HIGH COURT OF AUSTRALIA

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

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS APPELLANT

AND

B & ANOR RESPONDENTS

Minister for Immigration and Multicultural and Indigenous Affairs v B
[2004] HCA 20
29 April 2004
A246/2003

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Family Court of Australia made on 19 June 2003 and, in their place, order that the appeal to the Full Court of the Family Court be dismissed.*

On appeal from the Family Court of Australia

Representation:

D M J Bennett QC, Solicitor-General of the Commonwealth with G R Kennett for the appellant and intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

S W Tilmouth QC with S C Churches and S D Ower for the first respondents (instructed by Jeremy Moore & Associates)

D F Jackson QC with B W McQuade for the second respondent (instructed by Boylan & Co)

F P Hampel SC with K L Eastman appearing as amicus curiae on behalf of Amnesty International Australia (instructed by Public Interest Advocacy Centre)

CATCHWORDS

Minister for Immigration and Multicultural and Indigenous Affairs v B

Courts and judicial system – Family Court – Jurisdiction – Scope of welfare jurisdiction – Constitutional basis of welfare jurisdiction – Whether conferral of jurisdiction in relation to a "matter" – Children in immigration detention – Whether welfare jurisdiction extends to children of marriages of parents in immigration detention – Whether Family Court in exercising welfare jurisdiction can make orders directed at third parties – Whether Family Court has power to order release from detention – Whether any general welfare jurisdiction and powers of Family Court authorises orders inconsistent with specific obligations imposed on federal officers under Migration Act.

Family law – Children – Children in immigration detention – Welfare jurisdiction – Scope of welfare jurisdiction – Whether welfare jurisdiction extends to children of marriages of persons in immigration detention – Whether court has power to order release from detention.

Family Court of Australia – Jurisdiction – Scope of welfare jurisdiction – Whether welfare jurisdiction extends to children of marriages of parents in immigration detention.

Family Court of Australia – Order – Certificate granting leave to appeal to High Court of Australia – Relevant considerations governing grant of such certificate.

Migration – Detention – Unlawful non-citizens – Children in immigration detention – Whether Family Court has power to make orders releasing children from detention.

International law – Interpretation of legislation in conformity with treaty obligations – Relevance and effect of provisions of treaties to which Australia is a party – Obligation to give effect to clear provisions of valid Australian statutory law notwithstanding alleged breaches of international law.

Words and phrases – "jurisdiction", "matter".

Constitution, covering cl 5, ss 51(xxi), 51(xxii), 73, 74, 75, 76, 77.
Family Law Act 1975 (Cth), Pt VII, ss 60B, 67ZC, 68B, 69H, 69ZH, 95(b).
Migration Act 1958 (Cth), ss 189, 196.

1 GLEESON CJ AND McHUGH J. The question in this appeal is whether the Family Court of Australia has jurisdiction to order the Minister for Immigration and Multicultural and Indigenous Affairs to release children who are detained in an immigration detention centre in accordance with the *Migration Act* 1958 (Cth) ("the Migration Act"). In our opinion, the Family Court has no jurisdiction to make such an order. Nor has it any jurisdiction to make orders concerning the welfare of children who are held in immigration detention.

2 The principal difficulty in the appeal arises out of the complexity of the legislative scheme contained in Pt VII of the *Family Law Act* 1975 (Cth) ("the Act") dealing with children, a complexity that is not reduced by a form of drafting that is sometimes used in federal legislation. This form of drafting commences with the enactment of a provision that, standing alone, suggests an absence of constitutional constraints on the federal Parliament. Other sections of the legislation, however, then operate to confine the primary provision and bring its content within one or more heads of federal constitutional power. No doubt the drafters of legislation in this form can defend it as being no more than a logical set of propositions that conduce to clarity of meaning. Nevertheless, in the present case it appears that this form of drafting does not convey clearly to the reader the object of the legislation. What is clear to the drafter is not necessarily clear to the reader. The drafter has the advantage of knowing the object that he or she is seeking to achieve. As the argument in this appeal and the division of opinion in the Family Court indicates, however, the object of the drafter may not be as clear to those whose task is to read and interpret the legislation. We think that it may also fairly be said that the drafter of significant parts of Pt VII has not always kept in mind the constitutional requirements of ss 75, 76 and 77 of the Constitution. Section 77 confines the jurisdiction of federal courts to the "matters" mentioned in ss 75 and 76 of the Constitution. In turn, this requires that the conferral of jurisdiction identify – expressly or inferentially – the substantive legal rights, privileges, liabilities or duties of persons who are the subject of the conferral or investing of federal jurisdiction for the purposes of assessing whether jurisdiction has been conferred in respect of a constitutional "matter".

Statement of the case

3 The children concerned in this appeal are two sons and three daughters of persons who, like the children, are unlawful non-citizens within the meaning of ss 4 and 14 of the Migration Act. In July 2002, the children and their mother were being held at an immigration detention centre at Woomera in South Australia, a centre established under that Act. At the time this appeal was heard, but not in July 2002, the father of the children was detained in an immigration detention centre. In July 2002, the two sons commenced proceedings by their mother as their next friend in the Family Court of Australia in its South Australian registry. Later, the mother was given leave to join the three female

children as parties to the proceedings. Among the orders sought by the male children was a mandatory order under s 67ZC of the Act that the Minister "be required to release [the children] from detention at the Woomera Immigration Reception Processing Centre." The father intervened in the proceedings on behalf of all five children and also sought various orders against the Minister.

4 In October 2002, Dawe J dismissed both the applications by the two male children (the three female children had not yet been joined as parties to the proceedings) and by the father. Her Honour held that the Family Court did not have jurisdiction in South Australia to make the orders sought. However, an appeal to the Full Court of the Family Court succeeded, and the matter was remitted for rehearing before another judge, who dismissed the applications. After another appeal, the Full Court ordered that the children be released from immigration detention until the final hearing of their applications. In the first appeal the majority of the Full Court, Nicholson CJ and O'Ryan J, said that the provisions of subdiv F of Div 12 of Pt VII of the Act "assume the conferring of jurisdiction upon the court in respect of children of marriages without limitation."[1] Their Honours held that the welfare jurisdiction of the Family Court in respect of children was not limited to disputes between parents concerning custody and access to children. The majority said that, when the welfare of children requires it, the Court could make orders against third parties[2]. The majority was also of the view that s 67ZC of the Act gave effect to the United Nations Convention on the Rights of the Child[3], and that the constitutionality of s 67ZC was not confined by the marriage and divorce powers conferred on the federal Parliament by s 51(xxi) and (xxii) of the Constitution[4].

5 After the hearing of the first appeal to the Full Court of the Family Court, that Court granted a certificate under s 95(b) of the Act, giving the Minister a right of appeal to this Court on the ground that the case involved "an important question of law or of public interest". The Full Court certified that four such questions were involved in this case. In the view we take of this appeal,

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1 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 627.

2 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 639-640, 645, 655.

3 Opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990; entered into force for Australia 16 January 1991).

4 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 650-651.

however, it is necessary to refer only to question 1, which raises the following issue for determination:

> "The scope of the 'welfare' jurisdiction of the Family Court under s 67ZC and/or s 68B of the *Family Law Act* 1975, in particular whether that jurisdiction extends to:
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> (i) determining the validity of the detention of a non-citizen child (who is the child of a marriage) under s 196 of the *Migration Act* 1958, and
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> (ii) making orders directing officers in the performance of their functions under the Migration Act in relation to such a child."

Jurisdiction

6 As the above question indicates, a central question in the appeal concerns the jurisdiction of the Family Court. Jurisdiction is a term used with a variety of meanings. It is often used to describe the amenability of the defendant to the reach of a court's process[5], which may be limited to certain subject matters or geographical locations. In a legal context the primary meaning of jurisdiction is "authority to decide"[6]. It is to be distinguished from the powers that a court may use in the exercise of its jurisdiction[7]. Because the Family Court is a federal court created by the Parliament of the Commonwealth[8], its jurisdiction – its authority to decide – must be defined in accordance with ss 75, 76 and 77 of the Constitution.

7 Section 77 empowers the Parliament of the Commonwealth to define the jurisdiction of a federal court with respect to any of the matters mentioned in ss 75 and 76 of the Constitution. One of the matters mentioned in s 76 is a matter "arising under any laws made by the Parliament". "Matter" in ss 75, 76 and 77 does not mean a legal proceeding between parties or a bare description of some subject matter that falls within a head of federal legislative power. In

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5 *Laurie v Carroll* (1958) 98 CLR 310 at 331.

6 See *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

7 *Harris v Caladine* (1991) 172 CLR 84 at 136.

8 *Family Law Act* 1975 (Cth), s 21.

In re Judiciary and Navigation Acts, Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ said[9]:

> "[W]e do not think that the word 'matter' in s 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court."

8 A "right or privilege or protection given by law"[10] may give rise to a "matter" within the meaning of ss 75 and 76. Likewise, an existing claim of right[11] or any criminal liability or civil duty imposed by federal legislation may also give rise to a "matter" within the meaning of ss 75 and 76[12]. However, there can be no "matter" for the purpose of ss 75, 76 and 77 of the Constitution unless the relevant legislation identifies – expressly or inferentially – some right that may be determined or privilege that may be granted by a court, or some duty or liability that is enforceable against a person by another person. Most "matters" involve the determination of a duty or liability in one party and a correlative right or standing in another person to enforce the duty or liability. In some exceptional cases, however, a court may be given jurisdiction to make an order on the application of a person that will constitute a "matter" even though there is no *lis inter partes* or adjudication of rights. Orders concerning judicial advice to trustees or company liquidators, the administration of assets or the giving of consent to the marriage of a ward of the court are well-known exercises of judicial power[13] and are therefore "matters" in this exceptional sense. The jurisdiction of the Family Court is confined constitutionally to "matters" in the senses described above.

9 Despite the requirements of Ch III of the Constitution, namely, that the Commonwealth Parliament may invest federal courts only with jurisdiction in respect of the matters set out in ss 75 and 76, some provisions of the Act which use the term "jurisdiction" can only loosely – or at all events inferentially – be

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9 (1921) 29 CLR 257 at 265.

10 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

11 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

12 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 166.

13 See, eg, *R v Davison* (1954) 90 CLR 353 at 368.

regarded as defining the jurisdiction of the Family Court with respect to such "matters". Thus, s 67ZC, a key provision in this appeal, declares:

> "(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
>
> (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

10 Under the Constitution, the Family Court, as a federal court, may only be invested with jurisdiction that the Parliament has defined by a law with respect to one of the "matters" mentioned in s 75 or s 76 of the Constitution. In this case, the only relevant "matter" is a "matter ... arising under any laws made by the Parliament"[14]. The "welfare of children" is not a matter mentioned in s 75 or s 76 of the Constitution. Indeed, it is not a matter mentioned in s 51 of the Constitution, the chief provision which invests the federal Parliament with legislative power. Section 67ZC also does not itself expressly give jurisdiction in respect of a "matter": it does not refer to any substantive rights, privileges, duties or liabilities or the persons who can apply for or be made subject to an order under the section.

11 However, this Court has long recognised that the requirements of s 77 of the Constitution may be satisfied even though jurisdiction in respect of a matter is defined or invested only inferentially. The inference may be drawn from the nature of a remedy granted[15] or from other provisions in the legislation that confer rights or impose duties or liabilities on persons[16]. Thus, in *Hooper v Hooper*[17], this Court held that federal jurisdiction was invested in the Supreme Courts of the States by a combination of two sections of the *Matrimonial Causes Act* 1945 (Cth), namely ss 10 and 11. The first section, s 10, authorised a person domiciled in one State but resident in another State to commence proceedings in respect of a "matrimonial cause", as defined, in the Supreme Court of the State of residence. The second section, s 11, gave that person the rights that he or she had

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14 Constitution, s 76(ii).

15 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141.

16 *Hooper v Hooper* (1955) 91 CLR 529.

17 (1955) 91 CLR 529.

under the law of the State of domicile. In a unanimous judgment, this Court stated[18]:

> "A substantive 'law of the Commonwealth' is thus enacted, and, whenever a 'matrimonial cause' is instituted putting any of those rights in suit, there is a 'matter' which 'arises' under that law of the Commonwealth. And 'with respect to' that 'matter' State courts may be lawfully invested with federal jurisdiction under s 77(iii) of the Constitution."

12 Similarly, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[19], this Court held that inferentially Parliament had conferred jurisdiction with respect to a "matter" mentioned in ss 75 and 76. In *Barrett*, s 58E of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) empowered the Commonwealth Court of Conciliation and Arbitration to "make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules." The prosecutor objected that, although s 58E defined the jurisdiction of a federal court, it did not do so "with respect to" any of the matters mentioned in ss 75 and 76 of the Constitution. This Court unanimously rejected that objection. Dixon J said[20] that s 58E "must be taken to perform a double function, namely to deal with substantive liabilities or substantive legal relations and to give jurisdiction with reference to them." After referring to two forms that legislation may take, his Honour said[21]:

> "But, under either form of legislation, it is quite clear that a liability is imposed and that the liability accordingly supplies an appropriate subject or 'matter' upon which 'judicial power' or 'jurisdiction' may operate, whether the jurisdiction is given in the same breath or quite independently."

13 In contrast, s 67ZC does not itself impose any substantive liabilities or duties or confer rights or privileges on any person. Standing alone, therefore, s 67ZC does not confer jurisdiction in respect of a "matter" arising under a law of the Parliament because it does not confer rights or impose duties on anyone. The

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18 *Hooper v Hooper* (1955) 91 CLR 529 at 536.

19 (1945) 70 CLR 141.

20 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165.

21 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 166.

"jurisdiction" conferred by s 67ZC is therefore not comparable with those provisions considered by this Court in *Barrett* and *Hooper*. Moreover, unless it were supported by the external affairs power[22] or a reference from the States[23] or was read down to refer to the parties to a marriage[24], it could not constitutionally confer any rights or impose any duties in respect of the welfare of children.

14 Despite some similarities to this case, the principal judgment of Mason CJ, Dawson, Toohey and Gaudron JJ in this Court in *Marion's Case*[25] does not support a finding that s 67ZC is a source of power and also operates to confer jurisdiction for the purpose of Ch III of the Constitution. In *Marion's Case*, this Court held that the Family Court had jurisdiction under its "welfare jurisdiction" to authorise the carrying out of a sterilisation procedure upon a child of a marriage. *Marion's Case* arose out of a claim by the parents of the child for an order authorising the sterilisation. In the alternative, the parents sought a declaration that it was lawful for them to consent to the performance of those procedures[26]. The Secretary of the Department of Health and Community Services of the Northern Territory represented the child in the proceedings. The parents' claim gave rise to two main questions:

(1) Could the parents lawfully authorise the sterilisation without an order of a court?

(2) If not, did the Family Court have jurisdiction to give consent to the sterilisation?

15 This Court held that the Family Court had jurisdiction to give consent to the sterilisation. In their joint judgment, Mason CJ, Dawson, Toohey and Gaudron JJ said[27], in a passage with which McHugh J agreed[28]:

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22 Constitution, s 51(xxix).

23 Constitution, s 51(xxxvii).

24 *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 257.

25 (1992) 175 CLR 218.

26 *Marion's Case* (1992) 175 CLR 218 at 221.

27 *Marion's Case* (1992) 175 CLR 218 at 257.

28 *Marion's Case* (1992) 175 CLR 218 at 318.

"As the *Family Law Act* now stands, s 63(1) confers jurisdiction on the Family Court 'in relation to matters arising under this Part'. Section 64(1) of the Act provides:

> 'In proceedings with respect to the custody, guardianship or welfare of, or access to, a child –
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> ...
>
> (c) ... the court may make such order in respect of those matters as it considers proper, including an order until further order.'

The sub-section does not in terms confer jurisdiction on the Court but it confers power to make orders and presupposes jurisdiction.

Whether the source of jurisdiction is to be found primarily in s 64 along with s 63(1) as the appellant argued, or in a much wider range of sections in Pt VII as the Commonwealth argued, it is clear that *the welfare of a child of a marriage is a 'matter' which arises under Pt VII for the purposes of s 63(1)* and is, therefore, an independent subject which may support proceedings before the Family Court. Although there are limits on that jurisdiction, there is no doubt that it encompasses the circumstances of the present case." (emphasis added, footnote omitted)

16 Section 63E of the Act, as it then provided, gave the parents, as guardians of the child, responsibility for the long-term welfare of the child and all the powers, rights and duties that, apart from the Act, vested by law or custom in a guardian. Because the Act vested those rights, powers and duties and that responsibility in the parents, a controversy between the parents and the Secretary, as the child's representative, concerning the right of the parents to authorise her sterilisation gave rise to a "matter" for the purpose of Ch III of the Constitution. Hence, the first of the two main questions gave rise to a "matter" within the meaning of s 77 of the Constitution.

17 The second question also gave rise to such a "matter". Section 63E made the parents responsible for the long-term welfare of the child, and s 64 authorised the Family Court to make orders for the welfare of the child. At least by implication, Pt VII of the Act gave the parents the right to seek an order to advance or protect the welfare of the child. Accordingly, the second question in *Marion's Case* concerned a "right or privilege or protection given by law"[29]. It was analogous to those "matters" concerning children over which the Court of Chancery has long exercised *parens patriae* jurisdiction.

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29 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

18 It is beside the point whether an application for such an order is or is not opposed, or involves or does not involve a *lis inter partes* in an application, such as that involved in *Marion's Case*. As Dixon CJ and McTiernan J pointed out in *R v Davison*[30], courts make many judicial orders that involve no *lis inter partes* or adjudication of rights, yet they exercise judicial power. Further, any "matter" that involves the exercise of judicial power and answers one or more of the subject matters described in s 75 or s 76 of the Constitution is necessarily a "matter" for the purpose of s 77 of the Constitution. After referring to many well-known definitions of judicial power, Dixon CJ and McTiernan J said[31]:

> "It may be said of each of these various elements that it is entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law. In the administration of assets or of trusts the Court of Chancery made many orders involving no *lis inter partes*, no adjudication of rights and sometimes self-executing. Orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court are all conceived as forming part of the exercise of judicial power as understood in the tradition of English law. Recently courts have been called upon to administer enemy property. In England declarations of legitimacy may be made. To wind up companies may involve many orders that have none of the elements upon which these definitions insist. Yet all these things have long fallen to the courts of justice. To grant probate of a will or letters of administration is a judicial function and could not be excluded from the judicial power of a country governed by English law."

19 The joint judgment in *Marion's Case* regarded the application in that case as being analogous to some of the applications for orders traditionally made to the Court of Chancery. Their Honours stated that the "welfare jurisdiction" was "similar to the parens patriae jurisdiction"[32] of the Court of Chancery. They stated further[33]:

> "No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care

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30 (1954) 90 CLR 353 at 368.

31 *R v Davison* (1954) 90 CLR 353 at 368.

