[2006] FamCA 685

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA **Appeal No EA44 of 2006**

AT SYDNEY **File No SYF3228 of 2004**

IN RE F (HAGUE CONVENTION: CHILD'S OBJECTIONS)

REASONS FOR JUDGMENT

CORAM: **BRYANT CJ, KAY & BOLAND JJ**

DATE OF HEARING: **18 July 2006**

DATE OF JUDGMENT: **28 July 2006**

APPEARANCES:

Ms Christie of Counsel, instructed by Watts McCray, Level 15, 370 Pitt Street, Sydney NSW 2000, appeared on behalf of the Appellant Mother.

Mr Hill of Counsel, instructed by Department of Community Services 4-6 Cavill Avenue, Ashfield NSW 2131, appeared on behalf of the First Respondent.

Mr Pierce of Counsel, instructed by Stewart Cuddy & Mockler appeared on behalf of the Second Respondent.

Ms Cleary of Counsel, instructed by Reid Family Lawyers appeared on behalf of the Independent Children's Lawyer.

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Catchwords: ***Child Abduction – Hague Convention – Child's objections – Child brought to Australia from the USA in 2003 when he was 9 years old and wrongfully retained in Australia by mother – Consent orders made a year later by a Judicial Registrar for the return of the child to the USA, but child was not returned – Father travelled to Australia early in 2006 to arrange child's return – Child objected to return – Mother's application to review 2004 orders out of time relying on the child's objections not contested by the State Central Authority – Central Authority sought to be excused from taking part in proceedings once the mother applied for review – Father became involved in the proceedings – Trial judge ordered return of the child.***

Child Abduction – Conduct of the Central Authority – Central Authority stated that it had no budgetary allowance with which to return the child to the USA – The Regulations give the Authority the responsibility for giving effect to an order for return – Nothing in the Regulations suggests that where neither parent has funds to enable the child's return the Central Authority should disregard the orders of the court – Central Authority further declined to participate in the proceedings or offer the court guidance – This would seem to be contrary to its obligation to do anything necessary to enable the performance of the obligations of Australia under the Hague Convention

Evidence – Application to adduce further evidence – Non-contentious evidence that subsequent to the trial Judge's orders the child twice refused to board a plane to return to the USA – Federal Police used mild force on child in an endeavour to make him board the plane but declined to use stronger force when child resisted – Counsellor's report suggested that child had become alienated from his father and counselling sessions had not had a positive impact on child's relationship with his father – Overwhelming evidence that the child objects to return – Appeal allowed and application for return of child dismissed.

Practice and Procedure – Child Abduction – Whether the listing of Hague Convention cases before a Judicial Registrar potentially inhibits the due performance by the Court of the obligation cast upon it by Regulation 15(2) of the Family Law (Child Abduction) Convention Regulations 1986

This is the mother's appeal against orders made by Lawrie J on 28 April 2006 requiring the return to the United States of America of a child F born 22 July 1994 pursuant to the provisions of the *Family Law (Child Abduction Convention) Regulations* 1986.

The child is referred to in various documents in these proceedings by different nicknames. It is convenient for the purposes of this judgment that we refer to the child as **F** and to his parents as "the mother" and "the father".

The father was born in the United States in 1951. The mother was born in Australia in 1958. They married in the United States in 1994 and separated in May 1999. The marriage was dissolved in Louisiana in January 2001 and the mother subsequently remarried. She and her present husband have a child A who was born in 2001.

In May 2003 the Civil District Court for the Parish of Orleans State of Louisiana in the United States made orders that granted the mother and the father joint custody of F and designated the mother as "domiciliary parent". There were extensive orders made for the father and the child to enjoy "parenting time" together. The child spent several weeks with his father in June and July 2003.

In early August 2003, the mother accompanied by her then husband and their son A, brought F to Australia. There was some sort of understanding between the parents that the father would not object to F spending up to six weeks in Australia visiting the mother's parents. The mother stayed on in Australia after that period had expired.

Early in 2004 the father made application to the US Central Authority for assistance under the Hague Convention on Civil Aspects of International Child Abduction. The United States authorities contacted the Australian Central Authority and on 3 June 2004 an application was filed in the Family Court of Australia by the Director General of the Department of Community Services as the State Central Authority for New South Wales seeking the return of the child pursuant to the provisions of the relevant regulations.

The application came on for hearing before Judicial Registrar Johnston, who on 13 August 2004 ordered that the State Central Authority make such arrangements as were necessary to ensure the return of F forthwith to Louisiana in the company of a person and upon conditions to be determined. The Judicial Registrar found that the necessary preconditions for the exercise of the jurisdiction had been established. The child's habitual residence immediately before his removal from the United States was in the State of Louisiana, the father had rights of custody in relation to the child within the meaning of the regulations, and the child had been brought to Australia with the consent of the father as long as he was returned to New Orleans in about six weeks. The child's retention in Australia after the expiration of that period was wrongful within the meaning of the regulations.

On 24 August 2004 the mother and the State Central Authority consented to orders that provided that the Central Authority was to make such arrangements as were necessary for the return of the child to the United States as soon as practicable in the company of a person acceptable to the Central Authority and these orders made provision for the handover of relevant passports. The orders noted:

> "A. That the mother will be unable to leave Australia until 19 October 2004 although she intends returning to the United States at that time;
>
> B. That the Central Authority is endeavouring to arrange for a relative of the father to accompany the child to the United States soon."

Neither event happened and the child remained in Australia with his mother.

In an affidavit filed on 2 February 2006 Ms P", a solicitor in the employment of the Department of Community Services, deposed that since the making of the orders on 24 August 2004 the father had not been able to afford to travel to Australia. The mother had periodically indicated in a number of telephone conversations that she was endeavouring to acquire the necessary funds to facilitate the return. Ms P had learnt on 23 January 2006 that the father was scheduled to arrive in Australia on 5 February 2006 with flights booked to return himself and the child to the United States on 10 February 2006. The mother had then made contact with her, handing the phone to the child who told Ms P he did not want to leave. She subsequently received a telephone call from the maternal grandmother who told her that "they were not 'surrendering the child'".

The delay in facilitating the return of F is partly explained in Lawrie J's reasons for judgment where her Honour said:

> "16. In [the mother's] her supporting affidavit she says that in October 2004 the father had told her that he was coming to collect the child. He did not come. In mid 2005 the father again said that he was coming. He did not come. On each occasion the child said he did not want to go. She says that in September 2005 when she told the child the father did not seem to be coming he said amongst other things, 'I don't think he really cares about me or he would have done what he said he would do.'
>
> 17. The situation was further complicated by the fact that the father's home and community in New Orleans was devastated by cyclone Katrina."

