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[27/06/2001; High Court of Australia; Superior Appellate Court]
DP v. Commonwealth Central Authority; JLM v. Director-General NSW Department of Community Services [2001] HCA 39

FAMILY LAW ACT 1975

HIGH COURT OF AUSTRALIA

BEFORE: Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ

DP

Appellant

-and-

Commonwealth Central Authority

Respondent

[2001] HCA 39

27 June 2001

D12/2000 ORDER

APPEARANCES:

R K J Meldrum QC with S M Gearin for the appellant (instructed by Legal Aid Commission of the Northern Territory)

D Grace QC with P J Baston for the respondent (instructed by Diana Elliott)

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HIGH COURT OF AUSTRALIA

BEFORE: Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ

27 June 2001

S291/2000

JLM

Applicant

-and-

Director-General NSW Department of Community Services

Respondent

ORDER

1. Application for special leave to appeal granted, and appeal treated as instituted and heard instanter and allowed with costs.

2. Set aside orders of the Full Court of the Family Court of Australia of 30 November 2000.

3. Remit the matter to the Full Court of the Family Court of Australia for further consideration consistent with the reasons for judgment of this Court.

4. The costs of the original proceedings in the Full Court of the Family Court of Australia and on remitter, and of the trial, be in the discretion of the Full Court.

On appeal from the Family Court of Australia

APPEARANCES:

D F Jackson QC with P M Friedlander for the applicant (instructed by Aubrey F Crawley & Co)

J Basten QC with A L Hill for the respondent (instructed by I V Knight, Crown Solicitor's Office, (New South Wales))

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JUDGMENT:

1. **GLEESON CJ.: In each of two cases, one an appeal, the other an application for special leave to appeal, a challenge is made to a decision of a Full Court of the Family Court of Australia upon an application for an order for the return of a child pursuant to the Family Law (Child Abduction Convention) Regulations (Cth) ("the Regulations"). In the first case, the application was made by the Commonwealth Central Authority [FN1]. In the second case, the application was made by a State Authority [FN2]. In each case, the application was opposed by the mother of the child, who relied upon the ground in reg 16(3). That regulation provides:**

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

   ...

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

2. **The facts of the cases are set out in the reasons for judgment of Gaudron, Gummow and Hayne JJ, where reference is also made to the scheme of the Regulations, which**

represent Australia's method of fulfilling its international obligations under the Convention on the Civil Aspects of International Child Abduction ("the Convention").

3. **In *De L v Director-General, NSW Department of Community Services* [FN3], this Court pointed out that where there has been a wrongful removal, or retention, of a child to, or in, one contracting state, the concern of the Convention is to reserve to the jurisdiction of the contracting state which is the place of habitual residence of the child the determination of rights of custody and of access. This was said to entail a degree of self-denial, the natural inclination of any court before which such a question comes being to make its own assessment of the interests of the child. The objective is to secure the prompt return of children who have been removed wrongfully, or are being retained wrongfully, so that issues of custody and access may be dealt with according to the laws of their place of habitual residence. That objective, however, is not unqualified. The obligation to make an order for return, so far as presently relevant, is qualified by the existence of a discretionary power to refuse such an order in the circumstances stated in reg 16(3)(b).**

4. **A Full Court of the Family Court, in one case upholding the decision of the primary judge, and in the other case reversing the primary judge's decision, concluded that the ground for refusal had not been made out. This Court is invited to hold that such conclusions involved error of law. In neither case am I persuaded that this is so.**

The case of DP

5. **The person opposing return was the child's mother. The child having been removed by the mother from Greece in circumstances which otherwise fell within reg 16(1), the Australian court's discretion to refuse to make an order for the return of the child was enlivened only if the mother established the grave risk referred to in reg 16(3)(b). The decision of both the primary judge and the Full Court was that the mother did not, by evidence and argument, establish that grave risk.**

6. **The outcome turned upon the onus of proof. The onus was important partly because of the unsatisfactory nature of the evidence concerning the state of affairs said to give rise to the particular risk which the mother sought to establish.**

7. **In an adversarial litigious procedure, questions of onus may arise because there is an absence of evidence upon a material issue, or because the evidence bearing upon such an issue lacks the completeness or cogency necessary to support a rational conclusion, or because the evidence lacks sufficient weight to satisfy a tribunal of fact of some matter which arises for judgment. The nature of the issue, and the context in which it arises, may be significant in considering the sufficiency of evidence.**

8. **Here the issue was whether there was a grave risk that the return of the child to Greece (the country in which he habitually resided immediately before the removal by the mother) would expose the child to physical or psychological harm or otherwise place him in an intolerable situation. An issue of that kind will often involve difficult problems of evaluating future possibilities. The primary facts which form the basis for such an evaluation may be disputed or doubtful. The problem may be magnified by the context in which the issue arises: a custody dispute between parents; one parent in Australia, the other in a foreign country; one parent before the court, the claims of the other only advanced through a government official; language problems; the pressures of urgency; and the probability that some degree of harm to the child, at least of a psychological nature, will result from the very circumstances that have given rise to the need for a court to consider the issue. The regulation provides that the risk**

demonstrated must be grave. The nature and degree of physical or psychological harm is unspecified, but guidance as to what is in contemplation is given by the words "or otherwise place the child in an intolerable situation" [FN4].

9. **To my mind, it is unhelpful to say that reg 16(3)(b) is to be construed narrowly. In a case where there is no serious question of construction involved, such a statement may be misunderstood as meaning that the provision is to be applied grudgingly. The task of the decision-maker is to give effect to the regulation according to its terms. The meaning of the regulation is not difficult to understand; the problem in a given case is more likely to be found in making the required judgment. That is not a problem of construction; it is a problem of application. It may exist at the level of finding the primary facts relevant to judgment; or at the level of deciding the conclusion to be drawn from evaluating known facts. What is made clear, for reasons that are explicable by reference to the nature and purpose of the regulatory scheme, and the Convention to which it gives effect, is that the discretion not to make an order for return only exists where there is a grave risk of harm (the gravity being emphasised by the cognate reference to an intolerable situation), and the onus of establishing that circumstance is upon the person opposing return.**

10. **The risk to the child in the present case was said to be associated with the child's condition of autism, and the suggested unavailability of appropriate and accessible facilities for treatment of that condition in the event that the mother took him back to Greece. That issue, when raised, gave rise to subsidiary questions. One was a question of primary fact. What facilities are available in Greece, and, in particular, in the part of Greece to which the child would return, for the treatment of autistic children? That question, it might be thought, should have been capable of a relatively clear answer. There were other questions as well. As a practical matter, what would be the circumstances in which the child and the mother would live upon return to Greece? How accessible would any facilities for treatment be? What might be the legal, financial, or other impediments to adequate treatment for the condition of the child? No clear answer emerged in relation to the primary factual question, and there was uncertainty as to the other questions.**

11. **The matter was complicated by unsuccessful attempts by both parties to adduce further evidence at the hearing in the Full Court. The Full Court declined to receive such new evidence. There is no appeal to this Court against that aspect of the Full Court's decision. Nor is there any basis for supposing that the ultimate effect of new evidence upon the subject would have favoured the case of the appellant.**

12. **An absence of adequate evidence upon a matter of primary fact that ought to be readily ascertainable is deplorable, but this Court is not in a position to say that, if such evidence had been before the Full Court, it would have assisted the appellant. It may well be that the mother's case would not have improved had the evidence been re-opened.**

13. **The Full Court, after a review of the evidence before the trial judge, said:**

    "153. In order for the reg 16(3) defence to have been available, it was necessary for the wife to satisfy his Honour that the return of the child to Greece in the circumstances of this case would raise a grave risk that the child would suffer physical or psychological harm or otherwise be placed in an intolerable situation.

    154. The only relevant evidence before his Honour was that if the child returned the mother would return with him and he would stay in the mother's care given that his

return would be for the limited purpose of allowing the Greek courts to determine the future of the child.

155. The ultimate conclusion that the mother had not made out her assertion of grave risk on the basis of apparent unavailability of appropriate treatment and care for the child's autism were the child to return to Greece leads inexorably to the conclusion that the appeal should be dismissed ...

...

162. The difficulty in this case is that the reality of the mother's circumstances should she return to Greece was never fully explored ...

...

166. ... Our task in a Hague Convention application, having been satisfied that the child has been wrongfully removed to or retained in Australia, is to assure the return of the child unless we are satisfied of the existence of one of the defences to mandatory return. There is an onus upon the person opposing return of the child to establish the 'grave risk' exception ...

167. We think, however, that the unusual basis of the claim to a 'grave risk' exception in this case highlights the problematic nature of imposing an onus. The wife was here required to demonstrate the lack of appropriate services in Greece which would ameliorate the risk of the child's condition not being appropriately met. In effect, she bore the onus of establishing a negative proposition - that Greece lacked the appropriate facilities to meet EL's needs."

14. **The Full Court went on to make reference to the special duties of the Central Authority as an institutional litigant, and to criticise the Authority for not making a better effort to inform the primary judge about the availability of appropriate services in Greece.**

15. **The decision of the Full Court turned, not upon any misunderstanding of the Regulations, but upon a view that the person opposing the return of the child to the country where he habitually resided immediately before the wrongful removal had not established the grave risk of physical harm claimed to exist. Bearing in mind that the risk was said to arise from the unavailability, upon return to Greece, of medical treatment of a kind that was readily available in Darwin, as well as the regulatory context in which the claim was made, that claim required close scrutiny. The Full Court, in the light of the unsatisfactory evidence before the primary judge, held that it did not survive such scrutiny. That does not involve error of law.**

16. **I would dismiss the appeal.**

<u>The case of JLM</u>

17. **The issues in this Court were narrower than those dealt with by Rose J at first instance, and by the Full Court. They concerned the decision of Rose J in relation to reg 16(3)(b), and the reversal of that decision by the Full Court.**

18. **The grave risk of harm to the child was said to arise from the possibility that the mother, who was held to have retained the child wrongfully in Australia, and who opposed an order for the return of the child to Mexico, might commit suicide in certain**

circumstances. The identification of those circumstances, and an appreciation of the relationship between the nature of the risk and the provisions of the regulation, was central to the difference of opinion between Rose J and the Full Court. The Full Court considered that, upon analysis, the evidence showed that the mother's threats of suicide were directed, not towards the return of the child (in the company of the mother) to Mexico, but towards the possibility of an unfavourable outcome of court proceedings in Mexico following the child's return. The key passage in the reasons for judgment of the Full Court was as follows:

"62. The grave risk to which [r]egulation 16(3)(b) is directed relates to the return of the child ... to Mexico not to the father. There was no evidence that the mother would commit suicide rather than return with M to Mexico or that she would not return to Mexico with the child, indeed her evidence was to the contrary. The risk referred to in the [r]egulation is not the risk which would flow from the child being returned to the father, in which event Dr Waters was of the view that there was a risk, which he described as high, that the mother may attempt suicide but the risk which would flow from the child being returned to Mexico ..."

19. **As the Full Court pointed out, the expressed intention of the mother, if an order was made, to return to Mexico, and to use her best endeavours to resist an order for custody in favour of the father, demonstrated that her threat was a threat as to what would happen if the father gained custody of the child. Although, understandably, some of the evidence in the case was expressed in looser terms, that appears to be correct.**

20. **When a threat of direct or indirect harm to the child by the person opposing return is the source of the grave risk relied upon by that person, as Butler-Sloss LJ said in *C v C (Abduction: Rights of Custody)* [FN5], the threat could defeat the object of the Regulations. The Full Court was right to require that the evidence be measured carefully against the language of reg 16(3)(b).**

21. **The object of return, in the circumstances of the present case, is to permit the law, and the legal system, of Mexico (the child's place of habitual residence before the wrongful retention of the child in Australia) to deal with disputed questions of custody. The mother's threat to harm herself directly, and to harm the child indirectly, was taken seriously by the Full Court, but, between the return of the child and the exposure to harm there was an intermediate step, which was the operation of the law of Mexico. The Full Court's reversal of the decision of the primary judge was justified by the evidence. The mother was, in effect, inviting the Australian courts to resolve the custody issue and thereby pre-empt the decision of the Mexican courts.**

22. **I would grant special leave to appeal, but dismiss the appeal.**

23. **GAUDRON, GUMMOW AND HAYNE JJ. The Convention on the Civil Aspects of International Child Abduction ("the Convention") was adopted by delegates to the XIVth Session of the Hague Conference on Private International Law in October 1980. The Convention entered into force on 1 December 1983. Australia ratified it with effect from 1 January 1987.**

24. **Section 111B(1) of the *Family Law Act 1975* (Cth) [FN6] provided for regulations to 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. Pursuant to that power, the Family Law (Child Abduction Convention) Regulations ("the Regulations") were made in 1986 and have since been amended in several**

respects. The Regulations provide [FN7] for applications, in relation to a child who is removed from a Convention country to, or retained in, Australia, for an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention. The present two matters concern when the Family Court of Australia may refuse to make such an order. In particular, each concerns what is meant by reg 16(3)(b) of the Regulations and how it is to be applied. That regulation provides that:

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

...

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

The Regulations

25. **It is important to begin by recognising that the task of the Family Court in each of the present matters was to apply the Regulations to the facts established by the evidence. In doing so, account might have to be taken, in some circumstances, of the fact that the Regulations were made under the power granted by s 111B of the Act, and were, therefore, made to enable the performance of the obligations of Australia under the Convention and to obtain for Australia any advantage or benefit under it. Although it was not suggested in either of the present matters that there was some relevant disconformity between the Regulations and the Convention, it is the Regulations that govern the disposition of these matters, not the Convention.**

26. **Several aspects of the Regulations must be noted. Regulation 14 provides for applications to a court in relation to a child who is *removed* from a Convention country to, or *retained* in, Australia. The meaning of references to "removal" and "retention" is given in reg 3 and in each case it turns on a breach of the "rights of custody" in relation to the child if, at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention. The rights of custody to which reg 3 refers are rights "of a person, an institution or another body". A person, an institution or a body has rights of custody if rights of custody in relation to the child are attributed to the relevant person, institution or body, either jointly or alone, under a law in force in the country in which the child was habitually resident immediately before removal or retention [FN8]. The rights are further identified by reg 4. They "include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child"[FN9]. They may arise by operation of law, by reason of a judicial or administrative decision, or by reason of an agreement[FN10].**

27. **Nothing in the definitions of "removal" and "retention" or of "rights of custody" requires that, before removal or retention, there shall have been any judicial decision about rights of custody and nothing in those definitions requires that at some later time there be any application to a court to determine who shall have future rights of custody in relation to the child. All that the definitions require is that by the law of the place of habitual residence immediately before removal or retention, the child's removal to Australia or the child's retention in Australia is in breach of the rights of custody of some person, institution or body. Often enough, that will be so where, by**

operation of the law of the place of habitual residence, both parents have joint rights of custody of children of their union. Sometimes, before any application to the courts in Australia, the parent who has not removed or retained the child will have approached the courts of the place of habitual residence for interim or permanent orders about custody of the child but that will not always be so.