32 *Marion's Case* (1992) 175 CLR 218 at 258.

33 *Marion's Case* (1992) 175 CLR 218 at 258-259.

> and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the parens patriae jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have the power." (footnote omitted)

20 This passage, and the last sentence in particular, should not be read, however, as suggesting that the Family Court had a welfare jurisdiction that was at large. Earlier, the joint judgment recognised this when their Honours said that "there are limits on that jurisdiction"[34]. The above passage should not be read, therefore, as suggesting that the Family Court's welfare jurisdiction authorises orders that are divorced from the determination of "some immediate right, duty or liability"[35] of the parties to a controversy or that are not analogous to those exceptional orders traditionally made by courts exercising judicial power. Their Honours are hardly likely to have overlooked that there can be no conferral of federal jurisdiction unless there is a "matter" within the meaning of ss 75 and 76 of the Constitution.

21 It was common ground in *Marion's Case* that the Family Court had jurisdiction to authorise the sterilisation of a child[36]. As a result, this Court was not concerned to articulate definitively the jurisdiction of the Family Court in respect of the welfare of a child. However, the effect of s 77 of the Constitution is that, for federal courts, the jurisdiction must be defined with respect to a right, privilege, duty or liability. Ordinarily, this means that the law defining jurisdiction must identify the person or persons who have the benefit or burden of the right, privilege, duty or liability. In some cases, the law defining jurisdiction may grant a right or privilege without imposing any corresponding duty or liability on another person. The holding of the Court in *Marion's Case* is an example. Such cases are nevertheless rare and are recognised only for historical reasons.

22 Accordingly, the failure of s 67ZC, standing alone, to define the Family Court's jurisdiction with respect to a s 75 or s 76 matter is not itself decisive against the respondents' contention that the Family Court had jurisdiction in the

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34 *Marion's Case* (1992) 175 CLR 218 at 257.

35 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

36 (1992) 175 CLR 218 at 254.

present matter. Other provisions of the Act may supply the elements of a "matter". The ultimate question then is whether, read as a whole, the Act defines the jurisdiction of and thereby – for constitutional purposes – confers jurisdiction on the Family Court to determine the present dispute between the respondent children and the Minister. The question may be posed in two different ways:

(1) Does the Act confer jurisdiction on the Family Court to decide that the children have a right as against the Minister to be released from immigration detention?

(2) Does the Act confer jurisdiction on the Family Court to determine that the children have a right to require the Minister to act in their best interests while they are in immigration detention?

23 The valid application of s 67ZC, therefore, is dependent upon some other provision in Pt VII of the Act creating a "matter" within the meaning of s 75 or s 76 of the Constitution to which the jurisdiction conferred by s 67ZC can attach. Consequently, it is necessary to turn to other provisions in the Act – particularly Pt VII – to determine the jurisdiction, if any, that s 67ZC validly confers. This step is required in order to ascertain whether one or more provisions enacts substantive rights or privileges or imposes substantive duties which constitute a "matter" under s 75 or s 76 of the Constitution and which can be inferentially linked to s 67ZC. If this step is not taken, it is impossible to identify the "matters" concerning "the welfare of children" which arise under a law of the Parliament for the purpose of s 76(ii) of the Constitution and the jurisdiction of the Family Court that the Parliament has defined in respect of those matters for the purpose of s 77(i) of the Constitution.

Relevant provisions of the Act

24 Section 21 of the Act creates the Family Court of Australia and declares it to be a superior court of record. Sections 31 and 33 set out the original jurisdiction of the Family Court. Section 31(1)(a) confers jurisdiction on the Family Court with respect to "matters arising under this Act or under the repealed Act in respect of which matrimonial causes are instituted or continued under this Act". Section 31(1)(c) confers jurisdiction in respect of matters arising under a law of the Parliament of a Territory other than the Northern Territory. Section 31(1)(d) confers jurisdiction on the Family Court in relation to matters in respect of which proceedings may be instituted in that Court. Section 33 confers jurisdiction on the Court in respect of matters associated with matters in which the jurisdiction of the Court is invoked. Section 40(1) declares that "[t]he jurisdiction of the Family Court under this Act shall not be exercised except in accordance with Proclamations under this section."

25 Part V of the Act is concerned with applications relating to matrimonial causes. Despite the conferral of jurisdiction in respect of such matters by s 31, s 39 confers jurisdiction on the Family Court inter alia "with respect to matters arising under this Act in respect of which ... matrimonial causes are instituted under this Act [or] ... continued in accordance with section 9"[37]. Section 4 of the Act contains a definition of "matrimonial cause"; it does not extend to disputes concerning the welfare of children.

26 Part VI is concerned with applications for the dissolution and nullity of marriage. Unlike Pt V, Pt VI does not contain an express grant of jurisdiction.

27 Nothing in any of Pts I to VI of the Act, with the exception of s 31 in Pt IV, throws any light on the question of the Family Court's jurisdiction in this case.

28 As we have already indicated, Pt VII is concerned with children. Like Pt V, and despite the terms of s 31, Pt VII contains a number of conferrals of jurisdiction. None of them expressly indicates or inferentially suggests that the Family Court has jurisdiction to make orders against the Minister. On the contrary, the various Divisions and subdivisions of Pt VII show that the main object of the Part is to require parents to act in ways that will advance the best interests of their children. Indeed, s 60B(1) declares that the object of the Part is to:

> "ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities concerning the care, welfare and development of their children."

Nor, when construed as a whole, does anything in Pt VII suggest that the Part was intended to give the Family Court a general jurisdiction over children with the power to make an order against individuals whenever the best interests of a child require such an order to be made.

29 It is appropriate to consider each Division in turn.

30 Division 1 of Pt VII is introductory. It contains s 60F, which extends, for the purpose of the Act, the meaning of "a child of a marriage". The term includes a reference to a child adopted since the marriage by the husband and wife, a child

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37 Section 39(5).

of the husband and wife born before the marriage and a child of the husband and wife who is born as a result of artificial conception procedures[38].

31 Division 2 is concerned with parental responsibility. It contains s 61B, which defines "parental responsibility" in relation to a child to mean "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."

32 Division 3 deals with the counselling of people in relation to matters affecting children. Its chief concern is with the duties and powers of the Family Court and its officers in respect of counselling those who are involved in proceedings under Pt VII.

33 Division 4 is concerned with parenting plans. Section 63B states that the parents of a child are encouraged to agree about matters concerning the child rather than seeking a court order and, in reaching an agreement, to regard the best interests of the child as the paramount consideration.

34 Division 5 addresses parenting orders. Section 64B(2) defines a parenting order as one that deals with the person or persons with whom a child is to live, the contact between a child and another person or persons, the maintenance of a child or any other aspect of parental responsibility for a child. Section 64B subdivides parenting orders into residence orders, contact orders, child maintenance orders[39] and specific issues orders depending upon the subject matter of the particular order.

35 Division 6 is concerned with parenting orders other than child maintenance orders. Section 65C permits either or both of the child's parents, the child, a grandparent of the child or any other person concerned with the care, welfare or development of the child to apply for a parenting order. Such orders include orders concerning residence, contact and taking and sending children from Australia. Sections 65M, 65N and 65P oblige persons not to act contrary to, or hinder or impair, such orders.

36 Division 7 is concerned with child maintenance orders. Section 66B(1) declares that the principal object of the Division "is to ensure that children receive a proper level of financial support from their parents." Section 66F states that either or both of the child's parents, the child, a grandparent of the child or

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38 Section 60H(1).

39 A child maintenance order is a parenting order that deals with the maintenance of a child: s 64B(5).

any other person concerned with the care, welfare or development of the child may apply to a court for a child maintenance order.

37 Division 8 is concerned with other matters relating to children, including the liability of an unmarried father to contribute towards child bearing expenses, orders concerning the location and recovery of children and the reporting of alleged acts of child abuse. Section 67ZC – which is the key section in this case – is contained in this Division and, as we have said, gives the Family Court "jurisdiction" to make orders relating to the welfare of children. In deciding whether to make an order under that section, "a court must regard the best interests of the child as the paramount consideration."[40] Subdivision B of Div 10 of Pt VII prescribes rules for determining what is in a child's best interests.

38 Division 9 is concerned with the institution of proceedings for injunctions in relation to children. Division 10 also addresses separate representation of children in curial proceedings. Division 11 is concerned with the relationship between contact orders and family violence orders.

39 Thus, the object of Pt VII and the contents of Divs 1 to 11 read as a whole suggest that, except where expressly mentioned, Pt VII is concerned with proceedings between the parents of children and also with the obligations of parents to children.

40 Division 12 of Pt VII (ss 69A-69ZK) is headed "Proceedings and jurisdiction". Subdivision B of that Division regulates the institution of legal proceedings under Pt VII. Subdivision C confers jurisdiction on the Family Court, each State Family Court and the Supreme Court of the Northern Territory in relation to matters arising under Pt VII. Section 69H(1), which is in subdiv C, specifically confers jurisdiction "on the Family Court in relation to matters arising under this Part." Section 69M declares that the "jurisdiction conferred on or invested in a court by this Division is in addition to any jurisdiction conferred on or invested in the court apart from this Division." Subdivision D is concerned with presumptions of parentage. Subdivision E is concerned with evidence concerning the parentage of a child.

41 Subdivision F is concerned with the application of Pt VII to the States and Territories and is headed "Extension, application and additional operation of Part". The subdivision contains six sections, ss 69ZE-69ZK. Subject to the terms of the section and s 69ZF, s 69ZE extends the operation of Pt VII to New South Wales, Victoria, Queensland, South Australia and Tasmania[41]. Subject to

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40 Section 67ZC(2).

41 Section 69ZE(1).

the same provisions, s 69ZE also extends the operation of Pt VII to Western Australia if the Parliament of that State refers to the Parliament of the Commonwealth certain matters concerning children or if it adopts Pt VII[42]. Those matters are: (1) "the maintenance of children and the payment of expenses in relation to children or childbearing"; and (2) "parental responsibility for children". Western Australia has not made such a referral. Part VII extends to a State only if an Act of the Parliament of the State either refers to the Parliament of the Commonwealth those matters or "matters that include, or are included in, those matters" or adopts Pt VII[43]. Further, the Part extends to a State only in so far as it makes provision with respect to the matters that are referred to the Parliament of the Commonwealth or matters that are incidental to the execution of any power vested in the Commonwealth Parliament in relation to those matters[44]. South Australia has not referred the matter of the welfare of children to the Parliament of the Commonwealth.

42 Section 69ZG applies Pt VII to the Territories.

43 Section 69ZF, which empowers the Governor-General by proclamation to "declare that all the child welfare law provisions of this Part extend to a specified State"[45], has no application in the present case.

44 Section 69ZJ confers jurisdiction on courts where jurisdiction pursuant to Pt VII has been invested in or conferred on the court in matters between residents of different States with respect to the maintenance of children, the payment of expenses in relation to children or child bearing, or parental responsibility in relation to children.

45 Section 69ZH provides:

"**Additional application of Part**

(1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.

(2) By virtue of this subsection, Divisions 2 to 7 (inclusive) (other than Subdivisions C, D and E of Division 6 and sections 66D, 66M and

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42 Section 69ZE(2).

43 Section 69ZE(3).

44 Section 69ZE(4).

45 Section 69ZF(1).

66N), Subdivisions C and E of Division 8, Divisions 9, 10 and 11 and Subdivisions B and C of Division 12 (other than section 69D) have the effect, subject to subsection (3), that they would have if:

(a) each reference to a child were, by express provision, confined to a child of a marriage; and

(b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage.

(3) The provisions mentioned in subsection (2) only have effect as mentioned in that subsection so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage, including (but not being limited to):

(a) the duties, powers, responsibilities and authority of those parties in relation to:

(i) the maintenance of the child and the payment of expenses in relation to the child; or

(ii) the residence of the child, contact between the child and other persons and other aspects of the care, welfare and development of the child; and

(b) other aspects of duties, powers, responsibilities and authority in relation to the child:

(i) arising out of the marital relationship; or

(ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or

(iii) in relation to a dissolution or annulment of that marriage, or a legal separation of the parties to the marriage, that is effected in accordance with the law of an overseas jurisdiction and that is recognised as valid in Australia under section 104.

(4) By virtue of this subsection, Division 1, Subdivisions C, D and E of Division 6, section 69D, Subdivisions D and E of Division 12 and Divisions 13 and 14 and this Subdivision, have effect according to their tenor."

46 Section 67ZC is contained in subdiv E of Div 8. Thus, s 69ZH gives s 67ZC an "effect" as if the references to "children" and "child" in that section

were "confined to a child of a marriage"[46] and the section made "provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage"[47]. However, s 69ZH(1) declares: "Without prejudice to its effect apart from this section, this Part also has effect as provided by this section." The terms of s 69ZH(1) suggest, therefore, that the "jurisdiction" and powers conferred by s 67ZC are not necessarily restricted to those situations contemplated by sub-ss (2) and (3) of s 69ZH. Hence, the jurisdiction and powers conferred by s 67ZC may have two operations: the restrictive operation given to them by those sub-sections and such wider operation as it is possible to deduce from provisions of Pt VII other than s 69ZH. The majority of the Full Court held that s 67ZC had the wider operation.

47 Nicholson CJ and O'Ryan J stated[48] that "the source of power for the court to exercise its jurisdiction over children of a marriage ... is to be found in subdiv C of Pt VII and particularly in ss 69H(1) and 69M." In our view, however, ss 69H(1) and 69M, even when read together, do not operate to confer jurisdiction on the Court in respect of "matters" for the purpose of s 77 of the Constitution. As we have indicated, s 69H(1) confers jurisdiction on the Family Court "in relation to matters arising under this Part." However, s 69H(1) is not a self-contained conferral of *federal* jurisdiction: the "matters" over which the Court has jurisdiction can be identified only by reference to other provisions of Pt VII. Thus, s 69H requires a search for a relevant "matter" arising under Pt VII. It no more determines the question of the Family Court's jurisdiction in respect of children than does the reference to "jurisdiction" in s 67ZC. Section 69M, to which the majority also referred as giving jurisdiction, does not take the position any further. It simply declares that the jurisdiction conferred or invested by Div 12 "is in addition to any jurisdiction conferred on or invested in the court apart from this Division."

48 The Minister contends that the source of the relevant jurisdiction of the Family Court in the present case is Div 12 and not Div 8 (s 67ZC) or Div 9 (s 68B) as the respondents contend. In our opinion, the Minister is correct in asserting that on their face neither Div 8 nor Div 9 confers any relevant jurisdiction in this case – relevant in the sense that they give jurisdiction with respect to a matter "mentioned" in s 76 of the Constitution. The Minister is also almost certainly right in contending that it is Div 12 that confers the relevant

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46 Section 69ZH(2).

47 Section 69ZH(3).

48 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 623.

jurisdiction. This contention of the Minister does not sit well with the declaration in s 69ZH(1), however, if s 67ZC, for example, has "effect" independently of s 69ZH. Nor does it sit well with the statement in par 319 of the Explanatory Memorandum to the Family Law Reform Bill 1994 (Cth) which inserted s 67ZC into the Act. That paragraph provided[49]:

> "The new section 67ZC provides the court with jurisdiction relating to the welfare of children *in addition to* the jurisdiction that the court has under Part VII in relation to children. This jurisdiction is the *parens patriae* jurisdiction explained by the High Court in [*Marion's Case*]." (emphasis added)

49 On the other hand, despite s 69ZH(1), the terms of sub-ss (2), (3) and particularly (4) of s 69ZH suggest that s 67ZC is confined by the terms of s 69ZH(2) and (3). Section 69ZH(4) declares that various provisions of Pt VII have effect according to their tenor. If the provisions identified in s 69ZH(2) and (3) operated independently of Div 12, this declaration would be superfluous. Importantly, the terms of s 69ZH(4) also necessarily imply that the various provisions named in s 69ZH(2) – including s 67ZC – do not operate according to their tenor. If they did, Parliament's enactment of s 69ZG and s 69ZH would be unnecessary.

50 Ultimately, though, in the view that we take of Pt VII, it does not matter whether one accepts the Minister's or the Full Court's construction of s 69ZH. Even if s 67ZC has an operation independently of the terms of s 69ZH(2) and (3), the terms of Pt VII, read as a whole, and the constitutional imperatives of Ch III confine the Family Court's jurisdiction and powers with respect to the welfare of the children in this case in the same way as do s 69ZH(2) and (3).

51 By necessary implication, the parents of a child may seek an order under s 67ZC whether the operation of that section is confined by s 69ZH(2) and (3) or whether it has an operation independently of those sub-sections. The right to seek that order arises from various provisions in Pt VII, but particularly from ss 60B, 61B and 61C. Section 60B(1) declares that the object of Pt VII:

> "is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children."

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49 Family Law Reform Bill 1994 (Cth) Explanatory Memorandum at [319].

Section 61C(1) declares that "[e]ach of the parents of a child who is not 18 has parental responsibility for the child." Section 61B defines this parental responsibility in Pt VII to mean "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children." The provisions of these three sections provide ample support for an application by a parent for an order under s 67ZC, whether the source of the jurisdiction is Div 12 generally or s 69H in particular.

52 By necessary implication, the Family Court may also make an order under s 67ZC that is binding on a parent. Under that section it may also make orders such as those made in *Marion's Case* or those analogous to orders traditionally made by courts exercising the *parens patriae* jurisdiction. Nothing in that section or in the rest of Pt VII, however, suggests that the Family Court has jurisdiction to make orders binding on third parties whenever it would advance the welfare of a child to do so. Nothing in s 67ZC, or in Pt VII generally, imposes – expressly or inferentially – any duty or liability on third parties to act in the best interests of or to advance the welfare of a child. Except where Pt VII expressly imposes obligations on third parties – for example, ss 65M, 65N and 65P – that Part is concerned with the relationship between parents and children and parents' duties in respect of their children. We have already set out s 60B(1), which states the object of Pt VII. Section 60B(2) declares:

> "The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
>
> (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
>
> (d) parents should agree about the future parenting of their children."

53 The orders sought in the present case are not concerned with the relationship between the parents of the children. They do not seek to enforce duties or obligations owed by the parents to the children. They are not analogous to the orders sought in *Marion's Case*, which did not impose any duty or liability on a third party. The object of the orders in the present case is to require the Minister to take or to refrain from taking action in respect of the children. Nothing in Pt VII gives any support for the making of such an order or orders against the Minister. Consequently, no provision or combination of provisions in

Pt VII defines the jurisdiction of the Family Court with respect to a matter involving the Minister. So far as the Minister is concerned, the Act has not defined any jurisdiction of the Family Court with respect to a matter mentioned in s 75 or s 76 of the Constitution.

54 It follows that neither s 67ZC nor s 68B of the Act – alone or in combination with s 69H or s 69ZH – gave the Family Court jurisdiction to:

(i) determine the validity of the detention of an unlawful non-citizen child (who was the child of a marriage) under s 196 of the Migration Act; or

(ii) make orders directing officers in the performance of their functions under the Migration Act in relation to such a child.

