HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

DJL APPELLANT

AND

THE CENTRAL AUTHORITY RESPONDENT

DJL v The Central Authority [2000] HCA 17
Date of Order: 18 November 1999
Date of Publication of Reasons: 13 April 2000
S75/1999

ORDER

Appeal dismissed with costs.

On appeal from the Family Court of Australia

Representation:

G Griffith QC and K L Eastman for the appellant (instructed by Bruce A Swane & Co)

J Basten QC and M W Anderson for the respondent (instructed by Crown Solicitor for New South Wales)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with N E Abadee intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

P A Keane QC, Solicitor-General of the State of Queensland with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorneys-General for the States of Western Australia, Victoria and South Australia, the Northern Territory and the Australian Capital Territory (instructed by Crown Solicitor for the State of Western Australia, Victorian Government Solicitor, Crown Solicitor for the State of South Australia, Solicitor for the Northern Territory and ACT Government Solicitor)

CATCHWORDS

DJL v The Central Authority

Appeal – Family Court of Australia granted certificate under s 95(b) of *Family Law Act* 1975 (Cth) regarding "important questions of law and public interest" – Whether Family Court has power to set aside its own perfected orders – Scope of inherent powers of common law courts – "Slip rule" – Ambit of appellate jurisdiction determined by the terms of the statute granting right of appeal – Impermissibility of applying common law analogies to statutory courts.

Family Law – Family Court of Australia – Orders of Full Court – Orders perfected – Whether Full Court has inherent or implied power to set aside orders.

Practice – High Court – Appeal – Certificate by Family Court of Australia – *Family Law Act* 1975 (Cth) – Validity of requirement of – Specification of question certified.

Words and phrases – "inherent jurisdiction", "inherent power", "superior court of record", "slip rule".

Constitution, ss 71, 73.
Family Law Act 1975 (Cth), ss 93A, 95.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. What follows are our reasons for joining in the order made at the conclusion of the hearing on 18 November 1999 dismissing the appeal.

The history of the litigation

2 It is necessary first to outline the circumstances in which the matter came before this Court.

3 On 10 October 1996, the Full Court of the Family Court of Australia ("the Family Court") (Baker, Lindenmayer and Smithers JJ)[1] ordered that an appeal from orders made by a judge of that Court (O'Ryan J) on 20 February 1996 be dismissed. The orders made by O'Ryan J had been made following the hearing of an application pursuant to the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the 1986 Regulations"). The orders, the appeal from which was dismissed, were[2]:

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

Jurisdiction to entertain the appeal was conferred upon the Full Court by s 93A(1)(a) of the *Family Law Act* 1975 (Cth) ("the Family Law Act").

4 On 7 August 1998, this Court refused an application for an extension of time within which to present an application for special leave to appeal against the order of the Full Court. The application had been filed on 9 April 1998. It was brought out of time because the applicant, the mother of the child J, had gone into hiding with the child for some 14 months following the dismissal of the Full Court appeal.

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1 The judgment is reported, (1996) 135 FLR 68.

2 (1996) 135 FLR 68 at 68-69.

5 On the same day that the Full Court had delivered its decision, this Court delivered judgment in *De L v Director-General, NSW Department of Community Services*[3]. As a result of the reasons for judgment of this Court in *De L*, the view thereafter was taken that O'Ryan J had erred in that he had applied the Family Law (Child Abduction Convention) Regulations (Amendment) 1995 (Cth) ("the 1995 Regulations") instead of the 1986 Regulations. The 1995 Regulations, which commenced on 26 October 1995, amended the 1986 Regulations, but the latter continued to apply, in the unamended form, to applications made before 26 October 1995[4]. Whether or not his Honour erred in this respect[5], the Full Court had determined the appeal on the erroneous basis that the 1995 Regulations applied[6].

6 On 17 August 1998, the mother, the present appellant, made an application to the Full Court of the Family Court[7]. Orders were sought from the Full Court that it set aside its order of 10 October 1996 and in place thereof order that the order of O'Ryan J of 20 February 1996 be set aside and the matter be remitted for rehearing before a single judge. By amendment made during the hearing before the Full Court of this application, the relief sought was varied so as to include a declaration that the order of O'Ryan J was "spent" and that the matter be remitted

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3 (1996) 187 CLR 640.

4 *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 653. See also the report of the Full Court decision in the present litigation delivered on 9 February 1999, (1999) 24 Fam LR 555 at 558 per Nicholson CJ (with whom Moore J agreed), 588-590 per Finn J (with whom May J agreed), 601 per Kay J.

5 Although it is not clear exactly which regulations O'Ryan J applied, as he made no express reference to the date of the regulations, he appears to have applied the 1995 Regulations. He quoted regs 3, 4 and 13 in their form as substituted by the 1995 Regulations, and reg 16 from the 1986 Regulations, although he appears to have applied reg 16 in its amended form. See also (1999) 24 Fam LR 555 at 589 per Finn J.

6 (1996) 135 FLR 68 at 79-81. See also (1999) 24 Fam LR 555 at 583 per Nicholson CJ, 589 per Finn J.

7 The text of the application is set out in the reasons of Finn J, (1999) 24 Fam LR 555 at 591.

for further hearing before a single judge[8]. The application was said to be made pursuant to s 21 of the Family Law Act in "the inherent jurisdiction of the Court".

7 By majority (Finn, Kay and May JJ; Nicholson CJ, Moore J dissenting), the Full Court dismissed the application on 9 February 1999[9]. It should be noted that the application proceeded on the footing, which is not challenged, that the order sought to be set aside, that of the Full Court dismissing the appeal, was a final order and had been perfected. No question arose in the Family Court and none arises here with respect to interlocutory orders made by the Full Court or the revision of its final orders after they have been pronounced but before they have been entered. It has been assumed, no doubt correctly, both in the Full Court and in this Court, that the Family Court has power to act in that way before the entry of its orders.

8 Of the majority, Kay J held that, as an intermediate appellate court in Australia, the Full Court could not re-open proceedings which had been completed and duly entered into its records[10]. Finn J, with whom May J agreed[11], held that, assuming that the Full Court had power to re-open its previous orders for the alleged manifest error arising from the misapplication of the regulations, any such discretion should not be exercised in the circumstances of the present case[12].

9 No application for special leave to appeal from the orders of the Full Court dismissing the application was made. However, a successful application was then made to the Full Court for the issue of a certificate purportedly pursuant to s 95(b) of the Family Law Act. Section 95 states:

> "Notwithstanding anything contained in any other Act, an appeal does not lie to the High Court from a decree of a court exercising jurisdiction under this Act, whether original or appellate, except:

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8 (1999) 24 Fam LR 555 at 591.

9 (1999) 24 Fam LR 555.

10 (1999) 24 Fam LR 555 at 610.

11 (1999) 24 Fam LR 555 at 621.

12 (1999) 24 Fam LR 555 at 593-595.

(a) by special leave of the High Court; or

(b) upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved."

Provision in substantially the same terms is made in s 104 of the *Child Support (Assessment) Act* 1989 (Cth) ("the Child Support Act"). The Full Court ordered that the appellant:

> "be granted a certificate pursuant to section 95(b) of the *Family Law Act* 1975 (Cth) that important questions of law and public interest are involved in the judgment of this Court dated 9 February 1999".

A certificate in those terms was then issued by the Family Court.

10 Section 95 of the Family Law Act is an exercise by the Parliament of its power conferred by s 73 of the Constitution to regulate the exercise of the jurisdiction of this Court to hear and determine appeals from all judgments, decrees, orders and sentences of the courts mentioned in s 73, including any federal court[13]. The requirement in s 95(b) of a certificate of the Full Court of the Family Court is also to be read as conferring the necessary jurisdiction on the Family Court pursuant to s 77(i) of the Constitution to make an order for the grant of the certificate[14]. That the Full Court, in ordering that a certificate should be issued, was exercising the judicial power of the Commonwealth, with respect to a matter arising under a law made by the Parliament, was not called into question before this Court. Further, in our view, the Full Court was not exercising one of those administrative functions, such as the regulation of rules of procedure, which may properly be an incident of the exercise of the judicial power of the Commonwealth[15].

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13 See *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 208-211, 217.

14 See *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 541; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 506-507; cf *Attorney-General (Cth) v Oates* (1999) 73 ALJR 1182 at 1185-1186; 164 ALR 393 at 398.

15 See *R v Davison* (1954) 90 CLR 353 at 369-370.

11 The decision that a certificate be granted was implemented by a formal order of the Full Court. Before this Court, the appellant conceded in oral argument that that order itself would attract the operation of s 73 of the Constitution. Thus, if special leave were granted, the order might be set aside on appeal by this Court. The respondent challenged the scope and effectiveness of the certificate as part of its argument on the appeal, but it did not institute any cross-appeal seeking to set aside the order for the grant of the certificate.

The construction of s 95 of the Family Law Act

12 However, the circumstance that such an avenue was open throws light upon the construction of s 95. The construction of s 95 is to be approached keeping in mind the observations made by six members of the Court in the joint judgment of Barwick CJ, Menzies, Windeyer, Owen, Walsh and Gibbs JJ in *Willocks v Anderson*[16]. That decision was delivered before the enactment of the Family Law Act. Their Honours said[17]:

> "Under the Constitution this Court is entrusted with the most important of judicial functions. To confer additional original jurisdiction upon it may well impair its ability to discharge its major functions with despatch. The question whether in any particular circumstances, original jurisdiction should be conferred on this Court is of such great significance as to warrant the careful attention of the Parliament. Even if the power to do so may be validly delegated to the Governor-General it is not a matter to be left to the initiative of the Executive except after that attention has been given to the question by the Parliament. If after such consideration the Parliament for reasons sufficiently compelling in a particular case should decide to delegate the power, its intention to do so should be expressly and clearly stated."

13 Regard also may be had to the provisions of the *Matrimonial Causes Act* 1959 (Cth) ("the 1959 Act") which the Family Law Act replaced. Part IX (ss 90-93) of the 1959 Act was headed "APPEALS". Section 91 stated:

> "(1) If, in proceedings under this Act in a court, not being proceedings by way of appeal, a question of law arises which the Judge and at least one

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16 (1971) 124 CLR 293.

17 (1971) 124 CLR 293 at 299-300.

of the parties wish to have determined by the High Court before the proceedings are further dealt with by the court, the Judge shall –

(a) state the facts in the form of a special case for the opinion of the High Court; and

(b) transmit to the High Court the special case and the documents in the proceedings, or such of them as are required for the purposes of the determination,

and a Full Court of the High Court shall hear and determine the question.

(2) The High Court may draw from the facts and the documents any inference, whether of fact or of law, which could have been drawn from them by the court by which the case was stated.

(3) In proceedings under this Act, a case shall not be stated to any court other than the High Court."

In *Knight v Knight*[18], this Court entertained a case stated by a judge of the Supreme Court of South Australia, but the validity of s 91 itself was not called into question. However, s 91 purported to confer upon this Court original jurisdiction and therefore had to answer the description in s 76(ii) of the Constitution of a law conferring original jurisdiction in a matter "[a]rising under" a law made by the Parliament. In *Willocks v Anderson*[19], this Court left open the question whether the Parliament can delegate its constitutional power to make laws conferring original jurisdiction on the High Court. In that case, reliance for a conferral of jurisdiction was placed upon regulations made under the *Apple and Pear Organization Act* 1938 (Cth) and, in the event, the Court decided that the regulations were invalid as the Act did not confer power to make regulations conferring jurisdiction on this Court[20]. Section 91 of the 1959 Act did not involve the purported conferral of jurisdiction by regulations made by the Executive. However, the determinative step which engaged s 91(1) and obliged

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18 (1971) 122 CLR 114. The decision in *Knight v Knight* was overruled in *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49.

19 (1971) 124 CLR 293 at 298.

20 (1971) 124 CLR 293 at 299-300.

the High Court to hear and determine the question in the case stated was the wish by the judge and at least one of the parties in pending proceedings in another court to have a question of law determined by the High Court before the proceedings before the judge were further dealt with. The validity of a conferral of original jurisdiction upon the High Court by such means remains dubious.

14 It is against this background of the questionable validity of s 91 of the 1959 Act, particularly after the delivery of the judgment in *Willocks v Anderson* in 1971, that the device adopted in s 95(b) of the Family Law Act falls for consideration. Rather than original jurisdiction, the legislation engages the appellate jurisdiction of this Court under s 73 of the Constitution. It may be conceded that the requirement of a certificate granted under s 95(b) involves "regulation" within the meaning of s 73. The contrary was not contended. For present purposes, validity should be assumed. However, as we have indicated, the order for the grant of a certificate itself attracts the operation of s 73 of the Constitution.

15 The issue which is involved in the grant of a s 95(b) certificate must be "an important question of law or of public interest". The certificate in the present case does no more than repeat these criteria. That is unsatisfactory. Consistently with the approach to be taken to such a provision, as explained in *Willocks v Anderson* in the passage set out earlier in these reasons, the certificate should specify the terms of that important question[21]. It should also state whether that question is one of law or of public interest or both. The apparent object of s 95(b) will then be achieved. This is to obviate the necessity for a grant of special leave by the High Court limited to a ground perceived by the High Court, on the special leave application, to be an important question of law or of public interest.

16 The respondent did not submit that, in the present case, the certificate was a nullity for want of compliance with s 95(b). Counsel put the matter rather differently. It was said that the content of the question might be gleaned from the reasons delivered by the Full Court in support of the decision to grant the certificate. Such reasons were given in the present case on 30 April 1999[22].

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21 Compare the terms of the certificate under s 74 of the Constitution granted by this Court in *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182 at 234-235. This set out the terms of a particular *inter se* question which was to be determined by the Privy Council.

22 Reported, (1999) 24 Fam LR 623.

Finn J would have dismissed the application. Her Honour detailed the history of the litigation and the previous decision of the Full Court in *Re Z [No 2]*[23] in which a certificate had been refused. Her Honour then said[24]:

> "Against this factual background, and given the recognition which this court has previously accorded to the right of the High Court to determine which matters it will entertain, I do not consider that it would be appropriate for this court now effectively to require the High Court to 'revisit' this case, notwithstanding that it would come in a somewhat different guise."

Kay J would have dismissed the application on the ground that no important question of law and no important question of public interest was involved in determining what his Honour saw as the question, namely whether the Full Court had properly exercised its discretion in refusing to re-open its earlier decision[25].

17 However, the majority (Nicholson CJ, Moore and May JJ) favoured the making of an order for the grant of a certificate. Nicholson CJ referred to the narrow division of opinion which had led to the dismissal by the Full Court of the application to re-open its earlier order. His Honour took the earlier decision as supporting the proposition that the Full Court did have the power to set aside its perfected orders in appropriate circumstances, but that there was a "very obvious" difference of opinion as to the circumstances in which the power "can be or should be exercised"[26]. This was "a matter of considerable public interest", particularly "where the subject matter of the application is a child", and was sufficient to warrant the grant of a certificate under s 95(b)[27].

18 The respondent submitted that from the reasons of the majority of the Full Court in favour of an order for the grant of a certificate there was to be derived the "important question" within the meaning of s 95(b); the question being whether the Full Court could or should have acceded to the application made on

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23 (1996) 135 FLR 42.

24 (1999) 24 Fam LR 623 at 630-631.

25 (1999) 24 Fam LR 623 at 634.

26 (1999) 24 Fam LR 623 at 628.

27 (1999) 24 Fam LR 623 at 628.

17 August 1998 that the Full Court set aside the order of the Full Court made on 10 October 1996 and the order of O'Ryan J made on 20 February 1996.

19 In the circumstances of this case, and in the absence of opposition and submissions as to what we would otherwise have regarded as the true construction of s 95(b), we are prepared to accept that the order granting the certificate be benevolently construed. We would read the certificate as if it set out and identified an important question of law and of public interest which has two parts. The first is whether the Full Court had the power to set aside those perfected orders. The second only arises if the first be answered in the affirmative. It is whether that power should have been exercised by the Full Court.

20 The respondent submitted that the appeal which is enlivened by the grant of the certificate is not one in which the grounds of appeal are at large. There is little to support a construction of s 95(b) which denies to this Court the power, which it would have in disposing of a special leave application, to limit the appeal so as to exclude grounds which would not involve important questions of law or of public interest, or which would not necessarily arise for decision in the particular case, if special leave to appeal were granted. A contrary construction would lead only to the complication that a respondent, faced with a comprehensive appeal consequent upon an order for the grant of a certificate, would apply to this Court for special leave to appeal against the order granting the certificate. By that circuitous means, the position ultimately would be reached that this Court had not been denied the authority to limit the grounds of appeals taken to it.

