IN THE HIGH COURT OF AUSTRALIA **No. B28 of 2012**
BRISBANE REGISTRY

BETWEEN: **RCB as litigation guardian of EKV, CEV, CIV and LRV**

Plaintiff

AND: **THE HONOURABLE JUSTICE COLIN JAMES FORREST, ONE OF THE JUDGES OF THE FAMILY COURT OF AUSTRALIA**

First Defendant

AND **DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITIES (CHILD SAFETY AND DISABILITY SERVICES)**

Second Defendant

AND: **LKG**

Third Defendant

AND: **TV**

Fourth Defendant

ANNOTATED SUBMISSIONS ON BEHALF OF SECOND DEFENDANT

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Filed on behalf of: the second defendant

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I. CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II. CONCISE STATEMENT OF ISSUES

2. The proceedings raise two issues:

   (a) Does procedural fairness require that in proceedings under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ('the Child Abduction Regulations') a child must be independently and separately represented whenever it appears that a child may object to being returned?

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   (b) If so, is s 68L(3) of the *Family Law Act 1975* (Cth) ('the FLA') invalid because it breaches Chapter III of the Constitution?

III. SECTION 78B NOTICES

3. The plaintiff has given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth). The second defendant does not consider that any further notice is required.

IV. CITATIONS

4. The judgments of the first defendant that are relevant to these proceedings are these:

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   (a) *Director-General, Department of Communities (Child Safety Services) & Garning*[1] [2011] FamCA 485 (23 June 2011) **[SAB 74-104]**;
   (b) *Director-General, Department of Communities (Child Safety Services) & Garning* [2012] FamCA 342 (4 May 2012) **[SAB 148-153]**;
   (c) *Director-General, Department of Communities, Child Safety and Disability Services & Garning No 2)* [2012] FamCA 353 (14 May 2012) **[SAB 157-162]**;
   (d) *Garning & Director-General, Department of Communities, Child Safety and Disability Services* [2012] FamCA 354 (16 May 2012) **[SAB 64-69]**.

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1 'Garning' is the pseudonym adopted by the Family Court for publication of the judgements.

V. STATEMENT OF RELEVANT FACTS

5. The second defendant considers that many of the material facts stated by the plaintiff need qualification and are incomplete. The second defendant submits that the material facts are as follows.

6. The four children for whom RCB acts are girls aged between nine and 15 years. They were born in Italy and are Italian citizens **[AB 13]**; they became Australian citizens by descent on 16 November 2009. Their parents are the third defendant (the mother) and the fourth defendant (the father).

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7. By a consensual separation agreement made in Italy between the mother and the father in November 2008, the parents agreed to have joint custody of the four girls **[SAB 79]**.

8. The children lived in Italy before travelling to Australian with the mother on 23 June 2010. The ostensible purpose of travelling was to have a holiday for one month in Australia **[SAB 91 [65]]**. The children, however, have remained in Australia since their arrival **[SAB 79]**.

20 9. The mother currently lives in Australia, while the father lives in Italy.

10. On 18 February 2011, the second defendant filed an application seeking return orders for the children under regulation 14 of the Child Abduction Regulations **[SAB 78]**.

11. On 30 March 2011, the mother filed an Answer and Cross-Claim in the Family Court of Australia claiming, among other things, that the children objected to returning **[SAB 2]**.

30 12. On 6 April 2011, the second defendant applied for orders that, pursuant to regulation 26 of the Child Abduction Regulations, a Family and Child Counsellor or Welfare Officer be nominated by the Director of Court Counselling Family to prepare and submit a report on a number of issues. These issues included whether the children objected to being returned **[SAB 2, 14-20]**.

13. On 13 April 2011, the first defendant made orders directing the preparation and submission of that report **[SAB 3, 22-24]**.

14. On 15 April 2011, the mother filed a report prepared by Mr Alessandro Suppini, a
40 psychologist. His report addressed the psychological wellbeing of the children in relation to three scenarios involving remaining in Australia or returning to Italy **[SAB 3, 41-49]**.

