Professional insights

INTERNATIONAL CHILD ABDUCTION – AUSTRALIAN LAW, PRACTICE AND PROCEDURE

INTRODUCTION

This paper is based on a talk given in London in July 2010 at the Centre for Family Law and Practice's conference on international child abduction, relocation and forced marriage.[1] The purpose of the talk was to describe what to expect when making an application for the return of a child wrongfully removed to, or retained in, Australia, and why.

There is no difference between the general principles applied in Australia and the United Kingdom or, indeed, many other countries; it is considered generally desirable to return an abducted child promptly to his or her home country so that issues about custody and access can be decided there.[2]

But for those used to dealing with abduction cases in the United Kingdom, particularly in England and Wales, the significant difference in the form (rather than the substance) of the law, practice and procedure in international child abduction cases between England and Wales and Australia is that, at least in cases under the 1980 Hague Abduction Convention,[3] a great deal more is written down in Australia than in England.

A good example of this is to be found at the very start of an abduction case in England, when an application is being made to the High Court Applications Judge in London for a passport order or a location order to find the child and secure passports and travel documents to prevent her being moved on to another country. No-one asks whether the High Court's power to make those orders is to be found in s 5 of the *Child Abduction and Custody Act 1985* (UK) or within its inherent jurisdiction with respect to children. In the unlikely event of the question being asked, either answer would do.

But in Australia, regulations provide rather precisely for the relief that can be sought if a child is wrongfully removed from a Convention country to, or wrongfully retained in, Australia. The responsible Central Authority or person, institution or other body that has "rights of custody" can apply "… in Form 2, for any of the following orders …", which includes a return order, an order for the delivery of the child's passport, an order directing the child not to be removed from a specified place, and an order requiring arrangements to be made to place the child with an appropriate person, institution or other body until the request for return is determined. A responsible Central Authority can also apply for "any other order [it] considers appropriate to give effect to the Convention".[4]

AUSTRALIAN LEGISLATION ABOUT INTERNATIONAL CHILD ABDUCTION

Australia has three significant legislative provisions to deal with international child abduction, all enacted by the Commonwealth Parliament.[5] The return of children under the Convention is provided for in Pt XIIIAA, Div 2, s 111B of the *Family Law Act 1975* (Cth) and the *Family Law (Child Abduction Convention) Regulations 1986* (Cth). Recognition of overseas orders relating to children

[1] For the conclusions of the Conference, see http://www.londonmet.ac.uk/depts/lgir/centre-for-family-law-and-practice viewed 17 August 2010.

[2] *DP v Commonwealth Central Authority: JLM v Director-General New South Wales Department of Community Services* (2001) 206 CLR 401; 27 Fam LR 569; [2001] FLC 93-081; [2001] HCA 39 at [3]. But note that there is no specific requirement under the Convention that proceedings must either be instituted or on foot in the requesting state before a return order is made.

[3] The 1980 *Hague Convention on the Civil Aspects of International Child Abduction*. In 2009 there were 83 children wrongfully removed to Australia from other Convention countries, including the United Kingdom.

[4] *Family Law (Child Abduction Convention) Regulations 1986* (Cth), reg 14.

[5] The Commonwealth Parliament has the power to make laws with respect to international child abduction under s 51(xxix) of the *Constitution* ("external affairs") – see *State Central Authority v McCall* (1994) 121 FLR 45 at 58; 18 Fam LR 307; [1995] FLC 92-551: "The constitutional source of power for the passage of s 111B and the Regulations is, as [the Solicitor General] pointed out, the external affairs power" (judgment delivered on 3 November 1994).

made in prescribed overseas jurisdictions[6] is provided for in Pt VII, Div 13, Subdiv C of the *Family Law Act* ("Registration of overseas orders") and jurisdiction, recognition and enforcement of orders is provided for in Pt XIIIAA, Div 4, s 111CA of the *Family Law Act* and the *Family Law (Child Protection Convention) Regulations 2003* (Cth), which together bring the 1996 Hague Protection Convention[7] into effect in Australia.[8]

PREVENTING ABDUCTION, FINDING AND RECOVERING CHILDREN

Regulation 14(2) of the *Family Law (Child Abduction Convention) Regulations* enables an application to be made: for a warrant to find and recover a child, if necessary by stopping, entering and searching a vessel, vehicle or aircraft;[9] or for the delivery of the child's passport, or the passport of any other relevant person, to the Central Authority or the police or the person specified in the order.