Orders

55 The appeal should be allowed. The orders of the Full Court of the Family Court made on 19 June 2003 should be set aside. In place of those orders, there should be substituted an order that the appeal to the Full Court be dismissed. There should be no order in relation to the costs of the appeal to this Court. It was a condition of the grant of the certificate under s 95(b) of the Act that the Minister should pay the reasonable costs of the respondent children and the respondent intervener of and incidental to the appeal to this Court.

GUMMOW, HAYNE AND HEYDON JJ.

The Family Court proceedings

56 On 31 July 2002, two boys identified as A and M and who were then aged approximately 12 and 14 years, instituted a proceeding in the Family Court of Australia by their mother as their next friend. There were three female siblings, then aged approximately 11, nine and six years. The father was granted leave to intervene and sought orders respecting the five children. It has not been disputed that the children are children of the marriage of the father and the mother.

57 The children and their parents are unlawful non-citizens within the meaning of s 14 of the *Migration Act* 1958 (Cth) ("the Migration Act"). At the time of the institution of the proceeding in the Family Court, the children and their mother were detained at an immigration "detention centre" at Woomera in South Australia which was established under the Migration Act; the father then was living in the general community. By the time of the appeal to the Full Court of the Family Court giving rise to the litigation in this Court, the mother and the children had been transferred to another detention centre in South Australia known as the Baxter Immigration Detention Facility ("Baxter") and the father also was detained at Baxter.

58 The claims for relief made in the application to the Family Court illuminated the scope of the controversy which constituted the matter in respect of which the Family Court was said to have the necessary federal jurisdiction; if the Family Court had jurisdiction to determine the controversy it would have power in the exercise of that jurisdiction to give the remedies sought[50].

59 Interim and final orders were sought in the application by A and M that the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") release them from the Woomera detention centre on the ground that, broadly speaking, their continued detention was harmful to their welfare. The orders sought were described by reference to s 68B and s 67ZC of the *Family Law Act* 1975 (Cth) ("the Family Law Act"). Both provisions appear in Pt VII (ss 60A-70Q). Part VII, which is headed "Children", comprises 14 Divisions. It was introduced by s 31 of the *Family Law Reform Act* 1995 (Cth) ("the 1995

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50 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [65].

Act") and since has been amended. The structure of Pt VII was described in *Northern Territory v GPAO*[51] and *U v U*[52].

60 The father sought interim and final orders that the five children reside with him or, in the alternative, that orders be made protective of the children whilst they remained in detention. No particular provisions of Pt VII were identified in his application, but in argument in this Court counsel relied principally upon s 67ZC, which was said both to deal with subject-matter and to confer jurisdiction on the Family Court.

61 On application by the Minister, a judge of the Family Court (Dawe J) dismissed the applications by A and M and by the father. Her Honour did so on the ground that the Family Court did not have any jurisdiction to make any of the orders sought against the Minister.

62 Appeals to the Full Court of the Family Court succeeded[53]. On 19 June 2003, the Full Court (Nicholson CJ and O'Ryan J; Ellis J dissenting) set aside the orders made by Dawe J and ordered that the applications be remitted for rehearing. Thereafter, and following another successful Full Court appeal, the children were, by order made by the Full Court on 25 August 2003, released from immigration detention pending the final hearing of the applications.

The authority of the Family Court

63 The Family Court of Australia is established by s 21 of the Family Law Act as a superior court of record. It follows from the reasoning of this Court in *Re Macks; Ex parte Saint*[54] that, like the Federal Court of Australia, the Family Court has authority to make decisions as to the existence of its jurisdiction in a matter and that its orders in relation thereto are final and binding unless and until set aside on appeal or pursuant to s 75(v) of the Constitution. The primary questions on this appeal by the Minister thus concern the existence and content of the jurisdiction of the Family Court to entertain the applications made to it. That

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51 (1999) 196 CLR 553 at 571-573 [20]-[26], 594-596 [103]-[106].

52 (2002) 211 CLR 238 at 250-251 [53]-[55].

53 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604. In that appeal, the mother was given leave to add the three daughters as parties.

54 (2000) 204 CLR 158.

requires consideration, in particular, of various provisions of Pt VII of the Family Law Act.

The s 95(b) certificate

64 The Minister appeals to this Court not upon a grant of special leave made by this Court pursuant to s 95(a) of the Family Law Act but upon a certificate granted by the Full Court of the Family Court under s 95(b) upon application by the Minister. The anomalous nature of s 95(b) and the difficulties to which certificates thereunder may give rise were considered in detail in the joint judgment of five members of this Court in *DJL v The Central Authority*[55]. That anomaly is the more apparent in the present case, given the remedies available in this Court under s 75(v) of the Constitution for jurisdictional error in the Family Court and the avenues for removal under s 40 of the *Judiciary Act* 1903 (Cth) upon application by the Attorney-General of the Commonwealth.

65 The Full Court gave reasons upon the application by the Minister for the certificate. Their Honours said:

> "We accept that were we to grant such a certificate, the appeal may be considered by the High Court earlier than if we refuse to do so."

However, the Court also noted:

> "[The submission for the Minister was that] it is almost inconceivable that the High Court would not grant Special Leave."

66 The order of business in this Court is not for the presumption of any intermediate appellate court. There was no good ground for the supposition that s 95(b) confers a power to be exercised by reference to a consideration, false in the event, that, by the grant of a certificate in the place of an application under s 75(v) of the Constitution or an application for removal or a grant of special leave, particular litigation displaces or obtains a priority over consideration by this Court of the many matters of urgent and general public importance that at any time stand in its list.

The appeal to this Court

67 In this Court no challenge is made to the issue or terms of the s 95(b) certificate and the appeal must be determined upon its merits. Those merits are

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55 (2000) 201 CLR 226 at 236-240 [12]-[23].

that the decision of Dawe J as to the absence of jurisdiction in the Family Court was correct and the consequential orders that her Honour made should not have been set aside. Accordingly, the appeal to this Court should be allowed and the orders of Dawe J reinstated. We turn to explain why this is so.

The jurisdiction of the Family Court

68 It is necessary to begin with the term "jurisdiction", of which it was said in the joint judgment in *Lipohar v The Queen*[56]:

> "It is a generic term, a point made by Isaacs J in *Baxter v Commissioners of Taxation (NSW)*[57]. It is used in a variety of senses, some relating to geography, some to persons and procedures, others to constitutional and judicial structures and powers. Thus, 'federal jurisdiction' is 'the authority to adjudicate derived from the Commonwealth Constitution and laws'[58] whereas the phrase 'inherent jurisdiction', used in relation to such things as the granting of permanent stays for abuse of process, identifies the power of a court to make orders of a particular description[59].
>
> 'Jurisdiction' may be used (i) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ, or (ii) rather differently, to identify the subject matter of those actions entertained by a particular court, or, finally (iii) to locate a particular territorial or 'law area'[60] or 'law district'[61]."

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56 (1999) 200 CLR 485 at 516-517 [78]-[79].

57 (1907) 4 CLR 1087 at 1142. In *United States v Vanness* 85 F 3d 661 at 663(n) (1996), 'jurisdiction' was said to be 'a word of many, too many, meanings'.

58 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142. See also *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Gould v Brown* (1998) 193 CLR 346 at 379.

59 *Williams v Spautz* (1992) 174 CLR 509 at 518-519; *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at 450-453.

60 An expression used by the Court in *Laurie v Carroll* (1958) 98 CLR 310 at 331, with respect to New South Wales and Victoria. See also *Breavington v Godleman* (1988) 169 CLR 41 at 77, 97, 107.

61 An expression used by Wilson and Gaudron JJ in *Breavington v Godleman* (1988) 169 CLR 41 at 87.

Further, the categories listed in ss 75 and 76 of the Constitution identify the existence of "federal jurisdiction" by a range of characteristics including the character of parties (s 75(iii), (iv)) and the source of the rights and liabilities in contention (s 75(i), s 76(iii)).

69 In *Harris v Caladine*[62], Toohey J distinguished between "jurisdiction" in the sense of authority to decide the range of matters which may be litigated before a court and the powers expressly or impliedly conferred by the legislation governing the court. His Honour added[63] that this distinction between jurisdiction and power could not be applied neatly to the notion of the judicial power of the Commonwealth in Ch III of the Constitution. Of that notion, Toohey J said[64]:

> "[I]t is not concerned with the jurisdiction of particular courts and is broader than the particular powers that courts have in the exercise of their jurisdiction."

70 The determination of the issues which arise on this appeal requires analysis of statute law. That analysis is not assisted by the use of general expressions such as "the welfare jurisdiction" or "the *parens patriae* jurisdiction" as an encouragement to subside from consideration of the statutory construction question affecting Ch III courts into the broad waters of the general law.

71 It should be added immediately that in the text of Pt VII itself the various senses of the term "jurisdiction" are not clearly marked. This appeal turns upon the conferral upon the Family Court of the federal jurisdiction for it to adjudicate the controversy with the Minister. However, as will appear, the term "jurisdiction" is used in some provisions of Pt VII more loosely, and to identify the nature of disputed rights and liabilities (eg "the welfare of children") which, by the exercise of legislative power under s 51 of the Constitution, may provide the subject for adjudication, rather than the conferral of federal jurisdiction by a law made in exercise of the legislative power conferred by s 77 of the Constitution.

72 The institution of the present proceedings invited two inquiries. The first was the source in federal law of the rights and liabilities presented for

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62 (1991) 172 CLR 84 at 136. See also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64].

63 (1991) 172 CLR 84 at 137.

64 (1991) 172 CLR 84 at 137.

adjudication. The second was the identification of the federal law made under s 77 which conferred jurisdiction upon the Family Court. The distinction is explained in various authorities, including *Hooper v Hooper*[65], where the validity of the *Matrimonial Causes Act* 1945 (Cth) was upheld.

73 In its initial form, the Family Law Act was drawn in a fashion which obscured the distinction between these two steps, namely the identification of a "matter" and the law conferring jurisdiction with respect to it. At bottom, the issues on this appeal require consideration of the text and structure of what is now Pt VII to ascertain whether, as the Minister submits, it is in Div 12 (ss 69A-69ZK), headed "Proceedings and jurisdiction", rather than in the earlier provisions of Div 8 (ss 67A-67ZD), headed "Other matters relating to children", and Div 9 (ss 68A-68C), headed "Injunctions", and containing respectively s 67ZC and s 68B, that the relevant (and limited) conferral of jurisdiction upon the Family Court is to be found.

74 It is desirable to approach consideration of the text and structure of what is now Pt VII by first referring to some earlier decisions of this Court about the Family Law Act. Those decisions illustrate how that Act, in its earlier forms, has been held to operate in identifying matters and in conferring jurisdiction with respect to them. From there it is convenient to go to the examination of a number of the provisions of Pt VII in order to reveal the place occupied by the particular provisions which are in issue in this appeal. That examination will reveal that the Minister's submission is correct. It is Div 12 which provides the relevant conferral of jurisdiction on the Family Court. The jurisdiction conferred is limited. Neither s 69ZE nor s 69ZH conferred jurisdiction to decide either of the applications which gave rise to this appeal. Section 69ZE confers jurisdiction on the Family Court in matters the subject of a reference by a State of power, and matters incidental to the execution of a power vested by the Constitution in the federal Parliament in relation to those matters. Neither of the applications which give rise to this appeal was such a matter, the reference by South Australia being limited to matters of maintenance, custody, guardianship and access. Section 69ZH confines the operation of s 67ZC to the parental responsibilities of the parties to a marriage for a child of the marriage.

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65 (1955) 91 CLR 529 at 535-536.

Dowal v Murray[66]

75 It is convenient first to consider some aspects of the Family Law Act in its pre-1995 form. The difficulties referred to above appeared shortly after the commencement of the Family Law Act with such decisions as *Russell v Russell*[67] and *Dowal v Murray*, which were discussed in argument on the present appeal.

76 *Dowal* decided that s 61(4), as it appeared in the Family Law Act as first enacted, was a valid exercise of the power conferred by s 51(xxi) of the Constitution to make laws with respect to marriage. Section 61(1) stated the general proposition:

> "Subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child."

This was followed by s 61(4) which provided:

> "On the death of a party to a marriage in whose favour a custody order has been made in respect of a child of the marriage, the other party to the marriage is entitled to the custody of the child only if the court so orders on application by that other party and, upon such an application, any other person who had the care and control of the child at the time of the application is entitled to be a party to the proceedings."

77 One argument for the Commonwealth was that s 61(4) both created the relevant rights and obligations and conferred jurisdiction on the Family Court to give effect to them[68]. Murphy J appears to have accepted that construction[69], but Gibbs ACJ and Jacobs J[70] located the conferral of jurisdiction in s 39, which provided for the institution of a "matrimonial cause" in the Family Court, and in par (f) of the definition of that expression then appearing in s 4(1).

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66 (1978) 143 CLR 410.

67 (1976) 134 CLR 495.

68 See *Dowal v Murray* (1978) 143 CLR 410 at 413, 437.

69 (1978) 143 CLR 410 at 428-429.

70 (1978) 143 CLR 410 at 417, 427 respectively.

Marion's Case[71]

78 Further questions of construction appeared in *Marion's Case*. The structure of the legislation considered in *Marion's Case* sufficiently resembles the present Pt VII to merit close consideration. The Family Law Act then was in the form taken after the *Family Law Amendment Act* 1983 (Cth) and the further amendments by the *Family Law Amendment Act* 1987 (Cth) ("the 1987 Act").

79 The 1987 Act had gathered in Pt VII most of the provisions of the statute respecting children. In particular, the Parliament exercised under s 51(xxxvii) of the Constitution the power with respect to the references which then had been made in like terms by the Parliaments of four States, New South Wales, Victoria, South Australia and Tasmania. A law made pursuant to a reference shall, in the words of par (xxxvii), "extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law". The references in question here commonly were understood as dealing with ex-nuptial children, but in truth were drawn in broader terms to overcome some of the limitations and uncertainties respecting the scope of the marriage power in s 51(xxi). These had been revealed in a series of decisions in this Court, perhaps beginning with *R v Lambert; Ex parte Plummer*[72] and *Vitzdamm-Jones v Vitzdamm-Jones*[73] and culminating in *Re F; Ex parte F*[74].

80 For example, s 3(1) of the *Commonwealth Powers (Family Law) Act* 1986 (SA) ("the SA Act") had referred "*to the extent to which they are not otherwise included in the legislative powers of the Parliament of the Commonwealth*" matters being:

> "(*a*) the maintenance of children and the payment of expenses in relation to children or child bearing;
>
> (*b*) the custody and guardianship of, and access to, children". (emphasis added)

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71 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

72 (1980) 146 CLR 447.

73 (1981) 148 CLR 383.

74 (1986) 161 CLR 376.

81 Part VII, as then introduced in the 1987 Act, comprised 14 Divisions. Division 2 (ss 60E-60H) was headed "Extension, application and additional operation of Part". Section 60E reflected the terms of the references of power by the States, but also provided (s 60E(3)) that "[t]his Part applies in and in relation to the Territories". Section 60G applied the terms of the references to actions in diversity jurisdiction between residents of different States. Section 60F invoked the legislative powers of the Parliament with respect both to marriage and to divorce and matrimonial causes (s 51(xxii)). In so doing, the Parliament took perhaps a cautious view of the extent of the marriage power, in particular by limiting the effect of other Divisions (including Div 4) so that they applied "only in so far as they make provision with respect to the rights and duties of the parties to the marriage in relation to the child" (s 60F(2)).

82 Division 4 (ss 63-63D) was headed "Jurisdiction of Courts". It conferred federal jurisdiction on the Family Court (among other courts) in relation to "matters arising under this Part" (s 63(1)); that is to say, matters arising in the light of the limitations spelled out in Div 2. In *Marion's Case*, these limitations were of no great moment. This was because the parents who instituted the proceeding and their infant child all resided in the Northern Territory[75], and, as indicated, Pt VII applied there (s 60E(3)). It no doubt was for that reason that, in the judgments in this Court, attention focused upon s 63(1) in its operation, not with Div 2, but with the provisions of Div 5 (ss 63E-66), headed "Custody and guardianship of children", and, in particular, s 64.

83 In general outline, the scheme of Pt VII as it now stands resembles that of Pt VII introduced by the 1987 Act. Subdivision F of Div 12 resembles the previous Div 2 and subdiv C of Div 12 resembles the previous Div 4. Section 67ZC, upon which much reliance was placed in this Court by the respondents, is found in one of the Divisions descending from the previous Div 5. That had included s 64, to which reference was made in *Marion's Case*.

84 The Court concluded in *Marion's Case* that what had been achieved "was a vesting in the Family Court of the substance of the parens patriae jurisdiction, of which one aspect is the wardship jurisdiction"[76]. That statement in the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ was preceded by the passage[77]:

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75 (1992) 175 CLR 218 at 229.

76 (1992) 175 CLR 218 at 257.

77 (1992) 175 CLR 218 at 257.

"As the *Family Law Act* now stands, s 63(1) confers jurisdiction on the Family Court 'in relation to matters arising under this Part'. Section 64(1) of the Act provides:

> 'In proceedings with respect to the custody, guardianship or welfare of, or access to, a child –
>
> ...
>
> (c) ... the court may make such order in respect of those matters as it considers proper, including an order until further order.'

The sub-section does not in terms confer jurisdiction on the Court but it confers power to make orders and *presupposes jurisdiction*.

Whether the source of jurisdiction is to be found primarily in s 64 along with s 63(1) as the appellant argued, or in a much wider range of sections in Pt VII as the Commonwealth argued[78], it is clear that the welfare of a child of a marriage is a 'matter' which arises under Pt VII for the purposes of s 63(1) and is, therefore, an independent subject which may support proceedings before the Family Court. Although there are limits on that jurisdiction, there is no doubt that it encompasses the circumstances of the present case." (emphasis added)

85 Their Honours went on to say that what they had identified as "the welfare jurisdiction" conferred in this way upon the Family Court was "similar to the parens patriae jurisdiction"[79].

P v P[80]

86 This case also was decided when Pt VII was in the form taken after the 1987 Act. In the joint judgment, Mason CJ, Deane, Toohey and Gaudron JJ said that *Marion's Case* established that Pt VII[81]:

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78 See, eg, ss 64(1B), 65, 70C.

79 (1992) 175 CLR 218 at 258.

80 (1994) 181 CLR 583.

81 (1994) 181 CLR 583 at 598.

> "has invested the Family Court with a welfare jurisdiction in respect of a child of a marriage which encompasses the substance of the traditional parens patriae jurisdiction freed from the preliminary requirement of a wardship order[82]".