15. On 13 May 2011, Ms Maggie Egan filed an affidavit attaching the report under regulation 26 of the Child Abduction Regulations **[SAB 3, 26-39]**. That report dealt with the issue of objection as well as the other issues specified in the order of the first defendant on 13 April 2011.

16. The first defendant heard the second defendant's application for return orders on 16 May 2011 **[SAB 74-75]**.

17. On 23 June 2011, the first defendant ordered that the children be returned to Italy **[SAB 72-73]**. His Honour held that the mother had not established any of the defences under the Child Abduction Regulations on which she relied **[SAB 56, 103]**. His Honour found, among other things, that the children's desire to remain in Australia was not a strength of feeling beyond the mere expression of preference or ordinary wishes **[SAB 101-102]**.

18. On 24 June 2011, the mother and the second defendant consented to amendments to the orders made on 23 June 2011 **[SAB 193-194]**. These amendments set a timetable for the return to the children to Italy depending on whether the mother elected to return **[SAB 194]**.

19. The mother appealed to the Full Family Court **[SAB 4]**. A failure to afford procedural fairness to her children formed no part of that appeal **[SAB 113]**.

20. On 9 March 2012, the Full Family Court dismissed the mother's appeal **[SAB 111]**. She subsequently applied for special leave to appeal from the High Court **[SAB 151 [9]]**.

21. On 4 April 2012, the mother filed a notice of discontinuance in relation to her application for special leave to appeal **[SAB 67 [10]]**.

22. On 4 May 2012, the first defendant ordered the mother to deliver the children to the Brisbane International Airport at a date not before 16 May 2012 **[SAB 4, 52-53]**.

23. On 14 May 2012, the first defendant issued warrants for possession of each of the children pursuant to regulation 31 of the Child Abduction Regulations **[SAB 4, 156]**. His Honour did so after finding that, on the evidence before him, there was a real risk that the children had already been relocated to a place where they might not be able to be easily found, with a view to defeating the orders made by him on 4 May 2012 **[SAB 161 [11]]**.

24. The mother did not comply with the order of the first defendant and claimed that she did not know the whereabouts of the children **[SAB 67 [14]]**.

25. On 15 May 2012, the mother applied to discharge the return orders under regulation 19A of the Child Abduction Regulations **[SAB 164-165]**.

26. On 16 May 2012, the plaintiff sought leave to intervene in the application to discharge the return orders as litigation guardian for the children **[SAB 171-174]**.

27. On 16 May 2012, the first defendant initially refused to hear the mother's application and the application of the plaintiff to intervene. In response to submissions from senior counsel for the mother that he had not provided any order against which she could appeal, however, the first defendant ultimately dismissed both applications **[SAB 60-61, 69, 182-183]**.

28. The children were discovered by police at a residence on the Sunshine Coast in Queensland on the evening of 21 May 2012.[2]

29. On 26 June 2012, the mother filed a second application to discharge the return orders and other orders made by the first defendant as well as other applications dealing with where the children should live pending the determination of these proceedings.[3]

30. On 6 July 2012, Murphy J of the Family Court made certain orders regarding the arrangements for the children pending the determination of proceedings in the High Court. His Honour otherwise adjourned the mother's application to discharge the return orders.[4]

V. APPLICABLE PROVISIONS

31. The provisions relevant which are relevant to the resolution of these proceedings are found in the Annexure.

VI. ARGUMENT

(a) Procedural fairness does not require independent representation

32. The plaintiff's complaint is a limited one. She submits that the Family Court failed to afford procedural fairness to the children because it did not give them an opportunity to be separately and independently represented under s 68L of the FLA.

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2 [2012] HCATrans 125 p 4, line 75.

3 *Garning v Director-General, Department of Communities, Child Safety and Disability Services* (Discharge of Return Order) [2012] FamCA 565 at [49].