There are also statutory provisions for locating and recovering children in the *Family Law Act*.[10] Those statutory provisions include a location order, which can require a government department to provide the court with information contained in, or coming into, departmental records,[11] and a recovery order requiring the return of a child. A recovery order can authorise or direct a person to stop and search any vehicle, vessel or aircraft or to enter and search premises to find a child, by force if necessary. Section 67V makes it clear that in deciding whether to make a recovery order, the best interests of the child are the court's paramount consideration.

RETURNING ABDUCTED CHILDREN

If the Convention applies, then it is the obvious route to the recovery of an abducted child. If it does not apply, an application for return can be made under the *Family Law Act*,[12] to which the ordinary principles applicable to the determination of children's cases will apply.

Cases under the Convention

The Commonwealth of Australia has been a state party to the Convention since 1986.[13] The Secretary of the Commonwealth Attorney-General's Department is the Commonwealth Central Authority (CCA).[14] The International Family Law Section of the Commonwealth Attorney-General's Department is responsible for coordinating the implementation of the Convention and carries out the functions of the Central Authority for Australia.

The legislation

The Convention is imported into Australian domestic law in a rather unusual way. Section 111B(1) of the *Family Law Act* provides that regulations may make such provision as necessary or convenient to enable Australia to perform its obligations under the Convention:

> The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on

[6] See *Family Law Regulations 1984* (Cth), reg 14 and Sch 1A. The prescribed jurisdictions are Austria, New Zealand, Papua New Guinea, Switzerland and most, but not all, of the United States of America.

[7] *The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, signed at the Hague on 19 October 1996.

[8] See *Family Law (Child Protection Convention) Regulations 2003* (Cth), reg 21.

[9] *Family Law (Child Abduction Convention) Regulations 1986* (Cth), reg 31.

[10] *Family Law Act 1975* (Cth), ss 67J to 67Y.

[11] A location order which requires a government department to disclose information is known as a "Commonwealth Information Order" (*Family Law Act 1975* (Cth), s 67J(2)).

[12] Note that in Western Australia an application in respect of a child not born in wedlock would have to be made under the *Family Court Act 1997* (WA).

[13] Ratified by Australia on 29 October 1986, in force in Australia since 1 January 1987.

[14] *Family Law (Child Abduction Convention) Regulations 1986* (Cth), reg 2(1).

> the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (the ***Convention***) but any such regulations shall not come into operation until the day on which that Convention enters into force for Australia.[15]

The regulations made under that provision are the *Family Law (Child Abduction Convention) Regulations*, Sch 2 of which contains the Convention. So the Convention itself is not part of Australian law, only the Regulations are.[16]

There are one or two unusual features about the Regulations. First, the *Family Law Act* has quite a bit to say about what they should contain – or not contain. Section 111B(1A) says that:

> In relation to proceedings under regulations made for the purposes of subsection (1), the regulations may make provision:
> (a) relating to the onus of establishing that a child should not be returned under the Convention; and
> (b) establishing rebuttable presumptions in favour of returning a child under the Convention; and
> (c) relating to a Central Authority within the meaning of the regulations applying on behalf of another person for a parenting order that deals with the person or persons with whom a child is to spend time or communicate if the outcome of the proceedings is that the child is not to be returned under the Convention.

Regulation 111B(1B) goes on to be quite specific about what the approach to a child's objections to being returned should be:

> The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes.

And s 111B(1C) deals with how a child might be protected after returning to Australia pending a decision about his or her future:

> A Central Authority within the meaning of the regulations may arrange to place a child, who has been returned to Australia under the convention, with an appropriate person, institution or other body to secure the child's welfare until a court exercising jurisdiction under this Act makes an order (including an interim order) for the child's care, welfare or development.

Because the Regulations embrace more than just the Convention (reg 4, for example, defines "rights of custody")[17] they have been amended many times to accommodate legislative changes, such as those made by the *Family Law Reform Act 1995* (Cth) and the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), so great care needs to be taken when looking at the case law to make sure that the principles expressed are still consistent with the most recent version of the Regulations.

