

The Child's Voice in International Child Abduction Cases in Australia

Michelle Fernando*

* Michelle Fernando is a Senior Lecturer in Law at the University of South Australia.

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

2 *Ibid* art 1.

3 The *Hague Convention* equally applies to people who may not be parents, but nevertheless have 'rights of custody': at art 3.

4 *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(1) 'Regulations'.

5 *Ibid* reg 16(1A).

6 *Ibid* reg 16(3).

I Introduction

The *Hague Convention on the Civil Aspects of International Child Abduction* ('*Hague Convention*')¹ is an important international instrument which aims to ensure that children who are wrongfully removed from their home country are returned promptly and that family laws in participating jurisdictions are respected.² Parents living in *Hague Convention* countries whose children are brought to Australia by the other parent³ and retained here without permission are generally entitled to rely on the *Hague Convention* to secure the child's return.

The summary nature of Hague proceedings means that the views and interests of individual children are not generally considered. The *Hague Convention* is premised upon parenting issues being determined in the home country once the child has been returned. Even if we accept the inherent proposition that it is generally in children's best interests to be returned, how can children's rights to express their views be accommodated?

This article explores the apparent tension between children's right to be heard and Australia's obligation to return children without considering their individual interests. I argue that hearing from children is not inconsistent with Australia's obligations under the *Hague Convention*, and children must be given greater opportunities to voice their perspectives.

II Australia's Obligations under the Hague Convention

The principles of the *Hague Convention* are implemented in Australia by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ('the Australian regulations'). If an application is brought within one year of a child's removal to, or retention in, Australia and a court is satisfied that the child's removal or retention was wrongful, the court *must* make an order that the child be returned to their home country.⁴ The retention is wrongful if the child is under 16 years of age and habitually resided in a convention country immediately prior, and if the child's removal to or retention in Australia breached a parent's 'rights of custody'.⁵

There are limited circumstances where a court *may* refuse to make a return order. These are: if the 'left behind' parent was not exercising parental rights, or consented or acquiesced to the child's retention in Australia; if returning the child would subject them to a grave risk of harm or an intolerable situation; if the child objects to being returned (and is of sufficient age and maturity and satisfies a 'strength of feeling' test); or if returning the child would be contrary to Australia's principles of human rights and fundamental freedoms.⁶ It is in deciding whether one of the exceptions to mandatory return applies that the interests and views of

individual children may be considered. The exceptions reflect an acknowledgement that return might not always be in a child's best interests.⁷ However, even if one or more of these exceptions exist, a court still has discretion to order that the child be returned.⁸

III Relationship between the Hague Convention and Article 12 of the Convention on the Rights of the Child

Article 12 of the United Nations *Convention on the Rights of the Child* ('CRC')⁹ states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Australia ratified the *CRC* in 1990,¹⁰ thereby undertaking to take all appropriate legislative, administrative and other measures to implement the rights contained therein.¹¹ However, the *Hague Convention* does not expressly recognise a child's right to participate¹² and, on its face, children are only given an opportunity to be heard if one of the 'exceptions' is raised and the child's views may be relevant to that determination (for example, if it is alleged that the child objects to being returned).¹³ The Australian regulations dictate that the child's objection must show a 'strength of feeling beyond the mere expression of a preference or of ordinary wishes'.¹⁴ Even then, the child's views will only be taken into account if the court considers that the child is of sufficient age and maturity that it is appropriate to take account of their views.¹⁵ This contradicts art 12 of the *CRC*, which requires that *all* children's views be taken into account, their age and maturity only relevant to deciding how much weight to attach to the views.¹⁶

There is an apparent tension between the summary nature of the *Hague Convention* and children's right to express their views.¹⁷ The challenge is to ensure that children are given an opportunity to be heard¹⁸ without diluting the objects of the *Hague Convention*. In Australia, this task has generally not been managed well. Even in cases where children's views have been taken into account for the purposes of establishing the 'children's objection' exception, the court has often prioritised the *Hague Convention's* principles and ignored children's right to be heard.

This is illustrated in the High Court judgment of *RCB v The Honourable Justice Forrest* ('*RCB*').¹⁹ An Australian mother living in Italy brought her four Italian daughters to Australia and refused to return them.²⁰ The mother alleged that the children, aged 14, 12, 9 and 8 years at the hearing, objected to returning.²¹ The primary judge, Forrest J, received evidence of the children's views through the written reports of two experts who had spoken with the children.²² The children were not represented by a lawyer and were given no opportunity to express their views directly or otherwise participate in the proceedings. Forrest J rejected the 'children's objection' exception because his Honour was not satisfied that the children's objections showed a strength of feeling beyond the mere expression of a preference or of ordinary wishes, and he did not find that all of the children were of an age and maturity that the Court should take account of their views.²³ An order was made that the children be returned to Italy.

