HIGH COURT OF AUSTRALIA

McHUGH, KIRBY AND CALLINAN JJ

HELEN BIENSTEIN APPELLANT

AND

SIMON BIENSTEIN RESPONDENT

Bienstein v Bienstein
[2003] HCA 7
13 February 2003
M140/2000

ORDER

Purported appeal struck out as incompetent.

Representation:

No appearance for the appellant

The respondent did not participate

CATCHWORDS

Bienstein v Bienstein

Practice and procedure – High Court – Removal of proceedings – Proceedings for adult child maintenance in Family Court – Whether a cause pending in a federal court – Whether matter arises under the Constitution or involves its interpretation.

Practice and procedure – High Court – Appeal from decision of a single Justice – Whether leave to appeal is required – Whether order to refuse removal of proceedings is final or interlocutory.

Courts and judges – Bias – Application for disqualification of a Justice – Whether reasonable apprehension of bias – Justice had practised professionally in city where proceedings originated – No imputed bias.

Judiciary Act 1903 (Cth, ss 34, 40.
Family Law Act 1975 (Cth), s 118.

1 McHUGH, KIRBY AND CALLINAN JJ. This is a purported appeal from an order of Hayne J made on 1 December 2000 dismissing an application for removal of proceedings pending in the Family Court under s 40(1) of the *Judiciary Act* 1903 (Cth). The parties to the "appeal" are wife and husband for the purpose of the *Family Law Act* 1975 (Cth). They have been involved in various proceedings in the Family Court that arose out of a claim for maintenance in respect of a child of the marriage who is a disabled adult. The purported appeal is brought by the wife who claims to appeal as of right[1].

Statement of the case

2 Under s 40(1) of the *Judiciary Act*, Mrs Bienstein applied to remove into this Court proceedings pending in the Family Court on the ground that they arose under the Constitution or involved its interpretation. The Family Court proceedings that she sought to remove were:

(i) proceedings in the original jurisdiction in ML7725 of 1991;

(ii) an associated appeal in SA87 of 1999.

3 The application for removal was heard by Hayne J. When the hearing commenced, Mrs Bienstein asked Hayne J to disqualify himself for apprehended bias. His Honour refused to do so, and later refused to order the removal of the Family Court proceedings.

4 Mrs Bienstein now purports to appeal against the order dismissing her application to remove the Family Court proceedings and the order dismissing the application that Hayne J disqualify himself from hearing the removal application. In our opinion, the purported appeal is incompetent and must be struck out on that basis. But, in any event, Hayne J did not err in either refusing to remove the proceedings or refusing to disqualify himself.

Grounds of appeal

5 Mrs Bienstein's Notice of Appeal contained 32 grounds of appeal. The principal grounds allege that Hayne J should have disqualified himself for reasonable apprehension of bias and that he erred in law, fact and discretion in

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1 This appeal from the order of Hayne J was listed for hearing in Canberra on Thursday, 2 May 2002. On 30 April 2002, at the request of Mrs Bienstein, the Court vacated the date set for the hearing of the appeal and indicated that the Court would hear the appeal on the basis of Mrs Bienstein's written submissions.

refusing to order the removal of the Family Court proceedings into this Court. Mrs Bienstein also submits that the proceedings involve the question whether s 18 of the *Family Law Act* is constitutionally valid and whether it is being "criminally misused" by the Family Court and, if that is so, ought to be removed into this Court.

Procedural history

Family Court of Australia

6 The proceedings in the Family Court have involved questions concerning or arising out of a claim that the husband provide maintenance for the disabled adult daughter of the former marriage. Mrs Bienstein told Hayne J that she has been litigating in the Family Court since 1996 when a registered child maintenance agreement in respect of her then 18 year old daughter expired.

7 According to Mrs Bienstein's submissions to this Court, the two matters that she seeks to have removed to the High Court under s 40(1) of the *Judiciary Act* are "the whole of the cause pending in proceedings at first instance No ML7725 of 1991" and the "related appeal", SA87 of 1999.

(a) ML7725 of 1991

8 It appears that the initiating document in ML7725 of 1991 was a registered child maintenance agreement that was filed in the Family Court in 1991. Several other applications have been filed subsequent to the filing of the agreement, but they were all made in the proceeding ML7725 of 1991. The applications in ML7725 involved in the removal proceedings can be summarised as follows[2].