The Central Authority

28. Reference must also be made to the role of the "Central Authority", a term which the Regulations provide [FN11] shall have the meaning it has in the Convention. Under the Convention [FN12] each Contracting State must designate a Central Authority to discharge the duties imposed by the Convention upon such authorities. (Federal States may appoint more than one Central Authority and Australia has done so.) Article 7 of the Convention provides:

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

The Regulations provide [FN13] that "[t]he Commonwealth Central Authority has all the duties, may exercise all the powers, and shall perform all the functions, that a Central Authority has under the Convention." They also provide for the appointment, powers, duties and functions of State Central Authorities [FN14].

29. If the Commonwealth Central Authority receives an application in relation to a child who has been removed from a Convention country, or has been retained in Australia, and it is satisfied that the application is in accordance with the Convention and with the Regulations [FN15]:

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

Action, for this purpose, includes seeking amicable resolution of the differences between the parties [FN16], seeking the voluntary return of the child [FN17], or seeking an order under Pt 3 of the Regulations [FN18], including an order for return of the child [FN19].

Orders for return

30. Regulations 15 and 16 govern the making of orders for return. Regulation 15(1) empowers the court to make certain orders, including an order for return, "[i]f ... satisfied that it is desirable to do so". Regulation 16 makes further important provisions governing that apparently general discretion. By reg 16(1), subject to sub-regs (2) and (3), a court *must* make an order for return if the application is made within certain time limits. Sub-regulation (2) provides that a court *must refuse* to make an order for return if satisfied of any of five matters: (a) there was not a removal or retention within the meaning of the Regulations; (b) the child was not an habitual resident of a Convention country; (c) the child had attained the age of 16 years; (d) the country from which the child was removed or retained was not, at the time of removal or retention, a Convention country; or (e) the child is not in Australia.

31. Sub-regulation (3) identifies four circumstances in which a court *may* refuse to make an order for return. They include the circumstances described in reg 16(3)(b): that

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

32. Before turning to consider what is meant by this paragraph of the Regulations, it is as well to notice at this point some fundamental features of the scheme for which the Regulations provide. First, they provide as a general rule that a child removed to, or retained in, Australia, in breach of rights of custody held under the law of the country in which the child was habitually resident immediately before removal or retention, will be returned to that country if it is a Convention country. Secondly, they provide that applications for orders for return must be made soon after removal or retention [FN20] and must be dealt with promptly [FN21]. Thirdly, and for present purposes most importantly, the Regulations do *not* provide that an order for return must always be made. There are important exceptions to the general rule that an order should be made for return of the child to the country of habitual residence. Those exceptions include, but are not limited to, cases in which the court is satisfied under reg 16(2) that a condition for making an order for return is not made out as, for example, that there has not been a removal or retention [FN22] or, under reg 16(3)(a)(i), that the person seeking the order was not actually exercising rights of custody. The exceptions extend to matters touching the welfare of the child. In addition to the provision in reg 16(3)(b) for cases of grave risk of exposure to harm, reg 16(3)(c) provides for cases in which the child objects to being returned, and has obtained an age and degree of maturity at which it is appropriate to take account of the child's views. Regulation 16(3)(d) provides for cases in which:

"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".

33. The content of those exceptions must be understood against the other provisions of the Regulations which, as has earlier been pointed out, make plain that there may be an order for return with no expectation that there will be any judicial process in the country to which the child will be returned in which any question about what is in the best interests of the child will be raised or addressed. Often enough, of course, there will be proceedings pending or anticipated in the country to which an order for return is sought. Many cases have been decided under the Regulations, and under equivalent provisions applying in other Convention countries, in which that has been so [FN23]. If, on return of the child, there will be a court hearing that will decide what arrangements for custody of and access to the child will be in that child's best interests, an Australian court, exercising a discretion under the Regulations, will no doubt take that into account. But the construction of the Regulations cannot proceed from a premise that they are designed to achieve return of children to the place of their habitual residence for the purpose of the courts of that jurisdiction conducting some hearing into what will be in that child's best interests. As the Regulations recognise, questions of rights of custody in the country to which return is sought are regulated in some cases by operation of law, by administrative decisions, or by agreement. There may be neither occasion nor opportunity for any engagement of the judicial processes of that country.

<u>The Regulations and the Convention</u>

34. The Regulations reflect what was agreed in the Convention. Article 13 of the Convention contains provisions in terms that are, for all relevant purposes, identical to reg 16(3)(b). Article 13 provides that, notwithstanding the general obligations,

recorded in Art 12, for the judicial or administrative authority of a Contracting State to order return of a child, that judicial or administrative authority:

"is not bound to order the return of the child if the person ... [who] opposes its return establishes that -

...

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

35. **The history of the development of the Convention is set out in detail in Beaumont and McEleavy's monograph, *The Hague Convention on International Child Abduction* [FN24]. It is unnecessary to notice more than one aspect of that history. The Special Commission of the Hague Conference on Private International Law considered four possible approaches to the problem of international child abduction: recognition and enforcement of custody orders; summary return of the child; harmonisation of jurisdictional rules; and increased administrative co-operation [FN25]. Summary return emerged as the preferred solution. But at an early stage there was some level of agreement among those who were participating in the work "that the semi-automatic return of a child might not be appropriate in an instrument which would be open to accession by [s]tates with different levels of social and legal development" [FN26]. The question was what exceptions should be made to that general rule.**

36. **What was adopted as Art 13(b) (and is reflected in reg 16(3)(b)) was described by the reporter for the Special Commission as the result of a "fragile compromise" [FN27]. It is unproductive to examine how or why that compromise was reached. What is important is that Art 13 and Art 20 (with its reference to refusing return if it would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms [FN28]) represent important qualifications to the general rule for returning a child to the place of its habitual residence.**

37. **That there are qualifications to the general rule that the child should be returned to the place of its habitual residence is not surprising. Using the place of habitual residence as the relevant connecting factor, rather than other connecting factors like nationality or citizenship, may suggest that an underlying assumption of the Convention and Regulations is that it is generally better for a child to be returned promptly to familiar surroundings rather than suffer the disruption of an international move. That assumption, however, will not be right in every case and that is why provision is made for the court (or other body) asked to make an order for return to examine what may be the consequences of doing so.**

38. **Due effect must be given to reg 16(3)(b) and the other qualifications on the general rule for return of the child to the place of its habitual residence. In approaching that task it is necessary to avoid adopting unspoken stereotypes of the kinds of case in which the Regulations or the Convention can be invoked. When preparatory work on the Convention began, it was commonly thought that "parental abductions were perpetrated by fathers dissatisfied with an access award they had or were about to receive in a divorce settlement" [FN29]. Time has shown, however, that many removals and retentions are by mothers and concern young children for whom the mother is the principal carer. And because the mother is the principal carer of the child she will often face great financial hardship if she cannot obtain either adequate maintenance from the father or support from her relatives. Often, then, as is the case**

in *JLM*, the mother, having moved abroad with the father of the child, seeks to live with the child in the country of the mother's origin.

39. Automatic return of a child to the place of habitual residence in such a case may not be a desirable outcome for that child. If it would expose the child to a grave risk of physical or psychological harm, or an intolerable situation, the discretion to refuse to make an order for return is enlivened. It is for the Australian court to decide whether return would expose the child to that risk. Of course it must be recalled that the onus of proof lies on the party opposing return. It will be for that party to demonstrate a grave risk of exposure to harm. Many factors may be relevant to that inquiry. Often enough the answer to a claim of grave risk will be that the feared harm will form a central issue in subsequent judicial proceedings in the country of return. But it is important to notice that this answer has two parts: first, that there will be judicial proceedings in the country of return and, second, that the feared harm which is alleged can be a matter relevant to those proceedings. Both parts of that answer are important if it is to meet a contention that return will expose the child to a grave risk of harm.

40. So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that "there is a grave risk that [his or her] return ... would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might *otherwise* have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.

"Narrow construction"?

41. In the judgment of the Full Court of the Family Court which gives rise to the first of the matters now under consideration (*DP v Commonwealth Central Authority*) it was said that there is a "strong line of authority both within and out of Australia, that the reg 16(3)(b) and (d) exceptions are to be narrowly construed" [FN30]. Exactly what is meant by saying that reg 16(3)(b) is to be *narrowly* construed is not self-evident. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous. The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in "an intolerable situation". That requires some prediction, based on the evidence, of what *may* happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

42. Necessarily there will seldom be any certainty about the prediction. It is essential, however, to observe that certainty is not required: what is required is persuasion that

there is a risk which warrants the qualitative description "grave". Leaving aside the reference to "intolerable situation", and confining attention to harm, the risk that is relevant is not limited to harm that will actually occur, it extends to a risk that the return would *expose* the child to harm.

43. Because what is to be established is a *grave* risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence [FN31]. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.

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

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

DP v Commonwealth Central Authority

46. The first of the present matters, *DP v Commonwealth Central Authority*, concerns a child born in Greece on 13 November 1994. The child ("M") is an Australian citizen, his mother being a Greek-born Australian citizen who lived in Australia from the year after her own birth until she was 14 and again from 1984 to 1989. In 1993, M's mother, who is the appellant in the present proceedings, married his father in the village of Nigrita, Greece, and they lived in Nigrita after their marriage and the subsequent birth of M. In July 1998, the couple separated. In December 1998, the appellant, the child M, and the appellant's parents left Greece and came to Darwin.

47. Since his arrival in Australia, M has been diagnosed as suffering from Autistic Spectrum Disorder, the essential features of which are said [FN32] to be "the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests". The opinion of a specialist paediatrician tendered in evidence to the primary judge was that:

"While it is suggested that [M] will continue to improve with therapy, it is impossible to predict ultimate prognosis in individual children. In the absence of treatment, [M] is likely to become increasingly withdrawn and dysfunctional and this often leads on to secondary problems with depression, poor self esteem and violent and aggressive reactive behaviour."

In a later report the same doctor said:

"Although autism is one of the best documented and validated childhood psychiatric syndromes, the more I deal with children with autistic spectrum disorder the more I

come to realize what a heterogeneous group these patients really are. Just as there is a huge gulf between the theoretical understanding of autism and understanding how it will affect the individual's daily life, there is likewise a huge gulf between the diagnosis of autism and how that will impact on each individual."

The essential question in the proceedings before the primary judge was whether the appellant, who opposed the making of an order for M's return to Greece, established that there was a grave risk that the return of M to Greece would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

48. Other aspects of the history of the course of the proceedings are referred to in the reasons of other members of the Court and we need not mention them except to the extent necessary to explain the reasons for our conclusions.

49. The primary judge found that:

"there is no apparent appropriate institution or qualified person capable of treating and managing the child's autism within the general area in which the child was born and brought up in Greece and from which the mother and father separated".

There was no admissible evidence at trial about what, if any, facilities were available elsewhere in Greece. In answer to a question by the primary judge suggesting that his Honour could not assume that Greece "can't look after its autistic children", the specialist paediatrician called to give evidence on behalf of the mother said:

"Of course not. I mean, I think if [M] was returned to the area [of Nigrita and the nearby town of Serres] then patently the services don't exist there to - compared to what's available in Australia. However, of course there *would be* areas of Greece that do have the services and facilities to care for children with autism exactly the same as anywhere else in the world." (emphasis added)

The primary judge relied on this answer in reaching his conclusion that reg 16(3)(b) did not apply.

50. As the Full Court rightly held, this speculation about what *would be* available elsewhere in Greece was not evidence upon which the primary judge was entitled to rely. So far as the evidence at the trial about the doctor's expertise went, this opinion was mere uninformed speculation on his part.

51. It is then important to recognise the way in which the appellant had sought to mount her case at trial and the response that was made to it. The appellant's case was directed to demonstrating that appropriate facilities for her son were not available in the area of Greece where she had been living at the time of separation and in which the child's father was still living. Both the primary judge and the Full Court accepted that there were no appropriate facilities in that area. Given that this was the area where the mother had been born, had married and had lived with her husband, and that it was the area where the husband still lived, the focus on this part of Greece was hardly surprising.

52. At trial there had been no suggestion made by the mother or by the Central Authority that she might be able to live elsewhere in Greece. What was submitted by the Central Authority was, first, that an order for return was not an order for return to a particular area of Greece but rather to the Republic of Greece, and second, that "as a matter of law, in the absence of evidence to the contrary [the primary judge] could not

assume that the Republic of Greece was unable to provide the various services necessary to care for an autistic child".

53. These submissions do not meet the case which the mother sought to make at trial. They are submissions which proceeded from an unstated factual premise: that on return to Greece the mother could live with the child elsewhere than in the area from which she came.

54. The orders made by the primary judge recorded some undertakings given to the Family Court by the father that he would not enforce a custody order that he had obtained in Greece until a court of competent jurisdiction in that country "deals with the issue of the said child's custody inter partes" and that pending such a hearing he would not seek to remove the child from the mother's care "except for periods of visitation/contact as agreed between the parties or as ordered ... or as may be otherwise enforceable pursuant to the law of Greece". (The exact width of the last of these qualifications seems not to have been explored at trial. On its face it is very broad and appears inconsistent with the general tenor of the undertakings that were given.)

