of public international law" his Lordship said this:- "Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna Convention on the Law of Treaties, to which my noble and learned friend refers."

After some discussion of the consequences of adopting (as the courts below had done) a literal construction of the relevant provision of the Convention under consideration, as against a construction which would meet the commercial purpose of the Convention, his Lordship identified (at 291) 3 "problems of importance" which he considered arose in the case, namely:- "(1) What is the approach to be adopted by British courts to the interpretation of an international convention incorporated by statute into our law?

(2) To what aids may our courts have recourse in interpreting such a convention?

(3) If our courts may have recourse to 'travaux preparatoires', to foreign judicial decisions, and to the writings of distinguished jurists expert in the field of law covered by the Convention, by what criteria are they to select such material and what weight are they to give it?"

His Lordship then undertook (at 291-3) a detailed analysis of the background to the Convention and of the relevant provisions of both the Convention and the municipal statute which incorporated it into the law of the United Kingdom. At 293, he then made the following general statements about the approach to be adopted by United Kingdom courts to the interpretation of such Conventions, and about the approach which he proposed to adopt in that case:-

"The broad approach of our courts to the interpretation of an international convention incorporated into our law is well settled. The international currency of the convention must be respected, as also its international purpose. The convention should be construed 'on broad principles of general acceptation'."

.....

"I propose, therefore, to consider only the implications and difficulties which arise in the instant case, and to direct myself broadly along the lines indicated by article 32 of the Vienna Convention on the Law of Treaties."

His Lordship then went on to consider some problems relating to the French text of the Convention before coming (at 294) to a consideration of what aids the courts might have recourse to in interpreting an international convention. With particular reference to the travaux preparatoires, he first observed that in the great majority of the contracting states the legislative history, including the travaux preparatoires, would be admissible as aids to the interpretation of the Convention, and that such sources would also be used in the practice of public international law. He concluded: "They should, therefore, also be admissible in our courts: but they are to be used as aids only". He then continued as follows (at 294-5):- "Aids are not a substitute for the terms of a convention: nor is their use mandatory. The court has a discretion. The exercise of this discretion is the true difficulty raised by the present case. Kerr J at first instance (1978) QB 108 and Geoffrey Lane LJ in the Court of Appeal (1980) QB 23 plainly thought it was unnecessary to have recourse to any aids to interpretation other than the words of the Convention. Although I disagree with their conclusion, I think their initial approach was correct. They looked to the terms of the Convention as enacted, and concluded that it was clear. I agree with them in thinking that the court must first look at the terms of the convention as enacted by Parliament. But, if there be ambiguity or doubt, or if a literal construction appears to conflict with the purpose of the convention, the court must then, in my judgment, have recourse to such aids as are admissible and appear to it to be not only relevant but helpful on the point (or points) under consideration. Mere marginal relevance will not suffice: the aid (or aids) must have weight as well. A great deal of relevant material will fail to meet these criteria. Working papers of delegates to the conference, or memoranda submitted by delegates for consideration by the conference, though relevant, will seldom be helpful: but an agreed conference minute of the understanding upon the basis of which the draft of an article of the convention was accepted may well be of great value. And I agree with Kerr J, at p.119, that it would be useful if such conferences could identify - perhaps even in the convention - documents to which reference may be made in interpreting the convention.

The same considerations apply to the international case law and the writings of jurists. The decision of a supreme court, or the opinion of a court of cassation, will carry great weight: the decision of an inferior court will not ordinarily do so. The eminence, the experience and the reputation of a jurist will be of importance in determining whether, and, if so, to what extent, the court should rely on his opinion.

Nevertheless the decision whether to resort to these aids, and the weight to be attached to them, is for the court."

His Lordship then proceeded to apply those criteria to the case before the House. He made specific reference, firstly, to the minutes of the conference of 1955 which produced the convention adopted into United Kingdom law by the 1961 Act (which minutes he noted had been published widely in England and elsewhere) and secondly, to international case law and the writings of jurists. He then concluded that the relevant article of the convention should be given not its literal interpretation but the interpretation which reflected the commercial purpose and intent of the convention (as revealed by the minutes referred to) and which was supported by that case law and those writings.

The remaining Law Lord in that case, Lord Roskill, expressed general agreement (at 302) with the views expressed on this topic by Lords Wilberforce, Diplock and Scarman, whilst acknowledging some concern expressed by Lord Fraser about the difficulties which might confront private citizens in obtaining access to the travaux preparatoires. His Lordship, however, unlike Lord Fraser, did not think those difficulties existed in the case then before the House.

Thus, although 4 of the 5 Law Lords who decided that case expressed the opinion that resort might legitimately be had, by courts of the United Kingdom, to the travaux preparatoires as an aid to the interpretation of a convention introduced into British law by municipal statute, there were some shades of opinion as to the weight which might be given to such extraneous material in the performance of that exercise. Lord Wilberforce's approach may be seen as the more conservative, and that of Lord Diplock and Lord Scarman as the more radical. As Lord Roskill purported to agree with all 3 of his brethren, it is difficult to know which approach he would favour. Interestingly enough, of all the Law Lords who considered that question, only Lord Scarman ultimately found it necessary to place any reliance upon the travaux preparatoires, or decisions of foreign courts, to support the interpretation of the relevant provisions of the Convention at which he arrived. The remaining Law Lords were able to reach the same conclusion on the question of interpretation without relying upon that extraneous material.

The principles applicable in Australian courts to the interpretation of international conventions, and in particular the use which may be made of travaux preparatoires in that process, were the subject of some discussion by some of the

Justices of the High Court in The Commonwealth v. Tasmania and Ors ("the Tasmanian Dam Case") (1983) 158 CLR 1.

Gibbs, CJ, referred to this question in his judgment in that case at 93- 94. After first stating that "interpretation of treaties is now governed by the Vienna Convention on the Law of Treaties", articles 31 and 32 of which he then proceeded to quote, his Honour then observed that that convention had not come into force either at the time when the relevant convention (a convention for the protection of the world cultural and natural heritage) was adopted or when Australia ratified it. Accordingly, he held that the Vienna Convention did not apply to the relevant convention. However, citing Lord Wilberforce and Lord Diplock in Fothergill v. Monarch Airlines Limited (supra) his Honour observed that "it has been said that the Vienna Convention, in this respect, did no more than endorse or confirm the existing practice". After referring, then, to some differences between the actual question decided in Fothergill and that which arose in the case then before the court, his Honour observed, firstly, that there had been "some controversy as to the exact part to be played by travaux preparatoires in the process of construction", and secondly, that that was not a controversy which he needed to join. He then stated his understanding of the position as follows:- "If there is an ambiguity, the travaux preparatoires may help to resolve it. Even if there is no ambiguity, it appears that the travaux preparatoires may be used as a supplementary means of interpretation, to confirm the meaning which appears from the treaty itself." His Honour then proceeded to refer to various parts of the travaux preparatoires in aid of his interpretation of the convention, and ultimately concluded (at 96) that "the travaux preparatoires confirm the meaning which the words of the relevant articles of the convention themselves reveal". Thus, his Honour used the travaux preparatoires for the second of the 2 possible purposes (confirmation) to which he had earlier referred.