On 9 February 2006 the mother filed an application seeking to set aside the orders made by Judicial Registrar Johnston. Directions were made the same day with the consent of the State Central Authority that the Director of Mediation arrange for F to be interviewed to ascertain to whether he objected to returning to the United States

and whether he had attained sufficient maturity to take account of his views.

In February 2006 the State Central Authority did not contest the mother's application to seek a review of the orders of the Judicial Registrar out of time. The effect of the grant of that application was to require the review to be undertaken as a hearing de novo of the original application (see Rule 18.10 Family Law Rules 2004). As the trial judge pointed out, the proceedings that took place before her were not really "'a review'" of the making of the original order as there was no contest that the order was appropriate when it was made. The application before her Honour was categorised by her as simply seeking to have the exercise repeated two years later but raising a defence that was not raised earlier, namely that the child objected to being returned.

Whilst the process of seeking to have the Judicial Registrar's orders reviewed out of time succeeded in these proceedings the necessary order having been made by consent, it would appear to have been an unnecessary and inappropriate manner of seeking a discharge of an extant return order.

In December 2004 the regulations were amended to provide as follows:

> "**19A Discharge of return order**
>
> (1) If a court makes an order under this Part for the return of a child (a ***return order***), the responsible Central Authority or a respondent to the proceeding may apply to the court, in accordance with Form 2D, for the discharge of the order.
>
> (2) The court must not make an order discharging a return order, or a part of a return order, unless it is satisfied of all of the following:
>
> (a) all the parties consent to the return order being discharged;
>
> (b) since the return order was made, circumstances have arisen that make it impractical for the order to be carried out;

(c) exceptional circumstances exist that justify the return order being discharged;

(d) the day on which the application for the discharge of the return order was made is more than 2 years after the return order was made or any appeal in relation to the return order was determined.

…"

As the trial judge pointed out, the process by which this case was able to be reheard was not something that was contemplated by the Convention but arose from the structure of delegated authority to Judicial Registrars. The Full Court has previously commented upon the undesirability of Judicial Registrars continuing to hear applications under the Convention. In *B v Director General of Community Services* [2001] FamCA 50 Lindenmayer, Kay and Watt JJ said

> "26. Without derogating in the slightest degree from the ability or diligence of the Judicial Registrars who carry such a heavy burden of this Court's day to day work, the very nature of Hague Convention cases is such that, as a general rule, a parent who has gone to the extreme lengths of removing himself or herself and his or her child from some overseas country in which the child has been habitually resident, to Australia, is likely to fight tooth and nail against the prospect of being forced, against his or her will, to either send or take the child back to that country, there to be dealt with by its Courts according to its laws. Thus, to list such cases for final hearing before Judicial Registrars, whose decisions create obligations which only really become binding if neither party seeks a review by the Court, seems to us to be an inefficient use of the Court's limited resources and also to potentially inhibit the due performance by the Court of the obligation cast upon it by reg 15(2) of the Regulations to "so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows".

Any criticism is not leveled at the undoubted competence of the Judicial Registrars, who by reason of their expertise have diligently and thoroughly carried out their

task in determining these very complicated cases. Rather the difficulty lies with the need for a prompt resolution of the proceedings. The processes involved when the cases are decided by delegated judicial authority lead to the very real prospect that an adverse outcome will simply be ignored by the respondent to the proceedings and inevitably the matter will have to be reheard. That situation is capable of being entirely avoided by ensuring that the matters are heard at first instance by a judge of the Family Court of Australia rather than by a Judicial Registrar.

Two reports were then prepared following interviews with the child. The child expressed a wish to stay in Australia and threatened to protest if he were taken away.

In the course of directions hearings in preparation for the further trial, the State Central Authority requested to be excused from attending at the further hearing of the matter as it would no longer be seeking an order for the return of the child based upon the view it took after having read the family reports. An attempt by the Central Authority to withdraw entirely from the proceedings was rejected by Cohen J on 17 March 2006 and ultimately the Central Authority was simply excused from attending at the rehearing by Le Poer Trench J on 24 March 2006. No objection was taken to the father becoming involved as an interested party without filing any further application.

When the matter came on before Lawrie J on 12 April 2006 there were appearances for the mother and the father only. Her Honour raised the jurisdictional issue seeking to clarify it, saying:

> "Well, we all agree that to all intents and purposes the father has stepped into the shoes of the Central Authority, and no jurisdictional or breach of Rules or time concerns will be---
>
> …
>
> [the father] is here on the basis that he has come along with the Central

> Authority who has been excused, but no jurisdictional difficulties are going to be raised to his being here."

Neither the father's counsel nor the mother's solicitor were heard to dissent from her Honour's comments.

The matter then proceeded before her Honour with cross examination being permitted of KB, a court mediator, who had prepared two reports as to the child's objections and maturity, and cross examination of the mother and the father.

The conduct of the hearing under the regulations that permitted cross examination of deponents was unusual. The Full Court (coram Ellis, Nygh and Ross-Jones JJ) said in *Gazi and Gazi* (1993) FLC 92-341:

> "The primary purpose of the Convention, the relevant Legislation and Regulations is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return to the country of their habitual residence of children who are wrongly removed or retained in another country in breach of rights of custody or access. See Convention, Articles 7 and 11, Family Law (Child Abduction Convention) Regulations, reg. 19(1). Accordingly, whilst there may be cases in which it is appropriate to allow cross-examination of deponents of affidavits, such cases would be rare. The majority of proceedings for the return of children, pursuant to the Convention, should be dealt with in a summary manner and cross-examination of deponents of affidavits would not be appropriate. See: *Re E (A Minor) (Abduction)* (1989) 1 FLR 135 at 142 per Balcombe LJ; *P v. P (Minors)* (Child Abduction) (1992) 1 FLR 155."

On 28 April 2006 Lawrie J delivered her reasons for judgment, announcing that she would be dismissing the application to set aside the order that required the return of F to the United States. The solicitor for the mother advised her Honour that the mother felt unable to ensure the presence of the child at the airport and that it would be appropriate in those circumstances to involve the Marshal of the Family Court of Australia. Her Honour then ordered:

> "1. That a warrant issue for the apprehension of the child…

2. That the Central Authority…do all things necessary to cause a social worker to attend with the officer executing the Warrant …

3. That the Central Authority shall cause such arrangements as are necessary to be made for the prompt return of the child…to the United States…consistent with their duty under regulation 20."