55. There was a further undertaking that the father would make a declaration pursuant to Greek law, which would be enforceable by that law, in the same terms as his undertakings to the Family Court. For our part we gravely doubt the efficacy of an undertaking in this form. If the undertakings to be given by the father about his future conduct in Greece were to be enforceable, it would seem to have been necessary to suspend the order for return until production of evidence to the Family Court of the giving of undertakings by the father which would be enforceable *in Greece* at the suit of the mother. Nothing, however, was said to turn on this, and we leave it aside. What is important for present purposes is that the order for return, in this case, was premised upon there then being proceedings in the courts of Greece about questions of the care and custody of the child.

56. Only if the mother *could* live elsewhere than in the area from which she came (even for the time pending the anticipated judicial proceedings) does the question of availability, elsewhere, of services suitable for the needs of the child become relevant. Whether living elsewhere would be practical would turn on any number of factual matters including, of course, how long a period she would have to do so pending the judicial resolution of questions of care and custody. The possibility of living elsewhere was, however, never put to her in her oral evidence and it was wholly contrary to the whole basis of her case. There was no evidence of how long she might have to do so pending the resolution of the proposed proceedings in Greece.

57. Nor did the primary judge find that on the child's return to Greece the child could live elsewhere than in the area where his father lived. Instead, his Honour appears to have treated the relevant question as one of law rather than fact. Having referred to some other decided cases [FN33] he said that "arising out of" one of these decisions [FN34] it would be "presumptuous ... to assume that the Republic of Greece does not have the facilities to care for an autistic child in a comparable way to the care which is being given to the child in Australia".

58. The question of what facilities were available was entirely a question of fact, not law. Nothing in the cases to which the judge referred was relevant to it. It was a question for evidence, not assumption.

59. Then, as the Full Court pointed out, the primary judge asked himself an irrelevant question: whether the unavailability of appropriate care for the child in one area of Greece justified his *removal* from that country in circumstances where the care was to be assumed to be available in another part of Greece. He concluded that it would be contrary to the whole intent of the Regulations and the Convention if he were to find that it did. It was on this basis, then, that he found that the mother had not made out her assertion of grave risk.

60. In the course of the hearing of the mother's appeal to the Full Court of the Family Court, attention was directed to what that Court described as "the sufficiency of evidence concerning the question of *'grave risk'* within the meaning of reg 16(3)(b)". Both the appellant and the Central Authority sought leave of the Full Court to adduce further evidence, in the appellant's case "as to the circumstances of the child and the mother in Greece if the child were returned" and in the Central Authority's, as to the availability of suitable facilities for the child in Greece. Both applications were refused. Neither party now seeks in this Court to challenge those orders.

61. In the Full Court, the appellant alleged that the primary judge had erred in law in failing to find that the return of the child would "place the child at grave risk of ... harm". It may be noted at once that this contention misstates the relevant part of reg 16(3)(b). That requires attention to whether there is a grave risk that return would *expose* the child to specified kinds of harm. The difference between a grave risk of *exposure* to harm and a grave risk of harm may be important.

62. The Full Court examined this ground of appeal in four stages: (a) the Regulations; (b) the proper approach to cases claiming to make out reg 16(3)(b); (c) the evidence said to support the claim; and (d) whether the primary judge erred. Of these we need now deal only with the third and fourth stages of the Full Court's reasoning. (We have earlier dealt with the Full Court's conclusion that reg 16(3)(b) is to be "narrowly construed".)

63. The Full Court referred to the evidence before the primary judge and then referred to what it said were the few reported cases outside Australia in which provisions equivalent to reg 16(3)(b) have been held to apply [FN35]. (www.hiltonhouse.com/cases/Johnson_UK.txwww.hiltonhouse.com/cases/Turner_ct.tx)

The Full Court's reasons do not make plain what legal principle it was said can be deduced from these decisions or how they were to be related to the particular facts of the case then before the Court.

64. Having decided that the primary judge had posed the wrong test by asking whether the child's *removal* from Greece had been justified, the Full Court concluded that application of the right test to the findings of the primary judge would lead to the same conclusion. The critical step the Full Court took in reasoning to that view was that it had been for the appellant to demonstrate a lack of services appropriate to the needs of the child *anywhere* in Greece. That was because:

(a) the "return" of which the Regulations speak is return to a jurisdiction rather than to a particular person, institution or body; and

(b) return is a return for the limited purpose of allowing the state to which the child is returned to determine issues relating to the child's future welfare.

65. As we have earlier pointed out, the return contemplated in *this* case was in circumstances where there would be a judicial determination about custody. That is not always so. Secondly, while it may be right to say that return is to a country, not a place or a person, the application of reg 16(3)(b) requires consideration of what are said to be the consequences of that return. That is essentially a question of fact which will fall for decision on the evidence that is adduced in the proceedings. No doubt it is necessary to bear in mind not only that the person opposing the return carries the onus of proof, but also the way in which the proceedings are conducted both by the person opposing return and by the Central Authority.

66. If, as was the case here, upon return of the child there will be a judicial determination of questions of custody and access, it will probably often be the case that assertions of risk of exposure to harm will not be established. But the bare fact that there will be such a judicial determination in the country of return does not mean that reg 16(3)(b) can have no operation. Cases in other jurisdictions concerning the possible return of a child to a sexually predatory or violent parent [FN36] www.hiltonhouse.com/cases/Turner_ct.tx illustrate why that is so. The fact that there will be proceedings between the parties in the country of habitual residence does not relieve the Australian court of its obligation to give effect to the whole of the Regulations including, where applicable, the provisions of reg 16(3)(b).

67. The present case having been contested at trial in the way it was, it was not open to the Full Court to conclude from the findings made by the primary judge that reg 16(3)(b) was not engaged. The appellant's case at trial had been that she could not obtain the services the child needed. If the Central Authority had wished to challenge this point or had wished to adduce evidence about what facilities are available in Greece, whether in the area to which the mother's evidence was directed in great detail, or elsewhere, it should have done so at trial. The Central Authority not having challenged the premise upon which her contention was based (that return of the child to Greece meant him returning to the area in which his father lived) it was too late on appeal to the Full Court to attempt to do so. The Full Court's refusal of the applications to adduce further evidence appears to recognise that this was so.

68. The primary judge erred in two ways. He wrongly acted upon the speculation of the specialist paediatrician about the availability of services elsewhere in Greece (an inquiry which was, in any event, irrelevant given the way the parties had conducted their cases) and he asked the wrong legal question (about justification for removal rather than gravity of risk of exposure to harm). A finding of grave risk was open. If made, the question would then be how the discretion given by reg 16(3) to refuse to make an order for return should be exercised. The Full Court not having considered that issue, it would not be appropriate to do so here. In the circumstances the appropriate order is to allow the appeal to this Court with costs, set aside the orders of the Full Court and remit the matter to that Court to reconsider the matter in light of the reasons of this Court. The costs of the original proceedings in the Full Court and on remitter, and of the trial, should be in the discretion of the Full Court.

JLM v Director-General NSW Department of Community Services

69. In the second matter, an application for special leave to appeal between JLM as applicant and the Director-General NSW Department of Community Services as respondent, generally similar questions arise. The proceedings concern a child born in Mexico on 7 February 1997. The mother, the present applicant, is an Australian citizen who married the child's father, a Mexican citizen, in February 1994 in New South

Wales. In 1994, the father, and later the mother, travelled to Mexico where, with the exception of two months in 1995 when the mother was in Australia, they lived until about December 1998. In that month the mother, father, and child travelled from Mexico to Australia with return airfares. The father returned to Mexico in January 1999 but the mother and child remained in Australia and she later told her husband that she did not intend to return to Mexico.

70. The primary judge found:

"that *'the very serious risk'* or *'high risk'* of suicide by the mother in the event of an order being made requiring the child who is 3 years of age, to be returned to Mexico [the country in which she habitually resided before the mother retained her in Australia] as being such that creates a grave risk of psychological harm to the child which would place the child in an intolerable situation."

There had been unchallenged expert evidence before the primary judge that the mother was suffering from a major depressive disorder. The primary judge found this was a genuine medical condition creating, in some circumstances, a very high risk of her suicide. Again, what application did reg 16(3)(b) have?

71. The primary judge held that reg 16(3)(b) applied and he refused to make an order for return. The Full Court allowed an appeal by the relevant State Central Authority, the Director-General NSW Department of Community Services, and made an order for return.

72. In this case, as in *DP*, the order for return was premised upon there being judicial proceedings in the country of return that would determine with whom the child would reside (unless the mother chose not to return with the child). The order provided for the father to give certain undertakings to the "Australian Central Authority". It is not self-evident how, or by whom, an undertaking to that body is enforceable. Again, however, the matter not having been debated in this Court we say no more about it than that the value of such undertakings is dependent entirely upon how, by whom and where they may be enforced. If they are not readily enforceable at the suit of the parent for whose benefit they are made, there is no point in exacting them.

73. In this case, there is a further aspect of the undertakings which must be noted. The father undertook that he would "co-operate with the mother to ensure that a court of competent jurisdiction in Mexico determines the issue of residence without delay". The Full Court said that there was no evidence before the primary judge from which he could conclude that the mother would be unable to contest a case in the Mexican family law jurisdiction. The unchallenged evidence of the mother at trial was, however, that she had no financial resources to fund proceedings in Mexico and that her belief (founded on the experience of a friend) was that it may be necessary to pay bribes to succeed in any such proceedings. In this respect, then, the Full Court was plainly wrong and a foundation for the undertakings it required as a condition for granting the order of return (that there would be litigation in Mexico about the residence of the child which could be contested by the mother) was not there.

74. The primary judge found (and it has not since been challenged) that the mother's suicide would cause great psychological harm to the child. In the Full Court's reasons the question was treated not as whether harm would result from the mother taking her life but what might cause the mother to do so. The Full Court found that there was no evidence that the mother would commit suicide rather than return with the child to Mexico and no evidence that she would not return to Mexico with the child. It went so

far as to say that the mother's evidence was to the contrary. The Full Court took the view that the evidence revealed a risk of suicide only if the child were to be placed in the father's custody, an event which would happen only if a Mexican court ordered it.

75. The Full Court was wrong to hold that there was no evidence which warranted the primary judge reaching the conclusions he did. Indeed, the Full Court referred to the relevant evidence in its reasons for judgment. The Full Court correctly noted that the psychiatrist who was treating the mother, and who gave unchallenged evidence on her behalf, spoke of the mother having no will to live beyond the time when she handed the child to her father. He expressed the opinion that if the child were to be handed over to the father there was a very serious risk that the mother would take her own life. Had the evidence stopped there, it might have been right to say that the only event which would lead the mother to take her own life was having to give the child into the custody of the father. But as the psychiatrist also said, it was his opinion that there was a high risk that the mother may attempt suicide if (among other circumstances) she was unable to contest a case in the Mexican family law jurisdiction. This was the very circumstance of which the Full Court wrongly said there was no evidence and which the primary judge found to be the case.

76. In addition to the evidence from the psychiatrist, which the primary judge described as "unchallenged", "detailed", "compelling" and "persuasive", the primary judge had evidence, which he accepted, from a friend of the mother who had had several years experience in the mental health field and who expressed the opinion that "suicide is a real risk if [the child] is returned to Mexico".

77. None of this evidence was challenged at trial. There was no cross-examination of the mother or of any of her witnesses. No evidence was led from any expert other than those called to give evidence on the mother's behalf. In these circumstances, the Full Court could not say, as it did, that it was "not open" to the primary judge to make the findings that he did.

78. In its reasons, the Full Court coupled the statement that the primary judge's finding of risk was "not open" with a reference to *Warren v Coombes* [FN37]. There having been no cross-examination of witnesses and the trial having been on affidavit evidence, the primary judge was, of course, in no better position than the Full Court to make relevant findings of fact. But the Full Court did not review the evidence and accept some evidence and reject other. It concluded, in effect, that there was *no* evidence for the view of the facts which the primary judge took. As we have sought to demonstrate, that conclusion was not open to the Full Court.

79. Because the Full Court formed the view that reg 16(3)(b) was not engaged, it did not have to consider two other grounds of appeal which might, on one view of them, be thought to have invited attention to the way in which the primary judge exercised his discretion by refusing to make an order for return. Each appears to be the particulars of a complaint that the primary judge's discretion miscarried when he refused to make the order for return. One of those two grounds asserted that the primary judge gave "undue weight to the threat made by the mother that she would commit suicide". The second asserted that the primary judge gave "no or insufficient weight to the fact that the mother was the originator of the source of the grave risk of psychological harm".

80. In so far as these grounds are intended to invite attention to the exercise of discretion, as failures to take account of material considerations [FN38], they will have to be dealt with by the Full Court. It is as well to say, however, that they are grounds which

appear to ignore the fundamental fact found by the primary judge (and not thereafter disputed) that the mother is ill. To say that she is the originator of the source of the risk of harm appears to take no account of the fact that the mother is *not* in command of her situation and it betrays a complete lack of any understanding of the major depressive illness from which she suffers.

81. The application for special leave should be granted, the appeal treated as instituted and heard instanter and allowed with costs. The orders of the Full Court should be set aside and the matter remitted to that Court for further consideration consistent with the reasons of this Court. The costs of the original proceedings in the Full Court and on remitter, and of the trial, should be in the discretion of the Full Court.

82. KIRBY J. The Court has before it two proceedings, heard consecutively. The first is an appeal [FN39]. The second is an application for special leave to appeal [FN40]. Each proceeding contests a judgment entered by the Full Court of the Family Court of Australia ("the Full Court"). In each case, the Full Court, pursuant to the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations"), ordered that the child, the subject of the proceedings, be returned to the country of its "habitual residence" [FN41].

83. In each case, the unsuccessful parent, who presently enjoys substantive custody of the child in Australia, contests the approach of the Full Court. Each invokes one of the few exceptions to return provided by the Regulations, namely reg 16(3)(b). That provision confers on an Australian court a discretion to refuse to make an order for the return of the child where "there is a grave risk that the return ... would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

84. The proceedings thus afford this Court, once again [FN42], an opportunity to consider the meaning and intended operation of the Regulations, giving effect in Australia (to the extent there stated) to the Child Abduction Convention [FN43]. Specifically, the proceedings necessitate consideration of the interaction between the primary rule of prompt return required by the Regulations and the Convention and the secondary provisions which recognise certain exceptions, including the one stated in reg 16(3)(b) [FN44].