21 In the present case, the appellant proceeded in this Court on the footing that the appeal was at large. Indeed, grounds were sought to be argued here which had not been argued in the original appeal to the Full Court. One such ground was the contention that the orders made by the Family Court for the return of the appellant and the child to the United States were beyond power, because the Parliament could not validly confer jurisdiction upon the Family Court to make such orders in respect of Australian citizens. Another ground the appellant advanced was that *De L*[28] was wrongly decided. In our view, the appeal does not extend beyond the ground which we are prepared to treat as canvassed by the order for the grant of the certificate. In any event, for the reasons given by

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28 (1996) 187 CLR 640.

Kirby J, we would reject the constitutional ground sought to be advanced. We also would refuse leave to re-open *De L*.

22 It follows that, if this Court concludes that the Full Court lacked the power to re-open its earlier order dismissing the appeal, in the manner sought by the application filed on 17 August 1998, there does not arise any question as to error in the exercise by the Full Court of any discretion it believed it had in the matter. The result would be that the appeal to this Court was to be dismissed.

23 In the event, the appeal was dismissed. We favoured this order for dismissal of the appeal on the footing that the Full Court had lacked the power in question. We turn to explain why this was so.

The power of the Full Court to re-open its orders

24 Section 21(1) of the Family Law Act provides that a court "to be known as the [Family Court] is created" by that statute. Original jurisdiction is conferred on the Family Court by s 31 and appellate jurisdiction by s 93A(1). Jurisdiction is also conferred by other statutes, including the Child Support Act (ss 101, 102, 105), the *Bankruptcy Act* 1966 (Cth) (s 35A), and the *Trade Practices Act* 1974 (Cth) (s 86B).

25 The Family Court is thus not a common law court as were the three common law courts at Westminster. Accordingly, it is "unable to draw upon the well of undefined powers" which were available to those courts as part of their "inherent jurisdiction"[29]. The Family Court is a statutory court, being a federal court created by the Parliament within the meaning of s 71 of the Constitution. A court exercising jurisdiction or powers conferred by statute "has powers expressly or by implication conferred by the legislation which governs it" and "[t]his is a matter of statutory construction"; it also has "in addition such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred"[30]. It would be inaccurate to use the term "inherent jurisdiction" here[31]

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29 *Grassby v The Queen* (1989) 168 CLR 1 at 16. See also *Pelechowski v Registrar, Court of Appeal* (1999) 73 ALJR 687 at 695-696; 162 ALR 336 at 347-348.

30 *Parsons v Martin* (1984) 5 FCR 235 at 241. The judgment was that of Bowen CJ, Northrop and Toohey JJ.

31 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7.

and the term should be avoided as an identification of the incidental and necessary power of a statutory court[32].

26 In *R v Forbes; Ex parte Bevan*[33], Menzies J, with whose judgment Barwick CJ, Walsh and Stephen JJ agreed, distinguished in the manner identified above "inherent jurisdiction" or "inherent power" and jurisdiction or power derived by implication from statutory provisions conferring a particular jurisdiction. The distinction between these sources of power is not always made explicit but is fundamental[34].

27 There is applicable to the Family Court the observations made by Starke J in *R v Bevan; Ex parte Elias and Gordon*[35]:

> "To the Constitution and the laws made under the Constitution it owes its existence and all its powers, and whatever jurisdiction is not found there either expressly or by necessary implication does not exist."

The circumstance that a federal court exercises the judicial power of the Commonwealth is significant. The exercise of that authority has, as incidents arising by necessary implication from Ch III, the power to punish for contempt[36] and the power to preserve the subject-matter of a pending application for special leave to appeal[37]. However, the powers conferred upon the Family Court by statute may be exercised only within the range of jurisdiction conferred upon it by laws made by the Parliament under s 77 of the Constitution[38].

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32 *Parsons v Martin* (1984) 5 FCR 235 at 241.

33 (1972) 127 CLR 1 at 7.

34 *Grassby v The Queen* (1989) 168 CLR 1 at 17.

35 (1942) 66 CLR 452 at 464-465.

36 *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at 1580-1581, 1585, 1600; 166 ALR 545 at 550-552, 558, 578-579.

37 *Tait v The Queen* (1962) 108 CLR 620.

38 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 465; *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 165.

28 Order 31 of the Family Law Rules is headed "DECREES". The term "decree" is defined in s 4(1) of the Family Law Act as meaning "decree, judgment or order" and as including "a decree *nisi* and an order dismissing an application or refusing to make a decree or order". Order 31 r 5 states:

> "Except where the court or a Registrar otherwise directs, all decrees, warrants and recognizances made under the [Family Law] Act, the [Family Law] Regulations or these Rules shall be drawn up and signed by the Registrar of the filing registry."

Rule 6 provides for the rectification by the Registrar of any error "that appears on the face of a decree" and for the rectification of the formal record of a decree where it contains an error appearing to arise "from an accidental slip or omission" (O 31 r 6(3)). This "slip rule" includes a power to "make or give such consequential orders or directions as may be necessary to ensure that justice is done between the parties" (O 31 r 6(4)(b)). However, it is not suggested that O 31 confers a power of the nature necessary to set aside a decree after entry for error of law in the reasons for judgment founding the decree. Nor was this Court referred to any other provision of the legislation directly and expressly conferring such a power.

29 The application to the Full Court filed on 17 August 1998 was expressed to be brought "pursuant to section 21 of the Family Law Act 1975 and in the inherent jurisdiction of the [Family] Court"[39]. The questions thus arise as to what is involved in the invocation of the "inherent jurisdiction" of a federal court created by the Parliament and of the significance of s 21 of the Family Law Act. Section 21(2) of the Family Law Act states:

> "The Court is a superior court of record."

30 Section 98 of the *Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act") established the Commonwealth Industrial Court as a "Superior Court of Record". In *Forbes*, Menzies J concluded that the Commonwealth Industrial Court did not, by virtue of its being a court of that description, have powers which would "go beyond protecting its function as a Court constituted with the limited jurisdiction afforded by the [1904] Act"[40]. Put another way, the principle

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39 (1999) 24 Fam LR 555 at 591.

40 (1972) 127 CLR 1 at 8.

that a grant of power carries with it everything necessary for its exercise did not apply to the Commonwealth Industrial Court to any greater degree than that identified by Menzies J.

31 The question in *Forbes* was whether the Commonwealth Industrial Court had power to make an interlocutory order restraining the officers of a trade union, which was a registered organisation, from withdrawing money from the bank accounts of the union and from transferring money or securities belonging to the union. The substantive proceedings in which the interlocutory order was sought were brought against the officers for an order requiring them to observe the union rules by treating as null and void a resolution made by ballot for the amalgamation of the union with other registered organisations. The Court decided that there was no power to make the interlocutory order. Menzies J said[41]:

> "In my opinion a court with the limited jurisdiction of the Commonwealth Industrial Court has not by virtue of its being a superior court of record, jurisdiction in relation to the property of an organisation which is party to litigation in the Court where no question of the exercise of powers or duties under the rules of the organization in relation to such property is involved."

32 The central issue in the present litigation thus is whether the creation of the Family Court as a superior court of record carried with it the statutory power exercised by the Full Court in the manner sought by the application to "re-open" of 17 August 1998. A starting point is the position respecting orders made after trials in the common law courts at Westminster. These undoubtedly were superior courts of record but, significantly for any analogy, were not appellate courts as was the Family Court in this litigation.

33 In *CDJ v VAJ*, McHugh, Gummow and Callinan JJ described the position in the common law courts at Westminster as follows[42]:

> "At common law, the verdict of a jury might be set aside in one of two ways. First, it might be set aside by way of writ of error. Secondly, it might be set aside where the jury had given a general verdict subject to the opinion of the court in banc on a question of law involved in the case, the

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41 (1972) 127 CLR 1 at 8.

42 (1998) 72 ALJR 1548 at 1562-1563; 157 ALR 686 at 706.

question being stated in a special case or in a point reserved[43]. But once judgment had been entered after trial before a jury, the common law courts would not entertain any fresh action to set aside the judgment. Entry of judgment might, however, be delayed until the next Term and, in the meantime, the disaffected party might move for a new trial. An order for a new trial was an interlocutory remedy[44]. It was an exercise of what in modern times is called original jurisdiction, the common law having no conception of appellate jurisdiction. In that respect, the order for a new trial was an exercise of original jurisdiction just as the issue by this Court under s 75(v) of the Constitution of a writ of prohibition or mandamus is an exercise of original and not appellate jurisdiction. The grounds relied upon on the motion for a new trial might include fraud or the discovery of new evidence."

34 The common law courts, as superior courts of record, had "full power to rehear or review a case until judgment [was] drawn up, passed, and entered". That statement, with citation of supporting authority, was made by Starke J in *Texas Co (Australasia) Ltd v Federal Commissioner of Taxation*[45]. Even after entry of judgment, an error arising from an accidental slip or omission might be corrected at any time by further order in the action and even without an enabling rule of court[46]. An order also might be made in the action for the correction of the records of the court to make certain that they truly represented what the court had pronounced or had intended to pronounce[47]. It also appears that a judgment might be set aside after entry if the parties to the judgment consented, although in deciding whether to make such an order the court would have regard to the interests of third parties[48]. Finally, where the business of the court was so

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43 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 483.

44 *Hall v Nominal Defendant* (1966) 117 CLR 423 at 443.

45 (1940) 63 CLR 382 at 457.

46 *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]* (1982) 151 CLR 590 at 594-595.

47 *Ainsworth v Wilding* [1896] 1 Ch 673 at 678-679; *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR (Pt 1) 642 at 669.

48 *Permanent Trustee Co (Canberra) Ltd v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45.

organised that some orders were made in chambers, those orders may have been open to review by motion in the action, even if they were final orders[49].

35 The Court of Chancery had power to re-open and rehear cases which had been tried before it, even after the decree had been entered. The right of rehearing in the Court of Chancery had involved the exercise of appellate rather than original jurisdiction. Sir George Jessel MR so concluded in *In re St Nazaire Co*[50]. However, that peculiar state of affairs in Chancery did not continue with respect to the exercise of equitable jurisdiction by the Supreme Court of Judicature established by the *Judicature Act* 1873 (UK). The structure it provided included the Court of Appeal[51].

36 The Court of Chancery also had had jurisdiction[52] to enjoin, by a species of common injunction, the enforcement of judgments fraudulently obtained, including those recovered in the common law courts, or to oblige the holder of such a judgment to enter satisfaction of it upon the judgment roll of the common law court. The exercise of this jurisdiction involved the institution of a separate proceeding. In dealing with the matter, the Court of Chancery might send the issues respecting the alleged fraud to a common law court for trial by a new jury[53]. It is unsettled whether this jurisdiction might have been invoked to set aside judgments by reason of the availability of "fresh evidence"[54].

37 A mainspring of the equity jurisdiction was the view taken in Chancery of the deficiencies of the common law procedures, particularly with respect to appeal processes and the absence of a record of the evidence which had been

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49 *C H Giles & Co Ltd v Morris* [1972] 1 WLR 307 at 313; [1972] 1 All ER 960 at 965.

50 (1879) 12 Ch D 88 at 97-98. See also *Werribee Council v Kerr* (1928) 42 CLR 1 at 20; *Fleming v The Queen* (1998) 73 ALJR 1 at 6; 158 ALR 379 at 385.

51 *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR (Pt 1) 642 at 670.

52 *CDJ v VAJ* (1998) 72 ALJR 1548 at 1563; 157 ALR 686 at 706.

53 *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 239. See also *Owens Bank Ltd v Bracco* [1992] 2 AC 443 at 483, 489.

54 *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 239-240.

called before the jury. It is significant that this was at a time before the creation of the modern statutory appellate structure in England. The equity jurisdiction remains in Australia, at least with respect to the impeachment of judgments for fraud, but the preferable course remains the institution of a separate proceeding. That was the view expressed by Barwick CJ in *McDonald v McDonald*[55].

38 These qualifications apart, the rule was that restated by Barwick CJ in *Bailey v Marinoff* with respect to the New South Wales Court of Appeal[56]:

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

In *Bailey v Marinoff*, Gibbs J dissented on the footing that the New South Wales Court of Appeal had an "inherent power" to vary a conditional order to dismiss an appeal after the time for compliance with the condition had expired[57].

39 In considering what is involved in the establishment of a statutory court as a superior court of record with appellate as well as original jurisdiction, as is the case with the Family Court, it is important to bear in mind that the position respecting the revision of the orders of the superior courts of record at Westminster can supply only a limited analogy. Those courts did not exercise appellate jurisdiction as that term is now understood, for example, in s 73 of the Constitution.

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55 (1965) 113 CLR 529 at 532-533. See also *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538; *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 at 699-700.

56 (1971) 125 CLR 529 at 530.

57 (1971) 125 CLR 529 at 544-545.

40 In *CDJ v VAJ*, McHugh, Gummow and Callinan JJ said with respect to the provisions of Pt X (ss 93-96A) of the Family Law Act, which is headed "APPEALS"[58]:

> "The operation of Pt X is to be contrasted with the procedures developed in the English common law courts which have influenced, if indeed they have not determined, the doctrinal foundation for the admission of new evidence after verdict. Appeal is not a common law remedy[59]. It derives from the civil law[60]. Exceptionally, in 1675 the House of Lords declared its right 'as the delegate of the Sovereign to receive and determine "appeals" from inferior Courts, "that there may be no failure of justice in the land"'[61]. But, apart from this special jurisdiction of the House of Lords, in the absence of statute there was and still is no basis for an appeal from a verdict of the common law courts[62]."

It follows that where the right of appeal is conferred by statute, such as by s 93A of the Family Law Act, the terms of that statutory grant will determine the nature of the appeal and consequential matters. These matters include the right, if any, to adduce further evidence on the appeal and the susceptibility of orders, made by the court in its appellate jurisdiction, to re-opening after they have been entered.

41 Section 93A(2) expressly confers on the Family Court a power on appeal to receive, in its discretion, "further evidence upon questions of fact". It was with the construction of that provision that *CDJ v VAJ* was concerned. There is, however, as has been indicated, no comparable provision rendering orders made

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58 (1998) 72 ALJR 1548 at 1562; 157 ALR 686 at 705-706.

59 *Attorney-General v Sillem* (1864) 2 H & C 581 at 608-609 [159 ER 242 at 253]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 552-553; *Grierson v The King* (1938) 60 CLR 431 at 436; *Paterson v Paterson* (1953) 89 CLR 212 at 218-219.

60 *Wiscart v D'Auchy* 3 Dall 321 at 327 (1796) [3 US 253].

61 *South Australian Land Mortgage* (1922) 30 CLR 523 at 553.

62 *South Australian Land Mortgage* (1922) 30 CLR 523 at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108.

by the Family Court in its appellate jurisdiction susceptible to re-opening after entry.

42 The reference to s 93A(2) has a further significance for the present appeal. In *CDJ v VAJ* it was decided that the existence and content of the power of the Full Court of the Family Court to receive "further evidence" turned upon the construction of the Family Law Act. The issues which arose were not to be decided by some general inquiry as to the position of "intermediate courts of appeal". Nor were they to be decided by reference to what had been said in this Court in cases concerned with the procedure of the common law courts. McHugh, Gummow and Callinan JJ said[63]:

> "The principles laid down in *Wollongong Corporation* [*v Cowan*[64]] and the similar appeal in *McCann v Parsons*[65] are to be understood by reference to the procedures of the common law courts. Those cases have nothing authoritative to say about the admissibility of further evidence in respect of a statutory power to admit evidence on appeal. They came before this Court on appeal from judgments of the Full Court of the Supreme Court of New South Wales on motions for a new trial in accordance with s 160 of the *Common Law Procedure Act* 1899 (NSW), after verdicts given by juries in the trial of common law actions for damages. Accordingly, the principles with respect to the allowance of a motion for a new trial on the ground of discovery of fresh evidence which were propounded by this Court in *Wollongong Corporation* and *McCann* were informed by the position in the English common law courts. In those cases, this Court was not concerned with the terms of any modern statute expressly conferring upon an appellate court a power to receive additional evidence. To regard *Wollongong Corporation* and *McCann* as defining the jurisdiction or controlling the discretion to admit evidence in statutory appeals is erroneous."

43 Likewise, in the present litigation, clarity of thought and the isolation of the true issues have not been encouraged by submissions expressed in general terms respecting the position in "intermediate courts of appeal". In the case of each

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63 (1998) 72 ALJR 1548 at 1563; 157 ALR 686 at 706-707.