Wilson, J also made it clear in his judgment (at 191-2) that he had had reference to the travaux preparatoires to confirm his construction of the relevant provisions of the convention. What his Honour there said was this:- "If there were any ambiguity on the question, reference to the travaux preparatoires serves amply to confirm the view which I have taken. The propriety of reference to the travaux preparatoires in these circumstances has been affirmed recently by Lord Wilberforce in Fothergill v. Monarch Airlines (1981) AC 251', at p. 278."

Brennan, J (as his Honour the Chief Justice then was), in his judgment in that case (at 222) said this:- "Whether the Convention gives rise to an international obligation is a matter of interpretation of its terms. The interpretation of the Convention should follow the articles of the Vienna Convention, the provisions of which codify existing customary law and furnish presumptive evidence of emergent rules of general international law. It is thus appropriate to refer to the Vienna Convention though it had not entered into force when the Convention was adopted." His Honour then proceeded (at 223) to quote articles 31 and 32 of the Vienna Convention, following which he said this (at 223-4):- "We were invited to refer to travaux preparatoires of the Convention in order to perceive the attenuation of obligatory language from the first draft of the Convention to its final text. In my view that invitation should be rejected. It accords with the Vienna Convention and with the consistent practice of the International Court of Justice and, earlier, of the Permanent Court of International Justice, generally to decline reference to travaux preparatoires, for 'there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself': Conditions of Admission of a State to Membership in the United Nations (1948) ICJR 56, at p.63. ... At the end of the day, the interpretation of the text itself must determine the content of the obligation it imposes."

His Honour then proceeded to construe the relevant provision of the Convention, in the course of which he indicated that he had recourse to the travaux preparatoires only in relation to the meaning of one word used in the Convention, the meaning of which he considered remained obscure after following the procedure prescribed by article 31 of the Vienna Convention.

Finally, Dawson, J made passing reference in his judgment (at 307) to the fact that the Commonwealth had referred the court to, amongst other things, the travaux preparatoires of the Convention, which apparently included a UNESCO recommendation concerning the protection, at national level, of the cultural and natural heritage, which was adopted shortly before the adoption of the Convention itself. However, as his Honour considered that this recommendation went no further than to indicate a level of concern similar to that indicated by the Convention, and that the Convention represented "the highest point in the international expression of concern" he apparently found it unnecessary to go beyond the provisions of the Convention in order to construe it.

The Vienna Convention on the Law of Treaties entered into force for Australia on 27 January, 1980, prior to the adoption and entry into force of the Convention whose interpretation is the subject of these proceedings. Accordingly, it seems that the interpretation of the latter Convention is now governed by articles 31 and 32 of the former Convention, which, relevantly provide as follows:

- "Article 31 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2.. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Article 32 Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article

31, or to determine the meaning when the interpretation according to article 31:- (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

Those provisions bear a quite striking resemblance to s.15AB of the Acts Interpretation Act 1901 (Cwlth).

Applying the above provisions of the Vienna Convention, our primary task in this case is to interpret the relevant provisions of the Convention "in good faith in accordance with the ordinary meaning to be given to" the words of the Convention "in their context" (which context comprises the text including the preamble) "in the light of its (i.e. the Convention's) object and purpose". That is the primary rule of construction. The secondary rule is that, whilst we may, in the course of that process, have regard to the travaux preparatoires, we may do so only in 2 cases and for 2 limited purposes, namely either to confirm the meaning arrived at by the application of the primary rule, or to remove an ambiguity or overcome a manifestly absurd or unreasonable result flowing from the application of that primary rule.

Having identified, as our primary task, the interpretation of the words of the Convention in their context (which includes the preamble) and in the light of the object and purpose of the Convention, which interpretation should be carried out "in good faith in accordance with the ordinary meaning to be given to" the terms of the Convention, we now turn to those words in order to discern their ordinary meaning in that context, with reference to the particular matter at issue arising from the submissions for the wife, and also to discover whether there exists any ambiguity in that meaning or whether that meaning leads to any manifest absurdity or unreasonableness of result calling for an examination of the travaux preparatoires.

In relation to the matters at issue in this appeal, the critical expressions in the Convention requiring construction are the words "removal or retention" as used in 3 places in article 3, and the words "return of" and "removed to or retained in" (with reference to children) in article 1(a). Those expressions must be construed in the context of the entire Convention, including the preamble. In considering the preamble as part of that context, the critical phrase is that which refers to the desire of the signatory states "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures for their prompt return to the state of their habitual residence" (emphasis added).

As a general observation, we think it correct to say that in their ordinary primary meaning the words "remove" and "return" are co-relative terms, each being the converse of the other, and each importing a notion of physical movement of a material object, in the former case "from" and in the latter case "to" a place in the material world. This, we think, is borne out by reference to dictionary definitions. The second edition of the Macquarie Dictionary states the primary meaning of the transitive verb "remove" as being "to remove from a place or position; take away; take off", and of the intransitive verb "return" as being "to go or come back, as to a former place, position, state etc". The same dictionary gives the primary meaning of the transitive verb "retain" as being "to keep possession of". The New Shorter Oxford English Dictionary gives the primary meaning of the transitive verb " remove" as being "move away from the position occupied; lift or push aside; take off or out; take away or withdraw from a place, person etc". The latter dictionary gives the primary meaning of the transitive verb "return" as being "come or go back to a place, person or condition" and of the transitive verb " retain" as being "restrain, hold back, stop; prevent, hinder". The former dictionary gives the primary meaning of the word "retention" as "the act of retaining" whilst the latter gives the primary meaning of "power to retain something; capacity for holding or keeping something". Notwithstanding the latter definition, it is clearly the notion of continuing to hold possession of a child which is the meaning borne by "retention" in article 3 and by " retained" in article 1(a).

The concept of the wrongful physical movement of children across state borders as being the evil which the Convention seeks to address is borne out strongly by many aspects of it. This is perhaps most clearly seen in article 1(a) which defines one of the objects of the Convention as being "to secure the prompt return of children wrongfully removed to or retained in any contracting state".

We think it is clear beyond argument that in that context "removed to" is meant to refer to a physical movement of children into a contracting state from a place outside it. If that is correct, then it seems to follow equally clearly that the " return" to which the same article refers as part of the same object, is the return of the children so removed to the place outside the contracting state from which they were so removed into it. Whilst children may certainly be " retained" in a contracting state without having first been physically moved into it, the object of securing "the return" of such children is as applicable to a retention as it is to a removal. Given the juxtaposition of " retained" and "removed" it therefore seems clear that the former has been added, not to narrow the scope of the object, but to expand it to cover situations where the removal into the relevant contracting state was not itself "wrongful" but, because of some subsequent act or event, the act of continuing to hold the child in that state is considered harmful to the child and is thus sought to be rendered "wrongful" and productive of the same consequences as if the initial removal had been wrongful.