85. Special leave was not granted in *JLM v Director-General NSW Department of Community Services*. The hearing of the application in that matter was referred to the Court constituted to hear the appeal in *DP v Commonwealth Central Authority*. Submissions were nonetheless heard from the parties in the application as on the hearing of an appeal. It is helpful to test the general propositions involved in both proceedings by reference to the differing factual situations in the two cases. It is therefore convenient to consider the second case as if it were the return of an appeal. Doing so permits this Court to ask whether, in ordering the return of each child from Australia to its country of habitual residence, the Full Court erred in the approach that it took, as for example by giving excessive weight to the primary rule and misunderstanding, or giving inadequate attention to, the exception.

<u>The facts</u>

86. *DP v Commonwealth Central Authority*: The child in this case was born in November 1994 in Greece. His father derives from the village of Nigrita. This is about 20 kilometres from Serres and 100 kilometres from Salonika, known as the second capital of Greece. The mother was born in Serres but emigrated to Australia with her parents

and sister when she was aged one. When she was fourteen, the family returned to Greece. However, four years later, the mother returned to Australia. She lived in this country for a further five years, acquiring Australian citizenship during that time. In 1989, she returned to Greece, where she married the father in 1993. The couple made their home in Nigrita.

87. Soon after the birth of their child, the relationship between the parents deteriorated. At first they lived separately under the same roof. Subsequently, in July 1998, the mother moved with the child to her parents' home in another village close by.

88. From an early age, the child manifested distressing symptoms. He would vomit and choke during and after feeding. At eighteen months he was still unable to walk properly and had developed a habit of walking on his toes. The mother sought medical treatment for him in Nigrita, Serres and Salonika. She consulted orthopaedic, paediatric, physiotherapy, optometrical and speech therapy specialists. None of these was able to diagnose what was wrong with the child or to propose useful treatment. She was told the child would grow out of his symptoms, and that she was spoiling him. One specialist even suggested that she was "an hysterical mother".

89. Being concerned that the community in which she lived lacked understanding, or facilities for the treatment, of her child, the mother asked the father for money to seek specialist treatment outside Greece. The father declined to provide it. After the separation of the couple, the mother, in October 1998, obtained from a court in Serres an order authorising her custody of the child and ordering the father to pay maintenance for the child and herself. In November 1998, the mother obtained an Australian passport for the child, who is a citizen by descent. Later in the same month, the father obtained an ex parte order from a court in Serres, prohibiting the mother from leaving Greece with the child. It seems that this order was not brought to the mother's notice before she departed Greece, with the child and her parents, for Darwin in the Northern Territory of Australia.

90. Although, by the first court order, the mother had temporary authority over the child, it was not contested in this Court that, by the law of Greece, the mother and father enjoyed joint legal custody. Accordingly, by leaving Greece without the father's authority, the mother had wrongfully removed the child from Greece. Within the time limited [FN45], the father applied for an order that the child be returned to Greece. This initiated the proceedings brought by the Commonwealth Central Authority ("the CCA").

91. The mother resisted the application. Relevantly, the ground of resistance related to the medical condition suffered by the child. After his arrival in Darwin, the child was diagnosed as severely autistic and was entered into a programme of therapy. He received specialist care from a paediatrician, a speech therapist, an occupational therapist and a special assistant at the school that he attends in Darwin. Following the diagnosis and treatment, the child progressed well. He was reported to be toilet trained, more social and capable of interacting with other children. His habit of walking on his toes was rectified. His communication was improved, as was his speech. The mother expressed concern that, in the absence of effective treatment in or around Nigrita, Serres or Salonika, the child, if returned to Greece, would revert to withdrawal, become dysfunctional again and manifest the problems of depression, low self-esteem and the violence and aggression which had preceded his diagnosis and treatment in Australia. The mother was also concerned that she would have no capacity to earn income or receive equivalent child support, in Greece, were she

obliged to return there with the child. The father had not paid maintenance pursuant to the court order and she deposed that she would not be in a position to afford to enforce this order in Greece.

92. The mother claimed that the father had denied that the child was autistic. However, the CCA pointed out that this denial preceded the father's receipt of the reports of the Australian doctors diagnosing autism. The father had asked for a copy of the medical reports so that he could have them translated and considered in Greece. The CCA also contended that a communication from the Greek Ministry of Health and Welfare listed a number of relevant medical institutes in Serres and Salonika.

93. The primary judge found that the evidence demonstrated that there was "no apparent appropriate institution or qualified person capable of treating and managing the child's autism within the general area in which the child was born and brought up in Greece" [FN46]. However, he was not willing to assume that such services were not available within Greece as a whole. A medical witness, a specialist paediatrician, acknowledged that "of course there would be areas of Greece that do have the services and facilities to care for children with autism exactly the same as anywhere else in the world" [FN47].

94. *JLM v Director-General (NSW)*: This case involved wrongful retention of a child rather than removal [FN48]. The child in question was born in February 1997 in Mexico. The father is a citizen of Mexico and the mother is a citizen of Australia. The couple met whilst travelling in Europe in 1992. Subsequently, the father came to Australia. He obtained a visa entitling him to permanent residence, contingent upon his marrying the mother. Such marriage took place in 1994 in New South Wales. The father returned soon after to Mexico for employment reasons. The mother subsequently joined him there and the child was later born.

95. In December 1998 the couple and their child travelled from Mexico to Australia. The mother claimed that it was with a view to the family residing permanently in Australia. The father claimed that it was a holiday, a statement supported by the fact that return airfares had been paid. In January 1999 the father returned alone to Mexico. A month later, the mother informed the father that she would not be returning to Mexico with the child as previously arranged. She stated that she intended to remain permanently in Australia with the child.

96. The father promptly sought assistance from the Mexican Central Authority. In August 1999, the Director-General of the New South Wales Department of Community Services, as the New South Wales Central Authority ("the NSWCA"), sought orders in the Family Court for the return of the child to Mexico. Orders having that effect were duly made by a judicial registrar. The mother sought review of those orders. In June 2000, the primary judge set those orders aside, on the basis of evidence tendered in support of reg 16(3)(b) of the Regulations. This evidence comprised affidavit testimony by the mother, her mother, an occupational therapist and a specialist psychiatrist that return of the child to Mexico would expose the child to "psychological harm or otherwise place the child in an intolerable situation" [FN49] due to the high risk of the mother's suicide.

97. The occupational therapist, who had specialist experience with mental health and cases of suicide, concluded that there was a "real risk" of suicide if the child were returned to Mexico [FN50]. The psychiatrist, in a report of January 2000, stated that the mother had "no will to live beyond when she hands [the child] back to her father". He

expressed the opinion that the mother had a "fairly well developed plan to take a fatal overdose immediately" [FN51] if she formed the view that the father was not going to return the child or that she was unable to contest the case in the Mexican family law jurisdiction [FN52].

98. At trial, the case was conducted exclusively on affidavit and documentary evidence. The NSWCA did not seek to cross-examine the mother or her witnesses, nor did it proffer any expert evidence of its own. The primary attachment of the child was found to be with the mother [FN53]. The mother deposed that no pension or unemployment benefit would be available to her in Mexico. On a tourist visa, she would not be entitled to engage in remunerative work. She had no assets of her own to support the child. She asserted that there was no legal aid for family law matters in Mexico, particularly not for people on tourist visas. She stated that she had no savings or assets with which to pay for legal representation in Mexico. She also expressed concern that, if she returned to Mexico, she might be prosecuted for having retained the child in Australia without the father's consent.

The Regulations

99. The Regulations are designed to implement the Convention, to which Australia, like Greece and Mexico, is a party [FN54]. The primary rule of prompt return is found in reg 14, which provides:

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

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

100. It is common ground in respect of each of the cases before the Court that all of the preconditions for reg 14(1)(a) were fulfilled. The respective Central Authorities were therefore entitled to apply for the order for return [FN55]. If satisfied that such an order was desirable, the court was empowered to fashion the order, including any conditions, in a way "appropriate to give effect to the Convention" [FN56].

101. Where (as in these cases) the requirements of reg 14(1)(a) are fulfilled, the making of an order for return is obligatory ("*must*"), subject only to an applicable exception. Relevantly, reg 16 provides:

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

...

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

102. There are other exceptions provided in reg 16(3), such as where a child of sufficient maturity objects to being returned [FN57], or where the person opposing return establishes that the return would not be permitted "by the fundamental principles of Australia relating to the protection of human rights and fundamental

freedoms" [FN58]. The inclusion of this latter regulation was part of the compromise reflected in the drafting of the Convention [FN59] designed to avoid broad grounds of exception based on public policy and to confine exceptions to a limited number expressly enumerated [FN60]. Regulation 16(3)(d) was not invoked, either at trial or in the Full Court, in the present cases. It would apply where the person opposing the order established that, in the country of habitual residence, matters regarded in Australia as fundamental to the protection of human rights and freedoms would not be observed were the child returned. Amongst other things, this would include a case where it was demonstrated that, notwithstanding formal adherence to the Convention, the authorities and officials of the country of habitual residence were corrupt, that due process would be denied to the child or to the custodial parent or that, otherwise, basic human rights would not be respected [FN61].

103. In the case of JLM, a general suggestion was made that such problems might be faced by the mother in Mexico. However, there was no evidence to prove that this was so [FN62]. In the case of DP, corruption or other incapacity on the part of the Greek courts or authorities was expressly disclaimed.

104. The most that was shown in the respective cases was that the opposing parent, being a mother without significant local means, would be at a disadvantage before the courts of the country of habitual residence of the child. However, that would commonly be the case with parents of either sex and especially mothers. It must therefore be assumed that it is not a consideration which, of itself and without more would warrant refusal to make an order [FN63]. Certainly, it does not fall within any of the enumerated grounds of exception. Orders are commonly made, notwithstanding such disadvantages, upon the assumption that decision-making authorities of Convention countries, acting reciprocally, will ensure, within their own laws and procedures, that a fair hearing is given to the claims to custody of the parent obliged to surrender the child for return to the country of its habitual residence.

The decisions of the Family Court

105. *DP v Commonwealth Central Authority*: The primary judge, Mushin J, was clearly affected by the undisputed medical evidence that "Greece would be able to care for the child '... exactly the same as anywhere else in the world'" [FN64]. He pointed to the fact that the application sought the return of the child to Greece, not to a particular town nor, as such, to the father [FN65].

106. In a case of such disabilities as the child displayed, Mushin J stated that it would not be unusual for a person to be required to travel from one city to another or to different parts of a country to obtain specialist medical care and treatment. He therefore concluded that the mother had not discharged the burden of showing that there was a grave risk to the child on the basis of the unavailability of appropriate treatment for his autism in Greece. He noted the stated intention of the mother, if the application were granted, to return to Greece with the child, accompanied by her parents. He also noted the provision by the father of single journey air tickets for the mother and child and undertakings of the father not to enforce any order of a Greek court in his favour in respect of custody; nor to remove the child from the mother's custody pending any order of a Greek court; and to provide maintenance until such court dealt with the issue of the child's custody. On that basis, Mushin J ordered that the child be returned to Greece in the company of the mother.

107. In the course of the mother's appeal to the Full Court, attention was directed to the sufficiency of the evidence concerning the suggested "grave risk" to the child within reg 16(3)(b) [FN66]. The Full Court directed the CCA to file supplementary submissions concerning the reception of further evidence or remitter of such task to a single judge and the mother was permitted to file submissions in response [FN67]. Pursuant to these orders, the CCA proffered an affidavit containing detailed evidence of the facilities for the treatment of autism available to the child in Greece. It was conceded by the CCA that such evidence had been available at the time of the trial and could have been obtained by the exercise of due diligence. The mother objected to the reception of the evidence both on the basis of its hearsay form and that some or all of it had been available, or should have been available, at the time of the trial. If the evidence were received, the mother insisted on her right to answer it. One ground argued by the mother for refusal to receive the evidence on the appeal was that the Convention (and by inference the Regulations giving it effect in Australia) represented a "hot pursuit remedy" making delay in the exploration of the medical facilities in Greece inappropriate [FN68].

108. The Full Court refused the CCA's application to adduce evidence on the appeal. It stated that it did so "[h]aving regard to our conclusions as set out below" [FN69]. In short, the Full Court concluded that, within the evidence at the trial, the mother's resistance to the order of return failed, rendering it unnecessary for the Full Court to consider enlargement of the record in order to reach its orders.

109. In relation to the invocation of reg 16(3)(b), the Full Court referred to the purpose of the Regulations as being to ensure, with few exceptions, that a wrongfully abducted child would be returned to its country of habitual residence. It noted the observation in the joint reasons in this Court in *De L* that the exceptions represented a "compromise" on the part of those who drafted the Convention [FN70]. It held that *De L* did not depart from "the strong line of authority both within and out of Australia" that the exceptions were to be "narrowly construed" [FN71].

110. Based on considerations of evidence law [FN72], the Full Court concluded that Mushin J had erred in treating the evidence of the paediatrician in Darwin, as to the facilities available for the treatment of autism in Greece, as amounting to expert testimony on the availability of such services in that country. The Full Court found a second error of reasoning which it is unnecessary to elaborate [FN73]. In the result, however, the Full Court was not convinced that these errors were determinative. By the application of the correct test, their Honours concluded that the primary judge's orders should be confirmed. They pointed out that the child was not necessarily being returned to a particular town or district in Greece.

111. In exercising for itself the powers under the Regulations, the Full Court accepted that it was "appropriate ... to give consideration to the reality of the circumstances of this child's return to Greece rather than to the theoretical concept of the return to the jurisdiction" [FN74]. Nevertheless, on the basis that the "reality of the mother's circumstances should she return to Greece" [FN75] had never been fully explored and that the purpose of the law was to allow the state, to which the child was returned, to determine issues relating to the child's future welfare [FN76], the Full Court confirmed the orders made at first instance. It parted with the case with criticism of the CCA which, it considered, "could have better performed its 'honest broker' role, by investigating for itself whether appropriate services exist in Greece for [the child]" [FN77]. The Full Court acknowledged the difficulty which a person in the position of the mother might face in proving the lack of appropriate services in Greece.