That Regulation provides:

> "(1) If the responsible Central Authority applies to the court for an order for the return of a child, and the order is made, the responsible Central Authority must cause such arrangements as are necessary to be made to give effect to the order."

Several days later a warrant for the apprehension or detention of the child was executed with the child being taken from his home at C late at night and placed into foster care.

On 8 May 2006 the mother filed a Notice of Appeal seeking a discharge of the orders made by Lawrie J and the dismissal of the original application for the return of the child to the United States. An application to stay Lawrie J's orders came on for hearing the same day before O'Ryan J but was rejected.

On 9 May 2006 the child was accompanied to the airport by his maternal grandmother and two aunts. The child refused to board a plane to be taken to the United States and the father reluctantly agreed to allow the child to return home that evening with his grandmother.

A further attempt was made to place the child on board a flight to the United States on 13 May 2006. On this occasion the child was accompanied to the airport by members of the Australian Federal Police and officers of the Department of Community Services. The child became distressed at the airport, insisting that he was not going to leave Australia. The Federal Police attempted some physical force by taking the child by the arm and endeavouring to lead him onto the plane.

The child refused to cooperate. The father was then called in an attempt to convince the child to get on the plane but the child continued his resistance. Eventually the Australian Federal Police determined that they would not use any further force and the child was then returned temporarily to the care of the officers of the Department of Community Services and ultimately collected by his grandmother.

The matter returned to Court before Judicial Registrar Loughnan on 15 May 2006 when a child representative (now called an Independent Children's Lawyer) was appointed.

On 7 June 2006 Judicial Registrar Loughnan ordered that the child attend upon "Ms C", a psychologist, for the purposes of reportable counselling. Ms C's role was directed to:

> "(a) assisting the child's relationship with the father;
>
> (b) explaining the Court's orders to the child;
>
> (c) exploring the child returning to America including the child's objection, if any, to returning to America;
>
> (d) encouraging the child to return to the United States in accordance with the decisions, orders and warrants of the Family Court of Australia."

On 16 June 2006 further orders were made with the consent of the mother, the father and the child representative for a single expert report to be prepared by Ms C to report on

"(a) The progress of counselling in relation to;

i) The child's relationship with the Father;

ii) Exploring and encouraging the child's return to America;

iii) The solutions, if any, to implementing the decisions, orders and warrants of the Family Court of Australia;

(b) The psychological effect on the child, if any, in circumstances where the mother accompanies the child or does not accompany the child to America;

(c) the child's level of maturity taking into consideration the changes in the child's circumstances since the date of the last Family Report and Her Honour, Justice Lawrie's judgment dated 28 April 2006 and whether he has attained a level of maturity where it is appropriate to take account of his views;

(d) whether in light of recent events since the date of the last Family Report and Her Honour, Justice Lawrie's judgment dated 28 April 2006, the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes."

The judgment

Her Honour commenced her judgment by outlining the nature of proceedings under the Hague Convention emphasising that they are:

"not a dispute over which a parent should have the child with them, but over which jurisdiction should determine that issue. It is a return to jurisdiction, not necessarily a change in custody."

Her Honour outlined the history of the proceedings, noting that in the two reports that were prepared following the father's arrival in Australia the child expressed a wish to stay in Australia and threatened to protest if he were taken. Her Honour said:

"29. What is the duty of the Central Authority? Does the Central Authority have a discretion not to take part in the execution of an

order on the basis that it might cause distress to a child, or require force to be used? The child has said that if he was ordered to return with his father he would, 'scream and yell so they couldn't put me on the plane.' He said, 'I don't want to go back and the government shouldn't be able to control your life. I don't see why I should.' He reasoned that the airlines would, 'rather not touch me 'cause it's child abuse. My Dad thinks they'd grab me and put me on the plane, but he's wrong.'

30. The difficulty of a child who does not want to return is not a novel one. Some of the problems were discussed in a paper by the Delegation from the Commonwealth of Australia at the International Child Custody Convention in Washington DC in September 2000 under the heading 'Problems of Enforcement Arising from the Actions of the Child'. It is pointed out in that paper that the Court has a statutory jurisdiction similar to the parens patriae jurisdiction which gives it extremely coercive powers, which can be brought to bear as a last resort. The Convention should not be rendered ineffective by threats of misbehaviour by a child who would prefer not to go."

Her Honour then turned to the two exceptions to mandatory return that were being relied upon by the mother. Her Honour said that the onus of establishing the grounds under Regulation 16 lay with the mother. Regulation 16 insofar as it is relevant provides as follows:

"(3) A court may refuse to make an order [for mandatory return] under subregulation (1) or (2) if a person opposing return establishes that:

…

(b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) each of the following applies:

(i) the child objects to being returned;

(ii) the child's objection shows a strength of feeling

beyond the mere expression of a preference or of ordinary wishes;

(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or

…"

We note in passing that the Regulation diverges from the provisions of Article 13 of the Convention which requires that the person opposing the return establish:

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

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

The requirements that take into account a child's objection are expressed in different terms, namely:

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

As will become apparent, it is unnecessary for us to determine whether there is any significance in that distinction.

Lawrie J indicated that whilst the return of the child to the United States against his wishes would be likely to cause him some distress, he would not be placed in an intolerable situation or exposed to a grave risk of harm. That finding was not challenged in the appeal before us.

Her Honour then turned to consider the provisions of regulation 16(3)(c) namely the

issue of the child's objections. Her Honour said:

"35. On the material before me there is no doubt that the child objects to the idea of having to leave the family unit which he has lived in for the past six years, namely with his mother, his de facto stepfather and his younger half-brother, to live with his father, who of course resides in the United States. However that is a different matter from objecting to return to the jurisdiction of the United States. If his mother, stepfather and half-brother were living there (and the stepfather and half-brother definitely have citizenship of the United States and it would appear the mother has at least a right to reside and work there) I believe he would wish to live in the United States with them, and that being in the United States would not cause him physical or psychological harm.

…

38. I think that the child's objections are to separation from the people he wants to live with, in an environment where he is happy and where he wishes to stay and would prefer to stay, not to the idea of returning to the United States as such. He objects to going to the United States because that would be a consequence of going with his father. He wishes to stay in Australia because that will be a consequence of staying with his mother. In my view his concerns are more about relationships than geography. He does not seem to have been asked whether he would object to going to the United States if his mother, stepfather and half-brother went with him until the matter was resolved.

