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Précis Paper

International Child Abduction: The Hague Convention

A discussion of child abduction proceedings under the Hague Convention, where a child has been wrongfully removed to, or retained in, Australia from another country.

Discussion Includes

- **The Hague Convention**
- ***Family Law (Child Abduction Convention) Regulations 1986* (Cth)**
- **The applicant in a child abduction case**
- **The intention behind the Regulations and the Convention**
- **Forms required in Hague applications**
- **Timeframe for the determination of Hague applications**
- **The hearing**
- **Costs**
- **Threshold conditions**
- **Defences**
- **Concluding points**

Précis Paper

International Child Abduction: The Hague Convention

1. **In this edition of BenchTV, Elizabeth Bedford (Director – Watts McCray Lawyers, Sydney) and Martha Barnett (Barrister – Culwulla Chambers, Sydney) discuss child abduction proceedings under the Hague Convention, in situations where a child has been wrongfully removed to, or retained in, Australia from another country.**

The Hague Convention

2. **The Hague Convention ("the Convention") is fundamentally concerned with jurisdiction in cases where a child has been alleged to have been removed wrongfully, or retained wrongfully, in another country other than its habitual residence by a parent. The question for the Hague Convention in these situations is which country's law will determine issues of custody (or what in Australia is termed parental responsibility) and living arrangements for that child. Essentially, the Convention is about denial of jurisdiction to determine custody battles, if the child is not a habitual resident of that country. This is the rationale behind the drafting of the Convention.**

3. **The Convention is now being acceded to in more and more countries, which means that there are fewer safe harbours for people and parents who are abducting their children to foreign jurisdictions. Over the last 20 years, there has been a growth in the number of countries that have become co-signatories to the Convention, as well as signatories to the Convention in and of itself. Therefore, all in all, it is a growing Convention.**

4. **Australia is a signatory to the Convention. However, it must be noted that a country can only be a Convention member in a bilateral sense – that is, the Convention can only be in force as between two specific countries. In Australia's case, the Executive in Australia and that in another Convention member country must agree for the Convention to be enforced as between themselves. Therefore, if a child abduction matter comes to Australia from a different country, it needs to be firstly determined whether or not Australia and that country are co-signatories to the Convention, so as to determine whether the Convention applies as between these two countries.**

***Family Law (Child Abduction Convention) Regulations 1986* (Cth)**

5. **The Convention is implemented into Australian domestic law by the *Family Law Child Abduction Convention Regulations 1986* (Cth) ("the Regulations"). Therefore, when involved in a Hague matter, the first stop should be the Regulations. The Regulations**

have been amended several times, the most significant amendments being in 1995, with further amendments throughout the 2000s.

6. Where there is an inconsistency between the Regulations and the Convention, the Regulations prevail over the Convention. Although the Convention helps interpret the Regulations, the Regulations are ultimately the fundamental source of law.

7. The Convention forms part of the Regulations by virtue of Sch 1 to the Regulations. As such, the Convention informs a determination made in a child abduction matter, if there is any lack of clarity in the Regulations, but the Regulations are what are looked at first and foremost.

8. It must be borne in mind that the Regulations are only applicable in situations where a child has been wrongfully removed or retained in Australia from another country. If the reverse situation is the case, that is, if a child has been wrongfully removed or retained to another country from Australia, while the Convention will still apply, it is the other country's domestic law which will first and foremost need to be looked at, as putting the Convention into practice.

<u>The applicant in a child abduction case</u>

9. The Central Authority of a signatory country is charged with satisfying the country's responsibilities under the Convention. Furthermore, the Central Authority is usually the applicant in a child abduction case in Australia.

10. In Australia, there are both federal and State-based central authorities. The Federal Central Authority is the Attorney-General's Department and the NSW Central Authority is the NSW Department of Family and Community Services. Both of these bodies, as Central Authorities, have the responsibility to be model litigants. Largely this means that they may only litigate appropriate child abduction matters.

11. An individual may also be an applicant, although this is a relatively new practice. Around 2006, the Regulations were clarified to permit left-behind parents to commence child abduction proceedings themselves, in which to have the Convention applied and the child returned to the country of habitual residence.