64 (1955) 93 CLR 435.

65 (1954) 93 CLR 418.

such court, State or federal, attention must be given to the text of the governing statutes and any express or implied powers to be seen therein. Nor is it of assistance to consider the position with respect to this Court in the exercise of its entrenched jurisdiction as a court of final appeal under s 73 of the Constitution, or with respect to the Privy Council or the House of Lords after *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)*[66], a decision referred to by the Solicitor-General of the Commonwealth.

44 We would add that the statement in *De L v Director-General, NSW Department of Community Services [No 2]*[67] that the power of the High Court to re-open its judgments and orders is not in doubt should not be misconstrued. In that case and in all of the authorities respecting orders of this Court which were referred to in that passage[68], the applications were to re-open final orders and were made before entry of the orders in question. There is, as yet, no decision of this Court which turns upon the position after entry of its final orders.

45 The Family Law Act in its text and structure provides no express conferral of the power sought to be exercised in the present case. Nor is there an inherent power by reason of the description in the statute creating the court of it as "a superior court of record". Further, no such power is derived by necessary implication from the statutory structure, in particular from the exercise of the appellate jurisdiction conferred by Pt X of the Family Law Act.

46 A power in the Full Court of the nature for which the appellant contends is not to be found by necessary implication from Ch III of the Constitution. Rather, the Constitution itself deals with the perceived injustice of which the appellant complains in the federal court system. Complaints that orders made by the Full Court should be set aside for error of law, apparent in the reasons for judgment, are to be vindicated through the exercise by this Court of its power conferred by s 73 of the Constitution.

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66 [1999] 2 WLR 272; [1999] 1 All ER 577.

67 (1997) 190 CLR 207 at 215.

68 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

47 The Family Court is a federal court within the meaning of s 73(ii) of the Constitution. Thus, this Court has jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Family Court with such exceptions and subject to such regulations as the Parliament prescribes. An appeal lies from a decree of the Family Court exercising appellate jurisdiction by special leave of this Court (s 95(a)). An application for special leave "is not in the ordinary course of litigation" and, until the grant of special leave, "there are no proceedings inter partes before the Court"[69]. Further, the disposition of a special leave application is not the determination of an appeal[70]. The result is that the refusal of an application for special leave does not produce a final judgment of this Court which forecloses the re-opening of the matter in an appropriate and, necessarily, very special case where the interests of justice so require.

48 Here, an application for an extension of time within which to seek special leave was sought and refused. The grounds urged on the application for extension of time included the prospects of success of any special leave application. These involved the ground of error of law by application by O'Ryan J and the Full Court of the 1995 Regulations to an application which had been made prior to the commencement of those Regulations. The re-agitation of that issue was then sought in the further application to the Full Court of the Family Court. That raised the question of the power of the Family Court to re-open its earlier order dismissing the appeal. This, in turn, led to the issue of the certificate purportedly pursuant to s 95(b) of the Family Law Act which has brought the litigation into this Court.

49 The presence of s 73 of the Constitution and the special nature of the function exercised by this Court, with respect to the grant of special leave to appeal, indicate that there is no compelling necessity to strain the structure of the Family Law Act so as to see as a necessary implication that which is not expressed. In particular, to adapt the conclusions expressed by Menzies J, with respect to the Commonwealth Industrial Court in *Forbes*[71], the power of re-opening after entry of final orders made by the Full Court is not necessary to protect this Court's appellate functions conferred by Pt X of the Family Law Act.

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69 *Collins v The Queen* (1975) 133 CLR 120 at 122.

70 *Attorney-General (Cth) v Finch [No 2]* (1984) 155 CLR 107 at 115.

71 (1972) 127 CLR 1 at 8.

Conclusion

50 We would answer in the negative what the Full Court sought to isolate as the important question of law or public interest as to whether the Full Court had the power to re-open its final orders after their entry. Consequently, no occasion arose for the exercise of discretion in that regard by the Full Court.

51 The position respecting costs remains unsettled. The appellant sought an order that the Attorney-General of the Commonwealth pay the entire costs of the appellant as the price of the grant of leave to intervene which was made.

52 The power to award costs in this Court is that conferred by s 26 of the *Judiciary Act* 1903 (Cth)[72]. Costs should follow the event. No order should be made against the Attorney-General. The appellant should pay the respondent's costs of the appeal.

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72 *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207.

53 KIRBY J. The Court, "[i]n the interests of bringing this litigation to finality"[73], ordered that this appeal from the Full Court of the Family Court of Australia[74] be dismissed.

54 The appeal arose from a case of international child abduction. The appellant, DJL (the mother), attempted by legal and illegal means to retain the custody of her daughter, J. Her husband, LLS (the father), invoked the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") and municipal law giving it effect. By reason of the order of this Court it may be expected that the requirements of the Convention and the law will now be fulfilled. It remains to provide the reasons for the order. I now state my reasons.

The facts

55 Most of the facts are undisputed[75]. The mother, a citizen of Australia, married the father, a citizen of the United States of America, in March 1991. The couple left Australia soon after to reside in the State of Georgia in the United States. In November 1993 the child J was born. On 12 January 1995, without the consent or knowledge of the father, the mother left the matrimonial home. She took J to Australia where they have lived ever since. At the time, the mother was pregnant with a second child of the marriage who was born in Sydney in September 1995. She named him "S". Meanwhile, in January 1995 the father commenced proceedings against the mother in the Superior Court of Gwinnett County in the State of Georgia. Those proceedings were heard *ex parte*. In May 1995, the judge ordered that the father have "sole permanent custody" of the daughter J, no visitation rights being granted to the mother who was ordered to return the child to the father immediately[76]. The marriage of the couple was dissolved. A month later the father applied to the Central Authority of the United

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73 Transcript of proceedings, 18 November 1999 at 173 per Gleeson CJ for the Court.

74 *L v Central Authority* [1999] FLC ¶92-849 (hereafter the "second Full Court decision"). Pseudonyms for the parents and children were adopted in this Court. In the courts below the children were referred to by their initials but the parents named. In order to preserve the point of the pseudonym, the names of earlier decisions have been amended.

75 Taken from the reasons of the primary judge (O'Ryan J) in *Central Authority v L* unreported, Family Court of Australia, 20 February 1996 (hereafter "the primary decision") at 2-9, and from the account in *L v Central Authority* [1996] FLC ¶92-709 (hereafter the "first Full Court decision") at 83,497-83,500.

76 Final judgment and decree, Superior Court of Gwinnett County, State of Georgia (USA).

States claiming the return of J. The relevant provisions of the Convention and the role in Australia of both the Commonwealth Central Authority and Central Authorities for the sub-national jurisdictions of the country are described in a previous case in which the Convention was examined[77].

56 The father's application was conveyed to the Commonwealth Central Authority by the United States Central Authority in June 1995. That month, an application was filed in the Family Court of Australia by the Director-General of the New South Wales Department of Community Services as the Central Authority (the respondent). The application sought an order that the father be permitted to remove J from Australia for the purpose of returning her to the United States.

57 The hearing of the application in the Family Court was delayed because of the impending confinement of the mother. Eventually it came before O'Ryan J, a judge of that Court. On 20 February 1996, his Honour ordered that, upon its being satisfied that the father had made appropriate arrangements to pay the cost of air travel of the mother and child to Georgia, the Central Authority "shall, as soon as reasonably practicable on or after 15 March 1996 cause the child to be returned to the United States in the company of the wife"[78]. The mother appealed against this order. The appeal was heard in July 1996 by the Full Court of the Family Court ("the first Full Court"). In October 1996, an order was made by that Court unanimously dismissing the appeal and thereby confirming the order made by the primary judge.

58 By coincidence, on the day that the last-mentioned order was made, the decision of this Court in *De L*[79] was handed down. It called to attention a misapprehension about the Regulations applicable to child abduction cases[80]. This mistake, as will appear, had been repeated in the decision of the primary judge and of the first Full Court. It does not appear to have been noticed by those then advising the mother. Nor was it drawn to their notice by the Central Authority. No immediate application was made for special leave to appeal to this Court from the order of the first Full Court. Instead, for approximately 14 months, the mother took the two children into hiding. They were apprehended by police in January 1998. For a time, J was placed in foster care but then

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77 *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 (hereafter "*De L*") at 647-653, 671-674.

78 Order of O'Ryan J set out in the first Full Court decision [1996] FLC ¶92-709 at 83,497.

79 (1996) 187 CLR 640.

80 (1996) 187 CLR 640 at 653, 674.

returned to the mother where she remained pending the outcome of these proceedings, growing up in the company of S.

59 In April 1998 a belated application was filed in this Court seeking an extension of time within which to prosecute an application for special leave to appeal from the decision of the first Full Court and, if such extension were granted, requesting special leave. The motion for extension of time, and the application dependent upon it, came before the Court for hearing on 7 August 1998[81]. The mother was represented by senior counsel. He sought an adjournment in order to put an amended notice of appeal into proper form. Counsel indicated his discovery that the judges below had applied the incorrect Regulations as revealed by this Court in *De L*. He foreshadowed arguments that the applicable Regulations made in 1986[82] ("the 1986 Regulations") and not those made in 1995[83] ("the 1995 Regulations") governed the power and discretion which the Family Court was called upon to exercise. Moreover, he indicated an intended attack on the validity of the applicable Regulations. The Central Authority opposed the applications. Extension of time was refused thereby terminating that application.

60 Nothing daunted, the mother on 17 August 1998 made a further application in the Family Court purporting to invoke "the inherent jurisdiction of the Court". That application was expressed to be made in accordance with s 21 of the *Family Law Act* 1975 (Cth) ("the Act"). It was made notwithstanding the fact that an order of the first Full Court, perfecting the decision publicly announced by it, had been taken out and entered in the records. The grounds for the purported reinvocation of the jurisdiction of the Full Court included (1) the manifest error involved in the application of the incorrect Regulations; (2) the alleged invalidity of the applicable Regulations having regard to the regulation-making power in s 111B of the Act; (3) the unconstitutionality of the Regulations in so far as they applied to a child "as an Australian citizen"; and (4) that the order of the primary judge was "spent".

61 The application was listed before the Chief Justice of the Family Court, Nicholson CJ[84], who determined that it should be heard by a Bench of five judges. This course was adopted because important legal questions were raised,

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81 The Court was constituted by Gleeson CJ and McHugh J.

82 Family Law (Child Abduction Convention) Regulations 1986 (Cth) (SR No 85 of 1986).

83 Family Law (Child Abduction Convention) Regulations (Amendment) 1995 (Cth) (SR No 296 of 1995)

84 Pursuant to s 21B(1) of the Act.

the original appeal court "was not readily available", and argument had been foreshadowed that previous authorities of the Full Court of the Family Court had been wrongly decided[85]. The Full Court ("the second Full Court") duly heard the application. The decision of the second Full Court was pronounced on 9 February 1999. By majority[86] that Court dismissed the application to reopen the order made by the first Full Court.

62 Thereupon, the mother applied to a similarly constituted Bench of the Family Court ("the third Full Court") for a certificate under s 95(b) of the Act to permit an appeal to this Court from the second Full Court's orders. Decision on this application was reserved, the grant of such certificates being almost unprecedented[87]. In April 1999, by majority[88], a certificate was granted by the third Full Court. It certifies "pursuant to section 95(b) of the *Family Law Act* 1975 (Cth) that important questions of law and public interest are involved in the judgment of this Court dated 9 February 1999". Following the issue of the certificate a notice of appeal was filed in this Court for the mother. Notices were also given by her in accordance with s 78B of the *Judiciary Act* 1903 (Cth) concerning constitutional questions said to arise in the appeal.

63 The constitutional questions initially raised were (1) whether the 1986 Regulations applicable in the case were invalid as beyond the regulation-making power afforded in s 111B of the Act; (2) whether the Regulations were invalid as not supported by the Convention; and (3) whether the Regulations were invalid in so far as they provided for the compulsory removal from Australia of an Australian citizen who was not alleged to have committed a criminal offence. Subsequently, following the intervention of the Attorney-General of the Commonwealth, the mother gave notice of a further constitutional question, namely (4) the right of the Attorneys-General of the Commonwealth and the States, purportedly pursuant to s 78A of the *Judiciary Act*, to intervene in her appeal and to become parties to proceedings that related to a matter arising under the Constitution. Eventually, the last-mentioned question disappeared when the Attorney-General of the Commonwealth sought and obtained the leave of the

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85 Second Full Court decision [1999] FLC ¶92-849 at 85,947.

86 Finn, Kay and May JJ; Nicholson CJ and Moore J dissenting.

87 *Re Z (No 2)* [1996] FLC ¶92-708.

88 *L v Director-General, Department of Community Services New South Wales* [1999] FLC ¶92-850 (hereafter the "third Full Court decision") per Nicholson CJ, Moore and May JJ; Finn and Kay JJ dissenting.

Court to intervene and the Attorneys-General for the States and Territories present[89] did not press a claim to be heard.

Decisions of the Full Court of the Family Court

64 There are therefore three decisions of the Full Court relevant to these proceedings. The first[90] may be largely disregarded for present purposes. Substantially, it concerned challenges to the findings of the primary judge and to the exercise of the powers and discretions conferred by the Regulations designed to give effect in Australia to the terms of the Convention. There was a challenge to the validity of the Regulations (initially identified by the first Full Court as the 1995 Regulations[91]). However, this challenge was made upon a basis that has not been reargued. It was summarily dismissed and need not be further noticed.

65 The second Full Court produced divergent views upon the matters argued. However, a majority emerged that the order of its predecessor should not be reopened or changed. The threshold question was whether the second Full Court had a power to set aside one of its own orders which had been perfected by entry in the formal orders of the Court. One judge, Kay J, held that, in the circumstances, there was no power to reopen the order. He relied upon a number of decisions of this Court[92]. He expressed the opinion that any "such a power ought be available to be utilised sparingly and in exceptional circumstances"[93]. However, he concluded that it was excluded by authority binding upon him.

66 The majority of the second Full Court reached the contrary conclusion. Nicholson CJ (with whom Moore J concurred) concluded that there was power to reopen the judgments and orders of the Full Court of the Family Court even where they had been perfected[94]. May J was of the same view[95].

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89 Queensland, Western Australia, Victoria, South Australia, the Northern Territory and the Australian Capital Territory.

90 First Full Court decision [1996] FLC ¶92-709 per Baker, Lindenmayer and Smithers JJ.

91 First Full Court decision [1996] FLC ¶92-709 at 83,496.

92 Second Full Court decision [1999] FLC ¶92-849 at 85,989 referring to *Bailey v Marinoff* (1971) 125 CLR 529 and *Gamser v Nominal Defendant* (1977) 136 CLR 145.

93 Second Full Court decision [1999] FLC ¶92-849 at 85,989.

94 Second Full Court decision [1999] FLC ¶92-849 at 85,964.

95 Second Full Court decision [1999] FLC ¶92-849 at 85,998.

Finn J considered that the position was not so clear in the case of perfected judgments and orders of courts below this Court[96]. However, her Honour was prepared to assume, without deciding, that there was such a power[97]. In this way a majority of the second Full Court supported the existence of the power. None of the judges disputed that such a power should exist for truly exceptional cases.

67 So far as the Regulations applicable to the case were concerned, it was held or assumed by all members of the second Full Court, following the decision in *De L*[98], that the Regulations which should have been applied were the 1986 Regulations; that the primary judge and the first Full Court had applied the incorrect 1995 Regulations and that they had also followed decisions of previous Full Courts of the Family Court[99] which had incorrectly interpreted those Regulations[100]. Nevertheless, the majority[101] were not persuaded that these mistakes (even if established) had any relevant consequence, or had occasioned any sufficiently exceptional injustice, to warrant a departure from the important principle of finality to litigation to which judgments and orders of all courts are intended to give effect. For that reason, they were not persuaded to exercise any rare and exceptional power to alter a perfected order, assuming such power to exist[102].

68 None of the judges of the second Full Court was impressed with the argument that the child J could not be returned to the United States because of her status as an Australian citizen[103]. None was convinced by the suggestion

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96 Second Full Court decision [1999] FLC ¶92-849 at 85,973-85,974 referring to *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215 (hereafter "*De L [No 2]*").

97 Second Full Court decision [1999] FLC ¶92-849 at 85,974.

98 (1996) 187 CLR 640.

99 *Gsponer v Director General, Department of Community Services, Victoria* [1989] FLC ¶92-001; *Murray v Director, Family Services, ACT* [1993] FLC ¶92-416.