…

16(3)(c)(ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes

40. The child has said that if he was ordered to return with his father he would 'scream and yell so they couldn't put me on the plane.' He said, 'I don't want to go back and the government shouldn't be able to control your life. I don't see why I should.' He reasoned that the airlines would 'rather not touch me 'cause it's child abuse. My Dad thinks they'd grab me and put me on the plane, but he's wrong.'

41. Notwithstanding the child's wishes, and some of the melodramatic

terms in which they are couched, I am not satisfied that they show a strength of feeling beyond the mere expression of a preference or of ordinary wishes. His demeanour when interviewed by the counsellor was 'relaxed, articulate and communicative.' It would be normal for a child to not wish to leave the family group where he had been living for six years, or the place where he is happy and popular.

42. I would not see the discretion to not order the return of the child as being engaged, but I have nonetheless considered the remaining 'steps'.

16(3)(c)(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views

43. Although he is described by the counsellor as having 'a high level of maturity for his developmental age' he is not yet twelve. He said as a 'preteen he was old enough to make up his own mind.' He is able to discuss his views on his father (being able to moderate his view of his father after greater exposure to him), and distinguish them from his views on returning to his former home. He appears to have been able to have some independence in forming those views, although he has, as would be inevitable, been subject to influences of varying degrees of subtlety from both sides.

44. However I do not think that he has such a high degree of maturity that he understands the real issues, and does not distinguish between leaving one parent's household for another, as against leaving one country for another.

45. Even if I did nonetheless consider it appropriate to take his views into account, the possibility of not ordering the return of the child is discretionary, not mandatory.

46. In my view they are not sufficiently weighty to displace the upholding of the Convention. It is in the interests of every child whose parents live in different countries to have the protection which the Convention affords. The inevitable upset caused when a child who has been away from the jurisdiction of origin is returned is not sufficient to displace the making of an order for his return."

The appeal

Further evidence

Section 93A(2) of the *Family Law Act* 1975 (Cth) empowers the Full Court on the hearing of an appeal to receive further evidence on questions of fact. The circumstances in which it is appropriate to exercise the discretion to admit such evidence were discussed by the High Court in *CDJ v VAJ* (1998) 197 CLR 172 and in particular in the joint judgment of McHugh, Gummow and Callinan JJ at pars 104 to 114 where their Honours said (footnotes omitted, emphasis added):

> [104] In the exercise of the discretion conferred by a power such as s 93A(2), the critical factor is the subject matter of the proceedings with which the appeal is concerned. This is because **the purpose of the power to admit further evidence is to ensure that the proceedings do not miscarry**….
>
> …
>
> [106] … Unlike courts in banc hearing applications for new trials, the Full Court of the Family Court can evaluate the facts of the appeal for itself and in many cases is in a position to evaluate the further evidence and take it into account in considering the appeal without the necessity to have the proceedings reheard.
>
> [107] The discretion conferred by s 93A(2) to receive further evidence on appeal is not expressed to be limited in any way. In particular, the subsection contains no requirement, comparable with that often found in statutes conferring power on an appellate court to receive further evidence, that 'special grounds' or 'special leave' be shown before the evidence can be adduced. …
>
> [108] … Although the discretion to admit further evidence is not attended by any express words of limitation, the subject matter, scope and purpose of the appeal provisions in Pt X of the Act and the issues involved in each appeal will point to the considerations which are or are not extraneous to the exercise of the power.
>
> [109] One consideration in construing s 93A(2) is its remedial nature. **Its principal purpose is to give to the Full Court a discretionary power to admit further evidence where that evidence, if accepted, would demonstrate that the order under appeal is erroneous.** The power

exists to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures. A further, but in practice subsidiary, purpose is to give the Full Court a discretion to admit further evidence to buttress the findings already made.

…

[111] Still another consideration is that the discretion is given to an appellate court hearing an appeal against an order made in the exercise of original jurisdiction. No doubt it is true that, because the appeal is by way of rehearing, the Full Court's jurisdiction is neither purely appellate nor purely original. In *Attorney-General v Sillem*, Lord Westbury LC pointed out that '[a]n appeal is the right of entering a superior court, and invoking its aid and interposition to redress the error of the court below'. Appellate jurisdiction in the strict sense is jurisdiction to determine whether the order of the court below was correct on the evidence and in accordance with the law then applicable. In contrast, **the Full Court of the Family Court must decide the rights of the parties upon the facts and in accordance with the law as it exists at the time of hearing the appeal.** Speaking of the similar jurisdiction of the English Court of Appeal, the Master of the Rolls, Sir George Jessel, said that the appeal is a 'trial over again, on the evidence used in the court below; but there is a special power to receive further evidence'. … The power to admit the further evidence exists to serve the demands of justice. Ordinarily, where it is alleged that the admission of new evidence requires a new trial, justice will not be served unless the Full Court is satisfied that the further evidence would have produced a different result if it had been available at the trial. Without that condition being satisfied, it could seldom, if ever, be in the interests of justice to deprive the respondent of the benefit of the orders made by the trial judge and put that person to the expense, inconvenience and worry of a new trial.

…

'Additional evidence dealing with events that have occurred since the hearing in the court below is readily admitted, especially in custody cases where the relevant circumstances may change dramatically in a short period of time.'

…

[114] No doubt **the Full Court will readily admit further evidence which is not in dispute and which the court is able to evaluate and**

> **take into account in considering the appeal without the necessity to have the proceedings reheard.** Further evidence of this kind is particularly likely to be admitted where the evidence relates to events occurring after trial. In the case of undisputed evidence which the Full Court can evaluate as part of the evidence in the appeal, the discretion to admit the evidence may even be properly exercised without the Full Court considering what effect it would have had on the trial judge's decision. In that context, the likely effect of the further evidence on the Full Court's view of the evidence before the trial judge is the important consideration. …"

At the hearing of the appeal the mother and the Independent Children's Lawyer each sought to adduce further evidence. The father resisted the applications but sought himself to lead further evidence in the event that his resistance was unsuccessful.

We determined to reject the mother's application to admit into evidence affidavits sworn by the mother, two of her sisters, her mother and a friend of the mother. It was conceded by counsel for the mother that the material contained in those affidavits was contentious and at best merely corroborative of other material of a non-contentious nature. We determined to admit an affidavit by Ms P, the solicitor for the Department of Community Services that annexed a report from an officer of the Department who had attended at the airport on 13 May 2006. We also determined to admit into evidence on the application of the Independent Children's Lawyer a report by Ms C who had been appointed as a single expert pursuant to the provision of Part 15.5 of the Family Law Rules 2004 with the consent of all the parties.