12. Normally, however, proceedings are commenced by the Central Authority. There are several reasons for this, including:
    (i) cost; and

(ii) the Attorney-General's Department and the NSW Department of Family and Community Services being much better resourced to run such proceedings, as they have lawyers who are very well-versed in the Convention.

13. Individuals do not only have the right to be an applicant, but they also have the right of appeal if they do not agree with the decision reached in the child abduction proceedings. This can sometimes give rise to an odd scenario, where the applicant in the initial proceedings might be the Central Authority, but the appeal is brought by the left-behind parent, who was not actually involved in the initial proceedings.

<u>The intention behind the Regulations and the Convention</u>

14. The purpose of the Regulations is to compel an Australian court to order the return of the child wrongfully removed or retained in Australia, unless there are specific and exceptional circumstances justifying not doing so. Unlike standard family law proceedings, the best interests of the child are not the paramount consideration in child abduction proceedings, and the discretion of an Australian court to refuse a return order is very limited.

15. Although the Regulations also deal with time applications - namely, the left-behind parent's access to the child - not many of these have been made in Australia, and the real focus of applications made under the Regulations is the return of the child to their country of habitual residence, rather than time applications or enforcement applications.

16. With respect to the consideration of "best interests", the idea behind the Convention was that the best interests of the child are served by trying to eliminate parental child abduction, and the best way to achieve this is to have a Convention with a swift mechanism to return a child where a parent has done the wrong thing by abducting their child.

<u>Forms required in Hague applications</u>

17. Schedule 3 to the Regulations sets out the forms required in a Hague application.

18. A Hague application is commenced with a Form 1, which is a request for the return of the child, which form must be supported by an affidavit. In this form, certain threshold conditions must be satisfied. Then, if the matter comes within the scope of the Regulations, a Central Authority must take all action to give effect to the Convention. If the Central Authority or the applicant are satisfied that the requirements/conditions

have been met, they must file a Form 2, which initiates proceedings in the Family Court of Australia seeking the return of the child. This application must have attached to it a copy of the law of the country where the child was habitually resident prior to being wrongfully removed or retained in Australia.

19. **What is normally seen in a Hague application is that the Central Authority commences proceedings, and by the time the respondent's lawyer becomes aware of this, there are some ex parte orders ordinarily made by the judge, placing the child on the airport watch list and requiring passports to be surrendered, which have the effect of securing the child and the abducting parent in the country until the matter can be determined.**

20. **An application can also be made for time – this is Form 3.**

<u>Timeframe for the determination of Hague applications</u>

21. **From the commencement of Hague proceedings, there are 42 days for the matter to be heard and determined, although the reality is that most determinations of applications that fall outside this time period, particularly if an appeal has been lodged.**

22. **In Elizabeth Bedford's experience, speed is of the essence in Hague applications. In matters where she has appeared in court to have directions made for the hearing, there is a very short turnaround. Particularly when acting for the respondent, directions for filing are a matter of weeks, which can be difficult when trying to pull evidence together and potentially obtain evidence from an overseas jurisdiction.**

23. **The Regulations provide that if the 42-day time limit is not being complied with, the overseas Central Authority is entitled to write and ask why this is the case, and the Family Court Australia must respond with an explanation. However, it is not clear whether this actually happens in practice.**

24. **The Hague website provides quite detailed statistics, including a country's compliance with the 42-day timeframe. This indicates that there is quite significant analysis being carried out as to which countries are complying with this time period and which are not, and the length of time different countries are taking.**

<u>The hearing</u>

25. **Historically, Hague application hearings were ordinarily done on the papers, however, it is now becoming increasingly common - in fact, almost standard - for there to be limited cross-examination during the matter.**

26. **In the case of *LK v Director-General, Department of Community Services [2009] HCA 9*, the High Court has said that the requirement of an expeditious hearing does not mean that there ought not to be adequate evidence, particularly in the form of cross-examination or the involvement of appropriate experts. In Martha Barnett's experience, although there has been a slight loosening up of the timing of the hearings and they are still usually contained to one day, there is some cross-examination that is usually allowed on specific points, particularly if there is a contentious issue that goes to one of the defences, or to one of the threshold conditions that the Central Authority must establish in order for the Convention to apply.**

27. **Importantly, because the Central Authority, as compared to an individual applicant, has the role of being a model litigant, the Authority has an obligation to put before the Court evidence that, though it might not assist the Authority, the Court needs to know about, something which is not the case where the litigant is an individual applicant.**