4 Ibid.

33. The plaintiff does not allege any other breach of procedural fairness. She does not claim that the first defendant misdirected Ms Egan, the family consultant, as to the questions relevant to the proceedings. She does not dispute that the report of Ms Egan accurately conveyed the views of the children to the first defendant. Nor does she dispute that the mother adduced evidence concerning the views of the children from Mr Suppini, who interviewed them on three occasions.

34. The plaintiff's submission should be rejected.

35. Neither authority nor principle support the claim that procedural fairness to a child in proceedings under the Child Abduction Regulations can only be satisfied if the child is offered independent and separate representation.

36. The principal Australian authority on which the plaintiff relies is *De L v Director-General, New South Wales Department of Community Services* ('*De L*').[5] The issue relevantly was whether a majority of the Full Family Court had breached procedural fairness by ordering the return of the child to the United States in circumstances where the court-appointed reporter had not been directed to the correct issues that arose in proceedings under the Child Abduction Regulations. The High Court unanimously held that it did. The question was whether it was sufficient to allow the appeal from the Family Court or to have the matter reheard by a single judge of the Family Court.

37. All members of the Court held that there should be a rehearing. Chief Justice Brennan and Dawson, Toohey, Gaudron, McHugh and Gummow JJ stated that given the difficulties confronting the mother in establishing whether the children objected to being returned, procedural fairness required a rehearing to determine if they in fact objected to being returned. After emphasising the importance of a properly directed report, their Honours then observed:[6]

> In the present case to date, there has been no separate representation for the children. Where issues of the kind involved in this case arise, or appear to the Court to arise with respect to a child of the age and degree of maturity spoken of in reg 16(3)(c), there ordinarily should be separate representation. A recent example is *Clarke v Carson*. There the issue before the New Zealand court, on a Convention application, concerned the objections by two children, aged 7 and 11, to their return to the United States.

38. Their Honours quoted s 68L of the FLA as then in force and said:[7]

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5 (1996) 187 CLR 640. See Plaintiff's submissions, para 27.
6 (1996) 187 CLR 640 at 659-660.
7 (1996) 187 CLR 640 at 660.

> The presence of separate representation should not hinder, and indeed should assist, the prompt disposition of Convention applications.

39. The joint judgment in *De L* cannot be fairly interpreted as holding that separate representation as an indispensable for compliance with procedural fairness, even in cases in which a child has objected to the return. The joint judgment did not express itself in those terms; nor did it say that the Family Court judge would have failed to afford procedural fairness to the children if the report had been properly directed to the issues. Indeed, the joint judgment concluded:[8]

> Upon [the] rehearing, it is to be expected that the Court will exercise powers under the new reg 26 for the preparation of a report by a family and child counsellor or welfare officer, and that the Court *will also give serious consideration to the exercise of its powers now conferred by s 68L.*

40. An expectation that the Family Court, on rehearing the matter, will give 'serious consideration' to the exercise of its powers under s 68L of the FLA (as it then stood) is inconsistent with a rule that procedural fairness requires children to be independently and separately represented. It is submitted that the joint judgment in *De L* stands for no more than that, as a matter of prudence, a judge should consider whether children are to be separately represented if it appears that there are serious questions about whether the child objects to return or another defence under regulation 16(3) of the Child Abduction Regulations may be established. It does not establish that every failure to afford separate representation amounts to a breach of procedural fairness. The plaintiff is wrong to suggest otherwise.

41. If, however, the joint judgment in *De L* were intended to lay down a rule that procedural fairness ordinarily requires a child who objects to return to be separately represented, then it is respectfully submitted that the Court should not follow it. That is so for several reasons.

42. First, the joint judgment's observations regarding separate representation were obiter dicta. They formed no part of the essential reasoning of the Court.

43. Secondly, the observations were apparently made without any party advancing specific submissions directed to the issue of separate representation for the children and its relationship with procedural fairness.[9] That is a significant flaw.