Regulation 26 of the *Family Law (Child Abduction Convention) Regulations* provides:

> "**Reports by family consultants**
>
> (1) In proceedings under these regulations in a court, the court may:
>
> (a) direct a family consultant to report to the court on such matters that are relevant to the proceedings as the court considers to be appropriate; and

(b) adjourn the proceedings until the report is made.

(2) A family consultant may include in a report, in addition to the matters required to be included in the report, any other matter that relates to the care, welfare or development of the child.

(3) The court may make such orders, or give such further directions, as it considers appropriate in relation to the preparation of the report including, if the court considers it appropriate, orders or directions in relation to the attendance on the family consultant of a party to the proceedings or of the child.

…

(6) A report made to the court in accordance with a direction given under this regulation may be received in evidence in any proceedings under these regulations.

…"

Given the circumstances in which the report came into existence, namely the visible and stern resistance of the child to attempt to have him either cajoled, persuaded, or ultimately forced to board a plane for return to America, it seemed to us that it would be an affront to justice for us to reject the application for admission of the evidence.

Counsel for the father sought leave to cross examine the maker of the report but we declined that leave on the basis that it would be inappropriate for that process to occur before the Full Court and given the need for a prompt resolution to the Hague proceedings, the referral back for yet further proceedings at first instance seemed highly inappropriate unless we could be persuaded that something constructive could come as a result of any further proceedings.

Once it had been determined that we would allow the documents into evidence, an affidavit by the father sworn 11 May 2006 outlining the events surrounding the attempted removal of the child on 9 May 2006 was admitted into evidence with the

consent of all the parties. In addition, a bundle of documents consisting of Qantas records, Australian Federal Police records and Department of Community Service records relating to the events of 9 May 2006 and 13 May 2006 were also admitted into evidence without objection.

What is apparent from the further evidence and which is non-contentious is as follows:

- On 9 May and 13 May 2006 F was taken to Sydney airport;

- On each occasion he refused to board a flight to the United States;

- On each occasion he informed his father and the authorities that he did not want to return to the United States;

- On the first occasion the father's attempts to persuade the child to join him voluntarily were unsuccessful and the father then desisted from any further attempt to force the child onto the plane;

- On the second occasion the Federal police officer approached the child who was crying and saying that he was not willing to get on the plane. The officer then said to F something like "What will you do if I have to pick you up and carry you onto the plane?". F said "I won't go" and started crying more. The officer then grabbed hold of F's upper arm and attempted to pull him off the seat. F reacted by pulling his arm free and attempting to move his body further away. F was also holding tightly onto the seat handles and cushion. The officer desisted and stepped back as it became evident that F was becoming more distressed. The Federal Police refused to apply any further force to the child. The father was then invited to attempt to persuade the child to join him on the plane but the child resisted any of his father's entreaties.

The father's evidence concerning the events surrounding 9 May 2006 would indicate that the maternal grandmother was fully supportive of the child in his resistance to

return to the United States. She insisted on accompanying the child to the airport and at the airport told the father to "[l]eave the child alone. Can you hear he doesn't want to go back with you". Whilst there may be reason to question whether the child's reactions might have been different if the maternal grandmother had appeared to be supportive of the return order, the reality is that the child was hostile and oppositional. The grandmother's empathy could not be seen to detract from that reality.

The counselling report

The counselling report prepared by Ms C details three one hour interviews with F on 16 June, 23 June and 4 July 2006 as well as shorter interviews with the mother, the father and the maternal grandmother. The reporter indicates that she discussed with the child the nature of the Hague Convention which had set out rules for what should happen if a child is moved between countries where both parents have not agreed that that should have occurred. It is not apparent that the reporter explained to the child that the nature of a return under the Hague Convention was so that the courts in the country to where the child was being returned could then decide the issue as to where the child should live and that accordingly any return to the United States may only be a temporary one. The reporter concluded that from her interviews with the child it was evident that the child's views of his relationship with his father had become significantly more negative. She noted that his unambivalent strident rejection of the father, with no apparent guilt or conflict, was consistent with the child being alienated.

The reporter noted that she was surprised that the father did not seem to have considered the impact on F's welfare if he was removed from Australia and relocated back to the United States and the emotional and psychological cost of this on the child. The reporter further noted considerable animosity between the mother, her mother and the father. It was long standing and pre-dated the move from America to Australia. She further reported that her counselling sessions with

the child did not have any positive impact on the child's re-evaluation of his relationship with his father. She reported that if any headway was to be made in healing the relationship, long term family counselling of over 12 months by an experienced practitioner needed to be conducted.

The reporter then noted that the child retained a strong conviction that he objected to being returned to America. He saw his father as unsafe and someone who did not listen to him. He said that he would resist any attempts to force him onto the plane by kicking and screaming, and that if he was forcibly taken back to America he would run away.

The reporter concluded that F had a:

> "strong objection to going back to America...He stated he feels Australian and this is a strong feeling… [i]t is…likely his feelings about the USA have been influenced by his Mother and her family."

The reporter observed that the psychological effect of returning the child to the United States was likely to be negative and adversely affect his welfare. If forced to return with the father this:

> "is more like [sic] to lead to an escalation of bad feelings towards the Father over time and further breakdown in the Father/son relationship, and an increased likelihood of depression, acting out behaviours, self harming behaviours and school failure."

The psychologist commented that the child had demonstrated a sufficient level of maturity, that it was appropriate to take his views into account, he having demonstrated the use of emotions as an internal monitoring and guidance system and was able to participate in exploring hypothetical situations. The reporter was clearly of the view that the child's objection showed a strength of feeling beyond mere expression of preference or ordinary wishes. The forcible removal to the airport had galvanised the child's belief that it was up to him to fight for what he

wanted.

The effect of the further evidence

The trial judge had concluded, after having read the welfare reports of KB and heard her cross examination, that the child's objections were to separation from the people he wanted to live with rather than an objection to returning to the United States, and that although he had expressed the wishes in melodramatic terms, they did not show a strength of feeling beyond the mere expression of a preference or ordinary wish. She had further concluded that the child did not understand the real issues and did not distinguish between leaving one parent's household for another as against leaving one country for another.