The meaning thus attributed to the expression "return of children" in article 1(a) is, of course, absolutely confirmed by reference to the phrase in the preamble which we have quoted in paragraph 5.27, above, where express reference is made to the desire (and therefore presumably the intention) of the signatory states to secure, by their Convention, the return of children " to the state of their habitual residence". Once again, but in the converse way to that discussed in paragraph 5.29 in relation to article 1(a), the earlier reference in the same phrase of the preamble to the "wrongful removal or retention" of children, in respect of whom the signatories desire to ensure their prompt return to their state

of habitual residence, must be taken to be a reference to removal or retention from that state. At least, that is clearly the ordinary meaning of that expression in that context.

Further support for the construction of article 1(a) which we have propounded above, is, we believe, to be found in the reference in the preamble to the desire to protect children "internationally from the harmful effects" of wrongful removal or retention, and in the very name of the Convention itself, with its reference to "international child abduction". Both of these references give the clearest of possible indications that the evil at which the Convention is aimed is the harm presumptively done to children by their removal, contrary to the wishes of a custodian, across state boundaries in circumstances where, absent the Convention, protracted and wasteful litigation might ensue on issues of forum and the like whilst the children are, throughout, kept from contact with the former custodian and with their country of habitual residence where they may reasonably be expected to have cultural, social and perhaps familial ties.

Turning to article 3, it is true to say that, looked at in isolation, the words "removal or retention" used therein do not necessarily import physical removal from or retention in a place, as distinct from removal from or retention as against a person. Still less do they necessarily import removal from one state to another or retention in one state as against another. However, this article is not to be construed in isolation from the rest of the Convention, but in the context created by the other provisions of the Convention, including its preamble, and in light of its objects as defined in article 1. Viewed in that context and in that light it becomes tolerably clear, in our opinion, that the word "removal" in that article is intended to convey the same concept of physical movement of children from one state to another as is conveyed by article 1(a), and that "retention" likewise is intended to convey the same concept of retention in one state as against another, and that in each case the state from which the "removal" has occurred or against which the "retention" is practised is the state of the children's habitual residence "immediately before" the removal or retention occurred. Thus this article, whilst undoubtedly a "choice of law" article, as submitted by counsel for the wife, is also much more. It not only identifies the law by which the wrongfulness of a removal or retention is to be judged, it also defines the conduct which constitutes "removal" or "retention" for the purposes of the Convention, namely removal from one state (being that of the child's habitual residence) to another, or retention in the latter after removal from the former, in each case subject to the requirement that that conduct is in breach of the custody rights of a person

We are fortified in our above conclusions by the knowledge that similar conclusions have been reached by various members of the English Court of Appeal and of the House of Lords. Most notable, in that respect, are the opinions of 2 of the 3 members of the Court of Appeal and of all 5 Law Lords in In re H (supra) . Before coming to that case, however, reference may be made to some earlier dicta in judgments of the Court of Appeal which also support our conclusions. For example, Lord Donaldson of Lymington, MR (with whom Staughton, LJ and Sir Roger Ormrod agreed) in In re J (A Minor) (Abduction: Custody Rights) (1990) 2 AC 562 at 567 said:- "The mischief at which the Convention and the Act of 1985 are directed, and it is a very serious mischief, is the wrongful removal of a child from, or its wrongful retention outside, the territorial jurisdiction of the courts of a Convention country. Where this occurs, it is the duty of the courts of any other Convention country where the child may be to order its return. Furthermore, this duty is almost absolute. However, the operative word is 'wrongful' and this depends in part upon the wording of the Convention as incorporated in the Act of 1985 and in part, in this case, upon the law of Western Australia."

Likewise, Balcombe, LJ in In re E (A Minor) (Abduction) (1989) 1 FLR 135 at 142, said:- "... The whole purpose of this convention ... is to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or, having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain that child." 5.34 The father's appeal to the House of Lords in In re J (supra - at 572) was rejected. Although no reference was made by Lord Brandon of Oakbrook, in delivering his judgment with which the remaining Law Lords agreed, to the dicta of the Master of the Rolls which we have quoted, nor did he make any express of implied criticism of it. The judgment of the House of Lords in that case is in fact the same judgment as is reported under the name C v. S in Volume 2 of the 1990 All England Reports and under the same name in Volume 2 of the 1990 Family Law Reports which the trial Judge in this case cited and relied upon in paragraph 28 of his judgment, as earlier explained.

Turning, then, to In re H (supra): first of all, Lord Donaldson of Lymington, MR, in the Court of Appeal at 486, said this, with reference to the meaning of the words "removal or retention" in article 3 of the Convention:-

"However in the context of this case I have also asked myself: 'removal from what?' and the answer must, I think, be 'removal from the jurisdiction of the courts of the child's habitual residence'. If this is right, 'retention' must similarly have an extra territorial component, namely 'retention outside the jurisdiction'."

A little further down on the same page, after quoting the relevant portion of article 3 in which he emphasised the words "immediately before" preceding the words "the removal or retention", his Lordship said this:- "Although quite plainly the Act and Convention can only apply if the child is found in a different state from that in which it was habitually resident, this wording suggests that it is the removal out of the original jurisdiction or the retention out of that jurisdiction which of itself gives rise to a conflict of laws."

The other member of the Court of Appeal in that case to express similar views was Sir Roger Ormrod. What he said in his judgment (at 488-489) was this:-

"The question arises as to what the words 'removal' and 'retention' in section 2 mean. Do they relate to the mother's custodial rights, or to the jurisdiction of the court of the habitual residence of the children?

At first sight article 3 appears to define removal or retention in terms of breach of rights of custody but, in fact, its purpose is to define 'wrongful'.

The Act and the Convention are only concerned with children who are no longer within the jurisdiction of the original court: there are only two ways in which this can come about wrongfully - by removal of the child from the jurisdiction without consent, or by removing the child with consent, but failing to return the child in accordance with the order or agreement: that is, wrongfully retaining the child." 5.37 The third member of the Court of Appeal in that case, Stuart-Smith, LJ, whilst agreeing with the outcome of the appeal proposed by the other members of the court, took a different view in relation to the interpretation of article 3 of the Convention. What his Lordship said on that topic (at 487) was this:- "In the judgment of Anthony Lincoln J, and in the arguments of counsel, it seems to have been assumed that the relevant removal or retention referred to in article 3 of the Convention was removal from the custody or care of the parent or other person who was exercising those rights. For my part I am not persuaded that this assumption was wrong, and on this point I respectfully differ from Lord Donaldson of Lymington MR and Sir Roger Ormrod who take the view that the removal or retention must be a removal from the jurisdiction of the court or retention outside its jurisdiction." It is to be noted, however, that his Lordship also said (at the same page):- "The Convention does not apply at all unless the child is taken from the territory of one party to the Convention to that of another."