9 On 12 November 1998, Carter J gave judgment in respect of various applications pending in proceeding ML7725. They included an application that Mr Bienstein pay adult-child maintenance for the daughter of the marriage. Her Honour dismissed the applications with costs. Carter J also made an order under s 118 of the *Family Law Act* restraining Mrs Bienstein from instituting or prosecuting any further actions, appeals or proceedings under the *Family Law Act* without the leave of the Court.

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2 Some of the matters summarised are only relevant to the removal proceedings in that they are referred to in Mrs Bienstein's submissions, rather than because they are strictly relevant.

10 Mrs Bienstein filed an appeal to the Full Family Court (Ellis, Finn and Moore JJ) – Appeal SA86 of 1998 – against the dismissal of her applications. The Full Court gave judgment on 30 June 2000. The Full Court recorded that Carter J had found that the daughter had an illness that had led to an inability to support herself for at least three months. The Full Court said that, having made those findings and having found that the husband had the capacity to contribute to the daughter's needs, it was not open to Carter J to dismiss the maintenance application on the ground that she had. That ground was the "features of the particular case" (including what Carter J described as Mrs Bienstein's "oppressive motives" for bringing the applications). The Full Court allowed the appeal against the dismissal of the application for maintenance and remitted it to a judge for rehearing. The Full Court also remitted the issue of costs. But it upheld the making of the remaining orders by Carter J including the order under s 118 of the *Family Law Act*.

11 On 28 October 1999, Guest J commenced hearing several applications arising out of the proceedings. They included enforcement applications filed by Mr Bienstein. During the course of the hearing, differences broke out between Mrs Bienstein and Guest J. Guest J recorded Mrs Bienstein as "somewhat hysterical" and that she was "yelling in a fierce voice" at him. His Honour directed an officer of the Federal Police to take her into custody and to place her in the cells in the Court building. Guest J told Mrs Bienstein that she was in contempt of Court. She was then removed from the courtroom. Guest J adjourned the Court until 2:15pm. Mrs Bienstein was kept in custody for about three hours. She complains that she was closely guarded by police during that time, that she was given no food, and was given water only when she asked for it.

12 When the Court resumed, his Honour told Mrs Bienstein that he intended to "consider whether [she] should be charged with contempt in the face of the Court". Guest J asked her to apologise to the Court, which she did.

13 Mrs Bienstein then made an application for Guest J to disqualify himself from hearing the proceedings. He declined to do so. At the conclusion of the proceedings, his Honour made orders on the applications before him. The orders were adverse to Mrs Bienstein. He also made costs orders in favour of Mr Bienstein.

(b) SA87 of 1999 (Ellis, Coleman and Rose JJ)

14 SA87 of 1999 is an appeal to the Full Court of the Family Court from the orders made by Guest J on 28 October 1999. Before that appeal was heard,

Mrs Bienstein applied to this Court to remove the proceedings in ML7725 and the appeal in SA87 into this Court[3].

15 In her Amended Notice of Appeal to the Full Court of the Family Court, Mrs Bienstein sought declaratory relief in relation to the manner in which Guest J had presided over the hearing. She also sought the disqualification of the Family Court as a whole in relation to the determination of any matters involving her and the removal to the High Court of all outstanding proceedings between the parties. Mrs Bienstein did not appear before the Full Court and did not file written submissions when directed to do so by that Court.

16 The Full Court (Ellis, Coleman and Rose JJ) handed down its judgment on 5 June 2001. Mrs Bienstein was partially successful in her appeal. The Full Court found that, although as a matter of law it was open to Guest J to find Mrs Bienstein guilty of contempt, he had not done so in accordance with the Family Law Rules, O 35 r 13. The Full Court held that Guest J had erred in finding that Mrs Bienstein was in contempt of Court without first having caused her to be orally informed of the contempt with which she was charged, in not affording her an opportunity to seek an adjournment and in not hearing any evidence and/or submissions she may have wished to adduce and/or make in relation to that charge. The Full Court held that, in doing so, Guest J not only had failed to comply with the appropriate procedure for hearing such matters provided for in the Rules of Court, but had also failed to apply the principles referred to in *Coward v Stapleton*[4]. The Full Court also found that Guest J had erred in failing to disqualify himself from further hearing the proceedings after he had had Mrs Bienstein removed from the Court. The Full Court said that a fair-minded lay observer might reasonably apprehend that the trial judge might not bring an impartial mind to bear on the proceedings because only that morning he had found Mrs Bienstein to be in contempt of the Court. The Full Court also set aside the orders as to costs made by Guest J in favour of Mr Bienstein. The Full Court remitted the determination of the costs issues to a judge of the Family Court other than Guest J.