There has been considerable discussion in the cases in the texts on precisely what it is that the child objects to. The relevant regulation talks about the child objecting to "being returned". Several of the cases have endeavoured to read down that phrase to mean effectively being returned to the country of habitual residence for the purposes of enabling that country to determine where and with whom the child should reside. The view was expressed by the Full Court (Barblett DCJ, Ellis and Lindenmayer JJ) in *Director General of Department of Community Services and Crowe* (1996) FLC 92-717 and reaffirmed in *De L and Director General NSW Department of Community Services* (1997) 21 Fam LR 413 at 426 that the objection was an objection to being returned to the country of the child's habitual residence and not to living with a particular parent. The Court went on in *De L* to say:

> "However, as was pointed out by Balcome LJ in **Re R (Child Abduction: Acquiescence) (1995) 1 FLR 716**, there may be cases 'where the two factors are so inevitably and inextricably linked that they cannot be separated'.
>
> …

> We would not suggest that children must articulate that they object to being returned to the country of their habitual residence for the purpose of enabling the courts of that country to resolve the merits of any dispute as to where and with whom they should live in order to come within the provisions of reg. 16(3)(c). That is not the language of children and the Court should not expect them to formulate and articulate their objection, if they had objected in the relevant sense, in that manner. The Court must have regard to the whole of the evidence and determine, no matter how the children articulate their views, whether the children object in the relevant sense."

In *Agee and Agee* (2000) FLC 93-055 a differently constituted Full Court (Finn, Holden and Guest JJ) questioned whether it was appropriate to place any gloss upon the words "objects to being returned" to import the words "so that the courts of that country may resolve the merits of any dispute as to where and with whom the child should live".

Ultimately it is unnecessary for us in this case to further comment upon the argument. In our view the evidence is now overwhelming that the child objects to being returned to the United States. Whether that is because of the absence of his primary caregiver or is based upon real or imagined memories of life in the United States as compared to life in Australia, it is clear that the child's objections are firm and have been rationally explained by him.

Because of the introduction of the further evidence, we find it unnecessary to deal with the grounds of appeal that assert error on behalf of the trial judge. The case that we are examining now is a different case to the case that the trial judge dealt with. Events have taken a much more dramatic course. The child has now experienced the execution of a warrant that resulted in his being placed into foster care, two trips to the airport with attempts to have him board the plane, including some mild force being applied, and several sessions of counselling in an endeavour to have him change his view. All of these events have proven unsuccessful. The evidence before us inextricably draws us to the conclusion that the requirements of Regulation 16(3) have been met and that the mother has clearly established that F

objects to being returned to the United States, his objection shows a strength of feeling beyond a mere expression of a preference or an ordinary wish and that he has attained an age and degree of maturity at which it is appropriate to take account of his views.

In their monograph entitled "The Hague Convention on International Child Abduction", Paul Beaumont and Peter McEleavy, (Oxford University Press, 1999) note at page 178:

> "Sixteen was taken as the outer limit for the scope of the Convention because it was agreed that persons over that age had a mind of their own which could be ignored neither by their parents nor the State. For those slightly younger a discretion was required to avoid forcible repatriations, which it was envisaged could have had a detrimental effect on the public perception of the Treaty."

Discretion revisited

In our view, in light of the events that have occurred since Lawrie J's judgment, including the material contained in the additional welfare report, it is clear that an exception to mandatory return has been established. That now requires us to determine the manner in which the discretion to make a return order should be now exercised.

There are two other reported cases in which children have refused to cooperate in being flown out of the country. In *Re HB (Abduction: Children's Objections) (No 2)* [1998] 1 FLR 564, Hale J (as she then was) dealt with a matter that had been remitted to her after a visit to the Court of Appeal. In October 1996 Hale J had ordered that children then aged 13 and 11½ should be returned from England to Denmark notwithstanding that it was contrary to their expressed wishes. The younger child refused to board the plane. The child was given leave to become a party to the proceedings and leave to appeal against the order. The Court of Appeal granted the child leave and remitted the matter for further hearing on the

basis that there had been a fundamental change in the circumstances since the original decision (see *Re HB (Abduction: Children's Objections) (No 2)* [1998] 1 FLR 564). In *Re HB* the children had been overheld in England from August 1996. When the matter came on for rehearing in November 1997 15 months had passed. The younger child was extremely resistant to live with her mother in Denmark. Hale J said (emphasis added):

> "It is obvious that there are now very serious questions about where the best interests of both these children lie. Mr Nicholls points out that the object of the Hague Convention is set out in its preamble. In essence this is to further the best interests of children by ensuring their speedy return to the country where they have been habitually resident**. Once the time for a speedy return has passed, it must be questioned whether it is indeed in the best interests of a child for there to be a summary return after the very limited inquiry into the merits which is involved in these cases**. Article 12 of the Convention recognises this by allowing the court to refuse to return the child if proceedings are brought more than a year after the wrongful removal or retention of the child where the child is now settled in its new environment.
>
> For all these reasons, it seems to me inevitable that the Hague Convention proceedings must be dismissed."

In *Re M (A minor) (Child Abduction)* [1994) 1 FLR 390 the Court of Appeal were faced with the circumstances where children aged 11 and 10 had been ordered to return to their father in Australia after their mother had, without consent, brought them to England. The children were placed on a flight as unaccompanied minors and the elder child created a scene and tried to open the aircraft door as the aircraft was taxiing. The captain refused to fly with him on board and aborted the flight. The two boys were handed over to the social services and detained at the airport. The Court of Appeal said that the behaviour of the eldest child amounted to a fundamental change in the position that had been presented to the trial judge, that it was proper to set aside the consent order made and reconsider the children's position. It was appropriate to have the matter remitted for rehearing.

In *Re SC (A Child)* [2005] EWHC 2205 (Fam Div) Nicholas Mostyn QC sitting as a Deputy High Court judge when dealing with a case involving a child who had been wrongfully removed from the United States in 1999 and secreted in England for more than four years said:

> "It is clear to me (at least) that notwithstanding the grievous wrong done to F; notwithstanding the deceit and subterfuge perpetrated by M; and notwithstanding the existence of a Californian custody order, that it was in October 2003 or at any time thereafter inconceivable that an English court would have returned S to California for a custody trial there."

His Honour then went on to deal with competing claims for residence and contact saying:

> "I recognise that all manner of moral and philosophical objections can be raised to this view. No doubt F, and his many supporters in California and Ireland would say that in taking this view I am rewarding the worst kind of turpitude and encouraging a kidnapper's charter which says that if someone can successfully abduct a child for sufficiently long period of time then that person will get away from it. But these views have to be subordinated to the child's best interests and in my view it would be a breach of the judicial duty to sacrifice a child's best interests in order to prove a point of principle."