100 Second Full Court decision [1999] FLC ¶92-849 at 85,948 per Nicholson CJ, 85,998 per Moore J concurring, 85,975 per Finn J (assuming), 85,992 per Kay J, 85,998 per May J.

101 Finn, Kay and May JJ; Nicholson CJ and Moore J dissenting.

102 Second Full Court decision [1999] FLC ¶92-849 at 85,975-85,976 per Finn J, 85,994 per Kay J, 85,998 per May J.

103 Second Full Court decision [1999] FLC ¶92-849 at 85,954 per Nicholson CJ, 85,995 per Kay J, 85,998-85,999 per May J.

that, by reason of the delays and supervening events (many of them of the mother's own making), the order of the primary judge should be regarded as "spent".

69 The third Full Court also divided on whether the certificate under s 95(b) of the Act should be granted. Upon this point, Moore and May JJ concurred with Nicholson CJ's reasons for acceding to the application. Those reasons adverted to differences which had emerged in decisions of the Full Court of the Family Court when earlier applications of a like kind had been made[104]. In one of those decisions, Nicholson CJ (with Frederico J; Fogarty J dissenting) stressed the "serious step" which was involved in the grant of a certificate because (as it was put) it "effectively usurps [the] High Court's discretion and detracts from its capacity to determine for itself, the matters which it considers significant for the function and development of the law as seen from the position of the highest court in the land"[105].

70 In the present case, Nicholson CJ was persuaded that "important questions of law or public interest" were involved[106]. The Chief Justice identified these as concerning "the circumstances in which [the] power [to reopen] can be or should be exercised"[107]. His Honour went on to say that the principles to be applied "where the subject matter of the application is a child is a matter of considerable public interest"[108], a conclusion reinforced by the division of opinion within the second Full Court.

71 In the third Full Court, Finn J and Kay J dissented. They would have refused the certificate. Each was affected by the fact that this Court, on 7 August 1998, had refused an application for a belated hearing of a special leave summons against the order of the first Full Court. In these circumstances, Finn J was of opinion that it would not "be appropriate for [the Family] Court now effectively to require the High Court to 're-visit' this case, notwithstanding that it would come in a somewhat different guise"[109]. In the view of Kay J, because there had been a majority in the Full Court which held that that Court had the power to reopen, the ultimate question tendered was no more than one

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104 *Re Z (No 2)* [1996] FLC ¶92-708; *"Re Evelyn" (No 2)* [1998] FLC ¶92-817.

105 *Re Z (No 2)* [1996] FLC ¶92-708 at 83,493.

106 Third Full Court decision [1999] FLC ¶92-850 at 86,003.

107 Third Full Court decision [1999] FLC ¶92-850 at 86,003.

108 Third Full Court decision [1999] FLC ¶92-850 at 86,003.

109 Third Full Court decision [1999] FLC ¶92-850 at 86,005.

concerning the exercise of the power or discretion. He did not consider that this, or any other of the suggested bases of challenge, was suitable for the exceptional grant of a certificate[110].

The issues

72 When the certificate was granted, it did not identify on its face the "important question of law or of public interest" said to be involved. Armed with the certificate, the mother filed her notice of appeal to raise the several issues which she then proceeded to argue. The emerging issues were:

1. Whether it was competent to the third Full Court to grant a certificate for an appeal to this Court from the decree of the Family Court exercising jurisdiction under the Act; whether, if it was, the discretion to grant the certificate miscarried in the circumstances; and, if not, whether the certificate was in proper form, given its failure to identify the "important question of law or of public interest" said to be involved. (The certificate issue).

2. Whether the second Full Court had the power to reopen a perfected order earlier made by the first Full Court; and whether, if it did, the decision of the second Full Court declining to reopen the order of the first miscarried in a way that should now be corrected. (The reopening issue).

3. Whether the first Full Court erred in the application to the facts as found of the Regulations which it applied in deciding the application for an order to return J to the United States; whether the Regulations applicable were valid; and whether, if the incorrect Regulations were applied and were valid, this had resulted in any error or injustice in the order ultimately made by the primary judge and confirmed by the first Full Court. (The validity of the Regulations issue).

4. Whether, in any event, it was constitutionally impermissible to order that J, an Australian citizen, be removed from Australia to the United States although she was not alleged to have committed a criminal offence; and whether, to the extent that the Act and the applicable Regulations giving effect to the Convention purported to provide for such removal, such laws were invalid as beyond the lawmaking power of the Commonwealth. (The citizenship issue).

5. Whether, in all the circumstances, and the events which had occurred since it was made, the order of February 1996 made by the primary judge should

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110 Third Full Court decision [1999] FLC ¶92-850 at 86,007.

be held to be spent, necessitating reconsideration by the Family Court of the application to the circumstances of the correct Regulations and redetermination of the order which should now be made. (The spent order issue).

The certificate

73 *Objections to the certificate:* At the outset of argument in this Court, the threshold question of the validity, revocability and terms of the certificate granted by the third Full Court was raised. The Court was informed that the Central Authority challenged the competency of the appeal. Although it had not sought, in terms, to move the Court to "deal with the issue of the certificate", it agreed that relevant to the competency of the appeal was whether this Court could, for itself, revoke the certificate and whether it should do so in the events that had occurred.

74 Various questions were raised in argument which might have suggested that an issue was presented as to whether s 95(b) of the Act was constitutionally valid. Did it, for example, involve an attempt to impose upon this Court a duty to answer a hypothetical question not apt to the jurisdiction of a court created by or under Ch III of the Constitution[111]? If it was open to a Full Court of the Family Court, by certificate, in effect to permit an appeal to be brought to this Court without any decision of this Court (and possibly without any power to revoke the certificate as to which the Act is silent) would it be equally competent to delegate such certification to a Magistrate's Court (bypassing the ordinary processes of appeal envisaged by the hierarchy recognised in the Constitution[112])? Would it be competent for the Parliament to authorise the giving of such a certificate by an organ of the Executive Government? In short, was the procedure compatible with the role and functions of this Court as envisaged by the Constitution, and elaborated in successive legislative provisions regulating and prescribing appeals to this Court?

75 After the appeal was adjourned and when the hearing was resumed, the Central Authority made it plain that it withdrew any challenge to the validity of the certificate. It explained this change of course by reference to its desire to avoid any further delay that might be occasioned by prosecuting the point. No notice was given under the *Judiciary Act* to suggest that s 95(b) of the Act whether generally, or as applied to circumstances such as the present, was beyond the lawmaking powers of the Parliament.

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111 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289.

112 Constitution, s 73.

76 Because the point was not therefore placed before this Court by an issue in its record, nor fully argued, it is inappropriate to do more than to notice it in passing. However, the point having been raised, as it was originally said to involve the jurisdiction of this Court to hear and determine the appeal, it is appropriate to say sufficient to establish that a valid foundation for jurisdiction exists, as in my view it does.

77 *The certificate and judicial power:* The Constitution in s 73 specifically envisages that appeals, relevantly from judgments, decrees, orders and sentences of federal courts to this Court, will be "with such exceptions and subject to such regulations as the Parliament prescribes". From the first enactment of the *Judiciary Act*, such "regulation" and "prescription" was made. Initially, that Act permitted appeals as of right in specified cases, including those in which claims, demands or questions involving a certain amount or value were at stake or where the status of persons was affected[113]. When this provision, as later amended, was altered to require in every case a grant of special leave to appeal[114], that enactment was upheld as valid under the Constitution[115]. If such regulation and prescription might be provided by the *Judiciary Act*, there is no apparent reason why, in relation to appeals from the Family Court, it might not be effected by the Act.

78 Section 95 of the Act is an adaptation of the special provision governing appeals to this Court in matrimonial causes earlier provided by s 93 of the *Matrimonial Causes Act* 1959 (Cth). The provision for a certificate was not included in the Family Law Bill 1974 (Cth) as originally drawn[116]. It was added later following extensive parliamentary and community debate[117]. It may be inferred that the Parliament considered that, by including the exceptional provision for a certificate, it was affording a desirable second means of securing the consideration of appeals to this Court involving "important questions of law or of public interest" in cases arising out of the new Act. In the 25-year history of the provision, it can scarcely be said that the facility has been overused. It

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113 *Judiciary Act*, s 35(1)(a) (repealed).

114 *Judiciary Act*, s 35(2).

115 *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194.

116 cl 72.

117 Family Law Bill 1974 (Cth) (Consolidation of Amendments and New Clauses), cl 72(b).

appears to have been exercised with great responsibility and with recognition by the Family Court of its exceptional character[118].

79 The grant of a certificate under s 95 of the Act is not in some way alien to the judicial power of the Commonwealth. It is a form of "regulation" by the Parliament of the right of appeal which is contemplated. Such a proposition would be difficult to reconcile with the terms of s 74 of the Constitution. That section envisaged that this Court might certify for an appeal to be permitted to the Privy Council in the class of matters which were otherwise excluded from the jurisdiction of their Lordships. Only once did this Court grant a certificate in such a case[119]. The jurisdiction is now treated as obsolete[120]. But the express provision for it in the Constitution and the several occasions when the jurisdiction to grant a certificate was invoked and considered[121] indicate that there is nothing in the procedure inimical to the functions of an appellate court.

80 Nor is s 74 of the Constitution alone in this respect. Other legislation mirrors the provision of a certificate by a court which is thereupon subject to appeal[122]. I am therefore satisfied that the appellate jurisdiction of this Court was properly invoked. It is not necessary to speculate on what would be the validity of other provisions or certificates given by other bodies. Nor is it necessary to explore the availability of revocation by this Court of a certificate once granted by the Full Court of the Family Court. Given that the donee of the power of certification is, in this respect, the Full Court of the Family Court and it alone, it seems unlikely that, once a certificate is given (and so long as it involves a matter within Ch III of the Constitution), this Court could do other than dispose of the appeal brought pursuant to the certificate. As the present is on no account a case where revocation would be contemplated or was ordered, I need not examine that question further.

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118 Only four such certificates have been granted: *In the Marriage of Stowe and Stowe (No 2)* [1981] FLC ¶91-074 which was settled after hearing; *Fisher v Fisher (No 2)* [1986] FLC ¶91-767 where the appeal was dismissed; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218; and the present appeal.

119 *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182.

120 *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 465.

121 *Deakin v Webb* (1904) 1 CLR 585; *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087; *Flint v Webb* (1907) 4 CLR 1178; *Western Australia v Hamersley Iron Pty Ltd [No 2]* (1969) 120 CLR 74.

122 cf *Administration of Justice Act* 1969 (UK), s 12(1).

81 *The certificate and hierarchy:* This conclusion leaves to be decided a submission which the Central Authority urged as a threshold objection to the proceedings in this Court based on the certificate. As "preliminary issues"[123] the Central Authority maintained two objections to the grant of the certificate under s 95(b) of the Act in the circumstances of this case. They were put forward to support a notice of contention which the Court allowed the Central Authority to file, although out of time. This sought to uphold the majority decision of the second Full Court on the basis that the order of this Court of 7 August 1998 precluded the mother from any further challenge against the correctness of the decision of the first Full Court. On this basis alone, it was said, the second Full Court lacked power to reconsider the earlier judgment.

82 To some extent this argument is concerned with the reopening issue to which I will shortly turn. However, (as I understood it) the argument went further. It suggested that the provision to the mother of the certificate which purported to allow her to appeal in this case represented, in the circumstances, the subversion of "the place of [the High] Court in the judicial hierarchy in Australia"[124]. An analogy was drawn to the observations in the Supreme Court of the United States to the effect that, where "certiorari is denied, its minimum meaning is that [the Supreme] Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata*"[125]. According to the Central Authority what was at stake was maintenance of "the regularity of the judicial process". The indirect means by which the mother had secured the hearing of an appeal in this Court, once having been refused that facility by the order of this Court itself, was said to involve a presumption which needed to be rebuffed "to maintain the authority of the Order made in this Court"[126]. I do not agree.

83 Whilst it is true that most, if not all, of the arguments eventually presented in the hearing of the present appeal were mentioned in brief form when the application for extension of time to apply to this Court was heard in August 1998, a study of the transcript of that hearing makes it plain that the matter which was concerning the judges constituting this Court was the mother's time default, the way that she was responsible for most of that default and her failure to explain or excuse it. No affidavit was filed by the mother in those proceedings. Repeatedly, as counsel sought to address the substantive issues, he was brought back to the threshold difficulty. Especially in the absence of an

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123 Respondent's written submissions.

124 Respondent's written submissions.

125 *Brown v Allen* 344 US 443 at 543 (1953) per Jackson J; cf at 451-452, 488.

126 Respondent's written submissions.

affidavit from the mother explaining the gross delay, it was unsurprising that the application was dismissed by the refusal of the motion. There was no apparent separate consideration of the substance of the application. Certainly, there was no reference to the matters of substance in the reasons given for the order of this Court.

84 By chance, this was a case where it was open to the mother to attempt to repair her predicament by a return to the Full Court and, if this failed, to invoke an extraordinary procedure to bring an appeal before this Court in which the merits could be canvassed. In my opinion, it cannot be denied that "an important question of law or of public interest is involved"[127]. The Full Court of the Family Court, in this and in earlier cases, has made clear its recognition that, given the ordinary procedure[128] and the functions and role of this Court, the grant of a certificate under s 95(b) of the Act is something that will be rarely provided. The words of the paragraph themselves suggest as much. There is no affront to this Court in a person's exhausting separate and distinct remedies provided by the Parliament, such remedies not being shown to be invalid. This is not a challenge to this Court's authority. It is the lawful invocation of it.

85 *Form of the certificate:* A final objection to the certificate in the terms granted by the Full Court concerned the complaint that it did not identify on its face the "important question of law or of public interest" said to be involved. Obviously it would be desirable that the "question" found to warrant the grant of a certificate should be identified and stated in that document. Doing this would ensure that the power to grant the certificate is properly discharged by reference to an identified question or questions. However, the failure to specify the questions in the document is scarcely one that goes to the certificate's validity or the Court's jurisdiction. There is nothing in s 95(b) of the Act which requires that the certificate be in any particular form. The closest analogy is the grant and refusal of special leave to appeal[129] to this Court. Where such special leave is granted, this Court occasionally limits the grant to some only of the grounds argued by the applicant and set out in its draft notice of appeal filed with the application[130]. This Court does not itself typically identify the matters in respect of which special leave is granted. That is usually left to the parties in their grounds of appeal. Whilst certification appears to contemplate a higher degree of particularity, by the time the "questions" were before the third Full Court, those

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127 The terms of s 95(b) of the Act.

128 *Judiciary Act*, s 35(2).

129 *Judiciary Act*, s 35(2).

130 eg *Cassell v The Queen* (2000) 169 ALR 439 at 441, 446 recording that special leave was confined to the decision on the fifth question in the case stated at trial.

questions were clear enough. Indeed, in the contested decision on the grant of the certificate the participating judges identified the several questions and indicated why they considered that they did, or did not, qualify for a certificate.

86 There is a final reason why the objection to the form of the certificate should not succeed. Placed before the Court was the correspondence between the parties and the official of the Family Court responsible for the issue of the certificate. No objection was taken at that stage by the Central Authority to the failure of the certificate to identify the "questions" in respect of which it was granted. The belated complaint about matters of form should therefore be rejected. No application was made for special leave to cross-appeal against the grant of the certificate. The Central Authority contented itself with its notice of contention and with grumbling about matters of form for which, in part at least, it was itself responsible. There was no substance in any of the certificate issues.

Reopening of a perfected order

87 *Finality and flexibility:* The question whether in any circumstances the Full Court of the Family Court (and other Australian courts equivalent to it) is entitled in law to reopen a perfected order previously entered is undoubtedly an important question of law and of public interest. The mother asserted that there was such a power. The Central Authority (supported by the Attorney-General of the Commonwealth) denied this.

88 The mother gained the support on this point of a majority of the second Full Court. She only lost her application because one of the judges in that majority (May J) was unconvinced that the power should be exercised in the present case. By its notice of contention, the Central Authority sought to uphold the dismissal of the mother's application to reopen the decision of the first Full Court. It did so on the ground that the second Full Court lacked the power to reconsider the matters determined by the first Full Court once the decision of the first Full Court was given effect by perfected orders entered on the Court's record. If there were no power in the second Full Court to reopen the earlier decision then, subject to any other remedies which the mother might have under the Constitution to prevent effect being given to unconstitutional conduct, the litigation between the parties would be closed.