High Court of Australia – Hayne J

17 Before the Full Court heard the appeal in SA87, Mrs Bienstein applied to this Court under s 40(1) of the *Judiciary Act* to remove the proceedings in

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3 *Bienstein v Bienstein*, High Court of Australia, Hayne J, 1 December 2000.

4 (1953) 90 CLR 573.

ML7725 and the appeal in SA87 into the High Court. Hayne J dismissed that application.

18 Mrs Bienstein appeared on her own behalf. When the proceedings commenced, Mrs Bienstein handed up an application for Hayne J to disqualify himself for apprehended bias and a conflict of interest. In her written submissions, Mrs Bienstein argued that her application to remove proceedings related to "allegations of serious and possibly criminal misconduct in the Melbourne Registry of the Family Court and in the bodies which are supposed to regulate the Legal Profession in the state of Victoria". Accordingly, there was a "real possibility of an actual conflict of interest and … a public perception of a conflict of interest and of consequent bias" if Hayne J should sit in judgment on the removal application. Mrs Bienstein submitted that this possibility of conflict of interest and perception of bias arose because his Honour "stems from the Melbourne legal fraternity and is likely to have past and continuing associations and friendships with the solicitors, barristers, serving and retired Judges and Registrars who are subject to [Mrs Bienstein's] very serious complaints".

19 Hayne J refused Mrs Bienstein's application to disqualify himself. His Honour observed that it was on the public record that, before his appointment to the Supreme Court of Victoria in 1992 and his later appointment to this Court, he practised at the Victorian Bar. However, Hayne J said that he did not feel "the slightest degree of embarrassment about dealing with the allegations which Mrs Bienstein makes in her principal application" in respect of the persons referred to in the papers before the Court. Hayne J said that he had no prior knowledge of the litigation involving Mrs Bienstein which gave rise to her application or of the issues which arose on, or lay behind, that application. His Honour said:

> "[T]here is … no demonstrated basis for any observer to conclude, either that there is some conflict of interest or that, by reason of some conflict of interest, I would not bring to the determination of the present application an unprejudiced mind".

20 After Hayne J gave this judgment, Mrs Bienstein said:

> "I thank your Honour for that considered judgment and you have set my mind completely at ease. I have no reservations about your being able to judge this on its merits."

21 Hayne J then considered what aspects of ML7725 remained pending in the Family Court. His Honour found that all the applications in proceeding ML7725 had been heard and dismissed at first instance by Carter J on 12 November 1998 and that the appeal against that decision was decided by Ellis, Finn and Moore JJ

on 30 June 2000. His Honour noted that Mrs Bienstein had referred to the constitutionality of s 118 of the *Family Law Act* and that there may have been an application filed in Mrs Bienstein's daughter's name in proceeding ML7725 to this effect. But his Honour said that the issues concerning s 118 of the *Family Law Act* had been heard and determined at first instance and on appeal without reference to any constitutional issue. There was, therefore, no live cause raising a constitutional issue. His Honour found that, in relation to matters pending in ML7725, there was not, at that time, pending in a federal court a cause involving the interpretation of the Constitution, which is the necessary condition of a s 40(1) removal order.

22 Hayne J also rejected the application to remove the appeal in SA87. His Honour said that the appeal was fixed for hearing the following week. Mrs Bienstein had a process by which she could challenge what had happened to her. His Honour held that it was better that the appeal be heard by the Full Court, rather than that the matter be removed into this Court. Hayne J said that Mrs Bienstein's application for removal was:

> "[i]n part, perhaps large part, an application seeking to have this Court, first, act as would the Family Court at first instance but, second, to embark upon a general review of the way in which the Family Court has dealt with the several applications to which Mrs Bienstein or her daughter have been parties".

His Honour said that he was not persuaded that it was appropriate to make orders removing either of the causes into this Court and dismissed the application for removal.

Preliminary issue: Leave to appeal is required

23 A threshold issue in this case is whether an appeal to this Court against the orders of Hayne J lies as of right, or whether it requires the leave of the Court. That depends upon whether the orders are final or interlocutory for the purposes of s 34 of the *Judiciary Act*. Mrs Bienstein contends that her appeal is as of right and that leave to appeal is not required.

24 Section 34 of the *Judiciary Act* provides:

> "(1) The High Court shall, except as provided by this Act, have jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers.

(2) An appeal shall not be brought without the leave of the High Court from an interlocutory judgment of a Justice or Justices exercising the original jurisdiction of the High Court whether in Court or Chambers."