Their Honours referred to s 63(1) and s 64(1)(c) of the Family Law Act and, in passing, to s 60F. That latter provision was the only section in Div 2 to which reference was made. Unlike the circumstances in *Marion's Case*, the general provision with respect to the Territories made elsewhere in Div 2 (in s 60E(3)) was not attracted. The child in question in *P v P* resided in New South Wales, as did the applicant mother[83]. The father was a respondent, but supported the application; the marriage of the parents had been dissolved by Family Court order in 1990, three years before the application[84].

87 In those circumstances, this Court appears to have proceeded on the footing that, by virtue of s 60F(2), s 64(1)(c) had effect with reference to a child of a marriage in so far as, among other things, it made provision with respect to the rights and duties of the parties to the marriage in relation to the welfare of the child. That this is so is confirmed by later remarks of their Honours concerning the scope of the marriage power as having supplied (with s 122) an additional basis for the decision in *Marion's Case*[85].

AMS v AIF[86]

88 The subsequent decision of this Court in *AMS v AIF* involved consideration of the structure of the Family Law Act following its amendment by the 1987 Act. The significance of what was then Div 2 of Pt VII, including s 60E(3) which dealt with the Territories, for the construction of the general custody and guardianship provisions of Div 5 was stressed in the judgments[87]. As will appear, comparable considerations apply to Pt VII in its post-1995 form.

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82 (1992) 175 CLR 218 at 256, 294, 318.

83 (1994) 181 CLR 583 at 591.

84 (1994) 181 CLR 583 at 591.

85 (1994) 181 CLR 583 at 599-600.

86 (1999) 199 CLR 160.

87 (1999) 199 CLR 160 at 170-171 [14]-[18], 242 [250]-[251].

89 In both its manifestations, Pt VII reflects a pattern in federal legislation[88] whereby provisions in comprehensive terms, apparently unconfined by constitutional limitations upon legislative power, are given specific and limited (but perhaps overlapping) operation by reference to identifiable heads of power.

The Act in its present form

90 Divisions 5, 6 and 7 of Pt VII deal with what are identified as parenting orders, including child maintenance orders. Division 8 (ss 67A-67ZD) is headed "Other matters relating to children" and contains subdivs A-E. Subdivision A comprises s 67A, which states:

> "This Division deals with:
>
> (a) the liability of a father to contribute towards child bearing expenses if he is not married to the child's mother (Subdivision B); and
>
> (b) orders for the location and recovery of children (Subdivision C); and
>
> (c) the reporting of allegations of child abuse (Subdivision D); and
>
> (d) other orders about children (Subdivision E)."

It is subdiv E, comprising ss 67ZC and 67ZD, which is of particular importance. Section 67ZC has a heading, "Orders relating to welfare of children", and states:

> "(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
>
> (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

(Division 10, subdiv B (ss 68E-68K) makes detailed provision for the ascertainment of the "best interests" of children.)

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88 Another instance is the *Disability Discrimination Act* 1992 (Cth), s 12.

91 In par 319 of the Explanatory Memorandum on what was the Family Law Reform Bill 1994, it was said:

> "The new section 67ZC provides the court with jurisdiction relating to the welfare of children in addition to the jurisdiction that the court has under Part VII in relation to children. This jurisdiction is the *parens patriae* jurisdiction explained by the High Court in [*Marion's Case*]."

92 Shortly after that statement was made, the Court determined in the *Native Title Act Case*[89] that s 12 of the *Native Title Act* 1993 (Cth) was invalid. Section 12 gave to the common law of Australia in respect of native title "the force of a law of the Commonwealth". One of the grounds upon which the provision was held invalid was that if the "common law" referred to in s 12 was understood as the body of law which is created and defined by the courts, the section attempted to confer legislative power upon the judicial branch of government[90].

93 In recent times, the *parens patriae* jurisdiction referred to in *Marion's Case* has, at least in the exercise of the "inherent" jurisdiction inherited by the High Court of Justice in England and Wales, not been treated as static or frozen[91]. In *AMS v AIF*, Gleeson CJ, McHugh and Gummow JJ observed[92]:

> "Chancery asserted its authority with respect to infants upon various grounds. These included (a) the ordinary residence of the child within the territorial jurisdiction; (b) allegiance to the Crown and (c) physical presence, even falling short of residence, if protection of the Court were needed[93]. Further, as Mason J put it in *Carseldine v Director of Department of Children's Services*[94]:

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89 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 484-488.

90 (1995) 183 CLR 373 at 485.

91 Cretney and Masson, *Principles of Family Law*, 6th ed (1997) at 703-712; Seymour, "Parens Patriae and Wardship Powers: Their Nature and Origins", (1994) 14 *Oxford Journal of Legal Studies* 159 at 178-187.

92 (1999) 199 CLR 160 at 168-169 [11].

93 *Holden v Holden* [1968] VR 334; *McM v C [No 2]* [1980] 1 NSWLR 27; *In re D (an Infant)* [1943] Ch 305.

94 (1974) 133 CLR 345 at 366.

> 'The courts have always been prepared, when the welfare of the child requires it, to divorce custody from guardianship; the existence of guardianship in one person is not a bar to the making of an order for custody in favour of another.'"

On the present appeal the Court was referred to a number of modern decisions of the English courts dealing with the extent of this jurisdiction. They included *In re B (Infants)*[95], *In re Mohamed Arif (An Infant)*[96], *In re X (A Minor)*[97] and *In re F (A Minor)*[98]. Nevertheless, no attempt has been made to treat s 67ZC as invalid by parity of reasoning with that in the *Native Title Act Case*. Accordingly, we say no more upon the subject.

94 Division 9 (ss 68A-68C) is headed "Injunctions". Section 68B applies where "proceedings are instituted in a court having jurisdiction under this Part for an injunction in relation to a child" (s 68B(1)). It details a range of injunctive relief which may be considered appropriate for the welfare of the child in question. Section 68B was not a new provision. It appears largely to have re-enacted what was s 70C previously appearing in Pt VII, Div 13, then headed "Injunctions".

95 Division 12 (ss 69A-69ZK) of Pt VII controls and limits the operation of the balance of Pt VII. This is indicated by the heading of Div 12, "Proceedings and jurisdiction", and the statement in the first section, s 69A:

> "This Division deals with:
>
> (a) the institution of proceedings and procedure (Subdivision B); and
>
> (b) jurisdiction of courts (Subdivision C); and
>
> (c) presumptions of parentage (Subdivision D); and
>
> (d) parentage evidence (Subdivision E); and

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95 [1962] Ch 201.

96 [1968] Ch 643.

97 [1975] Fam 47.

98 [1990] Fam 125.

(e) the places and people to which this Part extends and applies (Subdivision F)."

96 Turning first to subdiv B (ss 69B-69F), the effect of s 69B is to render the provisions of Pt VII imperative; proceedings that may be instituted under Pt VII are not to be instituted otherwise than under that Part. Section 69C(2) identifies those who may institute proceedings including those proceedings identified in s 67ZC and s 68B. The sub-section states:

"Any other kind of proceedings under this Act in relation to a child may, unless a contrary intention appears, be instituted by:

(a) either or both of the child's parents; or

(b) the child; or

(c) a grandparent of the child; or

(d) any other person concerned with the care, welfare or development of the child."

In the circumstances of the present case, the presence of the children in Australia was a necessary condition to the institution of the proceedings (s 69E(1)(a)).

97 Subdivisions C and F work together. They confer jurisdiction upon certain courts and do so within selected limits of federal authority concerning both "matters" for the conferral of federal jurisdiction and the creation of rights and liabilities in the exercise of legislative powers found in s 51 of the Constitution.

98 It is convenient to begin with subdiv C (ss 69G-69N). Jurisdiction is conferred by s 69H(1) on the Family Court "in relation to matters arising under [Pt VII]". That expression includes proceedings under the injunction provisions of Div 9, including s 68B (s 69G). However, looking outside subdiv C, par (d) of s 31(1) states that jurisdiction is conferred with respect to "matters ... with respect to which proceedings may be instituted in the Family Court under this Act". Further, s 33 confers jurisdiction in respect of matters which are "associated" with those in which the jurisdiction of the Family Court is invoked or with those arising in proceedings before it. These "associated matters" are limited to categories of "matter" of federal jurisdiction listed in ss 75 and 76 of the

Constitution[99]. These provisions are to be read together with s 69H. This follows from s 69M. That states:

> "The jurisdiction conferred on or invested in a court by this Division is in addition to any jurisdiction conferred on or invested in the court apart from this Division."

99 Subdivision F (ss 69ZE-69ZK) is headed "Extension, application and additional operation of Part". This may be compared with the heading to Div 2 of the previous Pt VII, to which reference has been made earlier in these reasons. Likewise, the identical heading to Div 4 of the previous Pt VII, "Jurisdiction of courts", anticipated the heading to subdiv C of Div 12 of the present Pt VII.

100 Section 69ZE again reflects the terms of the references by the States to matters being:

> "(i) the maintenance of children and the payment of expenses in relation to children or child bearing;
>
> (ii) parental responsibility for children" (s 69ZE(2)(a)).

Section 69ZJ again enlivens the diversity jurisdiction. Section 69ZG, the counterpart of which was important in *Marion's Case* but which is not important in the present case, again states that the Part "applies in and in relation to the Territories". Section 69ZK is a limitation upon the exercise of jurisdiction otherwise exercised under the Family Law Act. It is designed to give some measure of insulation to the operation of the child welfare laws of the States and Territories. A "child welfare law" is a State or Territory law or class of such laws prescribed under the Family Law Act (s 60D(1)).

Section 69ZH

101 Greatest attention was given in argument to s 69ZH. Sub-sections (1)-(3) thereof so far as relevant provide:

> "(1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.
>
> (2) By virtue of this subsection, [s 67ZC and s 68B] have the effect, subject to subsection (3), that they would have if:

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99 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 494-495, 516, 521-522, 536-539, 547.

(a) each reference to a child were, by express provision, confined to a child of a marriage; and

(b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage.

(3) The provisions mentioned in subsection (2) *only have effect* as mentioned in that subsection *so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage*, including (but not being limited to):

(a) the duties, powers, responsibilities and authority of those parties in relation to:

(i) the maintenance of the child and the payment of expenses in relation to the child; or

(ii) the residence of the child, contact between the child and other persons and other aspects of the care, welfare and development of the child; and

(b) other aspects of duties, powers, responsibilities and authority in relation to the child:

(i) arising out of the marital relationship; or

(ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or

(iii) in relation to a dissolution or annulment of that marriage, or a legal separation of the parties to the marriage, that is effected in accordance with the law of an overseas jurisdiction and that is recognised as valid in Australia under section 104." (emphasis added)

The paramountcy of s 69ZH(2) in its operation upon provisions such as s 67ZC and s 68B is emphasised by s 69ZH(4). By "virtue of [that] subsection", the provisions of subdiv F (including, of course, the earlier parts of s 69ZH) "have effect according to their tenor".

102 Section 104 deals with the recognition in Australia of dissolutions or annulments of marriages and the legal separation of parties to marriages, which are effected in accordance with the law of an overseas jurisdiction. It would

appear to be supported both by the power with respect to divorce and matrimonial causes and by the power with respect to external affairs; so also sub-par (iii) of sub-s (3)(b) of s 69ZH. Sub-paragraph (ii) of par (b) invokes the power with respect to divorce and matrimonial causes, whilst sub-par (i) depends upon the marriage power, as does par (a). Both pars (a) and (b) are species of the genus identified in s 69ZH(3), namely "provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage".

Conclusions

103 The Minister submits that there were two potential applications of Div 12 of Pt VII to the children in South Australia. The first was found in s 69ZE. That represents a continued exercise of the federal legislative power consequent upon the State references. Those references, as indicated in s 3(1) of the SA Act, which has been set out, were limited by referring the subject-matter only to the extent to which it was not otherwise within federal legislative power. That would include the marriage and divorce powers and the Territories powers which underpin, but may not be exhausted by, other particular provisions in Div 12.

104 In any event, the references were limited to matters of maintenance, custody, guardianship and access. In *Marion's Case*[100], Mason CJ, Dawson, Toohey and Gaudron JJ indicated that orders of that description were of a narrower genus than those relating to the welfare of a child.

105 The second potential application was in the combination of s 69ZH and s 67ZC. However, in its terms, s 69ZH confines the operation of s 67ZC to the parental responsibilities of the parties to a marriage for a child of the marriage. The result, the Minister submits, is that neither of these potential applications of Div 12 of Pt VII could be supported in the present litigation. That submission should be accepted. The same is to be said of reliance upon the injunction provision in s 68B in conjunction with s 69ZH.

106 In response, the respondents submit that s 67ZC and s 68B are to be given effect according to their terms. That effect is said to be, by reason of the use in the sections of the slippery term "jurisdiction", both to create subject-matter for adjudication and to provide curial authority to determine the relevant rights and obligations.

107 Particularly with respect to s 67ZC, it is submitted that if the phrase "relating to the welfare of children" be read down to identify children of a

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100 (1992) 175 CLR 218 at 255.

marriage, then the section is supported by the marriage power. That power is said to extend to the protection of children from any interference or risk of interference with their welfare, direct or indirect, and to support orders against third parties. Analogy is drawn with decisions such as *In re X (A Minor)*[101] given in the *parens patriae* jurisdiction of other courts.

108 Alternatively, it is submitted that s 67ZC is supported as an exercise of the power with respect to external affairs. Reliance is placed upon provisions of the Convention on the Rights of the Child, which entered into force for Australia on 16 January 1991[102]. In response, the Minister emphasises the statement in the joint judgment in the *Industrial Relations Act Case*[103] that, particularly in the implementation of treaty obligations, the external affairs power has a purposive aspect. The Minister refers to the legislative history in the Parliament of the Bill for what became the 1995 Act as indicative of the absence of any such legislative will.

109 Those references to legislative history in turn give rise to a further consideration. In *Newcrest Mining (WA) Ltd v The Commonwealth*[104], Brennan CJ observed:

> "So long as the Parliament has power to enact a law, from whatever provision of the Constitution that power be derived, the law is valid. As Starke J said in *Ex parte Walsh and Johnson; In re Yates*[105]:
>
> > 'A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, *from whatever source derived*. [The section under challenge] can be justified, in my opinion, if it is competent under any of the powers vested in Parliament, whatever the title of the Act, and whatever indications there are in the Act as to the precise power under which it may be suggested that Parliament purported to act.' (Emphasis added.)"

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101 [1975] Fam 47.

102 [1991] *Australian Treaty Series*, No 4.

103 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 487.

104 (1997) 190 CLR 513 at 534. See also *Spratt v Hermes* (1965) 114 CLR 226 at 278; *R v Hughes* (2000) 202 CLR 535 at 548 [15].

105 (1925) 37 CLR 36 at 135.

There may be a question as to whether those remarks have general application to instances of asserted exercise of the power with respect to external affairs in the implementation of treaty obligations.

110 It is unnecessary and would be inappropriate to embark upon further consideration of these various matters. This is because the submissions by the respondents fail at the threshold. The submission that s 67ZC and s 68B are to be given effect according to their terms should be rejected. Section 67ZC, which appears in Div 8, and s 68B, which appears in Div 9, must be read in the manner indicated earlier in these reasons, with the provisions of Div 12, in particular s 69ZH. It may be that s 69ZH does not represent an exhaustive exercise of the marriage power and that the marriage power may extend to authorise laws respecting the welfare of children of a marriage in the fashion urged by the respondents. However, given the complex adjudicative history of the exercises of the marriage power in the past, it is perhaps not surprising that some caution is manifest in the terms of s 69ZH. At all events, the terms of that provision are limiting and decisive.

111 The provisions of subdiv F of Div 12, including ss 69ZE, 69ZG, 69ZH and 69ZJ, control the application of the preceding provisions of Pt VII. They do not merely add something onto an operation which those earlier provisions have in their own right. They consist of a complete and exclusive statement of the application of the earlier provisions. That this is so follows from s 69A(e), which provides that subdiv F of Div 12 (not any earlier provision) deals with the places and people to which Pt VII extends and applies. It follows from the form of s 69ZE, and s 69ZG, neither of which, unlike a section which operates in supplementation of some provisions having independent application[106], is expressed to be "without prejudice to" the effect of those provisions. It follows from s 69ZH(1), which provides that Pt VII has effect as provided by s 69ZH without prejudice to its effect apart from "this section" – not "this subdivision"; if the latter word had been used, it would point against the construction being advanced, and use of the former word favours it. It follows from s 69ZH(4), which provides that certain miscellaneous provisions of Pt VII which are not those described in s 69ZH(2) have effect according to their tenor: for this would be unnecessary if the provisions had effect according to their tenor in any event, and implies that the provisions of Pt VII which are described in s 69ZH(2) do not have effect according to their tenor at all, but only according to the terms of s 69ZH(2) and (3). It follows from the fact that, if the provisions of Pt VII described in s 69ZH(2) did apply according to their tenor, s 69ZG and s 69ZH would have been unnecessary.

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106 eg *Trade Practices Act* 1974 (Cth), s 6(1).

112 The respondents rely on the expression "extends" in s 69ZE and on the word "Extension" in the heading to subdiv F and in the heading to s 69ZE. This language does not imply that there was some independent operation of earlier provisions which is being enlarged; it means only that, if the conditions provided for in s 69ZE are satisfied, Pt VII extends, in the sense of applies, to particular States. This construction of Pt VII is consistent with and reflects the reasoning in *Northern Territory v GPAO*[107].

113 That conclusion makes it unnecessary to consider the further questions that would arise upon the construction advanced by the respondents respecting the intersection between the operation of the Family Law Act and the Migration Act. Nor is it appropriate here to embark upon a consideration of any remedy which might be available in a court of broader jurisdiction in respect of the wrongful or illegal detention of children[108] and others, and which was focused more sharply upon the legality of the detention itself than upon the adverse effects of the detention upon the welfare of the detainees[109].

Orders

114 The appeal to this Court should be allowed. The orders of the Full Court of the Family Court made on 19 June 2003 should be set aside and in place thereof it should be ordered that the appeal to the Full Court be dismissed. There should be no order for the costs of the appeal to this Court. It was a condition of the grant of the certificate under s 95(b) of the Family Law Act that the Minister pay the reasonable costs of the respondent infants and the respondent intervener of and incidental to the appeal to this Court, irrespective of the outcome of such appeal.

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107 (1999) 196 CLR 553 at 573 [25], 595 [104]-[105], 611 [157], 650 [254].

108 Simpson, *A Treatise on the Law and Practice relating to Infants*, (1875) at 104; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 627 [94]; *Barnardo v McHugh* [1891] AC 388; *Clarke v McInnes* [1978] 1 NSWLR 598; *In re Mohamed Arif (An Infant)* [1968] Ch 643; *In re F (A Minor)* [1990] Fam 125.

109 cf *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36; *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *R v Davey; Ex parte Freer* (1936) 56 CLR 381; *R v Green; Ex parte Cheung Cheuk To* (1965) 113 CLR 506; *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168.