44. Thirdly, the joint judgment did not consider how the issue of separate representation was dealt with in countries other than New Zealand. It did not, for example, consider the position in the United Kingdom. At the time when the Court decided *De L*, the case law in the United Kingdom restricted representation of

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8 (1996) 187 CLR 640 at 663 (emphasis added).

9 Nothing in the authorised report suggests that the parties addressed the point.

children in child abduction proceedings to exceptional circumstances.[10] The joint judgment failed to address those authorities.

45. Fourthly, the suggested rule is contrary to current authority in the United Kingdom and Ireland. The cases in both jurisdictions make it clear that the views of children can be taken into account through a variety of means, and that separate representation in child abduction proceedings under the Hague Convention is generally not required. In *in Re D (A Child) (Abduction: Custody Rights)* ('*Re D*'), Baroness Hale of Richmond (with whose reasons a majority of the House of Lords agreed) referred to the obligations imposed by Article 11.2 of Brussels II Revised Regulation (EC) No 2201/2003 on the United Kingdom. That Article Regulation provides:

> When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

46. Baroness Hale, however, pointed out that there were possible three ways of obtaining the children's views: full scale legal representation of the child; the report of an independent CAFCASS officer[11] or other professional; and a face to face interview with the judge.[12] While her Lordship suggested that representation should be ordered whenever it seemed likely that the child's views and interests may not be properly presented to the court, she said that in most cases an interview with a CAFCASS officer would be enough, and added that '[o]nly in a few cases [would] full scale legal representation be necessary'.[13]

47. In *in Re M (Abduction: Rights of Custody)* ('*Re M*'), Baroness Hale (with whose reasons the other members of the House agreed) stated:[14]

> As pointed out in *Re D, it is for the court to consider at the outset how best to give effect to the obligation to hear the child's views. We are told that this is now routinely done through the specialist CAFCASS officers at the Royal Courts of Justice.* I accept entirely that children must not be given an exaggerated impression of the relevance and importance of their views in child abduction cases. *To order separate representation in all cases, even in all child's objections cases, might be to send them the wrong messages.* But it would not send the wrong messages in the very small number of cases where settlement is argued under the second paragraph of article 12 [of the Hague Convention]. These are the cases in which the separate point of view of the children is particularly important and should not be lost in the competing claims of the adults. If this were to become routine there would be no additional delay. In all

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10 *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 394 (Butler-Sloss LJ), 397 (Sir Thomas Bingham MR).

11 CAFCASS stands for Children and Family Court Advisory and Support Services.

12 [2007] 1 AC 619 at [60].

13 [2007] 1 AC 619 at [60].

14 [2008] 1 AC 1288 at 1311 (emphasis added).

> other cases, the question for the directions judge is whether separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion, the expense and the delay that may result. *I have no difficulty in predicting that in the general run of cases it will not.* But I would hesitate to use the word "exceptional". The substance is what counts, not the label.

48. These observations demonstrate that separate representation in child abduction proceedings is not mandatory even where the child objects to being returned. Separate representation will be ordered in settlement cases in the United Kingdom, but not in all proceedings under the Hague Convention.

49. The authorities from Ireland, likewise, contemplate that children do not have to be represented in child abduction proceedings. In *AU v TNU*, for example, the Supreme Court of Ireland upheld a decision of the High Court to refuse to return children on the grounds in Article 13(2) of the Convention.[15] The High Court judge had determined the views of the children by relying on the report prepared by court order. Chief Justice Denham, writing for the Supreme Court, did not suggest that the fact that the children's views had been ascertained by a court-appointed reporter posed any difficulty or raised concerns about procedural fairness.[16]

50. Any rule of procedural fairness requiring children to be separately represented is difficult to reconcile with these authorities.