25 The usual test for determining whether an order is final or interlocutory is whether the order, as made, finally determines the rights of the parties[5]. The test requires the appellate court to look at the consequences of the order itself and to ask whether it finally determines the rights of the parties in a principal cause pending between them[6]. Accordingly, orders refusing to set aside a default judgment or refusing to grant an extension of time are not final judgments because the unsuccessful party could make a further application for the same relief, even though such an application might have very little prospect of success[7].

26 Hayne J made two orders. First, his Honour dismissed the application to disqualify himself from hearing the application for removal. Secondly, his Honour dismissed the application to remove the causes pending in proceedings ML7725 of 1991 and SA87 of 1999 into this Court.

27 Mrs Bienstein submits that an appeal based on allegations of actual or perceived bias may be brought as of right. She argues that the effect of the order "refusing to stand aside was immediate and final because it obliged the [appellant] to immediately argue her case before" Hayne J. She also submits that Hayne J's order dismissing her removal application is final rather than interlocutory because she is prevented from making a further application for removal of her proceedings. Her submission is based upon advice that she allegedly received from this Court's Principal Registrar and the Deputy Registrar of the Melbourne Registry that any subsequent application for removal of proceedings that Mrs Bienstein might bring would be considered an abuse of process[8]. Mrs Bienstein argues that this prevents her from making another

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5 *Licul v Corney* (1976) 180 CLR 213 at 225 per Gibbs J (referring to *Hall v Nominal Defendant* (1966) 117 CLR 423).

6 *Hall v Nominal Defendant* (1966) 117 CLR 423 at 443 per Windeyer J.

7 *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 248, 256; *Hall v Nominal Defendant* (1966) 117 CLR 423 at 441.

8 Although it is submitted by Mrs Bienstein that refusal of the removal application is final because such an application would be considered an "abuse of process", it is likely that reference to "abuse of process" in discussions with High Court Registry staff related to O 58 r 4(3) of the High Court Rules which requires:

(Footnote continues on next page)

application for removal. Accordingly, she contends that the order refusing removal is a final order.

28 In our view, neither of the orders made by Hayne J finally determines the rights of the parties. The decision of Hayne J does not determine the rights of Mrs Bienstein, her former husband or the child of their marriage in the principal cause pending between them. In accordance with s 34(2) of the *Judiciary Act*, leave is required before Mrs Bienstein can pursue her proposed appeal challenging the correctness of those orders.

29 Accordingly, Mrs Bienstein's appeal must be dismissed for incompetence. But if an application for leave had been made, it would also have been dismissed. The principles that govern the grant of leave to appeal are well established. An applicant for leave must establish that the decision in question is attended with sufficient doubt to warrant the grant of leave. The applicant must also show that substantial injustice will result from a refusal of leave to appeal[9].

Merits of the proposed appeal

Refusal to disqualify for apprehended bias

30 A judge is disqualified from determining a case if the judge is biased or a party or a member of the public might reasonably apprehend that the judge is biased[10]. Bias exists if the judge might not bring an impartial and unprejudiced mind to the resolution of the issues[11].

> "If the … application [sought to be filed] appears to a Registrar on its face to be an abuse of the process of the Court or a frivolous or vexatious proceeding or application, the Registrar must seek the direction of a Justice who may direct the Registrar to issue or file it or to refuse to issue or file it …"

If Mrs Bienstein sought to file another application for removal of proceedings that appear to no longer be pending, it would be open to the Registrar to form the opinion that the application was an abuse of process and seek the direction of a Justice.

9 *Thornton v The Police* [1962] AC 339 at 343.

10 *Dickason v Edwards* (1910) 10 CLR 243; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Vakauta v Kelly* (1989) 167 CLR 568; *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11], 498-499 [31]-[35]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[8],

(Footnote continues on next page)

31 Mrs Bienstein contended before Hayne J that his Honour was precluded from hearing her matter as a result of a conflict of interest. This alleged conflict arose because Hayne J had practised at the Victorian Bar and Mrs Bienstein's applications involve allegations involving court and judicial officers in Melbourne. In the "appeal" to this Court, Mrs Bienstein has also alleged that Hayne J showed "actual bias" in prejudging her application and that he gave insufficient reasons for refusing to stand aside.