115 At the time of the grant of the certificate under s 95(b) of the Family Law Act, which founds the appeal in this Court, the Full Court had made no costs orders respecting the proceedings before Dawe J and the Full Court. This Court reserved its decision on the appeal on 30 September 2003. Thereafter, on 13 April 2004, the Full Court made a costs order and delivered supporting reasons, with reference to the special costs provisions in s 117 of the Family Law Act. The Full Court made a costs order against the Minister. Given the order of events just described, no question respecting that costs order has arisen in this Court.

116 KIRBY J. On the face of things, it appears doubtful that the Family Court of Australia, exercising jurisdiction under the *Family Law Act* 1975 (Cth) ("the FLA"), would have jurisdiction to decide the validity of the detention of alien children under the *Migration Act* 1958 (Cth) ("the MA") and the power to make orders directing the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") and federal officials, required under the MA to detain the children, to release them for reasons of their welfare.

117 This intuitive response to the central problem in this appeal is not shaken by demonstration of the fact that the children in question are children of a "marriage", a relationship attracting relevant constitutional powers[110] to the Federal Parliament upon the basis of which, in part, the FLA was enacted. On the contrary, the instinctive conclusion is reinforced by the knowledge that the "marriage" in question is uncontested; that it is the subject of no procedures for divorce nor any other matrimonial cause in the Family Court; and that, to this extent, the invocation of the jurisdiction of the Family Court seems contrived.

118 The MA establishes a highly detailed and complex scheme for the determination of the rights and obligations of constitutional aliens[111] (called "non-citizens" in the MA) present in Australia. It makes no relevant distinction between those who are adults and those who are children. It would therefore appear odd for the Family Court, established by the FLA[112], to have the jurisdiction and power to make orders intruding into the implementation and administration of the MA.

119 The oddity springs essentially from the functions, jurisdiction and powers of the Family Court. Although a superior court of record[113], it is a court of defined, specialised jurisdiction. One would not, therefore, normally expect it to concern itself with the validity or duration of detention, or other acts done, under the MA. Normally, one would expect any such challenges to be initiated in the original jurisdiction of this Court[114] or in the Federal Court of Australia[115].

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110 Constitution, s 51(xxi) ("marriage"), s 51(xxii) ("divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants").

111 Constitution, s 51(xix) ("naturalization and aliens").

112 FLA, s 21. See reasons of Gummow, Hayne and Heydon JJ at [63].

113 FLA, s 21(2).

114 eg under the Constitution, s 75(iii) or s 75(v).

115 eg under the *Federal Court of Australia Act* 1976 (Cth), ss 19, 21, 22, 23 or in proceedings for judicial review of relevant tribunals. See MA, ss 475A, 476.

120 The suggestion of a general, even comprehensive[116], child welfare jurisdiction in the Family Court following the passage of the *Family Law Reform Act* 1995 (Cth) ("the FLRA") does not allay the foregoing doubts. Notwithstanding the FLRA, it would not normally be expected that the Family Court would enjoy jurisdiction, or exercise powers, in relation to a teenage child committed to serve a term of imprisonment in a civil custodial institution, on the ground that orders on its part were necessary and appropriate for that child's welfare. On the face of things, any such orders would appear to involve the Family Court intruding beyond its proper functions, such functions being understood having regard to the context in which its powers are granted to it. If the Family Court could not direct orders to the lawful custodian of a child prisoner serving a criminal sentence, how could it enjoy the power to make orders directed to the Minister or the officers of the Minister's department with respect to the detention of a child under the MA? How could the Family Court do so requiring conduct on the part of the Minister and federal officers apparently different from the obligations expressly imposed on them by the MA?

121 These are the questions that lie at the threshold of the determination of the many legal issues that were argued in this appeal[117]. Intuition can be a useful check where the law appears to have taken a wrong turning[118]. In the courts, it is commonly based on long years of experience in the law, even if the exact reasoning is not at first consciously identified. On the other hand, intuition can sometimes be misleading or wrong[119]. Where the rights of vulnerable persons under valid legislation are in question, it is often necessary to keep judicial intuition in check "for sometimes it will be based unconsciously on the very attitudes that the law is designed to correct and redress"[120].

122 In the end, in cases of contest such as this, there is no substitute for legal analysis. The analysis must be addressed to the detailed provisions of the law in

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116 cf *Northern Territory v GPAO* (1999) 196 CLR 553 at 647 [243].

117 From orders of the Full Court of the Family Court of Australia: *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604.

118 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 642 [164]; *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (2003) 77 ALJR 1396 at 1421 [137]; 199 ALR 497 at 531.

119 *Purvis v New South Wales (Department of Education and Training)* (2003) 78 ALJR 1 at 6-7 [19]; 202 ALR 133 at 139-140.

120 *Purvis v New South Wales (Department of Education and Training)* (2003) 78 ALJR 1 at 7 [19]; 202 ALR 133 at 140 (footnote omitted).

question, not to generalities which may be displaced, or reversed, by new legislation or by new insights about the old law.

The facts, legislation and issues

123 *The facts and litigation*: The history of these proceedings is set out in other reasons[121]. It is there explained how the primary judge in the Family Court (Dawe J) originally dismissed the application for relief directed to the lawfulness of the detention of the respondent children, including relief claimed in the form of orders obliging their release from immigration detention.

124 The primary judge concluded that the welfare jurisdiction of the Family Court, on the basis of which the relief was claimed, had to be "exercised within the usual field of family law". That jurisdiction did not "extend to a power to override the exercise of any statutory power [belonging to the Minister under the MA] merely because that exercise of power may impact upon the best interests of children"[122].

125 Against this rejection of relief, on the stated jurisdictional grounds, an appeal was taken to the Full Court of the Family Court. That Court ("the first Full Court") divided[123]. As the findings of the first Full Court are fully explained elsewhere, I will not repeat them[124]. That Court allowed the appeal. Following the first Full Court's orders the proceedings resumed at first instance in the Family Court. Once again they reached a Full Court[125] ("the second Full Court"). It is unnecessary to detail these developments. Suffice it to say that, consistently with the reasoning of the majority of the first Full Court, the second Full Court ordered the release from immigration detention of the respondent children. It did so under conditions of reporting expressed in its orders. This Court was informed that, pursuant to those orders, the children were released. The central issue in the Minister's appeal to this Court is whether the Family Court had the

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121 Reasons of Gleeson CJ and McHugh J at [3]-[5]; reasons of Gummow, Hayne and Heydon JJ at [56]-[62]; reasons of Callinan J at [181]-[197].

122 See reasons of Callinan J at [187].

123 Nicholson CJ and O'Ryan J; Ellis J dissenting in part. See *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604.

124 Reasons of Gleeson CJ and McHugh J at [4]; reasons of Gummow, Hayne and Heydon JJ at [62]; reasons of Callinan J at [192], [197].

125 Reasons of Callinan J at [194]. The second Full Court was constituted by Kay, Coleman and Collier JJ: see *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 621.

jurisdiction and power to determine in this way the applications brought on behalf of the children.

126 *The certificate under FLA s 95(b)*: Following the orders of the first Full Court, the Minister applied to that Court for a certificate pursuant to s 95(b) of the FLA, in order to permit the Minister to appeal to this Court without further application. In the exercise of the jurisdiction conferred by the Parliament, the first Full Court granted such a certificate[126]. That certificate thereby invoked the appellate jurisdiction of this Court, to be exercised in accordance with the Constitution[127].

127 The reasons of Gummow, Hayne and Heydon JJ criticise the provision of the certificate and the reasons given by the first Full Court for granting it. The latter are described as exhibiting a "presumption"[128] on the part of an intermediate appellate court. I disassociate myself from both of these criticisms.

128 No party to this appeal submitted that the provision in s 95(b) of the FLA for a certificate to be granted by the Full Court of the Family Court was beyond the constitutional powers of the Parliament. The language of s 73 of the Constitution states that the appellate jurisdiction of this Court is subject to "such exceptions and … regulations as the Parliament prescribes"[129]. It cannot be said that the prescription by the Parliament, in terms of s 95(b) of the FLA, was ill-considered. On the contrary, the broad scope of the power to "prescribe" has been upheld by this Court in a case where that power was used to enlarge this Court's control over its own business[130].

129 Just as the Parliament can *enlarge* the Court's power by prescription it can, in a particular case, *diminish* it. It can do so as long as what it prescribes amounts to an "exception" or "regulation" of the constitutional facility to hear and determine appeals as envisaged by the Constitution – in this case an appeal

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126 *Minister for Immigration and Multicultural and Indigenous Affairs v B (Infants) [No 2]* (2003) 175 FLR 426 at 437 [43].

127 Constitution, s 73.

128 Reasons of Gummow, Hayne and Heydon JJ at [66].

129 The power of a court *a quo* to grant a certificate for an appeal is not uncommon. In the case of the Judicial Committee of the Privy Council, a power of certification was granted to this Court by s 74 of the Constitution in respect of *inter se* questions, as there defined. It was only exercised once: *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182.

130 *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 208-216.

to this Court from an "other federal court". There may well be good reasons why, in the context of family law, the Parliament afforded the power of certification to the Full Court of the Family Court. In some legal circles, family law is not regarded as having the importance of, say, commercial law. If the Parliament, acting under the Constitution, decides otherwise, it is not for this Court to call its decision "anomalous"[131]. To do so risks the accusation of a presumption on our part[132].

130 Nor were the reasons given by the judges of the Full Court irrelevant to the exercise of the power granted to them in the form of s 95(b) of the FLA. If the power is valid (as was not challenged) the duty of the judges was to consider all matters relevant to the exercise of that power[133]. They were not excused from doing so because some might wish that the power did not exist or prefer that this Court should enjoy exclusive control of its own business, which by s 95(b) of the FLA it does not. It would have been an unlawful abdication of a jurisdiction conferred on the Family Court by the Parliament for the Full Court to adopt such a posture. Respect for judicial hierarchy necessarily adjusts to the provisions of valid federal law imposing lawful judicial powers.

131 As Callinan J remarks, the questions of law raised in the application for a certificate were undoubtedly important for the jurisdiction of the Family Court[134]. Potentially, the first Full Court's decision had implications for hundreds of other children held in immigration detention. The earliest possible hearing of an appeal by this Court was therefore a proper and responsible matter to be considered by the Full Court. The obligations of a Minister were involved. Arguably, the repeatedly expressed will of the Parliament concerning the detention of unlawful non-citizens had been breached. Certainly, a clash between two federal laws (the FLA and the MA) was presented for resolution. Status and liberty were at stake. The grant of the certificate would save the time and cost otherwise inevitably incurred in requiring the Minister to proceed by a separate application to this Court for special leave to appeal. So much was no more than common sense. To ignore the consideration of additional delay would have been to ignore a relevant matter.

132 I do not accept that events have shown that the assumption of the Full Court that time would be saved by granting a certificate to the Minister was false. So long as the certification provision remains part of the law, it is quite wrong to

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131 Reasons of Gummow, Hayne and Heydon JJ at [64].

132 cf *DJL v Central Authority* (2000) 201 CLR 226 at 259 [80].

133 cf *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 504-507 [72]-[79].

134 Reasons of Callinan J at [195].

criticise the Full Court for referring to a consideration plainly relevant to its exercise. If this Court desires the repeal of the certification facility in s 95(b) of the FLA, there are ways to express that desire that do not involve criticising judges for doing no more than their duty in response to an application before them pursuant to a valid federal law.

133 *The legislation and issues*: The relevant provisions of the FLA[135] and the MA[136] respectively are set out, or described, in the reasons of the other members of this Court. So are the questions raised by the Full Court's certificate, so far as it concerns the first issue "of law and of public interest"[137] identified by that Court[138].

134 However, three other issues were isolated by the first Full Court in the certificate that it issued[139]. The second issue concerned whether the provisions of Pt VII of the FLA were supported by s 51(xxix) of the Constitution as implementing the United Nations Convention on the Rights of the Child ("the UNCROC")[140] or have only a more limited operation[141]. The third issue concerned "[w]hether the detention of a child who is an 'unlawful non-citizen' within the meaning of the *Migration Act* is beyond the authority conferred by that Act when that detention extends over a lengthy period or its duration is indefinite". The fourth and connected issue was "whether the detention of a child is 'indefinite' if the child lacks capacity to make a request under s 198(1) of that Act".

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135 Reasons of Gleeson CJ and McHugh J at [24]-[46]; reasons of Gummow, Hayne and Heydon JJ at [90]-[102]; reasons of Callinan J at [199]-[203].

136 Reasons of Callinan J at [217].

137 *Minister for Immigration and Multicultural and Indigenous Affairs v B (Infants) [No 2]* (2003) 175 FLR 426 at 437 [43].

138 Reasons of Gleeson CJ and McHugh J at [5]; reasons of Gummow, Hayne and Heydon JJ at [67].

139 *Minister for Immigration and Multicultural and Indigenous Affairs v B (Infants) [No 2]* (2003) 175 FLR 426 at 437 [43].

140 Adopted and open for signature on 20 November 1989; entered into force 2 September 1990 in accordance with Art 49; entered into force for Australia 16 January 1991: [1991] *Australian Treaty Series* No 4.

141 As provided for in subdiv F of Div 12 of Pt VII of the FLA.

135 *The intersection of the MA and the FLA*: I state the additional questions contained in the Full Court's certificate because, in my opinion, the resolution of this appeal is to be found in a reflection on the answers to the third and fourth questions. It is those questions that present the issues essential for the intersection of the FLA and the MA in these proceedings. If, as I believe, they must be resolved in favour of the Minister, it is unnecessary to decide the ambit, scope and even validity of the provisions for the welfare jurisdiction of the Family Court under the FLA. Such jurisdiction, and the powers that accompany it in respect of the welfare of children, can be assumed to exist and to be valid for the purposes of the appeal. However, if, as I would conclude, those powers do not permit the Family Court to exercise its welfare jurisdiction and powers in the manner attempted in relation to children in immigration detention under the MA, elaboration of the welfare jurisdiction and powers under the FLA is irrelevant for immediate purposes. It can be left to another case on another day.

136 I prefer to chart the metes and bounds of the jurisdiction and powers of the Family Court in welfare cases in a more normal case where the welfare of children is invoked without the complications presented in this case by the detention of the respondent children under the MA. As will be shown, that detention is part of a deliberate policy of the Australian Parliament, applicable without differentiation between alien adults and children. So long as it is constitutionally valid, it must be given effect by Australian courts. This is so, despite general provisions for child welfare in other legislation, including the FLA. It is so even if it brings Australia into contravention of its obligations under international law.

A deliberate statutory policy of mandatory detention

137 *Narrowing the essential issues*: It is convenient to start by addressing the critical issue in this appeal by reference to what I regard as the crux of the respondents' submissions about the illegality of the detention of the children under the MA.

138 The first Full Court accepted that, if the children's detention was lawful, the Family Court would have no jurisdiction or power under the FLA to make orders addressed to the Minister or other officials concerning the release of the children[142]. The key that was propounded to authorise that Court, as a matter of law, to intrude upon the powers of the Minister and migration officials to detain the children under the MA[143], had to be found by superimposing the *general* provisions of the FLA upon the *particular* provisions of the MA. Hence, various

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142 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 668-669 [400].

143 Especially MA, ss 5(1) (definition of "immigration detention"), 189, 196 and 273.

attempts were made to undermine the lawfulness of the "detention" of the children under the MA.

139 If a flaw could be established in the lawfulness of the children's detention by reference to the Constitution, the MA or some other law, interpreted in the light of Australia's international obligations, the first hurdle for the respondents might be passed. There would remain other hurdles. These would relate to:

- Whether the welfare jurisdiction contained in the FLA[144] applied to children, like the respondent children, present in South Australia;
- Whether the basis for the FLA provided by the marriage, divorce and incidental powers in the Constitution was sufficient to enable the Family Court to make orders under the FLA against third parties for the protection of such children;
- Whether, alternatively, the external affairs power in the Constitution sustained the welfare jurisdiction on the basis that the relevant provisions of the FLA were intended to implement the UNCROC; and
- Whether the welfare jurisdiction of the Family Court was to be equated to the *parens patriae* jurisdiction of the general courts of law and whether, on that basis, it extended to making orders against third parties for the protection of such children[145].

140 The critical point upon which the members of the first Full Court divided, therefore, concerned the conclusion reached by the majority that the continued detention of the respondent children was unlawful. Upon this issue, the dissenting judge (Ellis J) did not agree with the majority (Nicholson CJ and O'Ryan J)[146]. This was so although, in the resolution of most of the other issues before the Full Court, Ellis J expressed concurrence with the majority's conclusions[147].

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144 s 67ZC.

145 The issues are stated by the first Full Court: *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 607 [12] per Nicholson CJ and O'Ryan J.

146 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 673 [426].

147 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 671 [412], [414], [416], 672-673 [425]. See however at 672 [420], [424].

141 It is therefore sensible, and prudent, to start with these points of difference (or at least so many as are essential to reaching a dispositive order). Doing so reduces unnecessary *obiter dicta*. It also conforms with this Court's usual practice to put challenges to constitutional validity of legislation to one side, where possible, and to start legal analysis with arguments addressed to questions of statutory construction[148].

142 The relevant point of construction concerns whether the MA permits the "detention" of the respondent children for the period proved in the evidence in this case. This was not a case where the evidence showed that a fundamental postulate of the statutory purpose of detention in default of the grant of a visa (namely removal or deportation from Australia)[149] could not be fulfilled. A factual conclusion had been reached that the parents were nationals of Pakistan. Although the parents disputed that finding of fact, it was one not open to correction in these proceedings. Upon that basis, the respondent children, like their parents, were not stateless persons. Thus, the situation that arose in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[150] was not presented in this case.

143 In *Al Masri*, the Full Court of the Federal Court concluded that s 196 of the MA should be read, so far as its language permitted, to ensure conformity with Australia's treaty obligations[151]. The first Full Court in the present case unanimously agreed with that approach[152]. So would I. Whatever controversies may exist in respect of the interpretation of the Constitution and whatever difficulties may sometimes arise in the expression of the common law, the interpretation of federal statutes in Australia, to conform wherever possible to accepted obligations of international law, has long been a principle upheld by this

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148 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 187; see also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252] and the authorities there mentioned; cf Motomura, "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation", (1990) 100 *Yale Law Journal* 545 at 560-561.

149 MA, s 196(1).

150 (2003) 197 ALR 241.

151 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 276-277 [155].

152 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 666 [385]-[388] per Nicholson CJ and O'Ryan J, 672-673 [425] per Ellis J.

Court[153]. The first Full Court was correct to seek the meaning of the MA in conformity with this approach.