The Regulations are not exclusive, in the sense of precluding other forms of relief, because reg 6 makes it clear that they are not intended to prevent a "… person, an institution or another body that has rights of custody in relation to a child …" from applying to a court if the child is removed to, or retained in, Australia in breach of those rights, or to be taken as preventing a court from making an order for the return of the child. But (consistently with Art 16 of the Convention), if an application has been made for the return of a child under the Regulations, only an interim order providing for custody can be made until the determination of that application.[18]

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[15] "The reason why this method of applying the Convention was chosen is not clear and it is difficult to understand why Australia did not adopt the same method as that adopted by the United Kingdom. It is also apparent that there is, in some cases, no direct correspondence between the words of the Regulation and those of the Convention." (*State Central Authority v McCall* (1994) 121 FLR 45 at 51; 18 Fam LR 307; [1995] FLC 92-551).

[16] *State Central Authority v McCall* (1994) 121 FLR 45 at 51; 18 Fam LR 307; [1995] FLC 92-551.

[17] That seems to be an attempt to determine the characterisation issue, usually regarded as being a matter for the requested state. And see s 111B(4) (below).

[18] *Family Law (Child Abduction Convention) Regulations 1986* (Cth), reg 19. *Australian Family Law and Practice* (Subscription service, CCH Australia Ltd), Vol 1, ¶24-025, suggests that because reg 18 defines "custody" as including: guardianship of the child; responsibility for the long-term or day-to-day care, welfare and development of the child; and responsibility as the person or persons with whom the child is to live, the court cannot make a contact order and might not be able to make some specific issue orders. Sed quaere?

Interpretation: General

That the terms used in the Convention have what might be described as a "Convention meaning" has been recognised in Australia for some time. In November 1994 the Full Court of the Family Court of Australia in *State Central Authority v McCall* (1994) 121 FLR 45; 18 Fam LR 307; [1995] FLC 92-551, discussing the meaning of "rights of custody", said that:

> It must be remembered that the Convention is an international instrument couched in language that is intended to cover a wide variety of rights in relation to children as deemed in the domestic legislation of States that are members of the Convention and cannot be expected to mirror the language used in the domestic legislation of those States.

In December 2004 the Regulations were amended to make it clear that their purpose is to give effect to s 111B of the *Family Law Act* and that they are intended to be construed having regard to the objects and principles of the Convention. Regulation 1A states:

(1) The purpose of these Regulations is to give effect to section 111B of the Act.
(2) These Regulations are intended to be construed:
  (a) having regard to the principles and objects mentioned in the preamble to and Article 1 of the Convention; and
  (b) recognising, in accordance with the Convention that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and
  (c) recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries.[19]

Rights of custody

In November 1994, when *State Central Authority v McCall* was decided, Australian domestic law recognised two classes of powers and responsibilities, guardianship and custody.[20]

In 1996 the *Family Law Reform Act* of 1995 made significant changes to the law relating to children. In particular, it replaced the concepts of custody and guardianship with that of parental responsibility.[21] As a consequence, it was felt necessary to make some rather complicated statutory provisions about the effect of these amendments on the Regulations and the operation of the Convention. Section 111B states:

(2) Because of amendments of this Act made by the *Family Law Reform Act 1995*:
  (a) a parent or guardian of a child is no longer expressly stated to have custody of the child; and
  (b) a court can no longer make an order under this Act expressed in terms of granting a person custody of, or access to, a child.
(3) The purpose of subsection (4) is to resolve doubts about the implications of these changes for the Convention. That is the only purpose of the subsection.
(4) For the purposes of the Convention:
  (a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and
  (b) subject to any order of a court for the time being in force, a person:
    (i) with whom a child is to live under a parenting order; or
    (ii) who has parental responsibility for a child under a parenting order;

  should be regarded as having rights of custody in respect of the child; and
  (c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and
  (d) subject to any order of a court for the time being in force, a person:

[19] Inserted by Sch 2 of the *Family Law Amendment Regulations 2004 (No 3)* (Cth) (SR 2004, No 371).

[20] See Dickey A, *Family Law* (5th ed, Lawbook Co, 2007), Ch 15.

[21] See *Family Law Act 1975* (Cth), s 61A, substituted by s 31 of the *Family Law Reform Act 1975* (Cth) on 11 June 1996.

(i) with whom a child is to spend time under a parenting order; or
(ii) with whom a child is to communicate under a parenting order;

should be regarded as having a right of access to the child.

Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).

(5) Subsection (4) is not intended to be a complete statement of the circumstances in which, under the laws of the Commonwealth, the States and the Territories, a person has, for the purposes of the Convention, custody of, or access to, a child, or a right or rights of custody or access in relation to a child.

It seems that the intention of s 111B(3) is to ensure that the attempt to clarify Convention rights does not somehow confer domestic rights.