51. Fourthly, any rule that children ordinarily must be separately represented in proceedings under the Child Abduction Regulations is difficult to reconcile with the legislative context. It is well established that the requirements of natural justice are critically depend on the statutory scheme under which decisions are made.[17] The Child Abduction Regulations are made under s 111B of the FLA and are intended to give effect to the Convention on the Civil Aspects of International Child Abduction ('the Hague Convention').[18] The first object of the Hague Convention is to 'secure the prompt return of children wrongfully removed to retained in any Contracting State'. The Regulations provide that they must be construed with the objects in mind.[19] Consistent with the object of securing a prompt return, r 15(2) provides that the court, as far as practicable, must give an

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15 [2011] 1ESC 39.

16 See [2011] 1ESC 39 at [26].

17 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

18 Section 111B is not in Part VII of the FLA and decisions under the Child Abduction Regulations are not subject to the best interests principle that permeates most applications made under Part VII: *MW v Director-General, Department of Community Services* (2008) 82 ALJR 629 at [61]-[64] (Gummow, Heydon and Crennan JJ).

19 Regulation 1A(a).

application such priority as will ensure that the application is dealt with 'as quickly as a proper consideration of each matter relating to each application allows'. Subregulation 15(4) allows the responsible Central Authority to seek reasons from a court for a delay in determining the application. In addition, regulation 26 provides that the court may direct a family consultant to report to the court on such matters relevant to the proceedings as the court considers to be appropriate. Regulation 26 enables the views of the child to be placed before the Family Court without the child being represented. The scheme of the Regulations and the Convention to which they give effect therefore suggest that child abduction proceedings should be prompt and need not be based on children being having independent and separate representation.[20]

52. That conclusion is reinforced by the FLA. Quite apart from s 68L(3), the FLA envisages that the views of the child may be obtained, and procedural fairness thereby afforded, otherwise than through separate legal representation. Section 62G, in particular, provides for reports by family consultants who are required to ascertain the views of the child and include the views of the child in a report. Such a provision does not sit easily with the existence of any blanket requirement that children must be independently represented in proceedings under the Child Abduction Regulations or, indeed, other family law proceedings.

53. Finally, the joint judgment in *De L* did not address the legal and policy implications of routinely mandating independent and separate representation. Although the joint judgment dismissed the concern with delay by reference to the example in New Zealand, it did not address the financial burden that such a rule would impose on the executive, which would have to fund any independent children's lawyers through Legal Aid.[21] Nor it did address whether representation would send the wrong message to children about the importance of their views. As *Re D* and *Re M* demonstrate, such considerations are relevant to the question of whether representation is warranted.

54. Furthermore, the joint judgment did not examine whether a rule mandating independent and separate representation of children if it appears that they may object to being returned would be consistent with the Court's recognition that defendants in criminal proceedings are not entitled to legal representation at public

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20 The plaintiff characterises proceedings under the Child Abduction Regulations as not a procedural hearing but as a 'determination of substantive issues affecting a child's rights, liberty and welfare': see Plaintiff's submissions, para 33. However, while final relief under the Child Abduction Regulations may be more than a procedural hearing, a return order is not the determination of the merits of any competing claims, and its effect may vary from case to case: see *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at [27] (Gaudron, Gummow and Hayne JJ).

21 See 'Guidelines for Independent Children's Lawyers' (section 1).

expense,[22] nor are litigants in civil proceedings.[23] These issues, however, were not considered by the joint judgment.

55. For these reasons, if *De L* stands for the proposition that procedural fairness requires separate representation in proceedings under the Child Abduction Regulations, then it should not be regarded as not good law.

56. As stated earlier,[24] the plaintiff has not suggested that the first defendant misdirected the Ms Egan, the family consultant, as to the questions relevant to the proceedings **[SAB 23-24]**. The plaintiff has not disputed that the mother adduced evidence concerning the views of the children from Mr Suppini, who interviewed them on three occasions **[SAB 43]**. Indeed, the plaintiff has pointed to nothing other than the failure to be afforded representation as a breach of procedural fairness. As that is so, the claim for constitutional writs must be dismissed.[25]

(b) Section 68L(3) does not infringe Chapter III of the Constitution

57. Even if procedural fairness ordinarily required a child who objected to being returned to be independently separately represented, s 68L(3) would not infringe any implication in Chapter III of the Constitution.