89 According to the submission of the Central Authority, the proper answer by the second Full Court to the attempt by the mother to reopen the order of the first Full Court was that, in law, no such power existed in the Family Court so that the application was misconceived. If it was, the grant of a certificate permitting an appeal on the point was equally misconceived. On one or other of those grounds, the appeal would have to be dismissed, although for reasons different from those of the majority of the second Full Court and more akin to those of Kay J in that Court.

90 The law, for very good reason, places a high store on the finality of court judgments and orders. There would be little point in having courts to resolve disputes between parties according to law[131] with settled remedies of judicial review and appeal, and within a hierarchical judicial system, if no ultimate finality could be reached. The judicial system would become discredited if "final" orders were revealed as provisional or always subject to reconsideration and collateral challenge thus compounding costs, delays and the anxiety of submitting disputes to independent judicial determination. People caught up in litigation would not be able to order their affairs with certainty following its outcome. They could be subjected to repeated attempts by their opponents to engage them in fresh argumentation on issues they thought had been decided. Litigants with long purses[132], uncompromising certainty of their own rectitude or spiteful desire to win although they lose (by constantly running up the costs of reopenings) would defeat one of the chief objectives of any civilised legal system: the bringing of a litigated contest to an end[133].

91 On the other hand, because courts comprise decision-makers who are fallible human beings, not machines, occasionally errors and oversights will occur which can clearly be demonstrated and which produce a result that would be "manifestly unjust if the judgment were allowed to stand"[134]. Where the earlier decision has been announced but not yet "perfected" (in the sense of translated into a formal order entered in the records of the court) it is usually possible to repair the mistake and prevent the injustice by restraining (or securing agreement to withhold) the perfection of the order in question; relisting the matter before the court concerned; and attempting to persuade it to change its opinion and the orders which follow from it. In the course of judicial life it can happen that a party, receiving reasons for a decision pronounced in open court, notices a fundamental mistake, quickly calls it to the attention of the judge or judges involved and, before perfection of the orders, gains correction and even reversal of the previously announced decision. This has happened to most judges[135].

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131 *Eggins v Brooms Head Bowling and Recreational Club Ltd* (1986) 5 NSWLR 521 at 524 per McHugh JA.

132 *In re the Will of F B Gilbert (Deceased)* (1946) 46 SR (NSW) 318 at 323.

133 *Bailey v Marinoff* (1971) 125 CLR 529; *Gamser v Nominal Defendant* (1977) 136 CLR 145 at 154; *CDJ v VAJ* (1998) 72 ALJR 1548 at 1567; 157 ALR 686 at 712.

134 *Gamser v Nominal Defendant* (1977) 136 CLR 145 at 147 per Gibbs J.

135 *Winrobe Pty Ltd v Sundin's Building Co Pty Ltd [No 2]* unreported, New South Wales Court of Appeal, 24 December 1992; *New South Wales Medical Defence Union Ltd v Crawford [No 3]* unreported, New South Wales Court of Appeal,

(Footnote continues on next page)

92 Where a court is subject to appellate or other judicial review, it will often be possible within the judicial hierarchy, an error being shown, to obtain correction of a perfected order and the substitution of an order unaffected by the error brought to light. Apart from this, other means have been developed to afford exceptional relief from the affront to justice which would be done by the enforcement of a perfected order where this is in some way tainted by manifest error combined with demonstrable injustice.

93 Some accidental slips or omissions are capable of correction at common law[136]. This facility is now commonly replaced by provisions in rules of court. In the Family Court of Australia, that is where the "slip rule" may be found[137]. Ordinarily, it is limited to correction of the formal record for accidental mistakes or omissions of no substantive significance. Similarly, when it can be shown that a court order does not correctly reflect the court's decision as contained in its reasons, rectification of the order is viewed as nothing more than a mechanical task[138]. Thus where a party has been wrongly named or misdescribed[139] or is shown to have died or to be non-existent[140] corrections may be made. Where, without alteration, it is possible to repair an oversight and prevent injustice by making a supplementary order, the existence of a previously perfected order will be no barrier[141]. Some authorities suggest that parties may always consent to reopening even a perfected order[142]. If no third parties are involved, those named

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23 September 1994 noted in *Haig v Minister Administering the National Parks and Wildlife Act 1974* (1994) 85 LGERA 143 at 152-154.

136 *Ainsworth v Wilding* [1896] 1 Ch 673 at 677 per Romer J; *R v Cripps; Ex parte Muldoon* [1984] QB 686 at 695.

137 Family Law Rules, O 31 r 6.

138 *Rajunder Narain Rae v Bijai Govind Sing* (1839) II Moo Ind App 181 at 216, 222-223 [18 ER 269 at 282, 285] per Lord Brougham; *Ainsworth v Wilding* [1896] 1 Ch 673 at 677; *Thynne v Thynne* [1955] P 272 at 313.

139 *Thynne v Thynne* [1955] P 272 at 314.

140 *MacCarthy v Agard* [1933] 2 KB 417 at 427.

141 *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141 at 144; *Bailey v Marinoff* (1971) 125 CLR 529 at 540.

142 *Ainsworth v Wilding* [1896] 1 Ch 673 at 677; *Permanent Trustee Co (Canberra) Ltd v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 50 per Brennan J.

in the judgment or order can always agree between themselves not to enforce it or that they will only enforce it subject to an agreed variation.

94 In addition to these methods of overcoming the mistakes and injustices that can sometimes arise in perfected orders, the law has devised means of permitting collateral attack on such orders. This can be mounted in separate proceedings where it is alleged that the judgment was obtained through fraud[143]. But it can also arise where it can be shown that there has been a serious denial of procedural fairness[144]. Such remedies are necessary to maintain the integrity of the court process[145].

95 The courts have been reluctant to provide an exhaustive list of the exceptions to the general rule of finality[146]. The foregoing instances illustrate the responses of judges to particular cases that seemed to them to call for exceptional derogations from the rule of finality. The present case is no different. The mother sought to have an additional exception recognised, applicable to her case. In support she pointed to the position of a court such as the Full Court of the Family Court within the Australian judicial hierarchy and the peculiarities of litigation in the Family Court concerning, as hers did, a child who although profoundly affected by the order of the Court was at no stage a party to the proceedings or separately represented in them[147].

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143 *Thynne v Thynne* [1955] P 272 at 314.

144 *Bailey v Marinoff* (1971) 125 CLR 529 at 540 per Gibbs J; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 at 281; [1999] 1 All ER 577 at 585-586.

145 *Bailey v Marinoff* (1971) 125 CLR 529 at 532, 535, 539.

146 *Thynne v Thynne* [1955] P 272 at 313.

147 Although it is possible to provide for the separate representation of a child, no children's representative was appointed in this case. In his orders, Nicholson CJ proposed that one should be appointed for the rehearing. See second Full Court decision [1999] FLC ¶92-849 at 85,970 (Order 4); cf *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 202-204.

96 *Intermediate appellate courts:* It is now recognised both in Australia[148] and England[149] that orders made by ultimate appellate courts may be reopened by such courts in exceptional circumstances to repair accidents and oversights which would otherwise occasion a serious injustice. In my view, this can be done although the order in question has been perfected. The reopening may be ordered after due account is taken of the reasons that support the principle of finality of litigation. The party seeking reopening bears a heavy burden to demonstrate that the exceptional course is required "without fault on his part"[150]. For some time there has been a controversy in Australia as to whether this exceptional principle applies to the appellate courts of the Commonwealth, the States and the Territories which operate under this Court.

97 Two decisions of this Court in the 1970s tend to suggest that those courts do not enjoy such a power, at least as an attribute of their "inherent" jurisdiction and without specific legislation to that effect. In *Bailey v Marinoff*[151] the majority of this Court concluded that the New South Wales Court of Appeal lacked any inherent or other power "to make an order in litigation which, without any error or lack of jurisdiction, has been regularly concluded and is no longer before the court". A dissenting opinion was expressed by Gibbs J. By reference to the many exceptions to the finality of perfected orders which had been recognised (some of them collected above) Gibbs J could "see no reason in principle, and certainly none in justice or convenience, why an appellate court cannot vary the condition of an order dismissing an appeal … [T]he appeal may be at an end, but the power of the court remains, and an exercise of the power can reinstate the appeal."[152]

98 The majority view in *Bailey v Marinoff* was reaffirmed in *Gamser v Nominal Defendant*[153]. In that case the New South Wales Court of Appeal had

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148 *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302-303 per Mason CJ; *De L [No 2]* (1997) 190 CLR 207 at 215-216.

149 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272; [1999] 1 All ER 577.

150 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684; see also *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45-46; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 168; *De L [No 2]* (1997) 190 CLR 207 at 215-216.

151 (1971) 125 CLR 529 at 531-532 per Menzies J.

152 (1971) 125 CLR 529 at 545.

153 (1977) 136 CLR 145.

declined to reopen its order reducing an award of damages when, subsequently, clear evidence became available that the plaintiff's injuries were much more severe than those proved at trial. This Court would not disturb the original orders in an appeal against the refusal by the Court of Appeal to reopen its own perfected order. That disposition was agreed to by Gibbs J, although he added[154]:

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

99 It is worth mentioning that in *Gamser*, this Court proceeded to allow the appeal against the original order of the Court of Appeal. It thereby restored the more substantial judgment which the plaintiff had recovered at trial. Thus the principle of non-disturbance was affirmed in a case where the injustice could be repaired in disposing of an appeal which, at the time, was capable of being brought to this Court as of right.

100 The Central Authority, and the Attorney-General of the Commonwealth, urged this Court to adhere to the principle expressed in *Bailey* and *Gamser*. However, since those decisions were published suggestions have been made in this Court[155], in the New South Wales Court of Appeal[156] and in the Full Court of the Federal Court[157] that Courts of Appeal and Full Courts in Australia may, in wholly exceptional circumstances of the type to which Gibbs J referred in *Bailey*

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154 (1977) 136 CLR 145 at 147.

155 *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38.

156 *Wentworth v Rogers (No 9)* (1987) 8 NSWLR 388 at 394-395; *Haig v Minister Administering the National Parks and Wildlife Act 1974* (1994) 85 LGERA 143 at 152-154, 159, 160; cf *Wilcox v Richardson* [1999] NSWCA 192 at [5-6].

157 *Donkin v AGC (Advances) Ltd* unreported, Federal Court of Australia, 30 August 1995; *Wati v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 543 at 551; *Fox v Commissioner for Superannuation (No 2)* (1999) 88 FCR 416 at 429.

and *Gamser*, enjoy the power to correct even a perfected order. In my view this is a correct statement of the law.

101 A consideration which occasions further refinement of the principles stated in *Bailey* and *Gamser* is the alteration that has happened, since those cases were decided, in the judicial arrangements of Australia affecting appeals from what were, at that time, described with accuracy as intermediate appellate courts. The abolition of all remaining appeals to the Privy Council[158] meant that the last appeal to that Court from an Australian court was concluded in 1987[159]. Meanwhile, in 1984, by the *Judiciary Amendment Act (No 2)* 1984 (Cth), s 35 of the *Judiciary Act* was amended to substitute for previous arrangements[160] the universal requirement to obtain special leave to appeal for all appeals to this Court. The previous provision allowing certain appeals in civil cases to lie as of right was repealed. There were equivalent changes to other federal Acts[161].

102 By reason of these changes, and the criteria enacted by the Parliament for the grant of special leave[162], it cannot be disputed that the number and kinds of appeals thereafter coming to this Court were changed. The change was effected out of recognition of this Court's primary functions as the ultimate constitutional and appellate court of the nation. Published statistics indicate the relatively small number of appeals in both civil and criminal matters[163] and the very small proportion of applications that are granted special leave to appeal[164]. A moment's reflection upon these developments indicates that it is simply not

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158 *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); *Australia Act* 1986 (Cth and UK), s 11(1).

159 *Austin v Keele* (1987) 10 NSWLR 283 (PC).

160 The history is described in *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 205-206.

161 eg *Federal Court of Australia Amendment Act* 1984 (Cth), s 3(1).

162 *Judiciary Act*, s 35A.

163 High Court of Australia, *Annual Report 1998-99*, at 65, 66. This shows the following number of civil appeals decided: 1997-98, 48; 1998-99, 41. In the same periods the number of criminal appeals was 17 and 17.

164 High Court of Australia, *Annual Report 1998-99*, at 63, 64. Applications for special leave to appeal in civil cases were: 1997-98, 181 applications, 144 refused; 1998-99, 160 applications, 116 refused. In applications in criminal cases the statistics were: 1997-98, 86 applications, 66 refused; 1998-99, 83 applications, 62 refused.

feasible or honest, in the present judicial arrangements of Australia, to suggest that this Court is in a position to exercise, in fact, an appellate function to correct every minor mistake of fact or law which is discovered after the orders of a federal, State or Territory Court of Appeal or Full Court have been perfected and which would otherwise fall within the exceptional category of an accidental oversight occasioning injustice. To argue that such cases are not instances of "irremedial injustice" because of the theoretical possibility that this Court might, even out of time, permit special leave to effect a correction is to allow form once again to triumph over substance. I reject that approach.

103 It is impossible in these times, for example, to imagine that special leave would have been granted in *Gamser* which fortuitously and indirectly cured a possible injustice. The Courts of Appeal and Full Courts of Australia now therefore necessarily share with this Court the functions of preventing irremediable injustices which can be clearly demonstrated by reference to accident or oversight. In the face of clear evidence to the contrary, we should not pretend that this Court alone can or does perform that function[165]. We should not be content with the situation where no appellate court in the Australian judicial hierarchy performs the function effectively in the exceptional cases where relief is justified.

104 *Implied powers of statutory courts:* There is some discussion in the cases about whether the function of correction is part of the "inherent" jurisdiction of a court as such. I agree with the joint reasons[166] that it is desirable, in relation to courts created by statute, that the expression "inherent powers" should not be used. That appellation may be appropriate to courts originally created out of the Royal Prerogative. It is not apt to a court, such as the Family Court, which is created by federal legislation[167]. In such a case it is necessary to attribute the power (where it is not conferred expressly by or under such legislation) to an implication derived from the legislation establishing the body. It may also be implied from the character of the court as a court of the designated kind, and

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165 cf *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-269; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 418.

166 Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [25]; see also *Haig v Minister Administering the National Parks and Wildlife Act 1974* (1994) 85 LGERA 143 at 153-154.

167 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7; *Grassby v The Queen* (1989) 168 CLR 1 at 16; *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 16-17; cf *Cameron v Cole* (1944) 68 CLR 571 at 585-586; *Taylor v Taylor* (1979) 143 CLR 1 at 16; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476.

from the place which it enjoys in the Judicature of the Commonwealth for which the Constitution provides. There is no difficulty in ascribing these implications to the Family Court within the field of its jurisdiction.

105 The number of appeals from the Family Court granted special leave by this Court is extremely small[168]. It is no diminution of the function of this Court as the ultimate constitutional and appellate court of Australia to suggest that the Full Court of the Family Court enjoys an implied exceptional power to correct perfected orders in such circumstances. On the contrary, acceptance of this principle recognises (as the Parliament already has) the unique functions of this Court which necessarily confine it to appeals of a limited and particular kind.

106 I share Gibbs J's repeatedly expressed conviction[169] that the exceptional power to repair accidental mistakes and oversights causing injustice *should* exist in the appellate courts of this country under this Court. By reason of the changes which have occurred since Gibbs J expressed that view, I believe that, as a matter of law, such courts *do* enjoy that implied power. It is confined to exceptional cases where a mistake has occurred which, unrepaired, would cause a serious injustice. The applicant bears a heavy burden to persuade a court that he or she did not occasion the mistake and has moved for relief with relevant expedition. The majority in the second Full Court were right to so hold.

107 Care must be taken in treating the appellate courts of the Commonwealth, the Territories and the States below this Court as a uniform class. The history, functions and express powers of each are different. The differences are important in considering the outer limits of their respective "inherent" or "implied" powers, as the case may be. However, all of them are courts within the Judicature provided for in Ch III of the Constitution. All of them have a relationship with this Court as there provided. In deriving the implied powers of statutory courts within the Australian Judicature, the search should start with their functions under the Australian Constitution rather than the history of other courts in England where "appeal" was a very late invention. Clarity of thought in relation to Australian courts and their powers usually begins with a reflection upon the Constitution rather than books of English legal history.