When that case came before the House of Lords, Lord Brandon of Oakbrook delivered the only judgment, with which each of the other Law Lords (Lord Bridge of Harwich, Lord Griffiths, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle) all expressed complete agreement. In that judgment his Lordship first said this (at 498):- "Before addressing the three points in respect of which Mr. Munby challenges the view taken by the Court of Appeal, I would make some preliminary observations about the nature and purpose of the Convention. The preamble of the Convention shows that it is aimed at the protection of children internationally (my emphasis) from wrongful removal or retention. Article 1(a) shows that the first object of the Convention is to secure the prompt return to the state of their habitual residence (that state being a contracting state) of children in two categories: (1) children who have been wrongfully removed from the state of their habitual residence to another contracting state; and (2) children who have been wrongfully retained in a contracting state other than the state of their habitual residence instead of being returned to the latter state. The Convention is not concerned with children who have been wrongfully removed or retained within the borders of the state of their habitual residence." Later (at 500) his Lordship confirmed what he had earlier said, in the following terms:- "With regard to the third point, whether removal or retention means removal from or retention out of the care of the parent having the custodial rights, or removal from or retention out of the jurisdiction of the courts of the state of a child's habitual residence, I am of opinion that the latter meaning is the correct one. I think that follows necessarily from the considerations to which I referred in my preliminary observations about the nature and purpose of the Convention, that the Convention is only concerned with international protection of children from removal or retention, and not with removal or retention within the state of their habitual residence."

Senior Counsel for the wife submitted that the dicta of both the Master of the Rolls and Sir Roger Ormrod in the Court of Appeal, and of Lord Brandon of Oakbrook in the House of Lords which we have quoted above, were obiter, as the real ratio of the decision in each court was only that a "retention" under article 3 is not a continuing state but, like a "removal", a single event occurring on a specific occasion. The effect of that was that events constituting both a removal and a retention which occurred before the coming into operation of the Convention between the two relevant states (the United Kingdom and Ontario) could not found a successful application under the Convention. Whilst as a matter of strict analysis that may be correct, it is nevertheless the case that the construction of article 3 of the Convention and the meaning of the words "removal" and "retention" therein was central to the decision in that case. Accordingly, their Lordships dicta on that question of construction formed an important and integral part of their reasoning leading to their decision. Furthermore, and in any event, such dicta, particularly in the House of Lords, upon the construction of an international convention which has operation both here and in the United Kingdom must have considerable persuasive authority upon this Court.

Further persuasive international support for our conclusions about the construction of the Convention is to be found in the majority judgment of the United States Court of Appeals, Sixth Circuit, on appeal from the United States District Court for the Southern District of Ohio, in the case of Friedrich v. Friedrich 983 F 2d 1396 (6th Cir. 1993). In that case a German father had petitioned the United States District Court for the return of his son to Germany pursuant to the Convention, which was implemented in the United States by the International Child Abduction Remedies Act. The American mother of the child, who had married the German father whilst serving as a member of the United States Army in Germany, had lived with the father and their son in Germany until their final separation there on 27 July, 1991. On 1 August, 1991, after spending 4 days with the child at a U.S. army base in Germany, the mother, without the father's knowledge or consent, left Germany with the child and returned to live with him in the USA, where she intended thereafter to remain. The father filed his petition in the United States Court on 23 September, 1991. The District Court Judge denied his petition on the grounds that the mother's removal of the child from Germany was not "wrongful" because at that time the child was a "habitual resident" of the United States and the father was not exercising his parental custody rights. Those findings were based upon the Judge's finding that the father had "unilaterally expelled" the mother and child from their residence, and that as a result he had "terminated" his custody rights and "altered" the child's place of habitual residence from Germany to the United States.

The Circuit Court of Appeals, by majority (Boggs and Siler, Circuit Judges - Lambros, Chief District Judge, dissenting) allowed the father's appeal and remanded the case to the District Court to determine at first instance whether, under German law, the father had custody rights at the time of the child's removal from Germany. In so

deciding, the majority judgment (delivered by Boggs, Circuit Judge) considered the meaning of "wrongful removal" in article 3 of the Convention. In the course of that consideration the learned Judge said this (at 1400):- ". .. A primary purpose of the Convention (is) to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court. Under the Convention, the removal of a child from one country to another is wrongful when: ... (his Honour then quoted the balance of article 3)." (Emphasis added.) He further said this (at the same page):- "Therefore, as a threshold matter, Mr Friedrich must prove by a preponderance of evidence that (1) Mrs Friedrich removed Thomas from his 'habitual residence'...". (Emphasis added.) 5.42 As Senior Counsel for the wife pointed out, in addition to the contrary dicta of Stuart-Smith, LJ in In re H (supra) to which we have already referred, there is also contrary dicta about the construction of article 3 in the judgment of the Lord Ordinary, Lord Prosser, in the Scottish case of Kilgour v. Kilgour (1987) SLT 568 at 570. What his Lordship there said was this:- "The parties were at one in proceeding on the basis that the relevant removal for the purposes of the Convention is a removal in breach of custody rights rather than a removal from the country where the child previously lived. The need for the remedies of the Convention will only arise when the child has been thus removed from that country but the relevant removal is the prior one in breach of the custody rights of the parent."

However, it must at once be noted that that statement by the Lord Ordinary appears not to have been a considered one, as the point was not argued in the case before him. On the contrary, the construction adopted by his Lordship seems to have been accepted as common ground by both parties in those proceedings, the only real issue being whether a "removal" committed by a parent before the coming into force of the Convention as between the United Kingdom and Ontario could found a successful application for an order under the Convention. His Lordship held (at the House of Lords did also in In re H) that it could not.

Having regard to all of the foregoing matters, we are of the opinion that the meaning and intent of the relevant provisions of the Convention to which we have referred are quite clear and settled. We consider that the application of the principles of construction laid down in article 31 of the Vienna Convention leads to the construction which we have given those provisions in paragraphs 5.29 to 5.32 hereof. We further consider that the result of the application of those principles leaves no ambiguity or obscurity in the meaning of those provisions, nor does it lead to any manifest absurdity or unreasonableness of the result. Accordingly, there is no occasion for us to resort to the travaux preparatoires for the purpose either of removing any ambiguity, obscurity, absurdity or unreasonableness of or in relation to the meaning at which we have arrived, nor to confirm that meaning.

The construction which we have adopted is not only consistent with a considerable body of eminent authority, but, in our judgment, consistent with the essentially international background and essence of the Convention. The adoption of the submissions for the wife in this case would lead to what we would regard as the remarkable (some may say absurd) result that an international convention, designed essentially to overcome problems arising from the territorial limits of the jurisdiction of courts of contracting states and the diversity of custody laws applicable within them, could be used to determine cases without any real international flavour at all.