It described its conclusion as an "uncomfortable" [FN78] one because of the speed with which the child had been diagnosed in Darwin and the range of therapies available there. However, it was the conclusion to which it considered itself to be drawn by the language and purpose of the Regulations, the Convention which the Regulations implement and the decisional authority in this country and overseas emphasising the special character of the exception provided in reg 16(3)(b).

112. ***JLM v Director-General (NSW)*: In this case, the mother succeeded at trial, despite Rose J's acknowledgment of the restorative purpose of the Convention and the need to be wary of a parent who, having wrongfully retained a child in a country other than that of habitual residence, "might create, or manipulate, a situation of alleged psychological or other health problems which is then utilised as a basis for thwarting the main purpose of the Convention" [FN79].**

113. **On the basis that no application had been made by the NSWCA to submit the mother to psychiatric examination or to cross-examine her expert psychiatrist or other expert, Rose J concluded that, in the particular circumstances, there was "a grave risk of psychological harm to the child" [FN80].**

114. **Having found that the child's primary attachment was to her mother and that there was a "very serious risk" or "high risk" of suicide by the mother were the child returned to Mexico, Rose J proceeded to exercise his discretion in favour of refusing the order sought. In this respect, he took into account, additionally, the "mother's lack of financial resources for the purpose of supporting herself, including meeting the cost of litigation in Mexico" as set out in her affidavit which had not been challenged or contradicted [FN81]. Rose J also suggested that there was some evidence that the father had "instigated these proceedings ... for the purpose of punishing the mother, rather than being solely concerned with having the child in his care in Mexico" [FN82]. He considered that leaving the child in her present Australian environment was "in the best interests of the child" [FN83].**

115. **The NSWCA appealed to the Full Court which allowed the appeal. In disposing of the appeal, the Full Court also dealt with issues which are not now in contention [FN84]. The proposed grounds of appeal to this Court are confined to the suggested errors of the Full Court in interpreting reg 16(3)(b) and applying it to the facts of the case.**

116. **The Full Court's reasoning, on this point, proceeded thus. The psychiatric evidence on which the mother relied did not suggest that she was at risk of suicide if the child were merely returned to Mexico. That risk only arose if the child were "handed over to the father" or "hand[ed] ... to the father for the purposes of contact and she formed the opinion that the father was not going to return the child or that [the mother] was unable to contest a case in the Mexican Family Law jurisdiction" [FN85]. The Full Court pointed out that the "grave risk" in reg 16(3)(b) related "to the return of the child in this instance to Mexico not to the father" [FN86]. It found no evidence that the mother's medical condition would worsen from an order, as such, returning the child to Mexico [FN87]. Accepting that the evidence showed that the mother would return with the child to Mexico, if such return were ordered, the Full Court declined to "assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare" [FN88].**

117. **The Full Court went on to reject the suggestion that the mother would have "no realistic chance of success" [FN89] in proceedings in the Mexican courts concerning**

the welfare of her child. It pointed out that the mother's psychiatrist had not considered the possibility that the return to Mexico might only be temporary, pending judicial determination of the question of the child's future residence. Upon this basis, the Full Court expressed the conclusion that "it was not open to the trial Judge to find that the very serious risk or high risk of suicide by the mother in the event of an order being made requiring [the child] to be returned to Mexico is such as to create a grave risk of psychological harm to [the child] which would place [her] in an intolerable situation" [FN90].

118. The foregoing conclusion was supported by a reference to the authority of this Court relating to the duty of appellate courts conducting appeals by way of rehearing to consider challenges to factual findings and, unless disentitled to do so, to give effect to the appellate court's own conclusion [FN91]. The Full Court ordered that the father give certain undertakings to the NSWCA [FN92]. They included payment of the cost of travel to Mexico for the mother and child; support for the mother's visa application; a promise not to institute or support any criminal proceedings that might be brought against the mother; an agreement to a stay of the existing orders for custody of the child; a promise to pay the mother an equivalent of $US300 per week to cover the mother's separate accommodation and living expenses until the issue of custody was finally determined; and a promise to cooperate with the mother to ensure that a competent Mexican court determined the issue of residence without delay.

<u>The meaning and operation of reg 16(3)(b)</u>

119. The Regulations have been upheld as valid laws of the Commonwealth [FN93]. The task of an Australian court, dealing with cases such as the present, is therefore to give effect to the Regulations. Where a provision of a law, including a regulation, is clear and unambiguous, a court need not go behind its terms. Where there is any ambiguity in the language, or uncertainty as to the purpose of a law, it is permissible to have regard to the usual sources of clarification. These include the pre-existing law; the defects in that law that help to identify the mischief to which the law was addressed; the source in international law of the local Australian law to the extent that it is consistent with its terms; and any internal evidence as to how the law was intended to operate to achieve its purposes.

120. Before the Regulations were made, the pre-existing law governing cases of international child abduction and retention was most defective. It gave rise to the urgent need for a more effective and expeditious regime to respond to the increasing incidence of child removal and retention, which may be harmful to the best interests of the child concerned [FN94]. The new international regime grew out of the recognition that a painstaking consideration by the authorities (judicial or administrative) of the country to which the child had been abducted, or in which it is retained, of what the best interests of that child require for the disposition of its custody, would often unfairly reward the abducting or retaining parent. Yet, without adopting concepts novel at least to common law countries, such an individual evaluation would ordinarily be required in every case [FN95].

121. It is reasonable to assume that the Convention, negotiated and adopted to facilitate a novel approach to the problem outlined, did not have as one of its purposes the restoration of the procedures that had gone before. The object of the Regulations is expressed in s 111B(1) of the Act to "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" [FN96]. In some countries, the

Convention requirements have been implemented, in substantive terms, as part of domestic law. However, this was not the course adopted in Australia. Yet in view of the language of the Act and the close similarity of the provisions of the Convention and of the Regulations, it is appropriate to construe ambiguities and uncertainties in the Regulations so as to promote the achievement of the objects of the Convention that are not inconsistent with the terms of the Regulations.

122. Relevantly, authorities have confirmed that such objects include:

(1) To discourage international child abduction and retention with its negative impact on children [FN97];

(2) To make it clear to those who might be tempted to engage in this conduct, so as to secure a chosen forum for the resolution of custody disputes, that their attempt will ordinarily fail [FN98]; and

(3) To institute effective means that will ensure the prompt return of children removed or retained in this way by the observance on the part of the authorities of the country to which the child has been removed (or in which it is retained) of a measure of restraint in what would otherwise be the right or duty of such authorities to investigate painstakingly the facts of each individual case in order to assess the best interests of the child and to determine custody [FN99].

123. The urgency of instituting a new legal regime reinforces this understanding of the approach that was contemplated by the Convention and the Regulations giving it effect. In part, the urgency arose out of the increased incidence of marital breakdown occurring in many nations. But chiefly it arose from the comparative ease of, and ever-growing numbers of persons involved in, international travel [FN100]. These considerations brought about a problem of "immense social importance and requiring concrete early action" [FN101].

124. As explained in *De L* [FN102], the *travaux préparatoires* of the Convention reveal a conflict in its drafting between those who wished, in effect, to embrace a regime of virtually automatic return in every case and those who urged the provision of stated exceptions. The *travaux* show that the bureau of the conference drafting the Convention was concerned that the retention of provisions, such as those that became Arts 13 and 20 of the Convention, unless worded narrowly, might be used by domestic courts to "render the Convention impotent and ultimately worthless" [FN103].

125. Thus, within Art 13 of the Convention (the source of reg 16(3)(b)), a "grave" risk was substituted for "substantial" [FN104]. The history of the successive drafts thus strengthens what is, in any case, plain enough from the resulting product. The exceptions, including the one invoked in these proceedings, have to be construed and applied so that they do not undermine the achievement of the overall objective of the Regulations (and the Convention). This is the approach adopted by decisional authority in many countries with systems of law similar to Australia [FN105].

126. Although municipal courts are not bound by the approaches adopted by courts of other jurisdictions to the construction of the Convention (or of corresponding municipal law), it is both permissible and sensible for such courts to inform themselves of the approaches taken by others. As the Convention contemplates reciprocal benefits and cooperation between nation states, it is natural for courts, especially final courts, to strive to achieve, as far as they can, a general uniformity of approach in the application of this, as with other bodies of law [FN106].

127. Consistent with this general approach and consonant with the language of the Regulations (and of the Convention), it is proper to regard their objective as including that of normally restoring the child, and the other parties concerned, to the status quo that existed before the international removal or retention in question. Specifically, it is ordinarily to require that the authorities (courts or tribunals as the case may be) in the country of the child's habitual residence should resolve the merits of disputes over custody and, in that context, decide the best interests of the child [FN107].

128. It is in this sense that provisions such as those in the Regulations are properly to be classified not, as such, as laws searching for the best interests of the child but rather as laws for selecting the forum where that search is to be undertaken and concluded [FN108]. It is easy enough to slip back into a factual inquiry into the child's best interests, that having for centuries been the duty of common law courts in disposing of analogous cases. But such a tendency must be resisted for otherwise the attainment of the main point of the Regulations and the Convention will be frustrated [FN109].

129. Further support for this approach comes from internal evidence in both the Convention and the Regulations that a "full blown" contested custody suit was not what was contemplated once the Convention procedures were invoked. What was envisaged was the "prompt return of a child" [FN110]. To the extent that the proceeding under the Regulations is allowed to become (as these ones have) enmeshed in considerations that would normally arise in a contested custody hearing, the primary objective of urgency, reflected in the Convention [FN111] and in the Regulations [FN112], will be defeated [FN113]. Were it otherwise, the abducting party would effectively be rewarded for its conduct; time would tend to run in favour of the new status quo; and the party in the country of the child's habitual residence would commonly be forced to contest the proceedings often occurring far away and in a hearing, initiated by a central authority on behalf of a government, in which that party, if present at all, would usually be no more than a witness [FN114].

130. The foregoing considerations demonstrate why it is that courts in many countries have repeatedly stated that the proper application of the Convention (in Australia, to the extent expressed in the Regulations) is usually intended to result in a prompt order for the return of the child to its country of habitual residence. Inevitably, this means that the application of the exception provided for in reg 16(3)(b) will be rare both by virtue of the language in which that exception is expressed and so as not to undermine the achievement of the overall object of the law. This is also the source of the repeated proposition that the exceptions, being drawn with particularity and using restrictive wording such as "grave" and "intolerable", are to be narrowly construed by courts when applying their terms to the facts of a particular case [FN115]. Statements such as this may not take the decision-maker far. However, they do focus the mind on the obvious fact that the exceptions (including that in reg 16(3)(b)) are narrowly stated. It should not therefore be surprising that they have only been invoked successfully in comparatively rare instances [FN116].

131. This analysis requires decision-makers to face up to what will necessarily, on many occasions, be an unpleasant obligation where there may be a suspicion that the child's best interests, viewed purely as a custody determination, might suggest the child's retention within the jurisdiction, although the proper operation of the Regulations, implementing the Convention, requires an order of removal. This is inescapable in the structure of the Regulations (and of the Convention), in the language chosen to express their objectives and in the principal focus which the law places upon responding to

conduct which the international community, and municipal lawmakers (including in Australia), have agreed to resist.

132. The adoption of the word "*grave*" to qualify "risk" plainly contemplates that in some cases, an order of return will be made although there is a *real*, even *significant* (but not "grave") risk of the kinds of harm contemplated [FN117]. Similarly, the use of the word "otherwise" in reg 16(3)(b) [FN118] indicates that the types of "physical or psychological harm" referred to must also be such as to place the child concerned in an "intolerable situation" [FN119]. Therefore, the language in question, as well as its appearance in a provision enumerating limited exceptions to the general rule, make it clear beyond argument that orders of return will be made to uphold the principal object of the law in circumstances where, were the matter simply a custody dispute (however described), in all likelihood, on the evidence provided, the child's current arrangements would not be altered. Only a circumstance where the party resisting the order can establish, in the context presented by the ordinary rule of return, that that result would expose the child to a *grave* risk that was "*intolerable ... extreme* and *compelling*" [FN120], will invite the application of the exception.

133. In plain terms, the burden of bringing the abducting party within the applicable exception falls upon the party (or the institution or other body representing it) that opposes the return of the child. As the joint reasons pointed out in *De L* [FN121], this conclusion is reinforced in the case of the Regulations, by an amendment which added to the opening words of reg 16(3) (applicable in this case) the phrase "if a person opposing return establishes" [FN122]. Placed against the background and history of the Convention, the imposition of such a burden is deliberate. It is recognised in the law of other countries in language even more emphatic than that of the Australian regulation [FN123].

134. Whilst a federal court in Australia might suggest, encourage or even, perhaps, effectively require, a central authority to secure and provide evidence of conditions in the country to which the order of return would be made, such initiatives may not shift the burden of proof from those resisting the order of return to the central authority concerned. That would be contrary to the express language of the Regulations (and the Convention). To do that would not be to interpret the law but to alter it. A court in Australia has no authority to act in that way.

135. In some of the early decisions in cases of this kind, judges failed to note the fact that the provision for return envisages return to the central authority of the country from which the child was abducted or retained and not, as such, to the person (usually a parent) who enjoyed sole or joint custody of the child before the abduction or retention occurred. Subsequently, this misconstruction has been corrected [FN124]. The language of reg 16(3)(b) itself talks of the return of the child "to the *country* in which he or she habitually resided immediately before the removal or retention" (emphasis added).

136. Nevertheless, given the considerations otherwise addressed in that paragraph, a mechanical or narrow construction of the factors that may be taken into account must obviously be avoided [FN125]. It would be incompatible with the considerations mentioned in the paragraph to focus exclusively upon the risks of the journey to the country in question or of the immediate aftermath of arrival there. Many cases point to the need to consider the practical outcomes of the order for return [FN126]. It is on this basis that considerations of a "grave risk" of physical or psychological harm or otherwise "intolerable situation" arise. Thus, as a matter of practicality, a return that

might expose the child, even briefly, to intolerable physical or sexual abuse, would enliven the exception. But in the ordinary case, the scheme of the Regulations (and of the Convention) envisages that it will be for the authorities (judicial or administrative) of the country of the child's habitual residence to determine the implications for custody and residence orders of lesser risks and what is required by other situations.