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168 High Court of Australia, *Annual Report 1998-99*, at 57. In the year 1998-99 there were 21 applications for special leave to appeal from the Family Court of Australia. Since 1989 there have been 80 applications for special leave to appeal from the Family Court; 12 of these (15%) were granted and 68 were refused. Of the 12 cases, special leave was revoked in one; nine appeals were allowed with two dismissed.

169 *Bailey v Marinoff* (1971) 125 CLR 529 at 539; *Gamser v Nominal Defendant* (1977) 136 CLR 145 at 147.

108 It is for this reason that it is essential to approach the central problem in this appeal by considering the Act in the context of the Constitution and the respective functions of this Court and the Family Court in relation to each other. We can ignore the realities which the Constitution stamps upon that relationship and call it clarity of thought if we will. But in my view, in deriving the implied powers of the Family Court, this Court will not overlook the functions and powers of the Family Court, its character as an Australian superior court of justice and its duties which require it to make orders affecting the status of persons and the rights of children and others who may not be parties. Nor should this Court content itself with the fiction that it can always intervene to correct errors when it knows full well that, practically, it is unable to do so. Indeed, this is not the function which either the *Judiciary Act* or the Constitution envisages for this Court in the discharge of its appellate duties. The express power to make orders and enter judgments therefore includes, in the case of the Full Court of the Family Court, the implied power to unmake and correct those orders and judgments as the necessity of justice in a truly exceptional case requires.

109 *The separate position of the child:* The mother advanced a subsidiary argument on this point. It was that the implied power to reopen a perfected order existed at least in the case of the Full Court of the Family Court because of peculiarities of the jurisdiction of that Court, affecting, as it necessarily does, the status of parties and of non-parties. The importance of the effect on status as a ground attracting a right of appeal has long been recognised. It was mentioned in the original prescription by the Parliament of the cases entitled to be heard as an appeal to this Court without the necessity of leave or special leave[170]. This provision was later deleted. The orders of the Family Court commonly affect the status of the parties to proceedings (as by the dissolution of their marriage) and the status of children who are not parties and who (as in this case) may not have been separately represented and heard before the order was pronounced.

110 I do not consider that this argument is relevant to the implied power of the Family Court. That power derives from the character and functions of the Full Court of that Court as an Australian appellate court in relation to orders made in an appeal to it. Nonetheless, the consideration respecting the consequences of the orders of the Full Court of the Family Court on the status of a non-party child[171] is clearly one relevant to the exercise of the power, as I shall shortly indicate.

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170 *Judiciary Act*, s 35(1)(a): from a judgment which "affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency" (repealed).

171 cf *CDJ v VAJ* (1998) 72 ALJR 1548 at 1564; 157 ALR 686 at 708.

The validity and operation of the Regulations

111 *Mistakes and oversights:* In *De L* this Court held that the Regulations applicable in the facts of that case were the 1986, and not the 1995, Regulations[172]. Whatever doubt might have existed about that question[173], the construction and operation of the Regulations is concluded by the decision in that case. By that decision, on the facts of this case, it is clear that the 1986 Regulations applied. Although the Central Authority never conceded that a mistake had occurred in the application of the wrong Regulations[174], the second Full Court was clearly right to hold, upon this basis, that it had. It was one easy enough to make. It had been continued into the arguments of all parties before this Court in *De L*[175]. It was missed by the Full Court in that case and by the first Full Court in the present case.

112 I am also persuaded by the reasoning of the judges in the second Full Court that the previous decisions of the Full Court of the Family Court on the interpretation of the 1986 Regulations were erroneous[176]. Those decisions construed a provision of the 1986 Regulations relevant to this case. By reg 16(3) of the 1986 Regulations it was provided that:

> "A court may refuse to make an order [for the removal of the child] if it is satisfied that –
>
> …
>
> (b) there is a grave risk that the child's return *to the applicant* would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (Emphasis added).

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172 (1996) 187 CLR 640 at 653 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

173 (1996) 187 CLR 640 at 674 of my own reasons.

174 The primary judge had cited on one occasion (but apparently by mistake) the terms of the 1986 Regulations. See second Full Court decision [1999] FLC ¶92-849 at 85,971 per Finn J.

175 (1996) 187 CLR 640 at 674.

176 *Gsponer v Director General, Department of Community Services, Victoria* [1989] FLC ¶92-001; *Murray v Director, Family Services, ACT* [1993] FLC ¶92-416.

113 In previous decisions of the Full Court[177] the words "to the applicant" were construed to mean "to the applying Central Authority". If correct, this would mean that the attention of the decision-maker would be addressed (as the Convention[178] and the 1995 Regulations[179] provide) to the grave risk occasioned by the return of the child to the *country of residence* from which the child was removed rather than to the individual applicant (ordinarily the other *parent*).

114 Given that the primary judge and the first Full Court referred to this line of authority, the foregoing construction of the 1986 Regulations affords an argument that the mistaken application of the 1995 Regulations had no practical consequence because the actual focus of attention in both Regulations was (despite difference of their language) substantially the same.

115 In the second Full Court, Kay J[180] convincingly demonstrated (with the concurrence of other members of that Court[181]) that the previous construction was incorrect. The phrase "to the applicant" in reg 16(3)(b) of the 1986 Regulations refers only to the return of the child to the individual applicant, in this case the father. This reading leads to a prima facie conclusion that the primary judge and the first Full Court, by mistake or oversight, addressed their attention not only to the incorrect Regulations (which might be harmless) but also, potentially, to the incorrect destination of the child once returned (namely the father and not the Central Authority in the United States). What follows from such errors?

116 *The appellant's arguments:* The mother submitted that, for several reasons, the power being present, the minority in the second Full Court were correct in deciding that she had established the exceptional case required to authorise reopening of the original order dismissing her appeal and substitution of a new order remitting the question for redetermination at first instance.

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177 *Gsponer v Director General, Department of Community Services, Victoria* [1989] FLC ¶92-001 at 77,159-77,160; *Murray v Director, Family Services, ACT* [1993] FLC ¶92-416 at 80,259.

178 Convention, Preamble, Art 1(a), Art 7.

179 reg 16(3)(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".

180 [1999] FLC ¶92-849 at 85,990-85,993.

181 [1999] FLC ¶92-849 at 85,966 per Nicholson CJ.

117 First, she argued that it was highly relevant in this case that the incorrect Regulations had been applied. Once attention was correctly focussed upon the return of the child to the father, no comfort could be derived from the contemplation that the Central Authority of the United States would ensure that custody of J would be determined by the courts in that country in a manner conducive to the child's best interests. The mother submitted that the failure to evaluate explicitly and in detail the risks of physical or psychological harm to J caused by the order of return to the father resulted in a failure at first instance to examine and evaluate appropriately what those risks would be. Attention was drawn to the reasons of the primary judge in this regard. He had accepted that there would "be some psychological harm to J caused by the order which I propose to make". However, because he indicated that he was "only considering an application for the return of the child to the United States, in which country there will be a consideration of what the welfare of J ultimately requires", he did not feel obliged to scrutinise the evidence of harm to J with the care appropriate to an order specifically returning her to her father[182].

118 Secondly, the mother relied upon the need to take into account the separate interests of the child. Whilst the "paramountcy principle" does not control the decisions made on application under the Regulations, the impact of those decisions upon a child, not a party to the proceedings, could not be ignored[183]. The consequence of the order returning J to her father would be the separation from her mother and brother, and the restoration to the custody of a parent with whom she had spent only a short time and then always in the presence of her mother.

119 Thirdly, the mother relied on further discretionary considerations. These included: (1) the delays which had in fact occurred since J was brought to Australia; (2) the supervening birth of, and bonding with, the brother S who could not be made subject to an order under the Regulations "returning" him to the United States; (3) the practical difficulties that would face the mother in accompanying J to the United States and litigating a claim to reopen the custody order made by the Georgia court (this Court was invited to infer, as a matter of practicality, that the mother, because she would be unable to leave S in Australia at his age, yet be unwilling to take him to the United States, would be forced to abandon custody of, or even access to, J); and (4) the suggested failure of the Central Authority when it became aware of the decision of this Court in *De L* to bring promptly to the notice of the first Full Court and of the mother's representatives the application to her case of the incorrect Regulations.

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182 Primary decision at 26.

183 *CDJ v VAJ* (1998) 72 ALJR 1548 at 1558, 1561, 1587-1588; 157 ALR 686 at 699-700, 704, 739-740; cf *De L* (1996) 187 CLR 640 at 658, 678, 683-684.

120 *Invalidity of the Regulations:* The mother, more fundamentally, argued that the applicable terms of the 1986 Regulations[184] were invalid as beyond the regulation-making power in s 111B of the Act or alternatively as unsupported by the Convention and the external affairs power pursuant to which such Regulations were made part of Australia's domestic law. This argument gained some support in the second Full Court[185].

121 The basis upon which the Regulations were said to be invalid was that, relevantly, the 1986 Regulations (and to the extent that it authorised them, s 111B of the Act) did not give effect to the Convention. The Convention imposed upon a contracting State the duty to ensure the "prompt return to the State of [the child's] habitual residence"[186]. A provision requiring return (as in this case) to the applicant parent did not (so it was argued) comply with that requirement[187]. The variance was not insignificant. It was one thing to return a child to a country whose courts could be trusted to provide for the child's welfare. Obligatory return to a parent whose conduct may have occasioned the departure of the other parent with the child[188] was quite another[189].

122 If the 1986 Regulations were unsupported by the Act or the Constitution, the foundation for the first Full Court's order that J be returned to the United States would, so far as Australia's domestic law was concerned, be destroyed. If, by severance of the offending words ("to the applicant") or otherwise, the regulation could be sustained as within the Act and the constitutional power with

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184 regs 13, 16(3)(b) and 20.

185 Nicholson CJ held that the 1986 Regulations were invalid and possibly also the 1995 Regulations: second Full Court decision [1999] FLC ¶92-849 at 85,948-85,950. Moore J agreed with him: [1999] FLC ¶92-849 at 85,998. Finn J assumed invalidity but only for the purposes of her decision: [1999] FLC ¶92-849 at 85,974-85,975. May J did not decide the question. Kay J considered that the Regulations were valid and in any case held that any offending part could be severed: [1999] FLC ¶92-849 at 85,990-85,993.

186 Convention, Preamble; see also Art 1(a) and Art 7.

187 See Arts 8, 11, 15, 27, 28 where "applicant" has a defined meaning.

188 cf Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69, (Part 1) (1994) at 187-190.

189 The importance of the distinction was recognised in *Murray v Director, Family Services, ACT* [1993] FLC ¶92-416 and reflected in the analysis of the first Full Court decision [1996] FLC ¶92-709 at 83,512-83,514 applying *Gsponer v Director General, Department of Community Services, Victoria* [1989] FLC ¶92-001.

respect to "external affairs", the mother submitted that a significant argument for reconsideration of the order still remained. The primary judge and the first Full Court had, by mistake or oversight, applied the incorrect law. This had directed their attention to irrelevant considerations. Especially where a non-party child was concerned, with grave and possibly life-long consequences for her welfare, it was essential that the matter be recommitted for redetermination at first instance. Then, at least, the correct law would be applied and attention would be specifically paid, if the Regulations were valid, to any "grave risk" of returning the child to her father.

123 Nicholson CJ considered that "an ordinary member of the public" would "find it an astounding proposition" that the public interest in preserving the finality of court orders would operate to "preserve an order made upon the basis of the wrong piece of legislation, and relying on cases that are now found to have been wrongly decided" especially if the consequence of applying the correct legislation might be a different outcome[190]. The mother submitted that this Court would agree with that assessment.

124 *The Regulations are valid:* I acknowledge the force of these arguments. They lie at the heart of the ultimate issue which this Court was called upon to decide. It is therefore first necessary to determine the correctness of the mother's attack on the validity of the 1986 Regulations. If that attack be successful, it is difficult to conceive that the order for return of J to the United States, made under the Regulations, could be given effect. Even if this appeal were dismissed, it would remain open to the mother to seek a constitutional writ addressed to any officers of the Commonwealth purporting to give effect to the order[191].

125 In *De L [No 2]*[192], this Court emphasised the width of the language of s 111B(1) of the Act empowering the making of Regulations "as is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention". The majority reasons in that case state[193]:

> "These provisions confer a wide latitude upon the Executive Government in making the Regulations. They recognise the fact that the Convention is addressed to governments throughout the world, necessarily with differing

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190 Second Full Court decision [1999] FLC ¶92-849 at 85,969-85,970.

191 Pursuant to the Constitution, s 75(v).

192 (1997) 190 CLR 207 at 218.

193 (1997) 190 CLR 207 at 218-219 per Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

legal and administrative systems. It will be implemented in different ways: sometimes through judicial process and sometimes through administrative procedures."

126 In my view, there is not such a variance between the language of the Convention and the impugned regulation in the 1986 Regulations as to destroy the validity of the latter in so far as it depended for its constitutionality on the former. In giving effect to an international treaty, federal law does not lose its validity because it has not repeated verbatim the terms of the treaty[194]. Sometimes variance may occur to re-express the substance of the treaty in terms considered clearer or more in harmony with the Australian style of statutory expression. Only if the variance is substantial will it deny the law the character of a measure implementing the treaty[195]. A study of the *travaux préparatoires* makes it clear that the matter that was concerning the treaty makers was not, as such, the risk of return of the child to the applicant parent. In the overwhelming majority of cases that would be the only sensible arrangement that could be made. The concern was to permit the child to be returned to the place to which the applicant parent might have moved between the date of abduction and the date of the return[196].

127 Although the preamble to the Convention refers to the return of children promptly "to the State of their habitual residence", the operative article in the Convention merely contemplates an order for the return of the child without stating where, or to whom, the child is to be returned. In these circumstances, there is no relevant disparity between reg 16(3)(b) of the 1986 Regulations and the Convention. There is accordingly no foundation for the argument of invalidity. Validity was upheld, although challenged, in *De L*[197]. The challenge was rejected there. It has not improved in the second attempt. In light of this conclusion it is unnecessary for me to consider whether, had there been an impermissible variance, it could be cured by severance of the offending words.

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194 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 75 per McHugh J; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 488.

195 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 489.

196 Perez-Vera, "Hague Conference on Private International Law", *Actes et documents de la Quatorzième session*, (1980), vol 3 at 426 cited in second Full Court decision [1999] FLC ¶92-849 at 85,992 per Kay J.

197 (1996) 187 CLR 640 at 658, 672-682.

128 *Discretionary grounds for reopening:* Can it be said that the misapplication of the incorrect Regulations enlivens what I would hold to be the exceptional power to reopen the order of the first Full Court so as to permit and require that the case be reconsidered with the mind of the decision-maker addressed to the applicable Regulations? It will be remembered that the reopening of a perfected order is confined to truly exceptional cases. The applicant must have acted promptly and be without fault. To deny relief must effectively leave a serious injustice unrepaired.

129 In my view, it is quite exceptional for a decision of such importance to be made by an Australian court by the application of the incorrect law. Although there is to be attributed to the mother the conduct of the litigation on her behalf by the lawyers acting for her at the trial and in the first Full Court, I assume that, in this case, there was no relevant fault that would deny the person principally affected by the order (the child J) the benefit of reopening and reconsideration according to the correct law, if that course were otherwise warranted. It is true that the mother caused very great delay in the prosecution of the reopening application by failing to take advice after the first Full Court decision and by absconding with her children. But, again, I would be prepared to disregard this consideration when the practicalities of the mother's access to legal assistance and the impact of the orders on one or both of her children is considered in the predicament in which she found herself[198]. However, this still leaves the question whether the mistaken application of the 1995 Regulations in fact resulted in a serious injustice which it would be wrong to leave uncorrected on the record of the Family Court.

130 *Reopening is inappropriate:* I have concluded that the mistake was not of the requisite significance given the object of the applicable Regulations and the factual circumstances presented to the primary judge.

131 As this Court explained in *De L*[199], after a wrongful removal to or retention of a child in another country, the Convention and the Regulations have as their principal object that that country's courts should order the return of the child forthwith, without entering, as such, into the merits of any custody dispute between the parties. The exceptions to such an order are to be understood and implemented in the context of that vital policy[200]. Once returned, the parties may

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198 cf Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", (1974) 9 *Law and Society Review* 95 at 121.

199 (1996) 187 CLR 640 at 648-649, 674-678.