144 *An arguable breach of international obligations*: The respondents invoked identified requirements of international law, binding on Australia. They did so not only to support their contention that the welfare jurisdiction conferred on the Family Court under the FLA was designed to give effect to international obligations[154]; but also to support the submission that the MA, construed in the light of those obligations, did not sustain the detention of the respondent children proved in the evidence. It is with the latter submission that I am immediately concerned.

145 The first Full Court referred, in particular, to Art 37 of the UNCROC, drawing attention to pars (b), (c) and (d) of that article[155]. The article provides:

> "States Parties shall ensure that:
>
> (a) No child shall be subjected to … cruel, inhuman or degrading treatment or punishment …
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. *The … detention … of a child shall be* in conformity with the law and shall be *used only as a measure of last resort and for the shortest appropriate period of time*;
>
> (c) Every child deprived of liberty shall be treated with humanity … and in a manner which takes into account the needs of persons of his or her age …
>
> (d) Every child deprived of his or her liberty shall have the right … to challenge the legality of the deprivation of … liberty before a court

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153 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [29] per Gleeson CJ.

154 See *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 645-651 [248]-[288]; cf at 672 [424].

155 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 666 [387].

> or other competent, independent and impartial authority, and to a prompt decision on any such action." (emphasis added)

146 Parallel to the foregoing provisions of the UNCROC, and to others mentioned by the first Full Court[156], are provisions expressed in somewhat more general terms by the International Covenant on Civil and Political Rights[157] ("the ICCPR"). That treaty overlaps the UNCROC to some extent[158]. Australia is a party to each of these international instruments. In the case of the ICCPR, Australia is also a party to the First Optional Protocol[159].

147 *Communication to the UNHRC*: Pursuant to the First Optional Protocol to the ICCPR, the parents of the respondent children lodged a communication with the United Nations Human Rights Committee ("the UNHRC") set up by Pt IV of the ICCPR[160]. Their communication related, amongst other things, to the rights of the children in accordance with international law. They complained, relevantly, that Australia was in breach of the requirements of the ICCPR with respect to the children up to the time that they were released from immigration detention by the order of the second Full Court, the validity of which order the Minister challenges in these proceedings.

148 This Court has held, correctly in my view, that the signature by Australia to the ICCPR and to the First Optional Protocol, inevitably brings to bear on the exposition of Australian law the influence of the universal principles of

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156 See *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 666 [386]. It also cited Arts 2.1, 3.1, 3.2, 7.1, 9.3, 18.1, 19: see at 648-649 [273], 651 [285]-[286].

157 Adopted and open for signature on 19 December 1966; entered into force 23 March 1976 in accordance with Art 49: 999 *United Nations Treaty Series* 171; entered into force for Australia 13 November 1980: [1980] *Australian Treaty Series* No 23.

158 esp ICCPR, Arts 9.1, 9.4 and 24.1.

159 Adopted and open for signature on 19 December 1966; entered into force 23 March 1976 in accordance with Art 9: 999 *United Nations Treaty Series* 302; entered into force with respect to Australia on 25 December 1991: [1991] *Australian Treaty Series* No 39.

160 UNHRC, Views, Communication No 1069/2002: UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) ("UNHRC decision"). This Communication was adopted after both of the Full Courts had delivered their judgments.

international law stated in the ICCPR[161]. In ascertaining the meaning of the ICCPR, and thereby elucidating the extent of that "influence", it is permissible, and appropriate, to pay regard to the views of the UNHRC[162]. Such views do not constitute legally binding rulings for the purposes of international law[163]. However, they are available to municipal courts, such as this, as the opinions of independent experts in international law, to assist in the understanding of the requirements of that law for whatever weight the municipal legal system accords to it. In Australia, that is the weight of persuasive influence. No more; but no less.

149 After hearing the arguments of both sides, the UNHRC rejected objections raised by Australia to the admissibility of the communication[164]. Relevant to the position of the respondent children, the UNHRC noted that they had "remained in immigration detention for two years and eight months until their release". It went on[165]:

> "Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. … [It] has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances."

150 In the result, the UNHRC concluded that the mandatory detention of the respondent children (and of their mother as their carer) was contrary to Art 9.1 of the ICCPR[166]. The UNHRC also concluded that the period of detention of the children, disclosed by the evidence, and the inability judicially to challenge the mandatory character and duration of the detention "was, or had become, contrary

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161 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J (Mason CJ and McHugh J concurring at 15).

162 cf *Tangiora v Wellington District Legal Services Committee* [2000] 1 WLR 240 at 244-245 (PC).

163 McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (1994) at 151 [4.39].

164 UNHRC decision at [8.3].

165 UNHRC decision at [9.3].

166 UNHRC decision at [9.3].

to article 9, paragraph 1" and "constitutes a violation of article 9, paragraph 4"[167]. Various other breaches or possible breaches of articles of the ICCPR were referred to[168]. The UNHRC concluded[169]:

> "[T]he Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the [ICCPR], that is, of the children's right to such measures of protection as required by their status as minors up [to] that point in time."

151 If it is the case, as decided by the UNHRC, that articles of the ICCPR, namely Art 9.1 (prohibiting subjection to arbitrary detention), Art 9.4 (requiring access to a review with power to order release if the detention is not lawful) and Art 24 (measures of protection for every child), were breached by Australia in the detention of the respondent children, it appears even more arguable (as the majority in the first Full Court concluded) that the requirements of the UNCROC were breached[170].

152 The provisions of the UNCROC were considered by the first Full Court in the context of its examination of the validity, under the external affairs power, of the provisions of the FLA affording the Family Court its general welfare jurisdiction and powers. However, the same analysis is available in deciding the construction argument, considered at the close of the majority's reasons in the first Full Court[171]. Upon the basis of the majority's view that the respondent children were being held indefinitely in immigration detention the first Full Court concluded that this was contrary to Art 37 of the UNCROC, thereby suggesting that the continued detention of the children was not the obligation imposed by the MA, properly construed, when read with the FLA[172]. It was on that footing that the majority in the first Full Court concluded that s 196(3) of the MA, purporting

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167 UNHRC decision at [9.4].

168 UNHRC decision at [9.6], including references to ICCPR, Arts 17 and 23.

169 UNHRC decision at [9.7].

170 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 647 [263], 648-649 [273], 651 [285]-[286].

171 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 665-666 [383]-[384].

172 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 666-667 [387]-[390].

to prevent "the release, even by a court, of an unlawful *non-citizen* from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa" did not apply to the ordering of the release of *children* from detention[173]. Only if the Family Court had the power to order release, in the specific case of *children*, would the disconformity between Australian federal law and Australia's obligations under the UNCROC (specifically Art 37) be avoided.

153 Effectively, this conclusion of the first Full Court meant a reading down of the general language of ss 189 and 196 of the MA, so as to avoid infraction otherwise of the obligations Australia had freely assumed under international law. For its part, the UNHRC acknowledged that it had no authority to reach conclusions about the alleged breaches of the UNCROC, its mandate being confined to the ICCPR[174]. The UNHRC thus confined its attention to the alleged breaches of the latter instrument. Nevertheless, given the stronger and more specific language of the UNCROC, relevant to the detention of children such as the respondent children, it was strongly arguable that the mandatory obligation to detain such children for very long periods whilst the cases of their parents were winding their way through the primary decision-making processes, the Federal Court and this Court, constituted a breach of Australia's duties under international law.

154 In reaching that conclusion as a first step in its reasoning, the first Full Court did not, therefore, err. Indeed, it was not a novel conclusion, as I shall show. It was the starting point for the consideration of the element of the suggested unlawfulness of the respondent children's detention. It was upon this basis that the majority judges in the first Full Court concluded that they were permitted to override the provisions of the MA. These provisions otherwise appeared to apply to the children to oblige their continued immigration detention and to forbid any court ordering their release without a relevant visa.

155 *The relevance of any such breach*: Acting on the hypothesis sufficiently established by the foregoing analysis, that there was a breach of obligations imposed on Australia by international law, the critical question is reached. Does any such breach of international law sustain a reading down of the language of the detention provisions of the MA? In other words, within the authorities, would such a reading of the MA, viewed in the context of the welfare provisions of the FLA, amount to a construction "so far as the language of the legislation

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173 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 666-667 [389].

174 UNHRC decision at [5.15] referring to *KL v Denmark*, Case No 59/1979, decision adopted 26 March 1980.

permits"? Or would it involve an impermissible defiance by the courts of the clear requirements of valid Australian federal law?

Mandatory detention is clear, valid and applicable

156 *The language of the sections*: Two indications demonstrate, in my view beyond doubt, that the purpose of the Australian Parliament in enacting laws for the mandatory detention of aliens arriving in Australia as "unlawful non-citizens" was to include children, such as the respondent children.

157 The first indication appears in the text of the MA. There is no hint in the provision requiring the "detention of unlawful non-citizens" of any differentiation between the treatment of adults and children[175]. The definition of "non-citizen" in the MA[176] is simply "a person who is not an Australian citizen". Self-evidently, a child is a "person". If the child is not an Australian citizen, it is therefore a "non-citizen" as defined by the MA. If the child is an alien within the Australian Constitution, who has arrived in this country as a "non-citizen", it is clearly competent for the Parliament under the Constitution to enact a law with respect to the detention of such a child[177]. So much is not in doubt or contest. Generally, children at birth derive their nationality status from their parents. Unless the child is stateless on arrival in Australia, it ordinarily qualifies as a "non-citizen", taking its own citizenship in accordance with the law of the nationality of its parents. It is not an Australian citizen merely because of its arrival at, or presence in, Australia. It is a national of a foreign country. Such was the case with the respondent children.

158 The obligation to detain unlawful non-citizens, known or reasonably suspected to be in the "migration zone", is imposed by the MA on specified officers[178]. There is no hint in the obligation, so expressed, of any differentiated treatment in respect of unlawful non-citizens who are children. In practical terms, where children, because of age and dependency, arrive in Australia with their parents illegally, the adults and children are taken into custody together. Although the MA does contain some provisions specific to the status of

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175 MA, s 189.

176 MA, s 5(1).

177 Constitution, s 51(xix) ("aliens"). See also s 51(xxvii) ("immigration and emigration").

178 "Officer" is defined broadly in s 5(1) of the MA. The word includes officers of Customs, Protective Services officers, members of the Federal Police and of the police of external territories and other designated persons.

children[179], particularly in relation to bridging visas[180], such express differentiation appears neither in s 189 nor in s 196. On the contrary, the generality of the language, the stringency of its provisions and the apparent policy which the sections on their face are designed to implement, contradict any suggestion that the Parliament intended to provide only for the detention – even extended detention – of adults and not of children. In terms of the MA, mandatory detention was required of all "persons" arriving in Australia as "unlawful non-citizens"[181]. The provisions therefore include, and apply to, children as well as adults.

159 The language of the MA is intractable. It cannot be "read down" to avoid any problems created by obligations derived from international law. The effect of ss 189 and 196 is that no decision under the MA is required as a precondition to the existence of the power and duty of "officers" to detain an unlawful non-citizen, adult or child. Detention depends solely upon the status of that person as an unlawful non-citizen. The duration of detention is governed by the provisions of the Act[182]. An alien child, as much as an alien adult, falls within the designated status. The provisions of the MA are susceptible to no other construction.

160 *Parliamentary reports on such detention*: That this is so is put beyond any residual doubt by reference to a series of public reports, tabled in the Australian Parliament, which address the suggested defects of the system of

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179 eg MA, ss 211-212 (recovery of costs of detained spouses and dependants). As to the position of children under the MA see *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 318-320 [75]-[81].

180 MA, ss 31(3), 37, 72, 73 and Migration Regulations 1994 (Cth), reg 2.20. However, these visas are rarely granted as they depend upon the granting of the visa being in the best interests of the non-citizen. Some authors suggest that the government holds the view that the best interests of the child are protected by keeping the child and parent together: Poynder, "A (name deleted) v Australia: A Milestone for Asylum Seekers", (1997) 4 *Australian Journal of Human Rights* 155 at 166-167; Mares, *Borderline: Australia's treatment of refugees and asylum seekers*, (2001) at 65.

181 See also MA, s 192 where officers have the power to detain a non-citizen whose visa may be cancelled. This power is subject to s 192(2) which provides that officers cannot detain the non-citizen unless they reasonably suspect that the non-citizen will attempt to evade officers or otherwise not co-operate.

182 MA, s 196; cf *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 249 [31].

mandatory immigration detention followed in Australia, and specifically as such detention affects children.

161 Three reports in particular can be mentioned. They indicate that the Australian Parliament has had its attention directed expressly to the issue of universal mandatory detention of unlawful non-citizens and specifically to the case of children. Notwithstanding these reports, many subsequent amendments to the Act and an intervening change of government, no alteration of the legislation requiring mandatory detention has been adopted differentiating between adult and children non-citizens.

162 The first such report, *Asylum, Border Control and Detention*, responded to the terms of reference of the Parliamentary Committee on Migration[183]. The report contains an extensive review of the rationale accepted by the majority of the Committee for the detention of unlawful border arrivals in Australia[184]. The report notes the submission of the Department of Immigration and Ethnic Affairs that detention was an instrument to achieve administrative ends and was not, as such, punitive[185]. That department conceded, however, that "incidental to [the] universal visa system is deterrence"[186]. That "deterrence" arose from the detention of unauthorised border arrivals. The department acknowledged concerns, raised by the Attorney-General's Department, "regarding long term detention and detention of children"[187]. The latter department is recorded as observing that "the circumstances of particular cases may lead to breaches of international law"[188]. In this regard, particular concern was expressed about "the lack of discretion to release persons subject to long term detention, and the detention of children"[189].

163 The Attorney-General's Department's submission, summarised in the report, drew special attention to the requirements of the UNCROC in respect of the detention of children with, or separately from, their parents. It was the

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183 Australian Parliament, Joint Standing Committee on Migration (Senator J McKiernan, Chairman), February 1994 ("Border Control Report").

184 Border Control Report at 108-111 [4.8]-[4.19].

185 Border Control Report at 109 [4.11].

186 Border Control Report at 109 [4.12].

187 Border Control Report at 111 [4.18].

188 Border Control Report at 115 [4.36].

189 Border Control Report at 115 [4.36].

opinion of that department that "the power to release children from detention, if that was in the best interests of the child, would ensure that any criticism relating to the Convention on the Rights of the Child could be overcome"[190].

164 The Parliamentary Committee recommended consideration of the inclusion of a "prescribed class" of detainees, eligible for release from detention on a bridging visa where this was appropriate having regard to considerations such as "special need based on age" and "Australia's international obligations"[191]. A dissenting report went even further and questioned the requirement of mandatory detention, pointing to alternative overseas procedures. That report drew special attention to the "particularly worrying" effects of prolonged detention of children[192]. The dissenting report proposed that the MA be amended "so as to end the system of mandatory detention of unlawful non-citizens … save for the limited purposes of preliminary checks on identity, security and health"[193].

165 Although the foregoing Committee report was tabled in the Australian Parliament, no change to the system of mandatory detention provided in the Act has been introduced. Specifically, no amendments have been enacted providing particular rights for the release from detention of "unlawful non-citizens" who are children.

166 In May 1998, the Australian Human Rights and Equal Opportunity Commission ("the HREOC") presented its report to the Attorney-General, *Those who've come across the seas*[194]. This report also recommended modification of the MA. Specifically, the HREOC concluded that "[t]he detention of asylum seekers for any other purpose [than to verify identity, to determine the elements of the claim, to deal with cases of destroyed documents or to protect national security or public order] is contrary to the principles of international protection and should not be permitted under Australian law"[195]. The report recommended that "[d]etention is especially undesirable for vulnerable people such as single

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190 Border Control Report at 117 [4.41].

191 Border Control Report at xv [Rec 11].

192 Dissenting report of Senator C Chamarette: Border Control Report 201 at 207.

193 Dissenting report of Senator C Chamarette: Border Control Report 201 at 212 [Rec 1].

194 Australia, Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals*, (1998) ("HREOC Report").

195 HREOC Report at vii [R3.2].

women, children, unaccompanied minors". It called particular attention to the UNCROC, Art 37(b)[196].

167 Although the HREOC report was also tabled in the Parliament, no relevant amendments followed its recommendations, whether generally or specifically concerning children.

168 In September 2000, the Parliamentary Committee on Migration delivered a further report, *Not the Hilton: Immigration Detention Centres: Inspection Report*[197]. The Committee's terms of reference were confined on this occasion to inspection of the conditions of Australia's immigration detention facilities. They did not address larger policy issues. The report made no recommendations for change in the mandatory detention system. None have been enacted.

169 From the foregoing it must be inferred that the Australian Parliament was fully aware of the operation of mandatory detention of unlawful non-citizens arriving in Australia; of its particular application to the children of unlawful non-citizens; of the special problems that prolonged detention of children in such detention centres occasions; and of the concerns expressed by departmental officers and individual committee members about breach of the requirements of international law, specifically of the UNCROC, Art 37(b). In effect, the position of the Parliament has not altered since the view expressed a decade ago in the first of the above reports[198]:

> "[T]he Committee is of the view that those who arrive in Australia without authorisation or with invalid authorisation should be detained upon arrival. To do otherwise would compromise Australia's system of immigration control. In addition, detention of unauthorised arrivals ensures that the community is not exposed to unknown or undetected health or security risks. In the Committee's view, Australia's immigration control system must be upheld. It is important to ensure that immigration to Australia cannot be achieved simply by arrival."

170 *Mandatory detention is confirmed*: In the light of the foregoing history, it is impossible to draw any inference other than that the Australian Parliament intends a system of universal mandatory detention of unlawful non-citizen arrivals to remain in force, including in respect of children. In the face of the evidence, appearing as it does in the public record supplied to this Court, readily

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196 HREOC Report at vii [R3.3].

197 Australian Parliament, Joint Standing Committee on Migration (Mrs Chris Gallus MP, Chair), September 2000.

198 Border Control Report at 149 [4.153].

available to all, it is impossible to construe the MA otherwise than in accordance with its terms. It follows that it is impossible to accept that a significant alteration of the MA was introduced, by an undetected, unannounced, unnoticed side-wind, such as the enactment of the FLRA or the amendment of the FLA.

171 Mandatory detention of unlawful non-citizens who are children is the will of the Parliament of Australia. It is expressed in clear terms in ss 189 and 196 of the MA. Those sections are constitutionally valid. In the face of such clear provisions, the requirements of international law (assuming it to be as the respondents assert and as the UNHRC, in part, has found) cannot be given effect by a court such as this[199]. This Court can note and call attention to the issue. However, it cannot invoke international law to override clear and valid provisions of Australian national law. The Court owes its duty to the Constitution under which it is established. Pursuant to the Constitution, all laws made by the Parliament of the Commonwealth are "binding on the courts, judges, and people of every State and of every part of the Commonwealth"[200]. Those laws must be obeyed and enforced, whenever they are valid and their obligations are clear and applicable. They cannot be ignored or overridden, least of all by this Court.