The characterisation issue

"Characterisation" is the process by which a meaning or identity is ascribed to rights or obligations. In the context of the Convention, it usually arises in respect of a dispute about whether domestic rights amount to "rights of custody", and a good example is to be found in *Re D (Abduction: Rights of Custody)* [2007] 1 AC 619; [2006] UKHL 51; [2007] 1 FLR 961 at [43] in which the House of Lords said that:

> The Court of Appeal declined to accept that ruling. But their reasoning is important. They did not challenge the ruling as to the content of the father's rights in New Zealand law. They merely challenged the characterisation of those rights as rights of custody for Convention purposes.

In the jurisprudence of the Convention, whether or not a person has "rights of custody" is generally regarded as being a matter for the requested state. This seems to be accepted in Australia, because *Australian Family Law and Practice*, under the heading "Rights of custody and their breach to be determined by the law of the forum" says that:

> Whether a person enjoys rights of custody in relation to a child, and whether his or her rights of custody have been breached, is a matter for the courts of the jurisdiction which has to determine this issue, and not for the courts of the child's home country.[22]

In the light of that, it is not very clear what the effect of s 111B(4) is, or what it was intended to achieve.

Current issues in Hague Convention cases in Australia

In common with other states in which the Convention has been in force for some time, the early questions about its constitutional propriety, interpretation and relationship with domestic legislation have been resolved, and the current issues seem to be: whether the applicant had "rights of custody" at the time of the child's removal or retention;[23] whether the child concerned was habitually resident in the requesting state immediately before the removal or retention;[24] and, if the application is filed more than a year after the removal or retention, whether he or she is settled in the new environment.[25]

Procedure: The Central Authority

Australia has a federal system. If the Commonwealth Central Authority decides to accept an application for a child's return under the Convention, it will send it to the appropriate State Central

[22] *Australian Family Law and Practice* (Subscription service, CCH Australia Ltd), Vol 1, ¶24-108.

[23] See *MW v Director-General, Department of Community Services* (2008) 82 ALJR 629; 39 Fam LR 1; [2008] HCA 12. This involved a question of whether a father had guardianship rights under the law of New Zealand (and therefore "rights of custody" for the purposes of the Convention) as a result of being in a de facto relationship with the mother, and whether the Regulations could accommodate the concept of a court having rights of custody (see Chisholm R, "The High Court Indicates a Problem in the Hague Child Abduction Regulations" (2008) 22 AJFL 161).

[24] See, for example, *Department of Communities Child Safety Services v Fraser* (2010) 43 Fam LR 216; [2010] FamCA 340.

[25] *Family Law (Child Abduction Convention) Regulations 1986* (Cth), reg 16(2). If the child is settled in Australia there is nevertheless a discretion (which remains "at large") to make a return order – see *Department of Child Safety v Kells* (2009) 234 FLR 256; 41 Fam LR 525; [2009] FamCA 452.

Authority for action. In Western Australia, for example, that is the Commissioner of Police, and the application will be made on his behalf (not on behalf of the wronged parent) by the State Solicitor's Office.

Procedure: Who can apply?

Following a change in the Regulations in December 2004,[26] it is now possible for an individual to make an application for the return of a child. So applications can now be made by a responsible Central Authority or a person, institution or another body that has rights of custody.

Hearing the children

In Australia there seems to be something of a move toward involving children more in Convention cases than was the case in the past. In *State Central Authority v Quang* (2009) 237 FLR 166; 42 Fam LR 288; [2009] FamCA 1038 it was noted that under s 68L(3)(a) of the *Family Law Act* the court may order a child's interests in Convention proceedings to be independently represented by a lawyer only if it considers that there are exceptional circumstances that justify it doing so, but that in determining whether exceptional circumstances exist in this context, it is helpful to construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon.

> To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.[27]

Non-convention cases

There is nothing unusual in the Australian approach to non-Convention cases. The sole principle which governs the determination of an application for the return of a child from Australia to a non-Convention country is the best interests of the child, and the principles of forum non conveniens are not relevant.[28]

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[26] By Sch 2 of the *Family Law Amendment Regulations 2004 (No 3)* (Cth) (SR 2004, No 371).

[27] *State Central Authority v Quang* (2009) 237 FLR 166; 42 Fam LR 288; [2009] FamCA 1038 at [12]-[13].

[28] *Karim v Khalid* (2007) 38 Fam LR 300; [2007] FLC 93-348; [2007] FamCA 1287.