This may be demonstrated by taking the hypothetical case identified in paragraph 5.4 hereof, of an Australian couple (say from Brisbane in Queensland) holidaying with their children in Bali (so that the habitual residence of all parties remained Australia). Assume that one parent then removes the children from Bali back to Australia, without the consent of the other, but takes them to reside in a remote part of Western Australia. Upon the argument for the wife, the other parent could then return to Australia and invoke the Convention to have the children returned to him or her in Brisbane! Alternatively, he/she could go to any other contracting state of his or her choosing (e.g. Bosnia, which is now a contracting state) and invoke the Convention to have the children returned to him or her there. Whilst in the latter case there would be an "international" element to the case, it would be merely an incidental element and not one relating in any way to the welfare of the children or to the harmful effects upon them of their international abduction or retention.

Senior Counsel for the wife submitted (at p.27 of the transcript of argument) that to adopt the construction at which we have arrived would have the effect that, if a child were removed by a third party from its parents whilst on holiday with them outside its place of habitual residence, the parents would not be able to invoke the Convention to obtain the return of the child to them even if the abductor took the child to a contracting state. He submitted that this would be so because the abductor would not have removed the child from the jurisdiction of its habitual residence, as it was already outside that jurisdiction at the time of its removal from the parents. With respect, we do not agree with that submission, except in one circumstance to which we shall shortly refer. The fallacy in that argument, as it seems to us, is in the assumption that by taking the child from the holiday country to a third country the abductor would not be removing the child from his or her place of habitual residence. In our opinion, he or she would be doing just that, since the cloak of "habitual Residence" remains with the child whilst temporarily in the holiday country. The one circumstance in which the argument holds good, is if the abductor returns the child to its country of habitual residence, and for reasons which we have already given we consider it quite appropriate that the Convention have no application to that circumstance as the local law of that country is the appropriate law for the resolution of such a case.

In case we are wrong in our conclusion that there is no occasion to refer to the travaux preparatoires to assist in the construction of the Convention, we have in fact looked at those documents to which we were referred in considerable detail by counsel for each of the husband, the wife and the Central Authority. Whilst there are certainly some matters recorded in those voluminous documents which support the submissions of counsel for the wife in this appeal, there are others which in our view support the contrary position. In the end result, we do not find them of much assistance in the

task of construing the Convention. At the very best for the wife those documents might cast some doubt on the proposition that for a "removal" to be wrongful it must be a removal from the child's country of habitual residence. They throw absolutely no doubt, in our view, upon the proposition that the only obligation created by the Convention upon the judicial or administrative authorities of a contracting state to order the "return" of children is to order their return to their country of habitual residence immediately prior to their "removal". In this case, once his Honour found that Australia remained the habitual residence of these children on 27 April, 1995, despite their temporary return to the United States, he clearly had no obligation or power arising from the Convention to order the children's removal from Australia back to the United States.

For all of the foregoing reasons, we conclude that the first basis of the wife's appeal relating to the construction of the Convention must fail.

The Question of Habitual Residence

The second basis of the wife's appeal, as identified in paragraph 5.1 above, challenges his Honour's finding that the children were "habitually resident" in Australia at the time the husband removed them from the United States on 27 April, 1995. As an alternative, it asserts that he was in error in failing to find that the children had dual habitual residence, in both Australia and the United States, at that time. The submission was that in a situation of dual residence the Convention applies to a removal from either country of residence in breach of the custody rights of a person under the law of both countries (or, arguably, only the one from which the removal occurred).

We think that the alternative proposition of dual residence may be disposed of relatively quickly, and we therefore deal with it first.

In support of that proposition the wife's Senior Counsel submitted that there is nothing about the Convention which excludes its application to a case where children are in fact habitually resident in 2 countries, and they are removed from one in breach of a person's rights of custody in that country, or at any rate if that removal is a breach of those rights in both countries (as it would be in this case).

In our opinion, there are at least 2 answers to that argument. The first is that articles 3 and 15 of the Convention, and the preamble, all refer to "the state" of a child's habitual residence, not "a state", the definite article thus clearly conveying the singular meaning rather than the plural. Likewise, article 13 (the last sentence thereof) refers to "the central or other competent authority of the child's habitual residence" and not "of a habitual residence of the child". The second is that the notion of dual habitual residence for the purposes of the Convention runs counter to all judicial pronouncements upon it of which we are aware in any English speaking country. Whilst counsel has been unable to refer us to any authority in any country which holds that a child may have more than one country of habitual residence at any one time, there are innumerable cases in which it is clear that the court has proceeded upon the assumption or understanding that the opposite is the case, and in the case of Friedrich v. Friedrich (supra) at 1401, the learned Judges of the United States Court of Appeals for the Sixth Circuit who constituted the majority stated expressly:- "A person can have only one habitual residence."

That statement was quoted with apparent approval by Nicholson, CJ (with whom Kay and Graham, JJ agreed) in Cooper v. Casey (supra) at 81,695.

In our opinion, therefore, the notion of dual habitual residence is simply inconsistent with the wording of the Convention, and with all known judicial pronouncements upon it. It is also, in our view, quite inconsistent with the entire spirit and sense of the Convention, as any ordinary person vaguely familiar with its genesis would perceive them to be upon reading it. This alternative argument in relation to this basis of the appeal is therefore rejected.

We turn, then, to the argument advanced by the wife's Senior Counsel that his Honour erred in fact in finding that Australia was the "habitual residence" of these children at the relevant time. In advancing this argument, counsel did not attempt to challenge his Honour's findings of credit in favour of the husband. However, the argument focused upon some of the undisputed facts and upon certain aspects of the husband's own evidence to found the submission that, on a proper understanding of that evidence, the only finding properly open to his Honour was that as at 27 April, 1995, the children were habitually resident in the United States.

The evidence upon which reliance was placed to support this argument was summarised briefly thus, in paragraph 3.2 on p.6 of counsel's written outline of submissions:- "The evidence of the Husband was that he took the children to the United States in March 1995, intending, as he had arranged with the Wife, that they would stay there until the end of 1995. As he said at T15.15, 'my position was that I was prepared to return to the US with the children up until the end of 1995'. His airline tickets were for a return to Australia on 21 December 1995 (affidavit para 3). He intended that the children would be in the sole custody of the Wife for some of that time, while he returned to Australia for a period of time to pursue a new relationship. The children were re-enrolled in their old schools in the USA and the child H. was vaccinated with a view to her commencing schooling in August 1995: T59." (The references there proceeded by the letter "T" are references to the transcript of the oral evidence before his Honour.)