172 I do not regard it as arguable that the detention of the respondent children under the MA was permanent or indefinite. True, it lasted a long time before their release by order of the second Full Court. However, under the MA, the period of detention had a clear terminus. This (putting it broadly) is the voluntary election of the children (through their parents) to leave Australia or the completion of the legal proceedings brought by the parents on the children's behalf, with necessary consequences for the status of the children.

173 The case of the respondent children is to be distinguished from other recent proceedings. It cannot be said that the MA is inapplicable to them because they are stateless. Nor is the MA inapplicable because the conditions of detention have been shown, arguably, to fall outside the statutory conditions required by the MA. In this appeal, the attack was directed to the power of detention, as such, and its duration. With the dissenting judge in the first Full Court, in my opinion "it cannot be said that there is no real likelihood or prospect

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199 *Re Kavanagh's Application* (2003) 78 ALJR 305 at 308-309 [14]-[20]; 204 ALR 1 at 5-6; cf *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 284-285.

200 Constitution, covering cl 5.

in the reasonably foreseeable future of the children being removed and thus released from detention"[201].

Conclusions and orders

174 So far as Australian law was concerned, the respondent children were therefore lawfully detained under the MA. In such circumstances, by the language of that Act, they had to be detained until one of the provisions in s 196(1) was fulfilled, ie until removal or deportation from Australia or the grant of a visa. Even if a point might ultimately be reached where the loss of liberty of an "unlawful non-citizen" in proved conditions falls outside the statutory expression "immigration detention" (or would invite constitutional invalidity as amounting to unauthorised punishment), that point had not been reached in the case of the respondent children at the time of their release.

175 If there was protracted duration of the detention of the respondent children, as there clearly was, it was solely because of the operation of the MA upon the challenges mounted *seriatim* before the successive Australian decision-makers by the children's parents severally and then together. The confinement of the children was not only *lawful* under the MA. It was *obligatory* in terms of the provisions of that Act. And, as I have shown, those provisions represent the deliberate and repeatedly reaffirmed will of the Australian Parliament, acting in this case within its constitutional powers.

176 It follows that it is impossible to interpret the *general* powers and jurisdiction enjoyed by the Family Court under the FLA as authorising intrusion into the fulfilment of the clear and *specific* obligations of detention imposed on the Minister and federal officers by the MA. In the face of the specificity, particularity and universality of the application of the MA, requiring detention of persons such as the respondent children, any general powers and jurisdiction enjoyed by the Family Court under the FLA can have no operation to require or permit their release from detention[202]. Given the express command of the Federal Parliament to designated officers to detain the children, it was not

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201 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604 at 673 [426].

202 cf *Phillips v Lynch* (1907) 5 CLR 12 at 28-29; *Goodwin v Phillips* (1908) 7 CLR 1 at 7; *Maybury v Plowman* (1913) 16 CLR 468 at 474-476; *Lukey v Edmunds* (1916) 21 CLR 336 at 346-347, 348-349; *Bank Officials' Association (South Australian Branch) v Savings Bank of South Australia* (1923) 32 CLR 276 at 282-283, 289, 294, 297; *Victorian Railways Commissioners v Speed* (1928) 40 CLR 434 at 439; *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276, 280, 290; *Saraswati v The Queen* (1991) 172 CLR 1 at 17, 23.

permissible for the Family Court, under generally expressed powers, to give the Minister and such officers orders involving contradictory or inconsistent instructions[203].

177 Whatever powers are enjoyed by the Family Court under its welfare jurisdiction, they cannot be invoked to oblige contravention of the constitutionally valid legislative scheme of mandatory detention contained in the MA. It is unnecessary in this appeal to consider whether such powers would extend, in some exceptional circumstances, to require the alteration of the conditions of the respondent children whilst in immigration detention. Given that the children are not presently within such detention, that issue is theoretical in this case. On the face of things, however, the general responsibility for such detention is reposed in the Minister and the officers named in the MA. It is not placed in the hands of the judges of the Family Court.

178 I prefer to rest my conclusion on the foregoing approach to the intersection of the FLA and the MA rather than the approaches adopted by the other members of this Court reaching the same result.

179 In light of my conclusion, it is unnecessary in this appeal for me to decide whether the purported exclusion of the powers of a court to release an unlawful non-citizen, in terms of s 196(3) of the MA, is constitutionally invalid as an over-broad provision[204]. Because, as a matter of construction, the MA excludes the possibility of orders by the Family Court under the FLA in this case, an order for release of the respondent children from detention would travel beyond the jurisdiction and powers of the Family Court. It is for that reason, not because of the terms of s 196(3) of the MA, that I would set aside the orders of the first Full Court. On all other matters argued in the appeal, I would reserve my opinion.

180 The orders proposed in the reasons of Gummow, Hayne and Heydon JJ should be made.

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203 MA, s 196(3); cf *Immigration and Naturalization Service v St Cyr* 533 US 289 (2001); Neuman, "The Habeas Corpus Suspension Clause After *INS v St Cyr*", (2002) 33 *Columbia Human Rights Law Review* 555; Crock, "'You have to be stronger than razor wire': Legal issues relating to the detention of Refugees and asylum seekers", (2002) 10 *Australian Journal of Administrative Law* 33 at 53-54.

204 cf *HR & DR and Minister for Immigration & Multicultural & Indigenous Affairs* (2003) FLC ¶93-156 at 78,569-78,571 [151]-[171]. See Chisholm, "The immigration cases", (2003) 17 *Australian Journal of Family Law* 219 at 220-221; cf *NAFC v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 126 FCR 99 at 105 [21]-[22].

181 CALLINAN J. Collectively, the family of whom the respondents are members, have, since their arrival in this country, litigated in many of its tribunals and courts in attempts to obtain lawful residential status in it.

182 On 22 October 1999, the father arrived in Australia unlawfully and was taken into immigration detention. He claimed that he was a refugee from the Taliban regime in Afghanistan. He was granted a temporary visa (sub-class 785) on 3 August 2000 upon the basis of this claim. Four days later he applied for a protection visa.

183 On 1 January 2001, the mother and the infant first respondents ("the children") arrived in Australia unlawfully, and were taken into immigration detention. Seven weeks later the mother and the children applied for protection visas, upon the basis that they too were refugees from the Taliban regime in Afghanistan.

184 On 22 May 2001, the delegate of the Minister refused the application for protection visas by the mother and the children, and on 26 July 2001 the Refugee Review Tribunal affirmed the delegate's decision not to grant visas to the mother and the children because they were not nationals of Afghanistan but of Pakistan.

185 Two of the children on 27 June 2002 escaped from the Woomera Immigration Reception Processing Centre. They were found in Melbourne and returned to immigration detention on 19 July 2002.

186 The present proceeding was commenced in the Family Court at Adelaide[205]. The relief there sought was as follows:

> "1. An injunction pursuant to section 68B of the *Family Law Act* that the [appellant], whether by himself, his servants or his agents, be required to release the [children] from detention at the Woomera Immigration Reception Processing Centre.
>
> 2. An injunction pursuant to section 68B of the *Family Law Act* that the [appellant], whether by himself, his servants or his agents, be restrained from detaining the [children] pursuant to section 189 of the *Migration Act*.
>
> 3. Alternatively, an order pursuant to section 67ZC of the *Family Law Act* that the [appellant], whether by himself, his servants or his

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205 The initial application to the Family Court was made by two of the children, A and M. Subsequently, upon appeal to the Full Court of the Family Court, leave was granted to join the other three children.

agents, be required to release the [children] from detention at the Woomera Immigration Reception Processing Centre.

4. An order pursuant to section 67ZC of the *Family Law Act* that the [appellant], whether by himself, his servants or his agents, be restrained from detaining the [children] pursuant to section 189 of the *Migration Act*.

5. A declaration pursuant to section 68B and/or section 67ZC of the *Family Law Act* that the detention of the [children] pursuant to section 189 of the *Migration Act* is contrary to the welfare of the [children].

6. Such further or other orders as this Honourable Court deems fit.

7. Costs."

187 On 9 October 2002 Dawe J dismissed the application. Her Honour concluded as follows:

"**Summary**

A. The provisions relating to welfare of children in the Family Law Act fall readily into the category of a statutory power of general application which should be read subject to the specific unambiguous terms of the Migration Act.

This court cannot order the release of the children.

B. The Family Court of Australia does not have jurisdiction in South Australia to make the orders sought to bind the Minister because of the provisions of s 69ZE and s 69ZH.

C. The welfare jurisdiction to be exercised must be exercised within the usual field of family law. It does not extend to a power to override the exercise of any statutory power merely because that exercise of power may impact upon the best interests of children.

There is nothing in the Family Law Act or implied by its provisions which can give control over the Minister's behaviour or that of his officers to the Family Court even if the behaviour which it is sought to control were found to be contrary to the best interests of a child.

Even if the welfare jurisdiction granted by the Family Law Act is not restricted by the Migration Act or ss 69ZE and 69ZH (as I assert it is) that welfare jurisdiction is not wide enough to make orders binding on the Minister.

D. The existence of a power to make laws in relation to external affairs does not mean that Parliament has used the Family Law Act to implement the provisions of UNCROC to extend the welfare jurisdiction of the Family Court.

Conclusion

The applications by A and M and the father are misconceived and fatally flawed. The applications of A and M and the father fail on the grounds set out above. The Family Court does not have any jurisdiction to make any of the orders sought against the Minister.

The other matters raised in paragraph 11 of the father's submission cannot overcome these serious basic defects."

188 The next relevant event was the cancellation of the father's visa on 4 December 2002. The delegate found that he was from Pakistan, not Afghanistan. In consequence he was taken into immigration detention at Villawood (Sydney).

189 In January 2003 the mother and the children were transferred from the Woomera Immigration Reception Processing Centre to the Baxter Immigration Reception Processing Centre to which the father was also shortly thereafter transferred.

190 In the next month this Court dismissed an application for judicial review of the Refugee Review Tribunal's decision by the mother and the children[206], and on 4 March 2003 the Refugee Review Tribunal affirmed the cancellation of the father's visa. The father then unsuccessfully applied to the Federal Court (Selway J) for judicial review of the Tribunal's decision to cancel his visa. He appealed to the Full Court of the Federal Court against the decision of Selway J.

191 On 11 June 2003 the mother and three of the children (the daughters) were transferred from Baxter to the Woomera Residential Housing Project. The two elder boys remained at Baxter with their father.

192 About a week later the Full Court of the Family Court (Nicholson CJ and O'Ryan J, Ellis J dissenting) allowed an appeal against the judgment of Dawe J, and remitted the matter for rehearing[207].

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206 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441.

207 *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604.

193 It appears that the claim for relief (or the perception of it) may have assumed a different form at some stage during or after the hearing in the Full Court of the Family Court, perhaps because changes had occurred in the meantime to the situation of the children and the parents. Those were narrated in the judgment relating to the application for a certificate and a stay[208] to which I refer below:

> "In October 2002, the trial judge found that the Family Court had no jurisdiction to make orders in respect of children held in immigration detention, and accordingly dismissed the application. The appeal to the Full Court was initially brought on behalf of the two boys and the father as appellant intervener. Although not parties to the original application, the mother was also given leave to add A and M's three younger sisters aged 11, nine and six as appellants (together, 'the children').
>
> At the time of the trial, the children and their mother were detained at one particular immigration detention centre and the father was living in the general community. However, by the date of the hearing of the appeal, the mother and children had been transferred to another detention centre, and the father was detained in the same facility. All family members are unlawful non-citizens within the meaning of s 14 of the *Migration Act 1958* (Cth)."

194 The Full Court of the Family Court refused an application by the appellant for a stay. A single judge of the Family Court, Strickland J, on 5 August 2003 dismissed an application for interlocutory release of the children from immigration detention. The Full Court of the Family Court (Kay, Coleman and Collier JJ) on 25 August 2003 allowed an appeal against the judgment of Strickland J, and ordered the release of the children from immigration detention on an interlocutory basis[209].

195 The Full Court of the Family Court, in the due exercise of its jurisdiction under s 95(b) of the *Family Law Act* 1975 (Cth) ("the Family Act"), granted a certificate to enable an appeal to be brought directly to this Court. The question of law involved, essentially of the limits of the jurisdiction of the Family Court, is undoubtedly an important one.

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208 *Minister for Immigration and Multicultural and Indigenous Affairs v B (Infants) [No 2]* (2003) 175 FLR 426 at 427-428.

209 *B and B v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FamCA 621.

196 It had been the respondents' contention in the Family Court that the orders sought could be made by that Court pursuant to ss 67ZC and 68B of the Family Act. The response of Dawe J at first instance to that contention sufficiently appears from her Honour's conclusions which I have already quoted.

The reasoning of the Full Court of the Family Court

197 The different opinion of the majority in the Full Court of the Family Court was founded largely upon its view of s 67ZC of the Family Act, that the provisions of subdiv F of Div 12 of Pt VII of that Act do not relevantly limit its scope, indeed, they "assume the conferring of jurisdiction upon the court in respect of children of marriages without limitation"[210]. The Court had a general welfare jurisdiction over children. There is no necessity to limit that jurisdiction to disputes between parents: orders could properly be made against third parties to promote the welfare of children[211]. The orders sought were sufficiently related to the parents' marriage to bring them within the marriage power in s 51(xxi) of the Constitution[212]. Furthermore, s 67ZC of the Family Act gives effect to the United Nations Convention on the Rights of the Child and is, accordingly, supported by the external affairs power within s 51(xxix) of the Constitution[213]. The Full Court was prepared to accept that s 196 of the *Migration Act* 1958 (Cth) ("the Migration Act") could prevent the release of children in detention, but only in circumstances in which it could validly operate[214]; here, because the detention of a child was unlawful the Court had jurisdiction to order the child's release[215].

The appeal to this Court

198 In this Court the appellant and the Attorney-General of the Commonwealth challenge every one of the Full Court's holdings.

199 Part VII of the Family Act is concerned entirely with children. Section 60B(1) states its object, to ensure that *parents* fulfil their *duties* and meet their *responsibilities* concerning the care, welfare and development of their children. The whole of s 60B(1) is taken up with references to the relationship between

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210 (2003) 199 ALR 604 at 627 per Nicholson CJ and O'Ryan J.

211 (2003) 199 ALR 604 at 639-640 per Nicholson CJ and O'Ryan J.

212 (2003) 199 ALR 604 at 644-645 per Nicholson CJ and O'Ryan J.

213 (2003) 199 ALR 604 at 651 per Nicholson CJ and O'Ryan J.

214 (2003) 199 ALR 604 at 663 per Nicholson CJ and O'Ryan J.

215 (2003) 199 ALR 604 at 656 per Nicholson CJ and O'Ryan J.

children and their parents and incidents of that relationship. Division 2 of Pt VII of the Family Act elaborates upon the concept of *parental responsibility* and reinforces the notion that both parents owe it. Divisions 4 and 5 of Pt VII make provision for "parenting plans" and their registration in the Family Court. Section 64C provides that a parenting order may be made in favour of a parent of a child, or some other person. Subsequent provisions deal with financial obligations of parents and related matters.

200 Section 67ZC, which is in Div 8 of Pt VII is expressed in very general terms. It is as follows:

> "**67ZC Orders relating to welfare of children**
>
> (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
>
> (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

201 Subdivision F of Div 12 of Pt VII of the Family Act makes provision for the extension of the Part to the States. Section 69ZE is as follows:

> "**69ZE Extension of Part to the States**
>
> (1) Subject to this section and section 69ZF, this Part extends to New South Wales, Victoria, Queensland, South Australia and Tasmania.
>
> (2) Subject to this section and section 69ZF, this Part extends to Western Australia if:
>
> (a) the Parliament of Western Australia refers to the Parliament of the Commonwealth the following matters or matters that include, or are included in, the following matters:
>
> (i) the maintenance of children and the payment of expenses in relation to children or child bearing;
>
> (ii) parental responsibility for children; or
>
> (b) Western Australia adopts this Part.
>
> (3) This Part extends to a State under subsection (1) or (2) only for so long as there is in force:
>
> (a) an Act of the Parliament of the State by which there is referred to the Parliament of the Commonwealth:

(i) the matters referred to in subparagraphs (2)(a)(i) and (ii); or

(ii) matters that include, or are included in, those matters; or

(b) a law of the State adopting this Part.

(4) This Part extends to a State at any time under subsection (1) or paragraph (2)(a) only in so far as it makes provision with respect to:

(a) the matters that are at that time referred to the Parliament of the Commonwealth by the Parliament of the State; or

(b) matters incidental to the execution of any power vested by the Constitution in the Parliament of the Commonwealth in relation to those matters."

202 Section 69ZF then provides as follows:

"**69ZF Unless declaration in force, Part's extension to a State has effect subject to modifications**

(1) The Governor-General may, by Proclamation, declare that all the child welfare law provisions of this Part extend to a specified State.

(2) Despite anything in section 69ZE, if no declaration under subsection (1) is in force in relation to a particular State, this Part, as it extends to that State because of section 69ZE, has effect as if:

(a) subsection 66F(2) were omitted; and

(b) subsections 69ZE(1) and (2) were amended by omitting 'and section 69ZF'; and

(c) section 69ZF were omitted; and

(d) paragraph 69ZK(1)(b) were omitted; and

(e) subsection 69ZK(2) were amended by adding at the end the following word and paragraphs:

'; or (d) the jurisdiction of a court under a child welfare law to make an order in relation to the maintenance of the child; or

(e) an order of the kind referred to in paragraph (d).'.

(3) A Proclamation that was in force in relation to a State under subsection 60E(6) of this Act as in force before the commencement of this section has effect, after that commencement, as if it were a Proclamation under subsection (1) of this section."

203 Section 69ZH should also be noted:

"**69ZH Additional application of Part**

(1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.

(2) By virtue of this subsection, Divisions 2 to 7 (inclusive) (other than Subdivisions C, D and E of Division 6 and sections 66D, 66M and 66N), Subdivisions C and E of Division 8, Divisions 9, 10 and 11 and Subdivisions B and C of Division 12 (other than section 69D) have the effect, subject to subsection (3), that they would have if:

(a) each reference to a child were, by express provision, confined to a child of a marriage; and

(b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage.

(3) The provisions mentioned in subsection (2) only have effect as mentioned in that subsection so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage, including (but not being limited to):

(a) the duties, powers, responsibilities and authority of those parties in relation to:

(i) the maintenance of the child and the payment of expenses in relation to the child; or

(ii) the residence of the child, contact between the child and other persons and other aspects of the care, welfare and development of the child; and

(b) other aspects of duties, powers, responsibilities and authority in relation to the child:

(i) arising out of the marital relationship; or

(ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or

(iii) in relation to a dissolution or annulment of that marriage, or a legal separation of the parties to the marriage, that is effected in accordance with the law of an overseas jurisdiction and that is recognised as valid in Australia under section 104.