137. It is true that sometimes decisions have spoken in terms of return of the child to the "courts" of another country. Commonly that language will be applicable as it would in the two cases under consideration here. Cases may arise where it is not applicable, either because (as envisaged by the Convention) questions of custody are decided by the law itself or because they are decided by administrative tribunals not courts [FN127]. Depending on any evidence, if that were shown in a particular case to be incompatible with the "fundamental principles of Australia relating to the protection of human rights and fundamental freedoms" [FN128], it might enliven that exception provided by the Regulations. However, neither of the cases before the Court involves such risks. In both of the countries of proposed return, Greece and Mexico, questions of custody are decided by courts. Although in both cases it was said that the mother would be at a disadvantage before such courts, in neither was it shown that any such disadvantage was special to her, that she would be excluded from presenting her case (if necessary in person) or foreclosed of argument by operation of the court system or of the law.

138. Many litigants (including mothers) in Australia face disadvantages before our own courts similar to those of which the mothers complained in these cases. Practical considerations, beyond the return to the country of habitual residence as such, must certainly be considered. But to be applicable they must rise to the level of presenting a "grave risk", effectively that the child is exposed to some kind of "intolerable situation" [FN129]. In the ordinary case, the assumption upon which the Convention has been written (and Australia has subscribed to it and implemented it by the Regulations) is that participating countries will afford laws and judicial or administrative remedies that are acceptable so as to permit reciprocal orders of return to be made in such cases [FN130].

139. Nevertheless, the explicit inclusion of exceptions, and specifically the exception acknowledged in reg 16(3)(b), reflects the acceptance, as part of the law, that cases will arise from time to time where an order of return should *not* be supported. In the extreme cases contemplated, it is not therefore a *departure* from the scheme of the law, but its *fulfillment*, that allows the exception to be applied. Even where the grounds contemplated by the exception are established, it remains for the court in Australia, in terms of the opening words of reg 16(3), to exercise a discretion to refuse to make an order of return or to proceed to make it [FN131]. Where the conditions in par (b) are established, it would be less likely, in practice, that the discretion would be exercised otherwise than to refuse an order of return than, say, where a child of sufficient maturity objected to being returned [FN132]. There are two steps. So much was correctly recognised in *JLM* by Rose J [FN133].

140. Obviously, the preconditions such as are stated in reg 16(3)(b), and the discretion which they invoke, call forth judicial skills of fact-finding and evaluation. Such decisions cannot be reduced to rules of thumb [FN134]. This consideration presents a reason for a measure of appellate restraint, including on the part of this Court in reconsidering a decision made in the Full Court of the Family Court, a judicial body of specialist jurisdiction. Necessarily, the approach adopted by this Court to the interpretation and application of the Regulations influences the way in which courts in

this country will implement the Convention as it is reflected in the Regulations. Australia has repeatedly been a beneficiary of the orders of authorities in other countries returning to this country children abducted from Australia [FN135]. Self-evidently, an approach must be taken in cases such as the present that gives effect to the entire scheme of the Regulations, including exceptions such as that in reg 16(3)(b). But the exceptions must remain just that. The strength of the adjectives "grave" and "intolerable" permits no other approach. Furthermore, any other approach would effectively reward the abducting parent with the fruits of conduct which domestic and international law is designed to prevent and, where it occurs, to remedy promptly.

Application of authority to these proceedings

141. ***DP v Commonwealth Central Authority*: Approached from the perspective afforded by the foregoing analysis of the language, history, purpose and international operation of the Convention, to the extent that, in Australia, it is reflected in the Regulations, it is my view that no error has been shown in the reasons of the Full Court that would warrant the intervention of this Court.**

142. **It is unprofitable to dwell too long on the complaint about the use of the adverb "narrowly" as it was used to describe the approach which the Full Court took to the construction of the exception invoked under reg 16(3)(b). It is enough to say that, like all exceptions from a general rule, those in reg 16(3) must be construed in their context so as to fulfil their function as a departure from the general rule but one that does not destroy or undermine the ordinary attainment of that rule. The Full Court was right to recognise the exceptional character of the derogation from the general rule of return afforded by reg 16(3)(b). The overseas authorities to which the Full Court pointed confirmed this approach.**

143. **Correctly, the Full Court, in assessing whether the preconditions contemplated by reg 16(3)(b) were proved by the mother, looked beyond the immediate situation of the return of the child, as such, to Greece. It also recognised that the scheme of the Regulations (as of the Convention) is to leave it to the authorities, in this case of Greece, to determine the contested issue of custody (and residence) of the child. This is, after all, what would have occurred, if the mother had not taken the law into her own hands and clandestinely departed from Greece with the child without the father's consent.**

144. **On the face of the evidence before the primary judge, unsupplemented by any evidence received by the Full Court, it does appear that facilities exist in Greece for the treatment of autism in children. It would require very clear evidence to convince an Australian court (the burden of doing so being on the mother resisting the order of return) that such facilities did *not* exist, including in an area of Greece reasonably proximate to the likely residence of the mother and her family following their return with the child. It would be truly astonishing if, a proper diagnosis now having been made, facilities for maintaining the regime of therapy were not available in Greece, at least in Salonika and probably closer. Greece, after all, is a modern democracy and a member country of the European Union.**

145. **The evidence showed that the child did not speak English. In that respect, some of the facilities in his native tongue might be better adapted to his needs than those available in Darwin. But, whether this is so or not, the proper place for that point to be considered is the place contemplated by the Convention and the Regulations. It is before the authorities, judicial or administrative, of Greece. To escape this outcome**

much more evidence would be needed than the fact that removal of the child from certain therapeutic advantages in Darwin would cause temporary disruption and even certain setbacks. The language of the regulation is "grave" and "intolerable". The Full Court concluded that such language was inapplicable to the case. It did so recognising that if those strong adjectives are watered down, the major point, if not the whole point, of the Convention and the Regulations will be lost. In effect Australian and not Greek courts will assume the consideration of the custody of the child according to his best interests.

146. There is no evidence that the Full Court did otherwise than to recognise the painful decision which it was called upon to make when, error having been found on the part of the primary judge, it substituted a conclusion of its own. Although the facts may have caused judicial discomfort, disquiet or reluctance, they did not establish the necessary exposure of the child to a "grave" risk of harm or otherwise "intolerable" situation. The Full Court rightly recognised this. In doing so it did not err. This Court should not disturb the Full Court's judgment.

147. There was some discussion during argument about the enforceability of the undertakings proffered by the father to the CCA and the Full Court and reflected in the Full Court's final orders. Such undertakings are common in the exercise of this jurisdiction both in Australia and overseas [FN136]. The provision of appropriate undertakings has sometimes been described as a prerequisite to the return of a child to another country [FN137]. To the extent that such undertakings must be discharged before the child leaves Australia (as by the provision of paid air tickets) they are certainly enforceable here. To the extent that they can only be enforced in another country, because they involve a foreign central authority, and because the Convention and implementing domestic law are reciprocal in character, it will ordinarily be expected that they would be respected and upheld by the authorities (judicial and administrative) of the country of the child's habitual residence. Any other course would obviously endanger future cooperation between the respective national central authorities and courts concerned.

148. If the mother had any specific objections to the form of the undertakings, she was at liberty to raise them before the primary judge [FN138]. This could doubtless still be done. Too much should not, in my view, be made of the difficulty of enforcing such undertakings. Such problems are inherent in cases involving foreign jurisdictions but they cannot be allowed to undo the strong initiatives of the international community reflected in the achievement of the Convention. Undertakings are now a common feature of such cases. There is no mention in the casebooks that I could find of practical difficulties that have arisen in conforming to such undertakings. This Court need not be concerned about such problems where they are not shown to exist [FN139]. At least we should not pass upon them in the absence of a clear challenge on the record either to the power to exact undertakings generally or to obtain them in the form required.

149. *JLM v Director-General (NSW)*: The situation in this case is slightly different in that the Full Court reversed the decision of the primary judge, which was substantially based on the failure of the NSWCA, at trial, to challenge or contradict the mother's testimony about the risk of suicide. However, as the evidence in question was given on affidavit or by report, no issue arises concerning the restraints proper to appellate intervention based on the assessment of the credibility of witnesses [FN140]. The judges constituting the Full Court were therefore entitled, and bound, in the appeal by way of rehearing, to reconsider the matter for themselves.

150. In my opinion, the Full Court was correct to identify as erroneous the process of reasoning on the part of Rose J whereby his Honour effectively jumped from a conclusion that if the mother were separated from the child (or the child handed back to the father) this presented a "very serious risk" or "high risk" of suicide to the ultimate conclusion that that risk arose by requiring the child to be returned to Mexico. In order to bring about the event posited as presenting the "grave risk" and "intolerable situation" to the child, several circumstances had yet to occur. The order for return had to be made. The mother having indicated that she would accompany the child in that circumstance, an order separating her from the child would later have to be made by a competent court in Mexico. Presumably there would be a power, if dissatisfied, to seek appeal or review, which, it must be assumed, failed. In short, it had to be assumed that a Mexican court would deprive a mother, who had enjoyed unbroken custody of an infant daughter of three years, of that custody, in favour of the father. Even then, a final intervening act is contemplated, being one involving the mother's own conduct, notwithstanding her love for her child and the knowledge of the profound and irremediable damage which her suicide would occasion to the child.

151. The Full Court was correct to regard the fulfillment of the foregoing steps after an order returning the child to Mexico as too remote to enliven reg 16(3)(b). Such an order merely restored the situation which subsisted before the mother unlawfully retained the child by refusing to return her to her country of habitual residence.

152. The evidence showed that, ultimately, the mother's objection was directed to separation from the child rather than her return to Mexico. She deposed that were the child returned to Mexico, "I will travel ... with her. I have thought about this particularly since the Judgment by the Judicial Registrar and I am not prepared to remain in Australia if [the child] is living in Mexico." [FN141]. Accordingly, the return of the child to Mexico, as such, would not cause any risk at all to the child.

153. Obviously, as Rose J recognised, courts of law must be particularly cautious before permitting parents, in the highly charged circumstances of international child removal or retention, to attempt to dictate the outcome of proceedings by threatening that if a court decision goes against them, they will commit suicide to the great risk of harm to the child concerned. In many cases of this type, the very circumstances that have driven a party, typically a parent, to cross, or refuse to cross, the world with a child will be such as to engender the deepest of feelings. If such threats were easily upheld as attracting the exception in reg 16(3)(b) in a particular case, it might be expected that like claims would multiply enormously. These are the practicalities of cases of this kind which the Full Court can be taken to know only too well. Such threats would themselves add to the disruption occasioned to children by such international abduction or retention. I do not say that the threat of suicide by an abducting or retaining parent could never be established to occasion the type of "grave risk" of which par (b) speaks. But it would be a case different from the present where a number of events had to occur and then coincide and where the assertions of the necessary circumstances of suicide did not bear out the reasoning of the primary judge.

154. For these reasons, there was no error in the reasoning of the Full Court. I would therefore confirm its judgment.

Conclusion and orders

155. Unless Australian courts, including this Court, uphold the spirit and the letter of the Convention as it is rendered part of Australian law by the Regulations, a large international enterprise of great importance for the welfare of children generally will be frustrated in the case of this country. Because Australia, more than most other countries, is a land with many immigrants, derived from virtually every country on earth, well served by international air transport, it is a major user of the Convention scheme. Many mothers, fathers and children are dependent upon the effective implementation of the Convention for protection when children are the victims of international child abduction and retention. To the extent that Australian courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (and residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular.

156. Of themselves, these general considerations do not decide an individual application which enlivens the exercise of the power provided by the Regulations, subject to the exceptions there stated. But they do afford the context in which that power, and those exceptions, are to be given meaning. And they explain why the "narrow construction" to the exception invoked, as favoured by each Full Court, was correct and why, in each case, it justified the conclusion reached and the orders made. This Court should not disturb those conclusions and orders.

157. In the appeal of *DP v Commonwealth Central Authority*, I would order that the appeal be dismissed. In *JLM v Director-General NSW Department of Community Services*, because of the importance of the matter, I would grant special leave. However, the appeal should be dismissed. In neither matter did the Central Authority seek costs [FN142].

CALLINAN J.

DP v Commonwealth Central Authority

The facts

158. Nigrita is a village in Greece of about 2500 people. There are no medical specialists in the village. It is about 20 kilometres from the nearest town of Serres and several hours by road from the nearest regional centre of Salonika. Both the father and the mother of a child, EL, were born in Greece, at Nigrita in 1962, and Serres in 1966 respectively.

159. In 1967, the mother, the appellant, emigrated to Australia with her parents and sister. She spent the next 13 years in Australia before her family and she returned to Greece. In 1984, the appellant came back to live in Australia and remained here until 1989 when she again returned to Greece. She is an Australian citizen.

160. The appellant and the father of EL met in Greece in 1989 and married there in October 1993.

161. EL is the only child of the marriage. He was born on 13 November 1994, and is an Australian citizen.

162. The relationship between the parents deteriorated after the birth of EL. In October 1996, they separated but continued to live in the same residence in Nigrita. In July 1998, the appellant moved with the child to her parents' home in the village of Sitohori about 16 kilometres from Nigrita.

163. After his birth, EL often vomited and was difficult to feed. From about 7 months, he could not lift his head as other children of the same age, and could not sit up, roll over or crawl. When he began to stand, he stood on his toes and could not rest on the base of his feet. His eyes rolled oppositionally and he was unable to focus. At 18 months, he was still unable to walk properly and when he walked it was on his toes. He had to be assisted as he could not balance unaided. His speech was delayed and when he walked he held his hands raised to his face.

164. The appellant sought orthopaedic, paediatric, physiotherapy, optometric and speech therapy treatment for the child in Serres, Nigrita and Salonika. Her evidence was that none of these professionals were able to diagnose or treat the child: she said that they had informed her that the child would grow out of his problems and that she was spoiling him. The teacher to child ratio at the school which he attended was 1 to 60, and no specialized education was available where the parents lived.

165. EL remained undiagnosed and untreated in Greece. The appellant requested the child's father on several occasions to give her enough money to enable her to seek specialist treatment for him in another country. The father refused.