28. **Regulation 29 of the Regulations, concerned with evidentiary requirements, is of importance here, as it essentially allows the Central Authority to rely on whatever evidence the Central Authority chooses. Therefore, there is both a benefit and a responsibility contained in the Central Authority's role in terms of evidence: the benefit being that, broadly speaking, the rules of evidence do not apply to the Central Authority as a result of the effect of reg 29, and the responsibility being that the Central Authority must ensure that it puts all of the appropriate evidence, whether it supports its case or not, before the Court.**

29. **Conversely to the above evidentiary situation where the applicant is the Central Authority, the respondent in Hague proceedings is bound by the Evidence Acts, making the job of a respondent lawyer a little more difficult.**

Costs

30. **Costs are covered by regs 7 and 30 of the Regulations, the effect of which is that a costs order cannot be made against the Central Authority. This flows from the fact that the Central Authority is considered a model litigant. However, a costs order can be made against the respondent, and arguably the applicant, where the applicant is an individual. This is a further benefit of having the Central Authority as applicant.**

Threshold conditions

31. **The first of the two substantive parts to a Hague proceeding that fall for determination by the Court are threshold conditions, the onus of establishing which rests on the Central Authority. The threshold conditions which much be established are:**

(i) The child must be under 16 years of age.

(ii) The habitual residence of the child, the timing of which must be immediately before the child's wrongful removal or retention. In the case law concerning habitual residence, it has been generally accepted that determining habitual residence involves a broad factual inquiry requiring a settled purpose or settled intention. It is important to note that "settled purpose" or "settled intention" does not necessarily equate to a person's intention to live in a particular place permanently or indefinitely.

The High Court case of *LK v Director-General, Department of Community Services* (2009) 237 CLR 582; [2009] HCA 9 ("*LK*") is the authority for habitual residence. In this case, the High Court said that a variety of factors must be looked at in determining habitual residence, and it is really a broad factual inquiry that needs to be made in determining whether or not the child is habitually resident in the other country prior to their wrongful removal or retention from it.

In LK, it was held there should be very few and far circumstances in which the Court will find a child not to have a place of habitual residence, as that would have the effect of circumventing the Convention. The Court made clear that, in most circumstances, a child should be found to have a habitual residence, which should be the habitual residence of the child prior to their wrongful removal or retention. The younger the child, the more closely aligned they will be with the intention of the primary carer and parent, though it must be borne in mind that a number of different factors need to be looked at in determining habitual residence, and the focus needs to be on the child.

Some of the case law makes mention of how although a place of habitual residence can be abandoned within a day, it cannot be acquired within the same timeframe. The authorities usually use the term "appreciable period of time" in relation to acquiring a place of habitual residence, though they do not provide any further elucidation on what an appreciable period of time might be. Whether it might be one month, or several months, for example, really depends on the particular circumstances of each case. Where, for example, a person has sold all of their belongings in their previous place of residence, they have clearly found a place to live and a job in their new place of residence, and their children have started school in that place and are ingrained in the community, the Court will most likely find that the habitual residence of the child has been changed.

When drafting the affidavit for the respondent in a Hague matter, factors that the Court will look at and therefore which the respondent's evidence should go to in

relation to habitual residence are: settled purpose; actual and intended length of stay; the purpose of the stay; the strength of ties to the old place of residence; degree of assimilation (living and schooling arrangements, and cultural, social, and economic integration etc.); and the circumstances in which the previous place of habitual residence was abandoned. In relation to the last factor, if the respondent has departed their previous place of habitual residence with a clear intention of abandonment, a finding that they have found a new habitual residence will more easily be made than would be the case if there were mixed intentions at the time of departure. Examples of things that would evidence a clear intention of departure are: one-way, as opposed to return, plane tickets; resignation from employment; selling of house and household items.

(iii) Rights of custody - the left-behind parent must have had rights of custody and been exercising those rights, or would have exercised them, if the child had not been wrongfully removed or retained. Rights of custody does not expressly refer to the concept of time, such that a left behind parent does not necessarily have to have been spending time with the child prior to their wrongful removal or retention. The relevant case for rights of custody is *MW v Director-General of the Department of Community Services* [2008] HCA 12.