(4) By virtue of this subsection, Division 1, Subdivisions C, D and E of Division 6, section 69D, Subdivisions D and E of Division 12 and Divisions 13 and 14 and this Subdivision, have effect according to their tenor."

204 In my opinion the appellant's first submission is correct, that the jurisdiction conferred by s 67ZC of the Family Act does not, as a matter of statutory construction, extend to a jurisdiction to order the children to be released from detention. The only jurisdiction which the relevant States, including South Australia, sought to transfer and transferred to the Family Court for exercise under the Family Act pursuant to s 69ZE(3) and (4) was relevantly, the parental responsibility for, and the parental maintenance of children. Clearly, the orders sought by the respondents in this case are not orders with respect to any of these matters.

205 The reference by the States in the terms that it was made is consistent with these propositions: the Commonwealth has power to make laws with respect to marriage under s 51(xxi) and s 51(xxii) of the Constitution; power in relation to ex-nuptial children resides in the States; and the whole thrust of the Family Act so far as children are concerned is to deal with children of marriages *and* the obligations of their parents to them. That last appears (inter alia) from those provisions of the Family Act in Pt VII to which I have referred, including s 69ZH, in which the notion of, and obligations attached to "parenting", that is to say, parents within, or who have been in a marriage, are set out. It was with "parenting" and its obligations not otherwise the subject of the Family Act that the States were concerned, and some powers with respect thereto that they sought to, and did in terms transfer to federal courts, the Family Court, and, by s 69H(4), the Federal Magistrates Court.

206 Sections 69ZE to 69ZH are central to, and govern the application of the provisions of Pt VII. It is not only unlikely that a State would seek to confer a power upon the Commonwealth that the latter already possessed, but it also would be constitutionally unable to do so. What the States have done is simply to confer a jurisdiction with respect to parental obligations owed to children, not already possessed by the Commonwealth. Furthermore, the power or jurisdiction conferred is neither in terms nor by implication a general welfare jurisdiction over children. What I have said is, I believe, in conformity with the recent

approach of the Court generally to a reference of a State power to be exercised in conjunction with a constitutionally confined Commonwealth power[216].

207 It is also right, as the appellant and the Attorney-General of the Commonwealth submit, that the acceptance of their arguments so far is sufficient to dispose of this appeal in their favour. Nonetheless, in due deference to the extensive argument on the other issues determined by the Full Court of the Family Court, I propose to say something about them.

208 The majority of the Full Court purported also to exercise a parens patriae jurisdiction. That it was entitled to do so is met by the conclusion that I have already reached. But there is also this, the States did not purport to confer it. If it may be exercised by the Family Court, it can only owe its existence therefore to a parens patriae power residing in the Commonwealth. The Family Act cannot in my opinion be read as intended to confer it except to the extent that its provisions can constitutionally, and do replicate it. The Commonwealth Parliament's power to legislate is governed by ss 51(xxi) and 51(xxii) of the Constitution. The combined effect, and the influence of each upon the meaning of the other, and in consequence, the limitations upon Commonwealth power with respect to children, were the subject of some considerable discussion in *Russell v Russell*[217] in which Barwick CJ said[218]:

> "Whilst each topic referred to in s 51 is an independent subject matter and some overlapping is possible, cognate topics and the terms in which they are expressed cannot be and never have been ignored in deciding the content and ambit of a topic described in s 51. In the present instance, the presence and the terms of par (xxii) may be related to the content and ambit of par (xxi) and may be regarded, as I would regard them, as limiting that content and ambit, particularly with respect to proceedings in relation to parental rights, custody and guardianship of infants.
>
> As I shall later point out, par (xxii) covers 'matrimonial causes' as a specific head of power. In specifying that topic, the Constitution

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216 *Northern Territory v GPAO* (1999) 196 CLR 553 at 573 [25] per Gleeson CJ and Gummow J, 594-595 [103]-[104] per Gaudron J, 611 [157] per McHugh and Callinan JJ; *AMS v AIF* (1999) 199 CLR 160 at 170-172 [14]-[21] per Gleeson CJ, McHugh and Gummow JJ, 181-184 [54]-[64] per Gaudron J, 242-244 [249]-[258] per Callinan J.

217 (1976) 134 CLR 495.

218 (1976) 134 CLR 495 at 508-509.

expressly provides the extent to which parental rights, custody and guardianship of infants fall within the area of matrimonial causes.

It seems to me to be implicit in the topic of 'divorce and matrimonial causes' that proceedings incidental to a proceeding for divorce or nullity of marriage are matrimonial causes within the subject matter of par (xxii) and that it is not necessary to resort to s 51(xxxix) in order to find power to create a jurisdiction with respect to such proceedings. These undoubted consequences of par (xxii) are pertinent, in my opinion, to any consideration of the content or ambit of the power granted by par (xxi)."

209 Later his Honour said[219]:

"In my opinion, however, it is one thing to specify the consequences of the act of marriage, including a specification of the mutual rights and duties of the spouses, both towards each other and towards their children: it is quite another thing to erect a jurisdiction to enforce those rights and duties. Though in relation to some topics of legislation powers of adjudication and enforcement may be seen as no more than incidental to the topic or to the execution of the law made under it, it seems to me that the creation of such a jurisdiction, as that with which I am dealing, is not incidental within the meaning of par (xxxix) of s 51 to the declaration of the consequences of marriage: nor is it wrapt up as an incident of and contained within the constitutional topic of 'marriage' itself. It is, indeed, quite a disparate matter to determine how and by whom the particular consequences of the existence or exercise or non-performance of the rights or duties derived from the marriage may be determined and enforced. Hence the need for a specific topic of divorce and a specific topic of matrimonial causes, expressed in the terms of par (xxii) of s 51."

210 Gibbs J said this[220]:

"However, par (xxii) of s 51 expressly gives the Parliament power to legislate with respect to divorce and matrimonial causes. The latter expression, if widely understood, would refer to any controversy between the parties to a marriage as to a matter which pertained to the marriage relationship. It would indeed include divorce itself. If it were not for the concluding words of par (xxii), that paragraph could without difficulty be read as supplementing and amplifying, so far as necessary, the power

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219 (1976) 134 CLR 495 at 510.

220 (1976) 134 CLR 495 at 525.

given by par (xxi); together the two paragraphs would give the fullest power to legislate with respect to proceedings brought by one spouse against another to enforce any rights which had their source in the matrimonial relationship. However, the concluding words of par (xxii), by giving a power to make laws with respect to parental rights and the custody and guardianship of infants in relation to divorce and matrimonial causes, indicate a clear intention that the power given by par (xxii) should not authorize legislation with respect to those questions unless they arise as an incident to proceedings for divorce or some other matrimonial cause. Under par (xxii) the Parliament has power to deal with proceedings for custody which are brought as ancillary to proceedings for divorce or some other matrimonial cause, but has no power to deal with custody proceedings brought independently of any other claim to relief."

211 On this point Gibbs J reached this conclusion[221]:

"In my opinion it is not proper in the construction of par (xxi) to ignore the restrictions on power contained in par (xxii). To do so would in effect make the concluding words of par (xxii) quite ineffective. Paragraph (xxii) resembles par (xxxi) in that in each case there is an express indication of an intention that the power of the Parliament should be subject to a specified limitation. It would in my opinion give altogether too little weight to the words of par (xxii) to regard par (xxi) as granting a power to make laws with respect to parental rights and the guardianship and custody of infants even when those matters had no relation to divorce or any other matrimonial cause."

212 However, those views did not prevail in that case or subsequently. To the contrary, in the joint judgment of Mason CJ, Deane, Toohey and Gaudron JJ in *P v P*[222], this appears:

"The grants of legislative power contained in pars (xxi) and (xxii) of s 51 of the Constitution are cumulative. Each must be given its full scope and effect. Neither is to be read down by reference to the other[223]. Paragraph (xxi)'s grant of legislative power with respect to 'Marriage' encompasses laws dealing with the protection or welfare of children of a marriage in so far as the occasion for such protection or welfare arises out

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221 (1976) 134 CLR 495 at 527.

222 (1994) 181 CLR 583 at 600-601.

223 See *Attorney-General (Vict) v The Commonwealth* ("the *Marriage Act Case*") (1962) 107 CLR 529 at 560, 572; *Russell v Russell* (1976) 134 CLR 495 at 539; *Re F; Ex parte F* (1986) 161 CLR 376 at 387.

> of, or is sufficiently connected with, the marriage relationship[224]. To a significant extent, that operation of par (xxi) overlaps par (xxii)'s express conferral of legislative power with respect to 'parental rights, and the custody and guardianship of infants' in relation to 'Divorce and matrimonial causes'. The authorization of medical treatment of an incapable child of a marriage, including medical treatment of the kind involved in *Marion's Case* and in this case, is something which is directly related to the protection and welfare of the particular child and which arises out of, and is itself an aspect of, the relevant marriage relationship. To the extent that the relevant provisions of Pt VII of the *Family Law Act* confer jurisdiction to give or withhold such authorization, they are a law with respect to marriage within s 51(xxi). Moreover, the relevant provisions of Pt VII are, in the context of that conferral of jurisdiction upon the Family Court, directly concerned with parental rights and the custody and guardianship of infants in relation to divorce or matrimonial causes and are accordingly within the grant of legislative power contained in s 51(xxii)."

213 With all due respect, and acknowledging that constitutionally conferred powers may overlap, I am unable to accept that the Constitution is not to be read according to one of the most elementary canons of construction of all relating to instruments of any kind: as a whole. Nor can I accept a proposition that the language of each part of it is incapable of having a bearing, including in some circumstances, a restrictive or limiting effect upon other parts. This Court has held that implications can be drawn from the relationships of various sections of the Constitution with one another and its structure[225]. That approach is consistent only with its being read as a whole and careful regard being had to context. This means that ss 51(xxi) and 51(xxii) not only may, but should be read together, and in consequence, having regard to their proximity, read as intended to deal with separate and quite distinct, that is to say not overlapping topics. And despite that sometimes, probably very rarely, constitutional provisions and powers may overlap, the better view is that the drafters neither engaged in a process of intentional duplication nor accidentally achieved it.

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224 See, eg, *R v Lambert; Ex parte Plummer* (1980) 146 CLR 447 at 456; *Gazzo v Comptroller of Stamps (Vict)* (1981) 149 CLR 227 at 234-235, 247-248; *Fountain v Alexander* (1982) 150 CLR 615 at 632; *In the Marriage of Cormick* (1984) 156 CLR 170 at 175-176; *Re F; Ex parte F* (1986) 161 CLR 376 at 382, 389-390.

225 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-562.

214 Earlier, their Honours in *P v P*[226] had explained the reasoning of the Court in *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*)[227]. They were at some pains to say that the issue there, of sterilisation of a child, arose out of the custody or guardianship of a child of a marriage. It is unnecessary, for the purposes of this case to revisit *Marion's Case*. On no view are the statements made there likely to throw any light on the entirely different situation here.

215 No matter how extensive the powers conferred by ss 51(xxi) and 51(xxii) may be, the powers of the Family Court with respect to children are powers in relation to, or arising out of married (either currently or previously) *parentage* of children, or of unmarried *parentage* of them on a reference by the States. Those powers do not comprehend a general discretionary welfare power over any or all children, whether of a marriage or not, exercisable in such a way as to override any or all other powers over children, such as to detain them in immigration detention, or rehabilitative, reformative, or penal institutions. The Family Court may no more do this than it could exercise a jurisdiction in tort or contract in order to advance the welfare of a child.

216 The respondents' proposition that s 51(xxi) of the Constitution provides a power on the part of the Commonwealth to legislate, and that by the Family Act it has legislated pursuant to it, to confer a power upon the Family Court to make all such orders as it thinks appropriate and may make under Pt VII of the Family Act, in cases in which the obligations and rights of parents are in no way in issue, so long as children of a marriage are concerned, should be rejected.

217 The appellant's and the Attorney-General of the Commonwealth's third response was that whatever the extent of the jurisdiction of the Family Court, it had no power to contradict or interfere with the statutory directions for the detention of unlawful non-citizens whether or not they were children pursuant to ss 189 and 196 of the Migration Act. The point is certainly arguable. Before saying why that is so I should set out the two sections of the Migration Act:

> "**189 Detention of unlawful non-citizens**
>
> (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
>
> (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

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226 (1994) 181 CLR 583 at 599-600.

227 (1992) 175 CLR 218.

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

...

196 Period of detention

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."

218 The Migration Act, as appears inter alia, from the unmistakable language of those sections, is a very specific enactment apparently designed to deal with

all relevant matters in relation to the entry, departure and residence of unlawful non-citizens which these respondents undoubtedly are. No relevant exceptions are made by the Migration Act in relation to children as to the jurisdiction that courts, whether State or federal, might or might not otherwise have in relation to them. The appellant and the Attorney-General of the Commonwealth accept that detention under the Migration Act is subject to the general law and in that sense to the supervision of the courts. Officials administering the Migration Act may, for example, be liable criminally or in tort. The Migration Act, however, confers upon the officials the duty to decide where a detainee resides and the conditions of residence. These are administrative decisions. They are likely to be affected by considerations of policy to the extent that discretions have to be exercised, and with respect to priorities of allocation of public resources.

219 Some of the orders sought in the Family Court could well require the responsible Minister to exercise statutory powers under the Migration Act in a particular way, for example, to approve a particular place for the purposes of par (b)(v) of the definition of "immigration detention" in s 5(1) of the Migration Act. Section 474 of the Migration Act would appear to stand as an obstacle to the making of orders of the kind sought[228].

220 The respondents sought to rely on the United Nations Convention on the Rights of the Child. For present purposes I will proceed upon the basis that the welfare of children in this country can truly be an external affair. In enacting Pt VII of the Family Act the Parliament chose to rely on particular heads of power. Express references or indications of those heads of power will usually provide fairly sure pointers to the boundaries within which the Parliament was intending to legislate and has legislated. Here, those indicators are to be found in the long title to the Family Act and the reference to parentage and marriage in Pt VII of the Act. The Convention cannot expand the intended and clearly identified scope of Pt VII of the Family Act. Australia's treaty obligations do not form part of Australian domestic law unless incorporated by statute[229]. Whatever relevance the Convention may have as a declared instrument under the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), it has not actually been incorporated into the domestic law relating to the detention of unlawful non-citizens which is the subject of express provision under the Migration Act. Nor does Pt VII purport to incorporate the Convention into domestic law as an exercise of any legislative power with respect to external affairs, assuming that

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228 Compare the reasoning of Chisholm J in *HR & DR and Minister for Immigration & Multicultural & Indigenous Affairs* (2003) FLC ¶93-156 at 78,569-78,571 [151]-[171].

229 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 480-482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

the relevant matters could be external affairs. To do so the demonstration of a clear connexion between the law and the treaty would be necessary: the law must truly have the "purpose or object" of implementing the treaty[230]. Part VII manifests no such purpose, even though it may not be inconsistent with the Convention.

221 The language of Pt VII and the parliamentary history of the *Family Law Reform Act* 1995 (Cth) (which inserted Pt VII in its current form) make it clear that Parliament was *not* intending in enacting that Part to implement the Convention for these reasons. The changes introduced by the 1995 amendments were directed at the reinforcement of parental responsibility for children. Section 67ZC reproduced the earlier welfare jurisdiction, arguably in clearer terms but with no suggestion of any resort to the Convention which is nowhere mentioned in the Family Act. Section 60B is a direct indication of reliance upon the marriage power.

222 In explaining the amendments directed at parental responsibility, the Explanatory Memorandum to the Bill for the 1995 amendments noted that the object of Pt VII was "based [not on the reception of the Convention into the Family Act, but] on principles which are consistent with" the Convention[231]. The second reading speech noted Australia's ratification of the Convention and said that the objects clause in Pt VII gave "recognition" to the rights contained in that instrument "by specifying a number of *such* rights that should be observed"[232] (emphasis added). It is possible therefore that some Articles of the Convention may have influenced the drafting of sections of Pt VII. The Parliament did not however intend to implement the Convention by, in some way enlarging or creating an all-embracing welfare jurisdiction. The strong possibility in any event is that the Convention may be aspirational only. None of its provisions on any view require that the rights of children be protected or advanced by a conferral of jurisdiction upon the Family Court. Furthermore, the substantive Articles of the Convention set out rights which States are to ensure that children and parents should enjoy, but leave the selection of "appropriate legislative, administrative, and other measures"[233] to State parties.

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230 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, citing Brennan J in *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 322.

231 Explanatory Memorandum to the Family Law Reform Bill 1994 at 2 [4].

232 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 November 1994 at 2759.

233 United Nations Convention on the Rights of the Child, Art 4.

223 Something need only briefly be said about the fourth matter, the Full Court's reliance on the reasoning of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[234]. The applicant there failed to obtain a protection visa. He asked to be removed from Australia under s 198(1) of the Migration Act but (at the time of the decision at first instance at least) that removal could not be effected. The Full Federal Court held that the primary judge had been correct to regard Mr Al Masri's continued detention as falling outside the authority of s 196 of the Migration Act because, as a matter of construction, s 196 did not authorise the detention of a non-citizen for the purpose of removing him or her from Australia unless there was a real likelihood of removal in the reasonably foreseeable future. For the reasons that I have given it is unnecessary to explore the correctness of that proposition in this appeal.

224 The judges in the majority in the Full Court also embarked upon a long discussion of authority and academic writing about the "capacity" of children to make decisions[235]. The significance of "capacity" was that, in their Honours' view, "if the children or any of them are unable to bring their detention to an end [by making a request under s 198(1)], therefore, like Mr Al Masri, their continued detention is unlawful"[236]. They expressed the view, despite the absence of any evidence about capacity, that the children were unlawfully detained[237].

225 The Full Court heard no argument that, as with Mr Al Masri, the children here had failed in their visa application and had exhausted all avenues of appeal and that it was therefore the duty of every "officer" under s 198(6) of the Migration Act to remove them from Australia as soon as "reasonably practicable". If the reasoning in *Al Masri* was correct, the lawfulness of their detention depended on the prospects of that removal being achieved in the reasonably foreseeable future. Whether they had any capacity to request their own removal under s 198(1) would then have no relevance. It is unnecessary to reach any conclusion on this last matter.

Conclusions

226 For the other reasons I have given the appeal must be allowed.

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234 (2003) 197 ALR 241.

235 (2003) 199 ALR 604 at 663-665 per Nicholson CJ and O'Ryan J.

236 (2003) 199 ALR 604 at 665 per Nicholson CJ and O'Ryan J.

237 (2003) 199 ALR 604 at 665 per Nicholson CJ and O'Ryan J.

227 The effect of the orders of the Full Court was that the primary judge rehear the applications which were made at first instance. Those orders should be set aside. The judgment and orders of the primary judge should be restored. In consequence, the interlocutory orders in purported exercise of the jurisdiction which the Family Court has now been held not to have, can have no operation. The appellant accepts and accordingly it should be ordered that the appellant pay the respondents' costs of the appeal.

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