In reliance upon that evidence, the wife's Senior Counsel submitted that even if the parties' joint intentions in June/July, 1994 had been that the children would remain in Australia indefinitely, the decision in March, 1995, to take them back to the United States for the remainder of that year, especially in the light of the fact, known to the husband,

that the wife had decided to accept long term employment in the United States, meant the future residence of the children after 1995 was a matter for future agreement or, if need be, for decision in the courts. He thus submitted that, in effect, the stay of the children in the United States was to be at least for 1995, and thereafter as may be agreed or otherwise determined. It was therefore, he submitted, "an indefinite stay, and the habitual residence of the children was in the United States at the time of their removal".

The wife's Senior Counsel further submitted (at transcript of argument p.36) that his Honour's error "was to impose upon discussions that the parties had at ... July, 1994 . .. a legal analysis worked out in terms of offer and acceptance, and in terms of the circumstances which would give rise to a change in the effect of the agreement, rather than treating those discussions as part of ... the ordinary daily decision making of parents which would be understood by everybody to be ... for the time being, and unless circumstances change." It was further submitted that what his Honour really did was to undertake an exercise to discover the children's domicile, as that would have been done before the Domicile Act, and that in many cases it has been emphasised that such an exercise should be avoided in considering "habitual residence", which is to be regarded as a strictly factual matter not a legal term of art.

Finally, on this point, the wife's Senior Counsel submitted (paragraphs 3.4 and 3.5 of his written summary) that his Honour's finding, in paragraph 18 of his judgment (that the parties arrangement in July, 1994 was to the effect that the husband and children would take up residence in Australia and continue that residence unless and until they came to an agreement that the children would take up permanent residence elsewhere) was not supported by the evidence upon which he purported to base it, namely paragraphs 20 and 21 of the husband's affidavit sworn on 23 May, 1995. Those paragraphs of the husband's affidavit appear at p.39 of the Appeal Book, but we find it unnecessary to set them out here. The submission for the wife was that as paragraph 18 of his Honour's judgment was an essential part of his reasoning, if this Court does not agree with it, we may substitute our own finding on the "habitual residence" issue, and that on all the evidence we should find that the children were " habitually resident" in the United States at the time of their removal by the husband on 27 April, 1995.

Senior Counsel for the husband, in response to those submissions, took us in some detail through the chronology of the parties' lives and the evidence of both parties including, in particular, the wife's oral evidence at transcript pp.50-51 of 1 June, 1995 and pp.8-9 of 7 June, 1995. In that evidence she made a clear and unequivocal admission that she tricked the husband into returning with the children to the United States in March, 1995 by leading him to believe, before his arrival there with the children, that she shared his intent to abide their earlier agreement that he and the children would return to Australia to live at the end of that year, when her actual intent at that time was to take steps to prevent that occurring once the children arrived back in the United States. He also referred us to other parts of his Honour's judgment (e.g. paragraph 19) in which he made other findings about the conversations between the parties which preceded the children's return to the United States in March, 1995. In particular, he directed our attention to his Honour's findings in paragraph 19 (at Appeal Book pp.14-15) that during a telephone conversation between the parties in February, 1995, they agreed that at the end of 1995 the husband and children would return to live in Australia. This finding was supported by the husband's evidence in paragraph 35 of his affidavit of 23 May, 1995 (at Appeal Book p.42). He submitted that the evidence of the husband, which his Honour accepted, did not support the contention that the wife conveyed to the husband any uncertainty on her part about the children's future place of residence, but only about her own plans in relation to employment and place of residence.

Finally, in relation to the submission for the wife to the effect that his Honour adopted a formal legalistic approach to the question of "habitual residence" more akin to an enquiry about domicile, the husband's Senior Counsel submitted that his Honour's analysis and findings about the conversations of the parties were properly directed to discovering the sort of "settled purpose" referred by Waite, J in In re B (Minors)(supra) and adopted by Nicholson, CJ for the Full Court in Cooper v. Casey (supra) at 81,695, or the "settled intention" referred to by Mushin, J in Artso & Artso (1995) FLC 92-566 at 81, 638.

In relation to this issue, we prefer the submissions of counsel for the husband to those of counsel for the wife. Accordingly, we conclude that it was open to his Honour, as the primary judge of fact in this case, to find on the evidence before him which he accepted that, at the relevant time (27 April, 1995), the children were "habitually resident" in Australia, within the meaning of the Convention, and not in the United States. This basis of the wife's appeal must therefore also fail.

The Construction of the Regulations

The third and final basis of the wife's appeal which we have earlier identified is that relating to the construction of the Regulations. We think that we have adequately summarised the argument in support of that aspect of the appeal, and its basis, in sub- paragraph (3) of paragraph 5.1 of this judgment. There is therefore no need for us to repeat it here. A somewhat fuller exposition of it is contained in the hypothesis posed by Lindenmayer, J in Regino (supra) at 81,818-19. Interestingly enough, in advancing this aspect of the appeal the wife's counsel picked up and adopted, in part, the argument which had been advanced on behalf of the husband to his Honour on 2 June, 1995, and rejected by him, from which rejection the husband has appealed. However, what the wife's counsel did not pick up from the husband's argument as advanced to his Honour on this point, was the submission that the grant by the Regulations to the Central Authority of the power and duty to determine (to the exclusion of the Court) whether the removal in question was "wrongful" under the Convention, was constitutionally invalid.

The adoption by the wife, in support of her appeal, of part but not all of the argument previously advanced for the husband, which (if the wife's appeal succeeded) he would wish to put again in support of his appeal, placed the husband's counsel on the horns of a slightly uncomfortable dilemma on the hearing of the appeals. As Senior Counsel, Mr Bennett, QC, put it in the course of his submissions (at transcript of argument p.39), if we were to dismiss the wife's appeal on the facts (i.e. the "habitual residence" point) he would wish to argue that, under the Regulations, the Court, not the Central Authority, has the power to decide the wrongfulness or otherwise of the removal, as his Honour did. If, however, on the other hand, we were to uphold the wife's appeal on the facts and were thus minded to reverse his Honour's decision, he would wish to argue the exact opposite, namely that the Regulations confer that power on the Central Authority, but that that referral is unconstitutional and the Regulations accordingly invalid, so that his Honour ought to have permanently stayed the wife's application. That would lead to a dismissal of the wife's appeal and an allowance of the husband's.

The husband's Senior Counsel sought to escape from that dilemma by inviting us to determine the wife's factual appeal (which itself would only arise for consideration if we rejected her appeal in relation to the construction of the Convention) before calling upon him in relation to the issue of the construction of the Regulations, or requiring him to elect which of the mutually contradictory arguments he would advance on his client's behalf on that issue. We did not accept that invitation because, as we then indicated, we would not be in a position to decide the wife's appeal on the construction of the Convention issue and on the factual issue immediately, and even if we could do that within a day or two, we would not be able to reconstitute the existing bench later in the week to complete the hearing of the appeals. Accordingly, we effectively required the husband's counsel to elect which of the 2 mutually inconsistent arguments on that issue he wished to advance on behalf of his client on the appeals.