In determining the manner in which we should exercise the discretion as to whether to still require a return order to be made in this case it is important that we look not only to the impracticability of successfully enforcing such an order short of using inappropriate force on a now 12 year old child who is resistant to the course, but also that we look to the terms of the Regulations and the Convention itself. Section 111B provides that:

> "(1) The Regulations may make such provision as is necessary or convenient to enable a performance of the obligations of Australia, or to obtain for Australia any advantage of benefit, under the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980…"

Regulation 2 provides that the purpose of the Regulation is to give effect to s 111B of the Act.

In *De L v Director General NSW Department of Community Services and Anor* (1996) FLC 92-706 at 83,456 in their joint judgment Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said that once the defence based on the child's objections to mandatory return had been made out:

> "it remains for the judge hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The regulations are silent as to the matters to be taken into account in the exercise of that discretion and the 'discretion is, therefore, unconfined except insofar as the subject matter and the scope and purpose of the [regulations]' enable it to be said that a particular consideration is extraneous. That subject matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion." (footnotes omitted)

In *De L* the High Court was dealing with a case in which children were wrongfully removed from the United States to Australia in February 1995. In a judgment published in October 1996 Kirby J commented at 83,459 that:

> "…the delays [injected into the case by the legal processes] have accumulated to defeat the apparent purpose of the Convention, the Act, and, if they be valid, the Regulations. By repeated provisions, the Convention envisages a speedy process and a summary procedure. The same sense of urgency is reflected in the Regulations. It is reflected in judicial observations about the meaning and purposes of the Convention and of municipal laws designed to give it effect.
>
> The objective fact is that it has taken the Australian legal system more than 18 months to complete its decision in this case. This offends the spirit of Article 11 of the Convention…"

In agreeing with the majority of the Court that the matter needed to be remitted for reconsideration, Kirby J said at 83,472:

> "…by reason of nothing more than the delays which have attended this

> litigation, a great deal of time has now elapsed since the order was made by the primary judge. What might have been proper at that time, by the summary procedure envisaged by the Convention and the regulations, cannot now be entirely recaptured by the orders of appellate courts. The lapse of time presents a risk that the children, who are now a year older than when they were seen by the counsellor, may indeed formulate an objection of the kind contemplated by Regulation 16(3)(c)…This serious elapse of time cannot be ignored."

In the preamble to the Convention there is a reference to procedures to ensure the prompt return of children to their state of habitual residence. The first object of the Convention is said to be to "secure the prompt return of children wrongfully removed to or retained in any Contracting State". It is difficult to see how almost three years after the wrongful retention has taken place it would be appropriate to return a most reluctant 12 year old child in circumstances where the return might require the use of force and where the return would separate the child from his primary caregiver.

In *Knight and Knight* (an unreported judgment of Keane J of the District Court at Christchurch delivered 17 December 1993) his Honour dealt with an application concerning the return to America of two children who had been wrongfully removed by their mother in April 1993. The children were aged approximately 12 and 10. The elder girl did not wish to return. The father indicated he did not wish the children to be separated. The trial judge accepted that a forced return of the child would create a grave risk that the child would be exposed to psychological harm. In refusing the make a return order the trial judge commented:

> "I am not impressed by the way Mrs Knight handled her move from the United States with the children. Not only did she do by stealth but I think she overstated her plight at the time as being desperate with no finance and no support. I know that a decision in her favour will almost certainly be seen by Mr Knight, and no doubt by others, as rewarding her in a sense for the way she acted. There is no doubt in some ways, and whether consciously or unconsciously – and I have made some reference to that - she did work herself into a position of strength for this case. However I cannot ignore my findings under s13 on the basis that Mrs

> Knight would be then punished for what she has done. The ones who would suffer, and quite badly on my assessment, would be the children.
>
> I know my decision will be distressingly and extremely disappointing for Mr Knight. I want to say that I think he conducted himself in a dignified and restrained way when seeing the children here and the way he handled that and the proceedings themselves. I regret that at the end of the day this decision will be seen as having turned largely on Kristen's objection, but I am confident Mr Knight will accept her right to frank and free expression so that Kristen will not have any feelings of guilt in the future about what has occurred here."

Many of those observations are apposite to this case. A number of circumstances have combined to defeat the proper return of F to the United States. We must however look at the case not out of sympathy for the plight that the father finds himself in but coolly and objectively in the light of the provisions of the relevant Regulations. The mother did not honour her earlier commitments to ensure the return of the child to the United States in mid-2004. The father's financial circumstances apparently did not permit him to come to Australia to ensure the proper enforcement of the 2004 orders. Hurricane Katrina intervened. The child, apparently significantly aided and abetted by the maternal grandmother, had whatever antipathy he had towards his father reinforced. Instead of supporting the child in alleviating the trauma to him of the enforcement of the 2004 orders and the 2006 orders, those in the mother's camp appear to have continued to encourage the child in resisting the orders of the Court. Whilst much of that conduct deserves criticism, we cannot ignore the reality of the situation. In the circumstances it would be quite inappropriate for the Court to follow the course urged upon it by counsel for the father of requiring yet further counseling in an endeavour to persuade the child to withdraw his objections. The provisions of the Regulations have run their course so far as this family is concerned. The appeal must be allowed and the application for the return of the child dismissed.

Given that we have determined this case on the basis of the further evidence, we find it unnecessary to deal with the matter by reference to the trial judgment and the

various grounds of appeal that endeavour to show that the trial judge made an appealable error. The strength and determination of the child to carry out his threats had not been put to the test when the trial judge had to consider the depth of his objection and his apparent maturity. The findings that her Honour made in relation to those issues were totally understandable in relation to the evidence as it unfolded before her and we would be reluctant to interfere with her Honour's findings and outcome were it not for the further evidence.

One of the grounds of appeal sought to challenge the locus standi of the father to conduct proceedings relying on the decision of the Full Court (coram Finn, May and Carmody JJ) in *A (by her next friend) and GS and Ors* (2004) FLC 93-199. There the Court held that in Convention proceedings that the father had commenced in April 2004 seeking a return of children to the United States of America, the Regulations, as they then stood, did not provide for any person other than a Central Authority to bring such proceedings. It is to be noted that subsequently the relevant Regulation was amended to enable the responsible Central Authority, or a person, an institution or another body that has rights of custody in relation to the child for the purposes of the Convention to bring such an application.