200 Anton, "The Hague Convention on International Child Abduction", (1981) 30 *International and Comparative Law Quarterly* 537 at 550; cf *In the Marriage of Gazi and Gazi* [1993] FLC ¶92-341 at 79,623.

contest custody in the courts of the jurisdiction concerned. By the hypothesis of the Convention, that is the place in which such disputes ought to have been resolved without unilateral and unlawful action on the part of one parent. It may be accepted that great difficulties will be faced in practice by some absconding parents (especially women) who may be at a severe disadvantage – physical, emotional and financial – in presenting their case in a foreign court. But this is the policy of the Convention and of the Act. It is designed, amongst other things, to discourage the disruption to the lives of children which international child abduction typically causes[201].

132 The facts of the case make it impossible to suggest that the primary judge, and the first Full Court, were not fully alive to the practical results of their order. They were aware of, and recited in their reasons, the order of the court in Georgia giving sole custody of J to the father. They were aware of the fact that, as a matter of practicality, the only relative of the child in the United States to whom she could be returned was the father, a person in full-time employment whose contact with the child had been brief, interrupted and, because of the abduction, confined to her early years. But they were also aware that he had persisted with his application for an order, held a responsible position in full-time employment, was the owner of the former matrimonial residence in Georgia and would be subject to the orders of the Georgia courts. They noted that, in contested matters concerning the custody of children, the Georgia courts observe, as do Australian courts in equivalent cases, the paramountcy principle obliging them to advance the welfare of the child[202]. Minds might disagree on this point in this particular case. Experienced judicial minds have already done so.

133 Clearly, it would have been better had the earlier judges been assisted to apply the correct Australian law. But neither the foregoing considerations nor any of the discretionary matters that the mother relied on convince me that an irreparable injustice may have been committed by the error. When this conclusion is reached, the truly exceptional step of reopening a perfected order of the Full Court is not justified.

Citizenship and compulsory return overseas

134 The Australian Constitution does not refer to the status of "citizen" in relation to the native born or naturalised[203] people of the Commonwealth. The

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201 *De L* (1996) 187 CLR 640 at 678.

202 Second Full Court decision [1999] FLC ¶92-849 at 85,996 per Kay J.

203 See Constitution, s 51(xix).

"people" are referred to in several places[204]. Elsewhere the people who are entitled to vote are described as "electors"[205]. In harmony with the notions of the time, the Constitution refers to the national status of Australians as that of "a subject of the Queen"[206]. This has been construed, in contemporary circumstances, to be equivalent to a reference to Australian citizenship[207]. The one occasion on which the word "citizen" is referred to in the Constitution is in the form of a disqualification. In s 44(i) a "subject or a citizen of a foreign power" is disqualified from being elected to the Parliament[208]. In *Sykes v Cleary*[209] Brennan J explained that the word "subject" was considered in 1900 to be appropriate where the foreign power was a monarchy and "citizen" where it was a republic.

135 Nevertheless, the growing sense of national independence and identity, also reflected in the decisions of this Court in both constitutional and non-constitutional cases, has seen new attention being given to the consideration of citizenship[210] with the possibility that the status of citizenship may carry with it common law rights. In the case of a citizen who is a child these may include the right to have that child's best interests taken into account in discretionary decisions by governments and government agencies. This consideration was referred to by Gaudron J in *Minister for Immigration and Ethnic Affairs v Teoh*[211]. A growing body of doctrine ascribes as the ultimate foundation of the Constitution the will of the people (meaning the citizens) of the Commonwealth[212]. It therefore seems likely that further constitutional

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204 eg covering clause 5; Constitution, ss 7, 24, 51(xxvi), 53.

205 eg s 128.

206 s 117.

207 *Street v Queensland Bar Association* (1989) 168 CLR 461.

208 *Sue v Hill* (1999) 73 ALJR 1016; 163 ALR 648.

209 (1992) 176 CLR 77 at 109.

210 Mason, "Citizenship", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, (1996) 35.

211 (1995) 183 CLR 273 at 304.

212 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 441-442; *Breavington v Godleman* (1988) 169 CLR 41 at 123; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484-486.

implications will be derived for the idea of citizenship to which the political institutions established by the Constitution give effect.

136 The toehold for the mother's argument on the citizenship point was found in the remarks of this Court in *Air Caledonie International v The Commonwealth*[213]. The Court there held that a fee for immigration clearance imposed by the *Migration Amendment Act* 1987 (Cth)[214] was, so far as it related to passengers who were Australian citizens, a tax forbidden by s 55 of the Constitution. An ordinary Australian citizen returning from overseas was held entitled, under the law, to re-enter Australia as of right. He or she had no need of any executive "fiat" or "clearance", for so long as the status of citizenship was retained[215]. From this remark and from the general right of a citizen (as distinct from an alien) to remain in Australia[216], the mother sought to derive a constitutional rule that a citizen, such as her child J, could not be expelled from the Commonwealth. The only power to do so would stem from international treaty obligations relating to criminal offenders, such as extradition[217]. The mother went so far as to assert that the right to remain in Australia was an "absolute" one which deprived the Regulations under which the order affecting J was made of both statutory and constitutional authority.

137 These arguments were rightly rejected by all judges in the second Full Court[218]. The Regulations were purportedly made to give effect to an international Convention to which Australia is a State party. They are, in any case, clearly a law with respect to affairs external to Australia. Moreover, it is impossible to justify the differentiation which the mother sought to draw between extradition and the implementation of the Convention. Clearly, the Convention has analogous purposes. It gives effect, upon a reciprocal basis, to a high policy of international and domestic law. Australian citizens are beneficiaries of the Regulations (and the Convention) as well as being subject to them. Once removal of a citizen to a foreign country pursuant to extradition law and an extradition treaty is accepted, it is impossible to differentiate such a case (for constitutional purposes) from removal of a child pursuant to the Regulations.

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213 (1988) 165 CLR 462 at 469.

214 Section 7 purporting to insert s 34A in the *Migration Act* 1958 (Cth).

215 (1988) 165 CLR 462 at 470.

216 *Robtelmes v Brenan* (1906) 4 CLR 395; *Ah Yin v Christie* (1907) 4 CLR 1428.

217 *R v Governor of Brixton Prison; Ex parte Soblen* [1963] 2 QB 243 at 299-300; cf *Valentine v United States, ex rel Neidecker* 299 US 5 at 9 (1936).

218 See esp second Full Court decision [1999] FLC ¶92-849 at 85,995 per Kay J.

As was observed in the Full Court, J is a citizen both of the United States and Australia. By wrongfully removing her from the United States, the mother deprived her of a right of residence in that country. It is difficult to see why her basic right to live in Australia should be regarded as more worthy of legal protection than her basic right not to be wrongfully removed from the United States[219].

138 I have dealt with this argument although it was not advanced at trial or in the first Full Court and was dismissed by the second Full Court for a reason. It would at least theoretically be possible for a separate challenge on this ground to be addressed to officers of the Commonwealth effecting the removal of the child to the United States[220]. No encouragement should be given to that possibility. There is neither constitutional nor other legal merit in the argument. Citizenship involves duties and obligations lawfully imposed in addition to the ordinary entitlement to reside in, depart from and return to Australia[221]. In *Air Caledonie*, the Court made it clear that the right of a citizen to re-enter the country was one which was enjoyed "under the law"[222]. At least where the law which provides for the removal of a citizen is of the kind found in the Regulations, in turn giving effect to international law, no question of constitutional invalidity arises. This objection was therefore rightly dismissed.

The "spent" order

139 These conclusions leave only the argument that the order of the primary judge should be set aside as "spent". This argument repeated, in different words, many of the considerations already mentioned. The strongest argument for regarding the original order as "spent" is that it was made some 26 months before the order of this Court finally disposing of this litigation. However, more than half of that time was the result of the action of the mother in going into hiding. Whilst it is no part of the Court's function to punish the child J for the mother's conduct, it is the Court's duty (the law being valid) to ensure that it is upheld both in its letter and spirit.

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219 [1999] FLC ¶92-849 at 85,995 per Kay J.

220 Constitution, s 75(v).

221 cf *International Covenant on Civil and Political Rights*, Arts 12(1), 12(2) and 12(3); *Convention on the Rights of the Child* 1989, Art 9.

222 (1988) 165 CLR 462 at 470.

140 The scheme of the Regulations denies the contemplation of lengthy delays or multiple hearings[223]. The law would be undermined if the orders of the primary judge were treated as "spent" on the bases advanced by the mother. In particular, the suggestion that broad discretionary powers of the kind traditionally exercised in *parens patriae* jurisdiction over children should be superimposed upon the Regulations is wholly incompatible with the attainment of the Regulations' objectives. The problem of international child abduction was not present, at least to anything like the same degree, when the *parens patriae* jurisdiction of the courts was assumed from the Sovereign in medieval times. That problem is the product of international transportation, the reduction of barriers to immigration and tourism and the increasing number of marriages and relationships which cross nationalities and cultures[224]. The Convention, s 111B of the Act and the Regulations are a response to these phenomena. They require a measure of adjustment in the ordinary approach of Australian courts to decisions which affect the welfare of children.

141 The Act and the Regulations being valid, it is the duty of the courts to give them effect. The present case illustrates how, on occasion, that duty will be painful and potentially have very serious consequences for all involved. But the expressed exceptions to the order for return are deliberately narrow. Australian courts must faithfully observe these rules even as they are entitled to expect that the courts of other countries will do where demand is made for the return of a child abducted from Australia.

Conclusion and orders

142 A mistake and misapprehension of the applicable law occurred in this case. It was, in my view, within the implied power of the Full Court of the Family Court to reopen the order earlier made by that Court to permit correction of that error. Such reopening would only be ordered in the most exceptional of circumstances and then, relevantly, only to cure what would otherwise be a serious injustice. However, in this case, no such serious injustice was shown. The reasons of the primary judge and of the first Full Court were defective. But their orders were correct. They represented, in the facts of the case, a proper implementation of the applicable law giving effect to the Convention designed to redress and discourage international child abduction.

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223 See eg 1986 Regulations, regs 19, 20.

224 Dyer, "The Hague Convention on the Civil Aspects of International Child Abduction – towards global cooperation", (1993) 1 *International Journal of Children's Rights* 273 at 292.

143 It was for the foregoing reasons that I joined in the order made by the Court on 18 November 1999. I agree with what Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ have said in relation to the costs of the proceedings.

CALLINAN J.

The Question

144 The appeal to this Court came by way of a certificate granted by the Full Court of the Family Court of Australia that an important question of law is involved in the case. The important question that is said to be involved is whether the Full Court of the Family Court has power to re-open an appeal after orders have been entered.

The Certificate of the Full Court of the Family Court

145 After hearing full argument on the legal questions and the question whether the majority in the Full Court of the Family Court had properly exercised their discretion, assuming the availability of a discretionary power in the circumstances, the Court was able to announce that the appeal should be dismissed. That decision was expressed in these terms:

> "A majority of the members of the Court have reached the conclusion that, if there was power in the Full Court of the Family Court of Australia to reopen or reconsider the order made on 10 October 1996, no error is shown in the conclusion of Kay, Finn and May JJ that any power to reopen should not be exercised in this case.
>
> That being so, the appeal is dismissed. The Court will give its reasons for that conclusion and (to the extent necessary) its reasons in respect of other issues raised in the appeal, later. It will then deal with any question of costs."

The Effect of a Certificate Granted by the Full Family Court

146 At the outset of the hearing of this appeal other questions were raised, whether: first, s 95(b) of the *Family Law Act* 1975 (Cth) ("the Act") was constitutionally valid; and secondly, if it were, nonetheless this Court might revoke a certificate granted under the paragraph in the same way as it may revoke special leave granted by the Court.

147 In my opinion both of these questions are answered by the reasoning and decisions in *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth*[225].

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225 (1991) 173 CLR 194.

148 Section 95 of the Act provides as follows:

> "95 Appeals to High Court
>
> Notwithstanding anything contained in any other Act, an appeal does not lie to the High Court from a decree of a court exercising jurisdiction under this Act, whether original or appellate, except:
>
> (a) by special leave of the High Court; or
>
> (b) upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved."

149 The language is clear. It makes provision for two paths of appeal to this Court. It is not to the point that a court having a power to grant leave might have a necessary, incidental, or implied power to revoke leave[226]. The reference to a certificate in s 95(b) is unqualified. Nothing is to be gained, in my view, from attempting to characterise a certificate granted by the Family Court as either an interlocutory or a final order in the not entirely uncontroversial terms in which orders of similar kinds by various courts under different statutes or at common law have been characterised over the years.

150 In *Smith Kline*[227] this Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) unanimously held as follows:

> "Notwithstanding these special features, an application for special leave to appeal, like an application for leave to appeal, is an accepted and long-standing curial procedure in this country[228]. The procedure calls for a hearing, whether orally or on written materials, and a determination in the form of a curial order. If the application be refused, the order dismissing the application is the final curial act which brings the litigation between the parties to an end. An application for special leave to appeal therefore involves the exercise of judicial power."

151 In granting a certificate the Full Court of the Family Court is exercising a power of a similar kind to that which this Court exercises in granting special leave, that is, judicial power.

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226 See *Sanofi v Parke Davis Pty Ltd [No 1]* (1982) 149 CLR 147.

227 (1991) 173 CLR 194 at 218.

228 See *Coulter v The Queen* (1988) 164 CLR 350 at 359 per Deane and Gaudron JJ.

152 Furthermore, it follows from *Smith Kline* that if the Parliament can effectively legislate[229] that all matters (unless this Court grant special leave to appeal) are capable of being exceptions within s 73[230] of the Constitution[231] it can equally legislate, as I think it has, by s 95(b) of the Act, to confer a right (not revocable) to appeal upon the grant of a certificate by the Full Family Court.

153 In my opinion, as a matter of construction, s 95(b) also gives to a certificate the status of a judgment, decree or order within the meaning of those terms as used in s 73 of the Constitution. Because it has that status this Court no doubt has jurisdiction pursuant to s 73 of the Constitution, subject to such exceptions and regulations as the Parliament has lawfully prescribed by the *Judiciary Act* 1903 (Cth), to hear and determine an application for special leave to appeal, and an appeal, against the grant of such a certificate. However, no such application has been made in this case.

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229 *Judiciary Act* 1903 (Cth), s 35.

230 "73 The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

231 *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 208-217.

154 There is only one other aspect of these preliminary matters that I wish to touch upon. It may seem incongruous that although this Court may have power of its own motion to revoke special leave that it has itself granted, it should lack such a power in the case of a grant by some other court. But whether it is incongruous or not, if that is the position for which Parliament, within power, has legislated[232], that is the end of the matter just as it was not to the point that some may have preferred different legislative arrangements from those which eliminated appeals as of right to this Court in order to lessen the burden that they were imposing and would increasingly impose.

155 It may be unfortunate that the certificate that the Full Court granted did not itself identify with precision the important question of law or public interest involved. However, it is almost certain that the question which the Full Court thought answered that description is the one referred to by the Chief Justice of the Family Court in this way[233]:

> "36. As Kay J has said in his reasons for judgment in relation to this application, (which I have had the opportunity of reading in draft form) there is a clear majority in favour of the proposition that this Court does have the power to set aside earlier decisions of the Full Court in appropriate circumstances. As I have pointed out, it appears that the Full Court of the Federal Court have taken a similar view.
>
> 37. However, there is a very obvious difference of opinion amongst the judges who constituted the Court as to the circumstances in which such a power can be or should be exercised. I think that the issue of what principles should be applied where the subject matter of the application is a child is a matter of considerable public interest and in my view is sufficient to warrant the grant of the certificate under the section.
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> 38. I think that this view is reinforced when it is considered that a bench of five has divided so narrowly on this issue. Accordingly, I think that this is a

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232 The original s 21(1) of the *Judiciary Act* was repealed by s 5 of Act No 164 of 1976 (Cth), the *Judiciary Amendment Act* 1976 (Cth), and the present s 21(1) substituted therefor. Section 21(1) was further amended by Act No 138 of 1979 (Cth). Section 21(3) was inserted by the Schedule to Act No 19 of 1979 (Cth), the *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1979 (Cth).

Section 35A of the *Judiciary Act* was inserted by Act No 12 of 1984, s 4. Section 34(2) of the *Judiciary Act* was inserted by s 3 and Sched 1 of Act No 38 of 1988.

233 [1999] FLC ¶92-850 at 86,003-86,004.

case that is appropriate for the grant of such a certificate and would so order."

156 The certificate which s 95(b) contemplates is not one which would confine, or necessarily confine the issues or questions to be dealt with by this Court. The certificate, if issued, as this one was, in an unqualified way, had the effect of conferring upon the appellant an entitlement to appeal. Once that entitlement was certified the appellant had the right to have an appeal heard at large.