(iv) The application has been made not more than 12 months from the date of the child's wrongful removal or retention. In this vein, it is important to note that a return order is not for return of the child to the left behind parent, but to the country from which the child has been wrongfully removed. Within that scope, if the Hague application has been made after 12 months from the date of the child's wrongful removal or retention, and the child is settled in the new country, this threshold condition cannot be established.

Essentially therefore, two limbs must be established here: 1. Has the application been made within the 12-month timeframe? and, if yes, 2. Is the child well-settled in the new country? In terms of establishing how settled the child is in the new country, although this evidence can be adduced through the respondent's affidavit, the Court seems to rely fairly heavily on family consultant reports or evidence of a similar nature. So if the application for return of the child comes after 12 months of their wrongful removal or retention and the child is settled in the new country, the Full Court of the Family Court has recently, in *Department of Family and Community Services and Magoulas* [2018] FamCA 102, indicated that it has no discretion to consider the application in such circumstances. The key question here is therefore: is the child settled? Arguably, if a child has been living in the new country fairly normally for a period of a year, the Court will generally find the "settled" requirement satisfied, as during that time, the child is

likely to have established friendships, been going to school, established peer groups, engaging in social activities, etc. This is the type of evidence that must be led to establish "settlement" – it is concerned with the child's social, economic, and family situation in their new country.

Defences

32. Once the threshold conditions are established, the Court will proceed to the second substantive part of the Hague proceeding and consider any defences, which are grounds for the Court declining to make an order for the return of the child. It is vital to note, however, that successfully establishing a defence does *not* equate to automatic dismissal of the application for the return of the child; rather a successful defence gives the judge *discretion* not to order the return of the child.

33. The available defences are contained in reg 16(3) of the Regulations. They are as follows:

(i) The parent seeking the return of the child was not actually exercising rights of custody when the child was wrongfully removed or retained, and they would not have been exercising those rights if the child had not been wrongfully removed or retained.

(ii) The left behind parent either consented, or subsequently acquiesced, to the child's removal. The authority on consent and acquiescence is the Full Court of the Family Court case of *Paterson, Department of Health and Community Services, State Central Authority & Casse* (1995) FamLR 474. The consent or acquiescence must be real or actual (that is, the consent or acquiescence must be given with knowledge as to what the parent is consenting or acquiescing to), and not ambiguous, however, it can be inferred from conduct. For example, if the left behind parent gives their consent or acquiescence to the child's departure from their country of habitual residence with the belief that the child is going on a holiday, this is not real or actual acquiescence or consent to a change of the child's habitual residence. However, if time goes on, and it becomes clear to the left behind parent that the parent who has removed the child is staying, rather than holidaying, in the new jurisdiction with the child, and the left behind parent does not take any action against this situation, or at least indicate that they are unhappy with it, the respondent may be able to mount an argument that consent or acquiescence can be inferred from the left behind parent's lack of objection.

Consent, if given, can be withdrawn, but the withdrawal must be timely and very clearly done, as evidenced by a case in which the applicant's (assisted by Elizabeth

Bedford and represented by the Central Authority) late withdrawal of consent resulted in the judge exercising their discretion to not make a return order.

(iii) There is a grave risk that the return would <u>expose the child to physical or psychological harm, or place the child in an intolerable situation.</u> There is a great deal of case law on this defence, and it is very difficult to plead successfully. Some important cases in this area are: *Harris & Harris* [2010] FamCAFC 221 ("*Harris*"); *Arthur & Secretary, Department of Family & Community Services and Anor* [2017] FamCAFC 111 ("*Arthur*"), and *DP v Commonwealth Central Authority; JLM Director-General NSW Department of Community Services* (2001) 206 CLR 401; [2001] HCA 39 ("*DP; JLM*"). In *DP; JLM*, the High Court overturned the previous decisions of the Full Court of the Family Court, and found that there were circumstances in which to find that return of the child would expose them to grave risk of harm. In *DP*, the issue was that the child suffered from severe autism, and the issue was whether Greece, as the country of habitual residence, had the appropriate services to assist the child. In *JLM*, the respondent mother had a major depressive disorder, and there was a real risk that if she returned to Mexico she would commit suicide, which would cause psychological harm to the child. In both of these cases, the High Court overturned the decisions of the Full Court and remitted them back for determination in accordance with the law.