32 When Hayne J provided his reasons for refusing to disqualify himself, Mrs Bienstein stated that his Honour had "set [her] mind completely at ease" and that she had "no reservations about [his] being able to judge this [application] on its merits". Thus, at the hearing, Mrs Bienstein appeared to be satisfied of the sufficiency of Hayne J's reasons for not disqualifying himself. It seems likely that it is the fact that Hayne J did not find in her favour that has triggered her present allegations of bias and reasonable apprehension of bias. But however that may be, the allegations of bias and reasonable apprehension of bias have no substance.

33 Relevantly to the present matter, a reasonable apprehension of bias may exist where the presiding judge has a substantial personal relationship with a party to, or a person involved in, proceedings or a substantial personal relationship with a member of the family of that party or person[12]. But absent such relationships or others like them, it is absurd to suggest that a reasonable apprehension of bias can exist merely because a person involved in the proceedings comes from a city where the judge once practised professionally or because the judge may have had professional dealings with that person in the course of professional practice. In *Re Polites; Ex parte Hoyts Corporation Pty Ltd*[13], this Court held that even a prior relationship between a legal adviser and client does not generally disqualify the legal adviser, on becoming a member of a court or tribunal, from sitting in proceedings in which the client is a party. In the normal case (of which this is an illustration), it is only when advice given by the legal adviser is an issue in the proceedings that a reasonable apprehension

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363 [83], 397 [184]; cf at 394 [175]; see also Campbell and Lee, *The Australian Judiciary* (2001) at 137-144.

11 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87 per Mason CJ and Brennan J.

12 *Emanuele v Emanuel Investments Pty Ltd* (1997) 139 FLR 36.

13 (1991) 173 CLR 78.

of bias can arise. Similarly, ordinarily interaction (social or otherwise) between a practising lawyer who becomes a judge and other members of the legal community in that city does not itself give rise to an apprehension of bias if one of those members is involved in proceedings before the judge. Cases might arise where the conventional rules that govern such professional associations have been exceeded and require the judge to disqualify himself or herself[14]. But Hayne J did not err in refusing to disqualify himself on the ground relied on by Mrs Bienstein.

34 Mrs Bienstein contends that observations during the course of the hearing by Hayne J such as " … it is highly improbable that we can take on a family law matter and resolve those questions" and "to remove the whole cause is not, I think, a practical outcome", indicate that his Honour "pre-determined the application". But those remarks do not show pre-determination of the issues. This Court held in *Re Keely; Ex parte Ansett Transport Industries*[15] that the expression by a judge of tentative views during the course of argument as to matters on which the parties are permitted to address full argument manifests no partiality or bias. This approach has been confirmed and applied in many cases[16]. Clearly the comments of Hayne J in the present case are of this character: they occurred in the normal course of a hearing and do not demonstrate bias or the reasonable apprehension of bias.

35 In *Re JRL; Ex parte CJL*[17], Mason J said:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

36 A judge should not disqualify himself or herself on the basis of bias or a reasonable apprehension of bias unless substantial grounds are established. In the present case, Mrs Bienstein's allegations regarding apprehended or

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14 cf *Kennedy and Cahill* [1995] FLC §92-605.

15 (1990) 64 ALJR 495; 94 ALR 1.

16 *Vakauta v Kelly* (1989) 167 CLR 568 at 571, 584-585; *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12]-[13], 504-505 [46], 518-519 [81]-[85].

17 (1986) 161 CLR 342 at 352.

demonstrated bias on the part of Hayne J are without basis. While Mrs Bienstein is clearly dissatisfied with the result of her applications before Hayne J, there is no evidence whatever that Hayne J did not bring an unprejudiced mind to the application.

37 Leave to appeal on the grounds of bias would have been refused on the ground that an appeal on those grounds would have no prospect of success.

Refusal of application to remove pending proceedings

38 The findings of Hayne J in relation to the removal applications have been largely overtaken by the passage of time. SA87 of 1999 has now been determined, and some doubt exists over what actually remains to be determined in ML7725. In any event, an order for removal into this Court under s 40(1) of the *Judiciary Act* can be made only if the requirements of that sub-section are fulfilled. Here they are not.

SA87 of 1999 – No proceeding pending

39 An order for removal into this Court under s 40(1) of the *Judiciary Act* can be made only if there is a cause pending in a federal court. The Full Court of the Family Court gave judgment in SA87 of 1999 on 5 June 2001. Thus, the matter that is sought to be removed has been determined. As the Full Court has given judgment, there is nothing to remove into this Court[18]. Leave to appeal against the order dismissing the application to remove the appeal would be refused on the ground that the appeal would be futile.