166. The relationship between the parents irretrievably broke down. In October 1998, the appellant obtained an order from the single member Court of First Instance in Serres of temporary title to the exertion of parental authorisation over EL, together with an order for maintenance of the child. Unbeknown to the appellant, an order was made on 27 November 1998 by the President of the single member Court of Serres prohibiting her from leaving the country with EL.

167. In November 1998 the appellant obtained a passport for the child. She moved with her parents and the child from Greece to Darwin on 1 December 1998.

168. On 31 March 1999, the single member Court published a further decision in which it was noted that on 29 October 1998, it had rejected the father's petition and accepted the appellant's petition for a temporary title to exercise parental authority. By way of order, it amended that earlier order and attributed to the father "a temporary title [to] the exertion of the parental authorization [over] his minor son, whom he has had with the defendant."

169. EL was diagnosed, for the first time, as autistic when he came to Australia. Since that diagnosis, he has been treated in Darwin where he is residing. Among those who are treating him are a paediatrician, a speech therapist, an occupational therapist, and an "inclusion assistant" at the school that he attends in Darwin. He is progressing well. He is now toilet trained, and is not walking on his toes to the same extent as previously. He has become more social and plays with other children. His ability to communicate and his speech have improved. Without continued treatment, EL is likely to become increasingly withdrawn and dysfunctional, and secondary problems such as depression, lack of self-esteem, and violence and aggressive reactive behaviour may develop.

170. The father does not accept that the child is autistic.

171. The appellant has no income or capacity to earn it in Greece if the child were in her care in that country. The evidence is that there is no social security system in Greece and the father has not been paying child maintenance despite a court order that he do so. There is no equivalent of the Australian child support office in Greece and the appellant does not have the means to enforce the child maintenance order.

Previous proceedings

172. The respondent made application to the Family Court of Australia pursuant to the Family Law (Child Abduction Convention) Regulations 1986 ("the Regulations") seeking EL's return to Greece.

173. The application was heard in the first instance by Mushin J. After a contested hearing, his Honour granted the application and ordered that the child be returned to Greece.

174. His Honour found that, according to Greek law (evidence of which was before him) the power to determine the child's place of residence had not vested in the mother when she departed with the child for Australia on 1 December 1998. In consequence, on that date, rights of custody in respect of the child were "attributed" to the father, either jointly or alone, pursuant to Greek law and orders of a court of competent jurisdiction. It followed, therefore, that the mother's removal of the child from Greece on 1 December 1998 was a removal of the child within the meaning of the Regulations in accordance with reg 3(1).

175. These findings are not in contest in this Court.

176. There was some evidence, originating from the general hospital of Kavala in Greece, before the trial judge, making claim to the availability of suitable facilities and specialists for the treatment of autism.

"The town of Nigrita in the Prefecture of Serres is provided with medical services by the Prefectural General Hospital of Serres to where we referred your letter.

We have also worked together with the our [sic] region's Primary Directorate, in the Prefecture of Kavala and we forward to you a table of the Institutes (Organisations) in Thessalonica which is the closest city to the cities of Nigrita and Serres. These Institutes are special institutes that meet the needs of persons suffering from autistic disorders.

The table includes the address and telephone number of the Serres Primary Education Directorate for you to contact and obtain further information.

Finally I have written the Serres hospital telephone and fax numbers and I believe that the information I have provided will be useful for the matter that concerns you."

177. However, that evidence, on scrutiny, did not satisfy the primary judge that the relevant specialists and facilities were in fact available. He made this finding:

"The documentary evidence referred to above included a list of various institutions in the Prefecture of Government of Thessaloniki. Most are specialist psychiatric institutions which, it is common ground, are not appropriate for the treatment of autism. There is no suggestion that any of them has any expertise in the treatment of an autistic child.

Accordingly, I find that there is no apparent appropriate institution or qualified person capable of treating and managing the child's autism within the general area in which the child was born and brought up in Greece and from which the mother and father separated."

178. The issue, however, his Honour held, was whether the facilities for the appropriate care of the child were available in Greece rather than in any particular region of the country. With respect to this issue, his Honour said that the onus lay upon the appellant, and that she had failed to discharge it. He said:

"I accordingly find that the mother has not made out her assertion of grave risk on the basis of the apparent unavailability of appropriate treatment and care for the child's autism in that part of Greece in which she and the child were living at the time of their separation from the father."

His Honour also said that it would be "presumptuous of [him] to assume that the Republic of Greece [did] not have the facilities to care for an autistic child in a comparable way to the care which [was] being given to the child in Australia."

The appeal to the Full Court of the Family Court

179. The appellant appealed to the Full Court of the Family Court (Nicholson CJ, Buckley and Kay JJ) which unanimously dismissed the appeal. During the course of it, applications were made by the appellant and the respondent for leave to adduce further evidence: the former with respect to the mother's and EL's circumstances on return to Greece, and the latter with respect to matters not disclosed by the record. Both those applications were refused.

180. The Full Court was of the opinion that the trial judge erred in having regard to the availability of the relevant facilities anywhere in Greece rather than in the general locality of the child's likely residence. The Full Court did not consider, however, that this and other errors of a minor kind they thought him to have made affected the outcome. The appeal was rejected.

The appeal to this Court

181. There are two grounds of appeal to this Court:

1. "The Full Court of the Family Court of Australia erred in law in finding that, in the interpretation of Regulation 16(3) of the Family Law (Child Abduction Convention) Regulations 1986, Regulations 16(3)(b) and (d) are to be narrowly construed."

2. "The Full Court of the Family Court of Australia erred in law in finding that the evidence available to the Learned Trial Judge established that the return of the child to Greece would not constitute a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation."

182. It is convenient to discuss the second of these grounds first. The appellant's primary submission was that the appellant had satisfied any onus of proof for these reasons: the tender by her of evidence of her strenuous but fruitless efforts to obtain treatment for the child in Greece, from which it could be inferred that no such treatment was available there; the respondent provided no evidence of access to or the availability of appropriate treatment; and the fact that her evidence of the father's uncomprehending attitude to the child's disability was not challenged.

183. I feel a sense of disquiet that the resolution of a case of this kind to which a creature of the Executive is a party (and presumably possessed, therefore, of reasonably sufficient resources to enable it to obtain and tender cogent evidence directed to the issues) might turn upon a failure of an ordinary person to discharge an onus. (In that respect, it may be noted that the Full Court was critical of the failure of the respondent to adduce more evidence than it did of the relevant Greek law of custody, parental rights and obligations.) I have already referred to the fact that the respondent, presumably in order to repair any deficiencies in this and other respects, did seek to tender evidence in the Full Court. The Full Court apparently rejected the tender because it had already decided that it could resolve the appeal without recourse to that evidence. This Court was not provided with any detailed reasons for the rejection of the tender or of the evidence sought to be tendered by the appellant, or with any other material from which those matters could be ascertained.

184. Regulation 16 of the Regulations is in the following form:

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

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

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

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

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

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

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

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

(e) the child is not in Australia.

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

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

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

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

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

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

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

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

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

185. Regulation 16(2) speaks of the need for a state of satisfaction of the mind of the court hearing an application. Regulation 16(3) does throw the onus upon the person opposing the return of the child by using the word "establishes".

186. In my opinion, however, the appeal should be upheld because both the primary judge and the Full Court did err in the way in which they dealt with the evidence in this case. Despite the language of reg 16(3), the ordinary rules in relation to the onus of proof in civil litigation may not always be able to be applied in an entirely unqualified way in an application brought under the Regulations. One indication that the ordinary rules of evidence may not have the same application as they have in other civil, adversarial proceedings is that reg 26 empowers the Family Court to make orders for the provision, in such manner as the Court may direct, of a report by a counsellor or welfare officer on matters relevant to proceedings of this kind, and its reception in evidence.

187. In any event, one of the rules of evidence is the rule in *Blatch v Archer* [FN143] and referred to recently in this Court in *Vetter v Lake Macquarie City Council* [FN144] and *Marshall v Director-General, Department of Transport* [FN145], that all evidence is to be weighed and assessed by courts having regard to the capacities of the parties to adduce it. Its application here would result in the imposition of a very light burden on the appellant only.

188. Contrary to what the primary judge and the Full Court held, I am, with respect, of the view that the appellant did tender sufficient evidence to "establish", in a prima facie way at least, that the removal of EL would expose him to physical or psychological harm, or place him in an intolerable situation, in the locality in which he was likely and could reasonably be expected to reside. I would regard the unavailability of suitable treatment for autism as involving the child in exposure to physical or psychological harm or otherwise placing him in an intolerable situation within the meaning of the Regulations.

189. The situation in this case was that the appellant had established that her efforts to find suitable treatment in Greece had been unavailing. Against that was evidence which the

primary judge, correctly, thought did not prove the availability of treatment in the appellant's home region, and an assumption only on the part of his Honour as to what would be likely to be available somewhere else in the Republic of Greece. This could not tilt the balance to lean against the appellant.

190. The evidence adduced on behalf of the appellant with respect to the absence of suitable treatment was very slight. She was no doubt, however, doing her best as a person of fairly limited education, who had lived the greater part of her life in Australia, in attempting to establish technical medical matters in a distant country. But it was enough to discharge an evidentiary onus, which for its displacement needed to be met, but was not met, with contrary evidence.

191. For these reasons the appeal should be allowed. I would add that I agree with the observations of Gaudron, Gummow and Hayne JJ as to the proper construction of the Regulations.

192. There is a further question, and that is as to the orders that this Court should make. In my opinion, the matter should be remitted to the Full Court for further consideration and disposition. In doing so, it will be for the Full Court to consider whether it should receive further evidence in light of these matters: this is a case involving the welfare (current) of a child; the qualifications upon the ordinary rules of evidence to which I have referred; and the Court's establishment as a statutory court [FN146] whose procedures in respect of the reception of further evidence on appeal are not subject to the same constraints as other intermediate appellate courts. I would therefore order that the matter be remitted to the Full Court for further hearing and disposition in accordance with these reasons.

JLM v Director-General NSW Department of Community Services

193. I agree with the analysis of the evidence made by Gaudron, Gummow and Hayne JJ and their Honours' reasoning and conclusion with respect to them and would join in making the orders that their Honours propose for the allowance of the appeal and otherwise.

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[1] ***P v Commonwealth Central Authority*****, unreported, Full Court, Family Court of Australia, 19 May 2000.**

[2] ***Director-General, NSW Department of Community Services v JLM*** **(name removed), unreported, Full Court, Family Court of Australia, 30 November 2000.**

[3] (1996) 187 CLR 40 at 648-649 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

[4] ***C v C (Abduction: Rights of Custody)*** **[1989] 1 WLR 654 at 664 per Lord Donaldson of Lymington MR; [1989] 2 All ER 465 at 473.**

[5] [1989] 1 WLR 654 at 661; [1989] 2 All ER 465 at 471.

[6] As originally enacted by the ***Family Law Amendment Act 1983*** **(Cth) and amended by the** ***Family Law Reform Act 1995*** **(Cth).**

[7] reg 14.

[8] reg 4(1).

[9] reg 4(2).

[10] reg 4(3).

[11] reg 2(1).

[12] Art 6.

[13] reg 5(2).

[14] regs 8, 9.

[15] reg 13(1).

[16] reg 13(4)(a).

[17] reg 13(4)(b).

[18] reg 13(4)(c).

[19] reg 14(1)(a).

[20] reg 16(1).

[21] reg 15(2) and (4).

[22] reg 16(2)(a).

[23] For example, *Murray v Director, Family Services, ACT* [1993] FLC ¶92-416; *In the Marriage of Van Rensburg and Paquay* [1993] FLC ¶92-391; *Laing v The Central Authority* [1996] FLC ¶92-709; *Director-General, Department of Community Services Central Authority v RMS* [2000] FLC ¶93-026; *P v P (Minors) (Child Abduction)* [1992] 1 FLR 155; *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392.

[24] *The Hague Convention on International Child Abduction*, (1999) ("Beaumont and McEleavy").

[25] Beaumont and McEleavy at 18.

[26] Beaumont and McEleavy at 19 referring to Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 541 (Professor Anton was Chairman of the Special Commission which did the preparatory work for the Convention).

[27] Pérez-Vera, Explanatory Report of the Convention on the Civil Aspects of International Child Abduction, *Actes et documents* of the XIVth Session, (1982), vol III, 426 at 461 [116].

[28] cf reg 16(3)(d).

[29] Beaumont and McEleavy at 3.

[30] *P v Commonwealth Central Authority* [2000] FamCA 461 at [104]. See also *Gsponer v Director General, Dept of Community Services, Vic* [1989] FLC ¶92-001 at 77,160; cf *Friedrich v Friedrich* 78 F 3d 1060 (1996); *In re Walsh* 31 F Supp 2d 200 (1998); *Re M*

(Abduction: Psychological Harm) **[1997] 2 FLR 690 at 695;** ***Re C (Abduction: Grave Risk of Psychological Harm)*** **[1999] 1 FLR 1145 at 1153-1154.**

[31] cf ***Re C (Abduction: Grave Risk of Psychological Harm)*** **[1999] 1 FLR 1145 at 1154.**

[32] American Psychiatric Association, ***Diagnostic and Statistical Manual of Mental Disorders*****, 4th ed (1994) at 66, a copy of which was annexed to a report of a specialist paediatrician tendered in evidence to the primary judge.**

[33] ***Gsponer*** **[1989] FLC ¶92-001;** ***Murray*** **[1993] FLC ¶92-416.**

[34] ***Murray*** **[1993] FLC ¶92-416.**

[35] ***In re F (A Minor) (Abduction: Custody Rights Abroad)*** **[1995] Fam 224;** ***The Ontario Court v M and M (Abduction: Children's Objections)*** **[1997] 1 FLR 475;** ***Blondin v Dubois*** **19 F Supp 2d 123 (1998) (and on appeal to the US Court of Appeals 2nd Circuit 238 F 3d 153 (2001));** ***Rodriguez v Rodriguez*** **33 F Supp 2d 456 (1999);** ***Rechsteiner v Kendell*** **(1998) 39 RFL (4th) 127; and three apparently unreported cases described only as** ***Johnson v Fowler-Winning*** **unreported, High Court of Justice, Family Division, 24 March 1998 per Brown P <** ***Turner v Frowein*** **unreported, Superior Court of Middlesex, Connecticut, USA, 25 June 1998 <** ***Re VES, an Infant*** **unreported, High Court of Ireland, 20 November 1997 per Geoghegan J.**

[36] See, for example, ***Turner v Frowein*** **unreported, Superior Court of Middlesex, Connecticut, USA, 25 June 1998 <** ***Rodriguez*** **33 F Supp 2d 456 (1999).**

[37] (1979) 142 CLR 531.