58. The plaintiff's submissions to the contrary depend on interpreting s 68L(3) as effectively compelling the Court to breach procedural fairness.[26]

59. Those submissions should be rejected.

60. First, s 68L has only a limited operation: it restricts the capacity of the Family Court to order the appointment of an 'independent children's lawyer'.[27] Section 68L does not, however, purport to affect the Family Court's capacity to grant leave for a person to act as a litigation guardian for children or to obtain the children's views by any other means within the Family Court's power. On that basis, the claim that s 68L has 'removed from the person most aggrieved...the fundamental principles of natural justice'[28] is misconceived.[29]

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22 *Dietrich v The Queen* (1992) 177 CLR 292 at 297-298 (Mason CJ and McHugh J), 317 (Brennan J), 330 (Deane J), 343 (Dawson J), 356 (Toohey J), 364-365 (Gaudron J).

23 *New South Wales v Canellis* (1994) 181 CLR 309 at 330-331 (Mason CJ, Dawson, Toohey and McHugh JJ).

24 Paragraphs 32 and 33 above.

25 Furthermore, it is submitted that the plaintiff has failed to establish that separate representation could have brought a different result. In these circumstances, there is no basis for relief: see *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626 at 635 (McPherson JA).

26 See, for example, Plaintiff's submissions, para 41.

27 See FLA, s 4, sv 'independent children's lawyer'.

28 Plaintiff's submissions, para 36.

29 For the same reason, there is no analogy between the legislation invalidated in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 and *South Australia v*

61. Secondly, and relatedly, there is no reason to suppose that an unfettered power to order that a child be independently represented is essential to affording procedural fairness to the child. Section 68L allows for the appointment of an independent children's lawyer. That role is created by legislation and is not that of traditional counsel: the lawyer is not the child's representative and is not obliged to act on the child's instructions in relation to the proceedings.[30] While the independent children's lawyer must ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court,[31] the lawyer must form an independent view, based on the evidence available, of what is in the best interests of the child and must act accordingly.[32] This can include putting submissions that are contrary to the child's views. Given the unique role of an independent children's lawyer, which is a legislative creation, it is difficult to see why the appointment of such a person is mandated by procedural fairness.[33] That suggests that the Commonwealth Parliament (which created the position) can limit the Family Court's capacity to order the appointment such a person to exceptional circumstances.[34]

62. Thirdly, the use of the term 'exceptional circumstances' in s 68L(3) is not meaningless and does not impose a requirement that is impossible to satisfy.[35] In *Baker v The Queen*,[36] the Court rejected a similar argument concerning the term 'special circumstances' in s 13(3A) of the *Sentencing Act 1989* (NSW).[37] Justices McHugh, Gummow, Hayne and Heydon JJ emphasised that courts were bound to

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Totani (2010) 242 CLR 1. The legislation in the former case compelled a court to proceed ex parte upon an application by the executive and provided no practical means by which an ex parte order could be dissolved. The legislation in the latter case drew the Magistrates Court into the implementation of executive policy. It did so because the Magistrates Court was required to give effect to the Attorney-General's declaration about an organisation without undertaking any independent curial determination of the claim or premise for a control order by the Commissioner of Police. Subsection 68L(3) is not comparable to such legislation.

30 FLA, s 68LA(4).

31 FLA, s 68LA(5)(b).

32 FLA, s 68LA(2).

33 See also Soysa v Commissioner, Western Australia Police (2012) 46 Fam LR 648 at [187] (Thackray CJ) (pointing to the ambiguity of the role of the independent children's lawyer).

34 It is noteworthy that independent children's lawyers were not introduced into the FLA until some time after *De L* had been decided. Section 68LA was inserted in 2006 by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). This Act also repealed and substituted s 68L.