Faced with that requirement to effectively make an election, Mr Bennett, QC, elected to put the argument in favour of the validity of the Regulations, i.e. that the Regulations confer the power to decide the "wrongful removal" question on the Court, not on the Central Authority. However, he formally asked that, if we should decide to allow the wife's appeal on the facts, we then disregard all that he was about to say on the issue as to the construction of the Regulations, and do the opposite. He then proceeded to adopt the arguments of the Solicitor-General on that issue, to which we shall refer below. He made some brief supportive submissions of his own on the construction of the Regulations, the main points of which were:- (1) On its true construction Regulation 13 does not confer upon the Central Authority power to decide conclusively that a " removal" of a child to or "retention" of a child in Australia in a particular case is "wrongful" under the Convention, but only to decide that question at a prima facie level, as a prosecutor does in a criminal case, as a pre- condition to the commencement of proceedings.

(2) The reference in Regulation 16(1) to "a date less than 1 year after the removal of the child to Australia" (our emphasis) is sufficient to confer upon the Court the power and duty to determine whether the child was the subject of a "removal" which is defined in Regulation 2(1) as "a wrongful removal ... within the meaning of the Convention".

(3) The reference, again, in Regulation 17(2) to the "removal" of a child, and the fact that that sub-regulation gives the Court a power to request the obtaining of an order of a court, or a decision of a competent authority, of the Convention country from which the child was removed that "the removal was wrongful within the meaning of article 3" are strong indications against a conclusion that the Regulations intended to give the Central Authority power to determine that question conclusively.

Mr Bennett made a further submission about the effect of s.111B upon the construction of the Regulations, to which we find it unnecessary to refer. It seemed to us to be based upon an assumption that Australia would not be performing its obligations under the Convention by conferring power on a central authority to make a determination of "wrongful removal" which would be binding upon a court asked to give effect to it by ordering a child's return to his or her country of habitual residence. For reasons outlined in paragraph 3.3 of this judgment we consider that assumption to be unjustified.

Mr Bennett further submitted, by reference to cases such as Brandy v. Human Rights Commission (1994) 69 ALJR 191 at 203-4 and J. v. Lieschke & Ors (1986-87) 162 CLR 447 at 458, that if the Regulations were construed as the wife's counsel submitted, they would effectively confer judicial power upon a non-judicial body (the Central Authority), contrary to Chapter III of the Constitution. The Regulations would therefore be invalid. Accordingly, it was submitted, the Regulations should, if possible, be construed so as to bring them within power. Such a construction, it was submitted, is open (in accordance with counsel's earlier submissions referred to in paragraph 5.65 and the submissions of the Solicitor-General on this issue which he adopted) and that construction should therefore be adopted: Acts Interpretation Act 1901 s.46(1)(b).

The arguments of the Solicitor-General for the Central Authority in relation to the construction of the Regulations were most detailed and thorough. We think we can best do justice to them by simply quoting verbatim from the relevant parts of the written outline of submissions provided in conformity with the relevant Practice Directions of the Court. Those parts are as follows:- "(A) Construction of Regulations: Role of Court 4. Moss J correctly held that his power (not jurisdiction) to make an order for the return of the child to the mother under Regulation 15(2) depended on him being satisfied that there had been a wrongful removal of the children from the United States, contrary to Article 3 of the Convention (AB 16). In the present context this involved finding on the evidence that the children were habitually resident in the United States at the date of their removal from the country by the father (AB 20-1).

5. The mother's contention to the contrary, that the only defences open to the father are those set out in reg 16(3) misconstrues the Regulation: (a) The Court's power under reg 15(2) to make an order is 'in respect of an application under sub- regulation (1)'. Such an application must be 'in relation to a child removed to Australia': reg 15(1). Pursuant to s18A of the Acts Interpretation Act 1901, this picks up the corresponding definition of 'removal' in reg 2, which means 'the wrongful removal or retention of a child within the meaning of the Convention'. This entails proof that Article 3 of the Convention is satisfied.

(b) Regulation 16 does not contradict this interpretation. The obligations imposed by reg 16(1) and (2) are expressly referable to an order 'pursuant to an application' made 'under' reg 15(1) (reg 16(1)) or 'of the kind referred to in' reg 15(1)(d) (reg 16(2)). The express reference back to reg 15(1) leads to Article 3 for the reasons stated in (a) above. In any event, the 'shall' in reg 16(1) and (2) is really concerned with the temporal aspects of the power exercised. The primary source of the Court's jurisdiction is reg 15(2), when read with ss31 and 39(5)(d) of the Act (McCall and McCall (1995) FLC 92-551 at 81,507). Regulation 16(1) and (2) is clearly referable to Article 12 of the Convention, which itself relates to a child 'wrongfully removed or retained in terms of Article 3'.

(c) To the extent that the mother's argument depends on attributing unreviewable effect to the Authority's ex parte satisfaction, this misconstrues reg 13. Regulation 13 does not bear the weight of such a construction which is both unfair in its operation and (according to the father) is constitutionally vulnerable. A construction favouring validity should be favoured: Davies v Western Australia (1904) 2 CLR 29 at 43.

(d) Regulations 17(2), 18 and 23(2) and (4) presuppose the receipt by the court of evidence on matters other than the Authority's satisfaction under reg 13, and are therefore inconsistent with the mother's contention. Cf also reg 14, which enables application to be made by a parent without the intervention of the Commonwealth Central Authority.

6. The mother's contention that 'habitual residence' and 'wrongful removal' is not a concern of the court, is contrary to the approach taken in earlier cases: G and O (1990) FLC 92-103 (Barry J); Artso and Artso (1995) FLC 92-566 (Mushin J, decided in 1991); State Central Authority v McCall (1995) FLC92-552 (Treyvaud J); Cooper v Casey (1995) FLC 92-575 (Full Court: Nicholson CJ, Kay and Graham JJ). Cf Regino and Regino (1995) FLC 92-587 (Lindenmayer J).

7. It is also contrary to the approach to the Convention adopted overseas: Re J (1990) 2 AC 562. See generally Sachs, 'Child Abduction - The Hague Convention and Recent Case-Law' (1993) Fam Law 530; Halsbury's Laws of England vol 5(2) para 986-7, 989. For the United States, see Friedrich v Friedrich 983 F 2d 1396, 1400 (1993); Rydder v Rydder 49 F 3d 369 (1995). In other jurisdictions, issues about habitual residence are determined judicially as a prerequisite on an order for return to that place: see Silberman, 'Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis' (1994) 28 Fam LQ 9 at 20-24.