In any event, the application that was dealt with by Lawrie J and was the subject of the appeal before us was the original application duly brought by the State Central Authority in 2004 in accordance with the Regulations as they then stood. There was no merit in the ground of appeal to suggest that the proceedings before her Honour were proceedings brought by the father rather than the Central Authority.

The role of the Central Authority

Before formally pronouncing the orders we feel it necessary to make some observations about the conduct of the Central Authority in these proceedings. We inquired of counsel for the State Central Authority why it was that the 2004 orders were never enforced. We were told vaguely that the parties were busy making

their own arrangements for the return of the child but that in any case there was no budgetary allowance that would have enabled the Central Authority itself to arrange for the transport of the child to America. We find that latter proposition most alarming.

Article 26 of the Convention provides that Central Authorities may require the payment of expenses incurred or to be incurred in implementing the return of the child. As already referred to, Regulation 20 requires that the Central Authority must cause arrangements as are necessary to be made to give effect to an order for return. Regulation 30 provides that if an order for return is made the Court "may make an order that the person who removed or retained the child…must pay to the responsible Central Authority…the costs of the application". Those costs are defined as meaning necessary expenses incurred and may include expenses incurred in returning the child. There is nothing in the Regulations that indicates that absent the availability of funds either from the requesting parent or the parent who has wrongfully removed or retained the child, that the Australian authorities can simply do nothing to enforce the orders of the Court. Such an attitude on behalf of the Australian authorities would render the application of the Convention nugatory in those cases where a left behind parent has no access to funds.

Further in the course of the proceedings before us, counsel for the Central Authority said that his instructions were to make no submissions relating to the application of the Regulations to the facts of this case, nor did he wish to make any submissions concerning the proper interpretation of the Regulations. We find this attitude somewhat puzzling.

In *Laing v Central Authority* (1999) 151 FLR 416; 24 Fam LR 555; (1999) FLC 92–849, at, FLR 481–2; Fam LR 616–17; FLC 85,994 Kay J said as follows:

"Special duties of the Central Authority

[93] It was submitted that it was incumbent upon the Central Authority to

have the matter reopened once it was apparent that the wrong Regulations had been considered. There is weight in the submission that the Central Authority needs to act to some degree as an honest broker. Its role may be likened to that of a Crown Prosecutor who is required to put before the Court matters which might assist the accused as well as matters which might lead to a conviction. The Central Authority's obligation is not to secure the return of the child but to implement the requirements of the Convention.

…

[94] If in implementing the requirements of the Convention it obtains the return of a child who ought to be returned then it is carrying out its function. If it draws to the Court circumstances which might lead the Court to make an order other than the return of a child then it is also carrying out its function."

Nicholson CJ said, at FLR 429–30; Fam LR 617; FLC 85,954:

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

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

[65] In my view, the repeat involvement of such organisations in forensic disputes places them in a circumstance of greater awareness of decisions which are material to their routine work. That awareness brings responsibilities. In matters of law, the playing field is not even when repeat organisational players are in dispute with a party who lacks a similar familiarity to be informed and lacks the organisationally vested responsibility to be vigilant for the effect of decisions as to the law in the area of their mandate. I would therefore place at a more stringent level than Kay J, the obligation upon the Central Authority as to the applicable regulations and the question of preventing a perfected order discussed

below.

> [66] A Central Authority is by design within a system of intelligence as to legal developments that cannot be deemed as equivalent to an individual respondent to an application under the Regulations. There are advantages in litigation that cannot be glossed over. As will become evident, such a view of the responsibilities which come from being a repeat player have bearing upon the question of how my findings to this point affect the view I have taken of the power to reopen."

These comments were adopted by the Full Court in *P v Commonwealth Central Authority* [2000] FamCA 461, 19 May 2000, Full Court of the Family Court, (unreported). In that case the central issue was whether or not appropriate services existed for a child suffering from severe autism. During the course of the reasons for judgment, the Full Court (Nicholson CJ, Buckley and Kay JJ) said as follows:

> "[168] We … draw attention to the views expressed in *Laing v The Central Authority* (1999) FLC ¶92–849 (paras 62-66 per Nicholson CJ and paras 93-95 per Kay J) about the special duties of the Central Authority as an institutional litigant. We think that in the present case, the CCA could have better performed its 'honest broker' role, by investigating for itself whether appropriate services exist in Greece for E.L. We would hope that Authorities will be alert to comparable situations in future cases and will make their own inquiries rather than relying on the onus placed on the person opposing return."

The State Central Authority is charged with the obligation to do anything that is necessary to enable the performance of the obligations of Australia under the Convention (Regulation 5(1)(a)). In our view not only does that obligation extend to the requirement to facilitate the return of a child where such an order has been made, but it also requires the Central Authority to actively partake in proceedings brought by it under the Regulations and to assist the Court in determining the proper application of the Regulations to the facts of any one case. Unfortunately the Central Authority appears to have been remiss in the manner in which it has failed to carry out both of those tasks in these proceedings. Had it been much

more diligent late in 2004 when it was apparent that the mother was not going to honour her promises to return the child voluntarily to the United States, then the issues surrounding the child's objection would never have arisen. The underlying purposes of the Convention would have been met and the courts of habitual residence would have been able to be the appropriate place for issues concerning the future welfare of the child to be decided.

Had the Central Authority paid proper attention to the provisions of the Regulations in February 2006 the matter could have been properly considered by a judge of this court pursuant to the provisions of Regulation 19A rather than to have been dealt with on the basis of a review of a stale order of a Judicial Registrar. Had the Central Authority remained active in the proceedings before the trial judge or before us then issues surrounding the proper application of the Regulations could have been more thoroughly explored. Whilst this may have ultimately led to the same conclusion that we have reached regarding the overall disposition of the proceedings, the task of the Court may well have been made easier with the assistance of the resources of the relevant department. As we have already indicated we find the attitude of the Central Authority difficult to understand in the circumstances.

Costs

It was agreed at the hearing that the issue of any costs that arise from the appeal would be the subject of written submissions.

Orders

1. That the appeal be allowed.

2. That the orders made by the Honourable Justice Lawrie on 28 April 2006 be set aside.

3. That the application for the return of the child F filed 3 June 2004 be dismissed.

4. That within 21 days each party be at liberty to file and serve any submissions concerning the costs of this appeal. If any submissions are received by any of the parties, then those parties shall have a right of reply in writing within a further 7 days.

I certify that the 82 preceding paragraphs are a true copy of the reasons for judgment delivered by this ***Honourable Full Court.***

Associate