35 Plaintiff's submissions, para 30.

36 (2004) 223 CLR 513.

37 This provided: 'A person who is the subject of a non-release recommendation is not eligible for the determination of a minimum term and an additional term under this section, unless the Supreme Court, when considering the person's application under this section, is satisfied that special reasons exist that justify making the determination.'

give meaning to s 13(3A) despite the difficulties of construction that it posed. But their Honours then stated:[38]

> It is important, as Gaudron J stressed in *Sue v Hill*, in construing such a broadly expressed conferral of authority that it is to be exercised by a court, not by an administrator. *There are numerous authorities rejecting submissions that the conferral of powers and discretions for exercise by imprecisely expressed criteria do deny the character of judicial power and involve the exercise of authority by recourse to non-legal norms.* A well-known example is the upholding in *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* of the conferral upon a federal court of a power of disallowance of rules of industrial organisations for imposing upon members conditions that were "oppressive, unreasonable or unjust". Subsequently, in *R v Joske; Ex parte Shop Distributive and Allied Employees' Association*, Mason and Murphy JJ observed:
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> > "[T]here are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised — nevertheless they have been accepted as involving the exercise of judicial power."

63. Their Honours' reasoning makes it clear that courts are required to give content to s 68(3) and that imprecision or a lack of reference to criteria does not amount to the conferral of non-judicial power. It is therefore inconsistent with the plaintiff's claim that the condition in s 68L(3) is devoid of content and it is impossible for the Family Court to be satisfied that 'exceptional circumstances' exist.

64. In any event, the making of orders under s 68L(2) demonstrates that the plaintiff's empirical claim is false. In *Director-General, Department of Families v S*, Buckley J made orders that the child be independently represented. His Honour identified a number of exceptional circumstances justifying the order. These included the fact that the child was abducted for three years; that his name was changed; and that he was led to believe that his natural mother had died. As those orders illustrate, the Family Court has not found it impossible or even difficult to give s 68L(3) meaning.[39]

65. Fourthly, it is not the case that a failure to have the children represented by an independent children's lawyer means that the children have no capacity to challenge an adverse decision under the Child Abduction Regulations. A child may be able to seek leave from the Full Court of the Family Court to appeal the decision if the Full Court determines that the child's interests are sufficiently affected and leave is warranted.[40] The child might also be able to invoke s 75(v) of the Constitution, depending on the grounds of review.

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38 (2004) 223 CLR 513 at [42] (emphasis added and citations omitted).

39 See also *Gamble v Director-General, Department of Community Services* [2006] FamCA 1401 at [20] (suggesting that, in the circumstances, the primary judge should consider whether to order the child's interests in the proceedings to be independently represented by a lawyer).

40 Compare *Cuthbertson v City of Hobart* (1921) 30 CLR 16 at 24 (Knox CJ and Starke J).

66. Accordingly, the suggestion that s 68L(3) removes any ability for an affected person to challenge a decisions under the Child Abduction Regulations is mistaken.

67. Finally, the plaintiff's reliance on Article 12 of the United Nations Convention on the Rights of the Child ('UNCROC') is misplaced, for several reasons. One is that the Article has not been implemented in domestic law and therefore cannot be used to override the law embodied in s 68L(3) of the FLA. Any other view would overturn the longstanding relationship between parliament and the executive.[41]

68. A second, related reason is that the Constitution is not to be read in conformity with international law. In *Al-Kateb v Godwin*, McHugh J said:[42]

> [T]his Court has never accepted that the Constitution contains an implication to the effect that it should be construed to conform with the rules of international law. The rationale for the rule and its operation is inapplicable to a Constitution — which is a source of, not an exercise of, legislative power. The rule, where applicable, operates as a statutory implication. But the legislature is not bound by the implication. It may legislate in disregard of it.

69. That position is reflected in a long line of authority.[43] It is flatly contrary to the position advanced by the plaintiff.