One of the high watermark cases about "grave risk" cases not meeting the requisite threshold is the matter of *Murray v Director, Family Services (ACT)* (1993) 116 FLR 321 ("*Murray*"). This was a case involving significant domestic violence, and the respondent mother had received threats from both the father and the mob in New Zealand of which he was a member. However, the Full Court determined that this did not meet the threshold of "grave risk", notwithstanding that the mother had been hospitalised as a result of conduct of the left behind father. However, behind the scenes, there was liaison between Australia and New Zealand, and the child was ultimately returned to New Zealand, although to a different city from that which the father resided. In Martha Barnett's opinion, if the facts of Murray came before the Court today, the Court would most likely find that there was a grave risk of harm to the child. However, the Court would then look to see what could be done to ameliorate that risk.

In the more recent decision of *Harris*, a determination was made that - in circumstances where there was domestic violence, and also where the mother, who was Australian, did not speak the language of the country of habitual residence and had very little, if any, economic support – the child being returned to its place of habitual residence would cause grave risk of harm to the child. Something that was discussed at length in *Harris* was the idea that return orders could be made on a

conditional basis, meaning that, notwithstanding the Court's finding of a grave risk of harm, the Court will then proceed to a second step and consider what protective measures can be taken to ameliorate the harmful circumstances of the return, prior to the return actually happening - such as AVOs, orders to ensure that the returning parent has appropriate accommodation and finances, etc. *Arthur* makes clear that these protective measures are intended to be a temporary solution until the court in the jurisdiction to which the child is being returned is seized with the matter. These measures are made as orders, but the judge can use the judicial liaison network where judges can communicate with one another through the Hague network, and the Central Authorities in the two respective jurisdictions can engage in discussion with each other.

(iv) The child objects to being returned. For this defence to be established, the child's objection must be more than just the expression of a wish; it must show a strength of feeling beyond ordinary wishes, and the child must be of an age and level of maturity where that begins to matter. The authority on this defence is the High Court case of *De L v Director-General Department of Community Services (NSW)* (1996) 187 CLR 640; [1996] HCA 5. Importantly, the child's objection must be an objection to return to the country of habitual residence, not an objection to return to living with the left behind parent, or a mere preference that they would rather stay in the new jurisdiction.

(v) The return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms. To date, there have been no cases in Australia where this defence has been successfully run. In Martha Barnett's opinion, the reality is that in most cases with relevant fact scenarios, grave risk of harm would more readily be found rather than this defence, although there may be a factual scenario where this defence is accepted by the Court.

Concluding points

41. **In Martha Barnett's opinion, the benefit of the Convention is not so much what is seen in court, but what happens out of court, because many returns have been made without use of the court process. In these cases, the parent who has wrongfully removed the child is usually told about the Convention, and of their own volition they return to the country of habitual residence, where a determination is made in accordance with the law of that jurisdiction. Martha sees this self-regulating effect of the Convention as a big benefit. However, in spite of the significant benefit of having the Convention, there is sometimes unfairness occasioned to the parent who has done the right thing, but who has to go through the Convention process.**

BIOGRAPHY

Elizabeth Bedford

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Elizabeth was admitted as a lawyer in 2005 and is an accredited specialist in family law. She appears in Court regularly as a Solicitor Advocate, including as an Independent Children's Lawyer. During 2007 and 2008, Elizabeth worked for the United Nations Children's Fund (UNICEF) in the Republic of Kiribati as a Child Justice specialist. Upon her return to Sydney, she was appointed to the Independent Children Lawyer's Panel. Elizabeth was appointed a Partner of Watts McCray in 2016.

Martha Barnett

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Martha R M Barnett was called to the New South Wales Bar in 2010 and practices mainly in family law, but also assists in adoption matters and coronial inquests. For the past six years she has been a member of Culwulla Chambers, Sydney. She was awarded a PhD in law from the University of Sydney in 2014, for a thesis titled 'Evolution: Procedural Innovation in Abduction Convention Determinations in Australia'. Originally from Canada, she completed a BA at the University of Alberta before migrating to Australia. She undertook an LLB at the University of Sydney and graduated with First Class Honours.

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Legislation

Convention on the Civil Aspects of International Child Abduction ('The Hague Convention'), opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983)
Family Law (Child Abduction Convention) Regulations 1986 **(Cth)**