[38] ***House v The King*** **(1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.**

[39] From the judgment of the Family Court of Australia: ***P v Commonwealth Central Authority*** **[2000] FamCA 461 per Nicholson CJ, Buckley and Kay JJ.**

[40] From the judgment of the Family Court: ***Director-General NSW Department of Community Services v JLM*** **(name removed) unreported, Full Court, Family Court of Australia, 30 November 2000 per Ellis, Coleman and Joske JJ ("Full Court reasons** ***JLM*****").**

[41] See regs 2(1), 13, 14(1)(a), 16(3)(b).

[42] The Regulations as originally made were considered in ***De L v Director-General, NSW Department of Community Services*** **(1996) 187 CLR 640 ("*** ***De L*** **"); see also** ***DJL v The Central Authority*** **(2000) 201 CLR 226.**

[43] Convention on the Civil Aspects of International Child Abduction, ***Australia Treaty Series*** **(1987) No 2 (entry into force 1 December 1983) ("the Convention"). The Convention is referred to in the** ***Family Law Act 1975*** **(Cth) ("the Act"), s 111B(1) inserted in 1983. The Convention is Sched 1 to the Regulations.**

[44] The Convention, Arts 12, 13; see Beaumont and McEleavy, ***The Hague Convention on International Child Abduction*** **(1999) ("Beaumont and McEleavy"), Ch 9.**

[45] The Regulations, reg 16(1)(a).

[46] ***Commonwealth Central Authority and P*** **unreported, Family Court of Australia, 23 December 1999 at [55] per Mushin J ("reasons of Mushin J").**

[47] Dr "D", quoted in reasons of Mushin J at [56].

[48] The same provisions apply: see the Regulations, regs 3(1), 3(2).

[49] *JLM* (name removed) *v Director-General, Department of Community Services* unreported, Family Court of Australia, 23 June 2000 at [78] per Rose J ("reasons of Rose J").

[50] Affidavit of Ms Campbell, quoted in reasons of Rose J at [82].

[51] Dr Waters, quoted in reasons of Rose J at [83].

[52] Dr Waters, quoted in reasons of Rose J at [87].

[53] Reasons of Rose J at [99].

[54] For the operation of the Regulations, see *De L* (1996) 187 CLR 640 at 647-650, 671-673. The subsequent change in the language of reg 16 was noted at 653.

[55] The Regulations, regs 14, 15(1)(a).

[56] See the Regulations, regs 15(1)(b), 15(1)(c).

[57] The Regulations, reg 16(3)(c); see *De L* (1996) 187 CLR 640 at 654-655, 685-688.

[58] The Regulations, reg 16(3)(d).

[59] See the Convention, Art 20.

[60] See Beaumont and McEleavy at 135.

[61] Beaumont and McEleavy at 174-175.

[62] It is worth noting that courts in the United States of America, also a Convention country, make orders for the return of children to Mexico: eg *Nunez-Escudero v Tice-Menley* 58 F 3d 374 (8th Cir 1995) ("*Nunez-Escudero*").

[63] See *Cooper v Casey* [1995] FLC ¶92-575 at 81,699-81,700.

[64] Reasons of Mushin J at [59] (emphasis omitted).

[65] Reasons of Mushin J at [60].

[66] *P v Commonwealth Central Authority* [2000] FamCA 461 at [46].

[67] Reception of fresh evidence by the Full Court is permitted on appeal: Family Law Rules, O 32, r 16A.

[68] Appellant's submissions, 12 April 2000 at [17] referring to *Director-General, Department of Families, Youth and Community Care v Bennett* (2000) 26 Fam LR 71 at 74-75 [13]; 155 FLR 121 at 124-125; *DM v Director-General, Department of Community Services* [1998] FLC ¶92-831.

[69] *P v Commonwealth Central Authority* [2000] FamCA 461 at [47].

[70] *De L* (1996) 187 CLR 640 at 649.

[71] ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [104].**

[72] ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [111]-[113];** ***Evidence Act 1995*** **(Cth), ss 76, 79.**

[73] That Mushin J had addressed the justification of removal rather than the consequences of return: see ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [158].**

[74] ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [160].**

[75] ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [162].**

[76] ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [163].**

[77] ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [168] referring to** ***Laing v The Central Authority*** **[1999] FLC ¶92-849 at 85,954 per Nicholson CJ, 85,994-85,995 per Kay J.**

[78] ***P v Commonwealth Central Authority*** **[2000] FamCA 461 at [165].**

[79] Reasons of Rose J at [92].

[80] Reasons of Rose J at [96].

[81] Reasons of Rose J at [99].

[82] Reasons of Rose J at [99].

[83] Reasons of Rose J at [100].

[84] Such as the identification of the habitual residence of the child (Full Court reasons ***JLM*** **at [71]-[86]); rights of custody under Mexican law (at [87]-[90]) and suggested acquiescence on the part of the father (at [92]-[105]), all found against the mother.**

[85] Full Court reasons ***JLM*** **at [63].**

[86] Full Court reasons ***JLM*** **at [62].**

[87] Full Court reasons ***JLM*** **at [64].**

[88] Full Court reasons ***JLM*** **at [64]-[65] applying** ***Gsponer v Director General, Dept of Community Services, Vic*** **[1989] FLC ¶92-001 at 77,160 ("*Gsponer*").**

[89] Full Court reasons ***JLM*** **at [66].**

[90] Full Court reasons ***JLM*** **at [68].**

[91] ***Warren v Coombes*** **(1979) 142 CLR 531 cited in Full Court reasons** ***JLM*** **at [68].**

[92] Full Court reasons ***JLM*** **at [108], [112].**

[93] ***De L*** **(1996) 187 CLR 640 at 650, 679-682;** ***McCall and McCall*** **[1995] FLC ¶92-551.**

[94] See the Convention, Preamble.

[95] ***McKee v McKee*** **[1951] AC 352. See** ***De L*** **(1996) 187 CLR 640 at 677;** ***McCall and McCall*** **[1995] FLC ¶92-551 at 81,510-81,511.**

[96] The Act, s 111B(1); see also the Regulations, reg 2(2).

[97] ***Murray v Director, Family Services, ACT*** **[1993] FLC ¶92-416 at 80,258.**

[98] ***Director General of the Department of Family and Community Services v Davis*** **[1990] FLC ¶92-182 at 78,226.**

[99] ***De L*** **(1996) 187 CLR 640 at 648, 678-679;** ***Gsponer*** **[1989] FLC ¶92-001;** ***Murray v Director, Family Services, ACT*** **[1993] FLC ¶92-416 at 80,258;** ***Re A (A Minor) (Abduction)*** **[1988] 1 FLR(UK) 365; see also** ***McCall and McCall*** **[1995] FLC ¶92-551 at 81,510-81,511 where the** ***travaux préparatoires*** **are cited.**

[100] ***De L*** **(1996) 187 CLR 640 at 678; cf** ***Gsponer*** **[1989] FLC ¶92-001 at 77,154.**

[101] ***Thomson v Thomson*** **[1994] 3 SCR 551 at 575 citing Hague Conference on Private International Law,** ***Actes et documents de la Quatorzième session*****, t III,** ***Child Abduction*** **(1982).**

[102] (1996) 187 CLR 640 at 649 quoting the description from Anton, "The Hague Convention on International Child Abduction", (1981) 30 ***International and Comparative Law Quarterly*** **537 at 550.**

[103] Beaumont and McEleavy at 137.

[104] Beaumont and McEleavy at 137.

[105] See Beaumont and McEleavy at 155.

[106] ***The Commonwealth v Tasmania*** **(*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 222-223;** ***Tahan v Duquette*** **613 A 2d 486 at 489 (1992).**

[107] ***Nunez-Escudero*** **58 F 3d 374 at 376, 378 (8th Cir 1995);** ***Friedrich v Friedrich*** **78 F 3d 1060 at 1063 (6th Cir 1996) ("*Friedrich*").**

[108] ***Gsponer*** **[1989] FLC ¶92-001 at 77,161;** ***Adams v Wigfield*** **[1994] NZFLR 132 at 139;** ***S v S*** **[1999] 3 NZLR 513 at 530 [9].**

[109] (1996) 187 CLR 640 at 648-649 quoting Eekelaar, "International Child Abduction by Parents", (1982) 32 ***University of Toronto Law Journal*** **281 at 305.**

[110] Anton, "The Hague Convention on International Child Abduction", (1981) 30 ***International and Comparative Law Quarterly*** **537 at 542 quoted in** ***De L*** **(1996) 187 CLR 640 at 677.**

[111] The Convention, Preamble, Arts 1, 2, 7, 9, 11.

[112] eg regs 13(3), 15(2), 20(2).

[113] ***Gsponer*** **[1989] FLC ¶92-001 at 77,161.**

[114] ***De L*** **(1996) 187 CLR 640 at 669-670; eg** ***Laing v The Central Authority*** **[1996] FLC ¶92-709 at 83,507.**

[115] ***S v S*** **[1999] 3 NZLR 513 at 532 [15]-[16];** ***Nunez-Escudero*** **58 F 3d 374 at 376 (8th Cir 1995).**

[116] ***In re A (Minors) (Abduction: Custody Rights)*** **[1992] 2 WLR 536 at 551; [1992] 1 All ER 929 at 943;** ***S v S (Child Abduction) (Child's Views)*** **[1992] 2 FLR(UK) 492 at 502;** ***In re F (A Minor)*** **[1995] 3 WLR 339 at 348; [1995] 3 All ER 641 at 649.**

[117] ***C v C (Abduction: Rights of Custody)*** **[1989] 1 WLR 654 at 664; [1989] 2 All ER 465 at 473.**

[118] Deriving from the Convention, Art 13(b).

[119] ***Director General of the Department of Family and Community Services v Davis*** **[1990] FLC ¶92-182 at 78,227.**

[120] ***In re F (A Minor)*** **[1995] 3 WLR 339 at 352; [1995] 3 All ER 641 at 653 (emphasis added).**

[121] (1996) 187 CLR 640 at 653.

[122] See also ***Re A (A Minor) (Abduction)*** **[1988] 1 FLR(UK) 365 at 369;** ***Adams v Wigfield*** **[1994] NZFLR 132 at 139;** ***Wolfe v Wolfe*** **(1993) 10 FRNZ 174 at 178; cf** ***Gsponer*** **[1989] FLC ¶92-001 at 77,157.**

[123] See eg 42 USC §11603(e) requiring proof by "clear and convincing evidence".

[124] ***Murray v Director, Family Services, ACT*** **[1993] FLC ¶92-416 at 80,259;** ***Friedrich*** **78 F 3d 1060 at 1068 (6th Cir 1996).**

[125] ***Tahan v Duquette*** **613 A 2d 486 at 489 (1992);** ***Nunez-Escudero*** **58 F 3d 374 at 378 (8th Cir 1995).**

[126] See eg ***Re A (A Minor) (Abduction)*** **[1988] 1 FLR(UK) 365 at 373 per Nourse LJ.**

[127] The Convention, Art 14.

[128] The Regulations, reg 16(3)(d).

[129] The Regulations, reg 16(3)(b); ***Cooper v Casey*** **[1995] FLC ¶92-575 at 81,699;** ***Currier v Currier*** **845 F Supp 916 at 922-923 (1994).**

[130] The country in question must itself have signed the Convention and to some extent this eliminates countries which find the prospect of such reciprocity uncongenial: ***Matter of Mohsen*** **715 F Supp 1063 (1989);** ***Mezo v Elmergawi*** **855 F Supp 59 (1994).**

[131] ***In re A (Minors) (Abduction: Custody Rights)*** **[1992] 2 WLR 536 at 550; [1992] 1 All ER 929 at 942;** ***Clarke v Carson*** **[1996] 1 NZLR 349 at 351 per Elias J;** ***S v S*** **[1999] 3 NZLR 513 at 530.**

[132] The Regulations, reg 16(3)(c).

[133] Reasons of Rose J at [97]-[100]; ***De L*** **(1996) 187 CLR 640 at 686.**

[134] Such as proposed in ***Friedrich*** **78 F 3d 1060 at 1069 (6th Cir 1996).**

[135] See eg *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654; [1989] 2 All ER 465; *N v N (Abduction: Art 13 Defence*) [1995] 1 FLR(UK) 107; *Walton v Walton* 925 F Supp 453 (1996).

[136] eg *Thomson v Thomson* [1994] 3 SCR 551 at 599-600 per La Forest J, cf at 624-625 per L'Heureux-Dubé J; *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR(UK) 492 at 502; *Re L (Child Abduction) (Psychological Harm)* [1993] 2 FLR(UK) 401 at 405; *Adams v Wigfield* [1994] NZFLR 132 at 140-141; cf discussion of appropriate conditions in *A v Central Authority for New Zealand* [1996] 2 NZLR 517 at 524.

[137] *Re A (A Minor) (Abduction)* [1988] 1 FLR(UK) 365 at 374 per Nourse LJ; *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654 at 659-660; [1989] 2 All ER 465 at 469-470.

[138] Noted by the Full Court: *P v Commonwealth Central Authority* [2000] FamCA 461 at [169].

[139] *Schwarz and Schwarz* [1985] FLC ¶91-618 at 80,001; *Cooper v Casey* [1995] FLC ¶92-575 at 81,699.

[140] *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306; 160 ALR 588.

[141] Full Court reasons *JLM* at [49].

[142] See the Regulations, reg 7; the Convention, Art 26; cf *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207.

[143] (1774) 1 Cowp 63 [98 ER 969].

[144] (2001) 75 ALJR 578; 178 ALR 1.

[145] [2001] HCA 37.

[146] *CDJ v VAJ* (1998) 197 CLR 172 at 185-186 [52]-[55] per Gaudron J, 200-204 [104] -[119] per McHugh, Gummow and Callinan JJ.

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