8. As the Full Court held in McCall and McCall (1995) FLC 92-551 at 81,509, it is legitimate to have regard to the Convention for the purposes of interpreting the Regulations. The Regulation should be construed so as to give effect to its expressed purpose, which is to 'enable the performance' of Australia's obligation under the Convention: see Family Law Act 1975, s111B; ref 2(2); Acts Interpretation Act 1901, s15AA; Minister for Immigration & Ethnic Affairs v Teoh (1995) 128 ALR 353 at 362. In Gsponer v Director General, Department of Community Service, Vic (1989) FLC 92-001 at 77,157 the Full Court (adopting Re A (a minor) (1988) 1 Fam LR (Eng) 365 at 368) described the primary purposes of the Convention as 'to provide for the summary return to the country of their habitual residence of children who are wrongfully removed to or retained in another country in breach of subsisting rights of custody or access' (emphasis added). The mother's proposed construction of the Regulation does not further this aim to the same degree as the Authority's proposed construction, inter alia because the mother's approach would either reward the applicant who misrepresented the facts ex parte, or drive the Authority into conducting its own mini-hearing (subject to administrative law review: see para 15 below) in order to provide procedural fairness.

9. Although reg 15(2) uses 'may', this is to be read as virtually obliging the exercise of the direction if its conditions are satisfied: Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106 at 134-5; Commissioner of State Revenue v Royal Insurance Australia Ltd (1994) 126 ALR 1 at 23, 32-3. Where there has been a wrongful removal, the duty of the court to order return to the country of habitual residence is 'almost absolute': Re J (1990) 2 AC 562 at 567 per Lord Donaldson MR."

We find those submissions cogent and persuasive. Because of their very precise and detailed nature, we consider it unnecessary for us to say more than that we accept them. Accordingly, this last basis of the wife's appeal also fails, and her appeal must be dismissed.

THE HUSBAND'S APPEAL

As for the husband's appeal, it follows from what we have said in relation to the last aspect of the wife's appeal, that his appeal too should be dismissed.

COSTS

At the conclusion of the hearing of the appeal we took some submissions on costs but, at the request of the Solicitor-General for New South Wales we gave leave to the Central Authority and the husband to make some further written

submissions on costs, particularly the question of costs as against the Central Authority. Pursuant to that leave, counsel for the Central Authority filed some written submissions on 11 August, 1995, and answering written submissions by counsel for the husband were filed on 18 August, 1995. In determining the costs applications we have had regard to those written submissions as well as the oral submissions which were made by counsel for the husband and for the wife at the end of the hearing.

Before dealing with the applications which were made for costs of the appeals, and the submissions directed to those applications, we should at once make it clear that although some reference was made at the end of the hearing to a costs order made by the trial Judge in relation to the hearing before him, and we were told that at that time consideration was being given on the husband's behalf to the question of an appeal from that order, no such appeal has, to our knowledge, been instituted, and if it has, it is certainly not before us for determination at this time. We therefore cannot and do not propose to make or attempt to make any comment or ruling upon the issue of the costs of the proceedings below. We propose to deal only with the costs of these appeals. If any opinions we express on any matters relevant to the liability in general of the Central Authority for costs have any relevance to matters arising in relation to the costs below, that may assist the parties to resolve any remaining issues about those costs without the necessity of an appeal. However, any such opinions are not intended to create any binding rule or authority in relation to any such appeal which may be instituted.

Counsel for the husband has asked that, in the event that the wife's appeal is dismissed (as it will be), the husband should have his costs of the appeal against both the appellant wife and the Central Authority. Counsel for the Central Authority, the learned Solicitor-General, seeks no order for costs in favour of the Central Authority, whatever the outcome of the appeals, but resists any order for costs against the Central Authority. Counsel for the wife sought costs against the husband if the wife's appeal succeeded, but if her appeal failed (as it has) he but faintly resisted the husband's application for costs against his client. He acknowledged there is no jurisdictional reason why an order for costs could not be made against his client, and conceded it is a matter for the discretion of the Court. When asked if he had anything to say about whether the Central Authority may be liable for costs, in view of Regulation 7 (to which submissions were directed by counsel for the husband and the Central Authority) he made the telling comment: "Well they (i.e. the Central Authority) did not bring this appeal".

As between the husband and wife, we have no doubt that there are circumstances justifying an order for costs in favour of the husband against the wife in respect of her unsuccessful appeal. Apart from the fact that the appeal has been "wholly unsuccessful" (s.117(2A)(e)), the relative financial circumstances of the parties (s.117(2A)(a)) as disclosed by the material before the Court, also support such an order. There is no doubt that the wife is in a far stronger financial position than the husband, and that she has ample capacity to meet any order for costs we may see fit to make. She has also, we think, put herself particularly at risk as to costs by effectively intervening in and taking an active role in these proceedings independently of the Central Authority which was, in any event, acting in her interests and at her behest. That is a matter of relevance under s.117(2A)(g). Accordingly, we consider it an appropriate exercise of our discretion to order the wife to pay the husband's costs of her appeal.

As to the husband's appeal, it too was wholly unsuccessful, but the wife has not sought an order for the costs of that appeal. In any event, the existence of that appeal would have added very little, if anything, to the wife's costs of the consolidated proceedings which focused overwhelmingly on her appeal. Accordingly, we consider there should be no order as to the costs of that appeal.

That leaves the question whether the husband should also receive the benefit of a costs order against the Central Authority in respect of the wife's appeal. We think that question must be answered in the negative for the very simple reason identified by the wife's Senior Counsel, to which we have referred in paragraph 6.3, above, namely that the Central Authority did not initiate the appeal. In addition, it supported the submissions of the husband and opposed the wife's appeal on the issue of the construction of the Convention, and argued successfully in favour of the validity of the Regulations (an argument eventually adopted also by Senior Counsel for the husband). It made no submissions against his Honour's findings on the factual issue or against the arguments of the husband's counsel in support of those findings. Accordingly, it can be said that the Central Authority too was entirely successful in the appeal. There are therefore clearly no circumstances justifying an order for costs in favour of the husband against the Central Authority.

Having reached that conclusion there is no need for us to express an opinion upon the interesting question of law raised in the oral and written submissions for the husband and the Central Authority as to whether Regulation 7 of the Regulations gives the Central Authority immunity from a costs order in respect of proceedings under the Regulations, or whether that immunity is only thereby granted to the person who holds that office for the time being, as an individual. What we do say, strictly obiter, is that there seem to be very strong policy reasons supporting the submissions of the Solicitor-General that, on discretionary grounds, costs orders should not generally be made against a Central Authority which acts in good faith and not capriciously, in fulfilment of its duty under the Regulations to take and to prosecute proceedings which it has been requested to take by the Central Authority of another contracting state under the Convention.

ORDERS

For all of the foregoing reasons, the Court makes the following orders:-

1. That the wife's appeal from the orders of the Honourable Justice Moss made herein on 9 June, 1995, be dismissed.

2. That the appellant wife pay the respondent husband's taxed costs of and incidental to the said appeal.

3. That the Court certifies, pursuant to O.38, r.13(1) of the Family Law Rules, that the briefing of senior and junior counsel to appear on behalf of the respondent in the appeal was reasonably required.

4. That the husband's appeal from the orders of The Honourable Justice Moss made on 2 June, 1995 be dismissed, with no order as to costs.