ML7725 of 1991 – Cause does not arise under the Constitution or involve its interpretation

40 In her written submissions, Mrs Bienstein states that the Family Court has refused to list any further applications filed by her or her "retrial ordered by the Full Court". Mrs Bienstein alleges that "the Chief Justice has made it quite plain in his responses, or lack thereof, to my correspondence directly to him that he will not list any of my matters in a way that will give me any relief. He refuses to list a Full Court's order for retrial". Presumably, Mrs Bienstein is referring to the order of the Full Family Court (Ellis, Finn and Moore JJ) in SA86 of 1998 on 30 June 2000 that remitted the issue of adult-child maintenance to the Family Court for rehearing. Mrs Bienstein concedes that "the retrial is the only matter still pending". An analysis of the matters filed under ML7725 indicates that this

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18 *Re Stubberfield's Application* (1996) 70 ALJR 646 at 647 per McHugh J.

is probably correct. Because Mrs Bienstein's purported appeal has been before this Court it is understandable that her matter in the Family Court has not been listed. The failure to list matters or to answer such correspondence is no proof, therefore, that the outstanding matters would not be listed in the normal way in the Family Court once these proceedings are concluded.

41 Mrs Bienstein has failed to show that any issues in the pending proceeding arise under the Constitution or involve its interpretation. The matter that the Full Court (Ellis, Finn and Moore JJ) remitted on 30 June 2000 to be reheard related to the payment of maintenance for the child of the marriage. This issue relates solely to matters under the *Family Law Act* and does not, in any way, relate to the Constitution or its interpretation.

42 Mrs Bienstein contends that the order made under s 118 of the *Family Law Act* prevents her from instituting or prosecuting any action, appeal or other proceeding without leave of the Family Court. However, this issue does not form part of any cause that is pending. The s 118 order was upheld by the Full Court of the Family Court. That issue has been fully determined by the Full Court, albeit without recourse to any constitutional issue that Mrs Bienstein now claims arises.

43 The only other possible constitutional issue involved in Mrs Bienstein's claims is the claim that "the right to not be tortured is an elementary protection implied in Chapter III of the Constitution". This appears to be in reference to her imprisonment for contempt before Guest J. This issue also does not form part of any cause that is pending before a federal court. The Full Court (Ellis, Coleman and Rose JJ) dealt with the imprisonment for contempt issue in its judgment of 5 June 2001. The appeal was determined in her favour, and a costs order against her was set aside.

44 Leave to appeal against the refusal to remove the proceedings in ML7725 of 1991 would be refused on the ground that an appeal would have no prospects of success because the conditions for an order under s 40(1) of the *Judiciary Act* do not exist.

Conclusion

45 There is no basis on which this Court could remove the proceedings identified by Mrs Bienstein even if the Court thought that the issues she seeks to raise would in other circumstances justify an order for removal. Orders for removal interfere with the processes of the courts hearing the proceedings sought to be removed. Only where the issues are important and require this Court's urgent decision should the Court make an order for removal. Not only do orders removing proceedings interrupt the processes of the lower courts but they deny

this Court the benefit of the reasons of the lower courts on the constitutional issues and allow parties to by-pass the special leave and leave requirements of the *Judiciary Act*. The s 40(1) power to remove is not intended to convert this Court into a court exercising a general supervisory jurisdiction over lower courts. As Hayne J observed in the removal proceedings:

> "It may be readily accepted that this Court has, as one of its fundamental roles that, as final Court of Appeal for this country and in its original jurisdiction, particularly under section 75(v), of ensuring application of the rule of law, particularly in the judicial system of Australia. That is not to be done, however, as if the Court were a general judicial ombudsman. In particular, the powers under section 40(1) of the *Judiciary Act* are not to be exercised save for the evident purpose for which they are conferred of permitting removal into this Court of causes, or parts of causes, which raise constitutional issues ripe for decision."

46 His Honour did not err in refusing to remove Mrs Bienstein's proceedings. If there are causes pending in matter ML7725, they do not arise under the Constitution or involve its interpretation. If Mrs Bienstein believes that there has been some error in the determination of her Family Court matters and wishes to have these rulings reviewed by this Court, the appropriate avenue is to seek special leave to appeal after the Family Court has discharged its part in respect of the cause. Given the delay that has taken place such an application would appear to have very little prospects of success even if the "error" might otherwise have attracted the grant of special leave. However, in saying this we express no concluded opinion. The issue would be decided by the Court as constituted to hear any special leave application that might be made.

Order

47 The purported appeal should be struck out as incompetent.