157 I propose therefore to deal with the appeal on that basis.

Previous Proceedings

158 On 17 August 1998, the appellant "DJL" applied to a Full Court of the Family Court seeking to re-open the judgment of a Full Court dated 10 October 1996 ("the first Full Court"), on the ground that the trial judge (O'Ryan J) and the first Full Court had applied the wrong law, namely the Family Law (Child Abduction Convention) Regulations (Amendment) 1995 (Cth)[234] ("the 1995 Regulations"), which were in materially different terms from the applicable regulations, the Family Law (Child Abduction Convention) Regulations 1986 (Cth)[235] ("the 1986 Regulations") in ordering the removal of her daughter "J" from Australia. It was also contended on a number of bases that the 1986 Regulations were, in any event, invalid laws of the Commonwealth, and could not support a lawful removal of J, an Australian citizen. The appellant in making the application sought to invoke an "inherent jurisdiction of the [Family] Court".

159 The Hague Convention has effect in Australian law by operation of the Family Law (Child Abduction Convention) Regulations made under s 111B of the Act. The applicable 1986 Regulations authorised the Central Authority[236] to ensure compliance in Australia with the Hague Convention. The Central Authority has standing to commence proceedings in the Family Court and secure orders for the return of a child who has been wrongfully removed from that child's country of habitual residence.

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234 SR 296.

235 SR 85.

236 Under reg 2(1) of the 1986 Regulations the Central Authority has the "meaning it has in the Convention". Regulation 2(1) also confirms that the Commonwealth Central Authority means the Secretary of the Department. Currently that person is the Director-General of the Department of Community Services (Cth).

160 The Full Court of the Family Court (Nicholson CJ, Finn, Kay, Moore and May JJ), constituted as a bench of five ("the second Full Court"), heard the application to re-open the earlier appeal to the first Full Court in August and September 1998. On 9 February 1999 the second Full Court dismissed, by a majority (Finn, Kay and May JJ[237]), the appellant's application to re-open the appeal.

161 Nothing daunted and despite her continued disobedience of the orders of the first and second Full Courts, the appellant again sought the intervention in her favour of a third Full Court of the Family Court in applying for the certificate under s 95(b) of the Act which was ultimately granted in her favour: the constitution of that third Full Court was the same as the second Full Court.

The Facts

162 The child J was born in the United States of America on 9 November 1993. She is a citizen of Australia and the United States of America. The appellant is an Australian citizen. She married an American citizen and moved to the United States with her husband in July 1991.

163 On 12 March 1994, with the father's consent, the appellant and J (then aged four months) travelled to Australia. At that time the marriage was foundering. The appellant and J remained in Australia until November 1994. At the end of November 1994, the appellant and J returned to the United States at the request of the husband who had suffered a heart attack. An attempted reconciliation failed.

164 On 12 January 1995, the appellant and J departed from America and returned to Australia without the consent or knowledge of the father. The appellant was by then pregnant with a second child of the marriage, "S", who was born in Sydney on 22 September 1995. By 17 January 1995, the husband had commenced divorce proceedings in the Superior Court of Gwinnett County, Georgia. The proceedings were heard ex parte after the appellant had been served and had entered an appearance. On 9 May 1995, the husband obtained orders including the sole permanent custody of J with no rights of visitation.

165 About five months after the departure of the child from the United States, on 5 June 1995, J's father applied to the Central Authority of the United States of America seeking her return.

166 The application was conveyed by the United States Central Authority to the Central Authority in Australia in June 1995. On 28 June 1995 an application was

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237 Nicholson CJ and Moore J in dissent.

filed by the Central Authority (the Director-General of the New South Wales Department of Community Services) in the Family Court, seeking an order that the father be permitted to remove the child from Australia for the purpose of returning her to America.

167 The application of the Central Authority was listed for hearing on 5 September 1995. The hearing dates were vacated and the proceedings adjourned on the appellant's application on the ground of her pregnancy.

168 The application was heard by O'Ryan J in the Family Court of Australia on 2 and 5 February 1996. On 20 February 1996, O'Ryan J made an order that the child be returned to America.

169 The appellant appealed by leave, out of time, to the first Full Court and that appeal came on for hearing on 3 and 4 July 1996. The first Full Court delivered judgment on 10 October 1996, some 16 months after the father's application. The appeal was dismissed.

170 The appellant then went into hiding with the two children. They were located in January 1998.

171 On 9 April 1998, the appellant lodged an application to seek special leave to appeal to the High Court out of time. The grounds for special leave were not exactly the same grounds as are the subject of the present appeal. On 7 August 1998, this Court (Gleeson CJ and McHugh J) refused the appellant's application for special leave to appeal out of time.

172 The next decision was that of the second Full Court, which, by a majority (Finn, Kay and May JJ; Nicholson CJ and Moore J dissenting) refused the application for a re-opening, holding that there was no legal basis upon which the matter could be re-opened, and, in any event, in the exercise of such a power, if it existed, the earlier appeal should not, on discretionary grounds be re-opened.

173 Nicholson CJ (with whom Moore J agreed) would have re-opened the matter for two reasons: that the first Full Court applied the 1995 Regulations instead of the 1986 Regulations; and, because there were specific features of the case relevant to the child J which should now be taken into account and which required that the matter be considered afresh.

The Appeal to this Court

174 The appellant correctly submits that the Regulations which should have been applied by the Family Court were the Regulations that were in effect at the time of the making of the application on 28 June 1995, the 1986 Regulations, as

amended up to October 1994[238]; and that the appellant (and J) were entitled to have the matter determined by reference to the applicable 1986 Regulations and not by reference to the materially different 1995 Regulations.

175 The application of the wrong Regulations occurred by oversight of all parties, in circumstances in which the Central Authority had a responsibility to bring applications in proper form to the Court. However, in *De L* a similar oversight did not become apparent to the litigants until the decision of this Court in that case[239] was delivered. That occurred on the same day as the judgment of the first Full Court in this matter was pronounced.

176 The most significant difference, the appellant submits, between the 1986 and 1995 Regulations was that regs 13, 16(3)(b) and 20(2) of the 1986 Regulations referred to the return of the child to the "applicant" and the later regs 13(1), 16(3)(b) and 20(2) referred to the return of the child to the "country in which he or she habitually resided".

177 There were some further differences. The earlier Regulations required the Court to consider whether there would be a grave risk that the child would be exposed to physical or psychological harm if she were returned to her father. Under the 1995 Regulations, the Court's inquiry was whether there would be a grave risk that she might be exposed to physical or psychological harm in the United States. The appellant adopted what the Family Court had said in *Murray v Director, Family Services, ACT*[240], to the effect that the distinction in this respect was not a trivial one.

178 The appellant argues that the differences in the Regulations were of determinative significance in the reasons of the first Full Court which turned on the proposition that the child would be returning to the United States and not to the father.

179 The different Regulations, it may be accepted, do call for the application of different tests. It may also be accepted that in some cases the results would be quite different if they were to be decided under one set of Regulations rather than the other. I do not think that it is possible to say in this case however that the decisions of the judge at first instance and of the first Full Court would have been different had the correct Regulations been applied. The issue upon which the

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238 *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640.

239 (1996) 187 CLR 640.

240 [1993] FLC ¶92-416 at 80,259.

parties were joined was formulated by the present respondent in the initiating application in terms which necessitated consideration and evaluation of the desirability of the child's return to America with, and to the father, and, consequently what might be involved by way of risk or otherwise to the child in those circumstances. The order sought was as follows:

> "That the Father ... is permitted to remove the child from Australia forthwith for the purpose of returning her to the UNITED STATES OF AMERICA pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction."

180 Evidence was given on that issue. For example, Professor Waters who was called by the appellant, spoke of, and the Courts must have evaluated, the "combination of abrupt removal [of the child] from the mother, [and] placement with the father with whom she has virtually no relationship or recollection"[241]. The first Full Court (Baker, Lindenmayer and Smithers JJ) expressly dealt with what their Honours described as the "gravamen" of the appellant's submission, that in fact return to the USA meant return to the father[242]. Those fears were certainly not treated as irrelevant or unimportant: the first Full Court rightly held that the trial judge had considered them and that his Honour's conclusion was not attended by error. The first Full Court also emphasised that even if the effect of return to the USA would be return to the custody of the father, the Family Court was not required or able to address questions of the ultimate, proper custody order.

181 It follows that the trial judge and the first Full Court must have been alive to the consequences for the child of their decision in every practical sense. It was on that basis that those Courts made the orders that they did. Those orders should have been complied with and it would be wrong for a subsequent Family Court to treat the matters as if they might be fully relitigated, albeit on the basis of Regulations which should have governed the proceedings from the outset.

182 I come now to the legal question whether the second Full Court had power to re-open the earlier decision of the first Full Court.

183 The Family Court of Australia is a superior court of record[243]. It has power in relation to matters, in which it has jurisdiction, to make orders of such kinds, and to issue, or direct the issue of, writs of such kinds, as the Court considers

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241 (1996) 135 FLR 68 at 88.

242 (1996) 135 FLR 68 at 90-91.

243 The Act, s 21.

appropriate[244]. There is no statutory power express or implied to be found in the Act or the Regulations conferring a power upon the Full Court of the Family Court as an intermediate court of appeal or otherwise to re-open a perfected order. And, as the majority point out in their reasons, as a statutory federal court the Family Court does not have recourse to the undefined powers in the inherent jurisdiction enjoyed by the three common law courts of Westminster.

184 In *Bailey v Marinoff*[245], a majority of the High Court held that the New South Wales Court of Appeal had no power to re-open a perfected order disposing of a proceeding. The Court of Appeal on 10 February 1970 had ordered[246]:

> "that the Appellant file and serve the appeal books herein on or before the 31st day of March 1970 [and] ... if the Appellant does not file and serve the appeal books herein on or before the 31st day of March 1970 the appeal is to stand dismissed for want of prosecution".

There, the order was signed and sealed on 5 March 1970. Appeal books were filed on 31 March but were not served until 6 April. Notwithstanding that the appeal stood dismissed in accordance with the order that had been made, the Court of Appeal, on 28 September 1970, ordered that the filing and late service of the appeal books should be deemed a sufficient compliance with the order of 10 February 1970. On appeal from that order to the High Court, it was held, applying the principle that once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding, apart from any relevant statutory provision to a different effect, is at an end in that court, and is, in substance, beyond recall by that court. It was further held that the Supreme Court had no inherent power or jurisdiction to make the order it made, its earlier order dismissing the appeal having been perfected by the process of the Court.

185 Barwick CJ said this[247]:

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. ... In my opinion, none of the decided cases lend support to the view that the Supreme Court

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244 The Act, s 34(1).

245 (1971) 125 CLR 529.

246 (1971) 125 CLR 529 at 531.

247 (1971) 125 CLR 529 at 530-531.

> in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court."

186 Menzies J put the matter this way[248]:

> "However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend the making of orders in litigation that has been brought regularly to an end. ... [A] court cannot, by a further order, get rid of the operative and substantive part of its judgment."

Owen J agreed[249] as did Walsh J, who echoed the words of Menzies J[250].

187 Gibbs J dissented, referring to the general rule[251] and then to the exceptions[252]. His Honour's opinion was that the cases indicated that a superior court had an inherent power to vary its own orders in certain instances, although the limits of the power remained undefined[253]. He emphasised that any such power should be exercised in "the interests of justice", and to "remedy any injustice"[254].

188 In *Gamser v Nominal Defendant*[255], this Court followed *Bailey v Marinoff*. Gibbs J accepted that the decision of the majority in *Bailey* established that the New South Wales Court of Appeal lacked inherent power to re-open a perfected order disposing of proceedings[256]. In that case a plaintiff had been awarded $160,000 in an action for damages for personal injuries in negligence. The damages were reassessed by the New South Wales Court of Appeal at $125,000

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248 (1971) 125 CLR 529 at 531-532.

249 (1971) 125 CLR 529 at 533.

250 (1971) 125 CLR 529 at 535.

251 (1971) 125 CLR 529 at 539.

252 (1971) 125 CLR 529 at 539-540.

253 (1971) 125 CLR 529 at 544.

254 (1971) 125 CLR 529 at 544.

255 (1977) 136 CLR 145.

256 (1977) 136 CLR 145 at 147.

and judgment of that Court was entered. The plaintiff subsequently applied to the Court of Appeal for an order setting aside the earlier order, and a new trial of the action, or a further reassessment of damages, on the ground that recent, supervening events had caused a significant deterioration in the plaintiff's condition. It was held that there was no power under s 75A(7), (8) and (9)[257] of the *Supreme Court Act* 1970 (NSW) to grant the application, by Barwick CJ, Gibbs, Stephen and Aickin JJ on the ground that the power of the Court to receive further evidence conferred by those provisions could be exercised only during the currency of an appeal and not after it had been determined and finally disposed of by entry of judgment; and that there was no power under the Supreme Court Rules (NSW), Pt 40, r 9(4) (which gives power to set aside or vary orders), to grant the application. Nor was there any power under the Supreme Court Rules, Pt 42, rr 11 and 12(1) (the latter of which provides that a "person bound by a judgment may move the Court for a stay of execution of the judgment, or for some other order, on the ground of matters occurring after the date on which the judgment takes effect and the Court may, on terms, make such order as the nature of the case requires"), to grant the application. The kinds of orders contemplated by those rules did not include one setting aside a judgment regularly obtained. The Court of Appeal did not have inherent power to set aside its judgment by reason of changed circumstances on application made after the case had been finally disposed of.

189 The decisions of the majority in *Bailey* and *Gamser* confirm that intermediate appellate, and certainly other statutory courts (absent clear provision to the contrary) lack inherent power to re-open perfected orders disposing of proceedings. Those authorities have not been doubted in this Court. The stated exceptions to this general rule are few and rarely found in practice. On the current authorities they are confined (statute apart) to the correction of formal

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257 The section relevantly provided:

"75A Appeal

…

(7) The Court may receive further evidence.

(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.

(9) Subsection (8) does not apply to evidence concerning matters occurring after the trial or hearing."

errors and the like, fraud, or failure to give a party a hearing[258]. This case is not an occasion for any extension of this narrow, and properly so, category of exceptions.

190 What I have said is sufficient to dispose of the appeal. It is therefore unnecessary to deal with the other points raised by the appellant with respect to the need for, and the degree of correspondence between the language of the Convention and the Regulations, whether the latter are within the regulation-making power conferred by s 111B of the Act, and the extent to which these matters are already covered by the decision of this Court in *De L v Director-General, NSW Department of Community Services [No 2]*[259].

191 I do not overlook that this is a case in which the future of a child is involved. However, the international arrangements and their adoption by this country provide a, indeed the, code for the way in which the future welfare of a child who has been removed from a subscribing country, is to be determined. In this respect the conduct of the appellant is, in a sense, irrelevant. What is relevant of course is that the arrangements under the Convention are not one-sided. They contemplate and require reciprocity, a matter of obvious importance when an Australian child is abducted to another subscribing country. In this case in any event if the appellant's foreshadowed application were to be granted it would only further delay the settlement of this child's welfare, which itself may be damaging to her.

192 Already, orders[260] which have been made have become, because of the effluxion of time and the appellant's conduct, inappropriate or not possible to comply with. For this reason, if the matter has not by now been finally disposed of by the Family Court then the respondent should have leave to apply to the

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258 The correct way to impeach a judgment procured by fraud is in independent proceedings: *Jonesco v Beard* [1930] AC 298 at 300; *McHarg v Woods Radio Pty Ltd* [1948] VLR 496 at 497; *Hillman v Hillman* [1977] 2 NSWLR 739 at 744. The jurisdiction is equitable and strict proof is required. See also Gordon, "Fraud or New Evidence as Grounds For Actions to Set Aside Judgments", (1961) 77 *Law Quarterly Review* 358 at 366-369. The history of the rule and its modern application are fully explained by the majority in pars [36]-[38] of their Honours' judgment in this case.

259 (1997) 190 CLR 207.

260 O'Ryan J, 20 February 1996; further staying order O'Ryan J, 8 May 1996; Full Court (Baker, Lindenmayer and Smithers JJ), 10 October 1996; Chisholm J, 20 January 1998; Judicial Registrar Knibbs, 2 February 1998; Ellis J, 9 April 1998; Full Court (Nicholson CJ, Finn, Kay, Moore and May JJ), 10 February 1999.

Full Family Court for orders to give effect to the judgment of this Court by making orders to secure the removal of the child in general conformity with the decisions of the trial judge and the first Full Court.

193 I would dismiss the appeal. The appellant should pay the respondent's costs for the reasons stated by the majority.