70. A third reason is that Article 12 itself does not require separate representation for children. The words of Article 12.2 speak of children being given an opportunity to be heard directly or 'through a representative or an appropriate body'. The reference to an 'appropriate body' indicates that the views of children can be provided through a court reporter or some other person.[44] Accordingly, Article 12 does not assist the plaintiff.

VII. ORDERS

71. The proceedings should be dismissed. The second defendant does not seek costs.

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41 *Western Australia v Ward* (2002) 213 CLR 1 at 390-391 [961] (Callinan J).

42 (2004) 219 CLR 562 at 591 [66].

43 *Polites v Commonwealth* (1945) 70 CLR 60 at 69 (Latham CJ), 74 (Rich J), 75-76 (Starke J), 78 (Dixon J), 79 (McTiernan J), 81 (Williams J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 551 (Brennan J); *Horta v Commonwealth* (1995) 181 CLR 183 at 195 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 383-386 (Gummow and Hayne JJ); *AIS v AMF* (1999) 199 CLR 160 at 180 (Gleeson CJ, McHugh and Gummow JJ). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224-225 [181] (Heydon J).

44 This interpretation of Article 12 is consistent with that given by the House of Lords to Article 11.2 of Brussels II Revised Regulation (EC) No 2201/2003: see the discussion of *In Re D* at paras 45 to 47 above.

72. It is necessary, however, to address a number of consequential matters raised by the plaintiff.

73. The plaintiff seeks an order that the second defendant pay the costs of and incidental to the 'Questions Reserved'. No specific questions were reserved by court order and none were agreed by the parties to be submitted as agreed questions.

74. If the plaintiff were to be successful, however, the second defendant would submit that there should be no order for costs, for the following reasons:

(a) the second defendant has been carrying out her duties as the appointed State Central Authority under the Child Abduction Regulations in seeking to uphold and enforce the return order duly made under the regulations (see regulations 5, 8,9 and 20). While the second defendant is not immune from costs under regulation 7, she has acted appropriately, in furtherance of her duties at all material times; and the plaintiff does not assert otherwise;

(b) this amended application was brought well after the third defendant had exhausted all her remedies in the Family Court, and had commenced but discontinued an application for special leave to appeal in this Court. Further, a significant part of the relief sought by the plaintiff is a writ of certiorari[45] quashing the original return orders, which orders were made well in excess of 6 months before the filing of this application.[46] Although the time was extended, the necessity for an extension is relevant to the question of costs;

(c) to the extent that the current application raises significant matters of public importance to the practice of family law generally, it is appropriate for each party to bear their own costs; and

(d) in any event, the plaintiff's submissions do not indicate that the plaintiff is incurring any liability for legal costs. In *King v King*, Chesterman JA explained the position regarding costs for pro bono legal representation this way:[47]

> An order for costs operates as an indemnity to a successful party in litigation. Costs are awarded to recompense a successful party in respect of what it cost to bring or defend successful proceedings. A corollary is that the unsuccessful litigant is not required to pay any more than the costs incurred by his successful opponent. See *Oshlack v Richmond River Council* (1998) 193 CLR 72. Before the right to indemnity can arise the successful litigant must be under a legal liability to his solicitors to pay costs. Another corollary is that if a successful

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45 Amended Application for an Order to Show Cause, relief claimed, para 2.

46 See High Court Rules 2004 (Cth), r.25.06.1 (providing that certiorari should be sought not later than six months from the date of judgment).

47 [2012] QCA 81 at [7].

litigant's lawyers act for him without charge he is not entitled to an order for costs. There is nothing to indemnify him against. See *McCullum v Ifield* [1969] 2 NSWR 329 at 330 cited by Santow JA in *Wentworth v Rogers* (2006) 66 NSWLR 474 at 486.

It is submitted that explanation is correct. However, because the plaintiff has not disclosed any cost agreement or other arrangements demonstrating that the plaintiff has a legal liability to be indemnified, no costs order should be made.

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