The matter was unsuccessfully appealed and, ultimately, the children (through a litigation guardian) made application to the High Court on the basis that Forrest J had not given them an opportunity to be represented, had failed to take their interests into account and had failed to afford them natural justice.²⁴ In dismissing the application, the High Court found that the children had been afforded natural justice and that their views had been appropriately heard and considered, despite them not having had legal representation or the opportunity to participate directly.²⁵ The plurality confirmed that the views and interests of a child may be relevant to one of the exceptions in reg 16(3),²⁶ and the information the court needs, to assess whether the 'children's objection' exception is met, can be provided by a report from a family consultant (child welfare officer) who speaks with the child and reports as to the strength of the child's views and their maturity.²⁷ The plurality

7 Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing, 2013) 97 ('*The Hague Child Abduction Convention*').

8 *Regulations* (n 4) reg 16(5).

9 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

10 'Status of Treaties', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en>.

11 *CRC* (n 9) art 4.

12 Schuz, *The Hague Child Abduction Convention* (n 7) 317–18.

13 *Ibid* 373, Michelle Fernando and Nicola Ross, 'Stifled Voices: Hearing Children's Objections in Hague Child Abduction Convention Cases in Australia' (2018) 32(1) *International Journal of Law, Policy and the Family* 93, 98. Children's views may also be relevant to factual determinations such as the child's place of habitual residence: Schuz, *The Hague Child Abduction Convention* (n 7) 373.

14 *Regulations* (n 4) reg 16(3)(c)(ii).

15 *Ibid* reg 16(3)(c)(iii).

16 Claire Fenton-Glynn, 'Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings' (2014) 9(1) *Journal of Comparative Law* 129, 131.

17 Schuz, *The Hague Child Abduction Convention* (n 7) 318–19.

18 I note that it is also the child's right to not express a view and they must not be compelled to do so: *Family Law Act 1975* (Cth) s 60CE ('*FLA*').

19 *RCB v The Honourable Justice Forrest* (2012) 247 CLR 304 ('*RCB*').

20 *Ibid* 309–10 [5] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

21 *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485 (23 June 2011) [6], [25].

22 *Ibid* [114].

23 *Ibid* [118], [121].

24 *RCB* (n19) 310 [5] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

25 *Ibid* 322–3 [45]–[49].

26 *Ibid* 315–16 [22]–[23].

27 *Ibid* 322 [44]–[45].

- 28 *FLA* (n 18) s 68L(3)(a).
 29 *RCB* (n 19) 320 [36], 322–3 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
 30 See further discussion of this case in Fernando and Ross (n 13); Rhona Schuz, ‘Commentary on RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest’ in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children’s Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 495.
 31 Fenton-Glynn (n 16) 133.
 32 See discussion in Schuz, *The Hague Child Abduction Convention* (n 7) 387.
 33 See generally John Tobin, ‘“Judging the Judges”: Are They Adopting the Rights Approach in Matters Involving Children?’ (2009) 33(2) *Melbourne University Law Review* 579; Aoife Daly, *Children’s Autonomy and the Courts: Beyond the Right to be Heard* (Brill, 2018).
 34 See Carol Smart, Amanda Wade and Bren Neale, ‘Objects of Concern: Children and Divorce’ (1999) 11(4) *Child and Family Law Quarterly* 365; Fenton-Glynn (n 16) 133.
 35 *Director-General, Department of Community Services v De Lewinski* (1996) 131 FLR 1, 4 (*‘De Lewinski’*).
 36 This aligns with the views of the Full Court in *Murray v Director, Family Services (ACT)* (1993) 116 FLR 321 and *State Central Authority for Victoria v McCall* (1994) 121 FLR 65.
 37 *De Lewinski* (n 17) 5.
 38 *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640.
 39 *Ibid* 657.
 40 *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 (*‘Re D’*).
 41 *Ibid* 642 [58], followed by the Court of Appeal in *Re KP (A Child) (Abduction: Rights of Custody)* [2014] WLR 4326, 4333 [23].
 42 *Re D* (n 40) [59].
 43 *Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility* [2003] OJ L 338/1 art 11(2).

confirmed the requirement in the *Family Law Act 1975* (Cth)²⁸ that an independent children’s lawyer (‘ICL’) may only be appointed in *Hague Convention* matters in ‘exceptional circumstances’, and said that there were no circumstances before Forrest J which might properly have been characterised as ‘exceptional’.²⁹

The High Court took a very narrow view of children’s voices in *Hague Convention* proceedings. The judgment made no mention of a child’s right to express their views. It did not mention children’s rights at all. The language used suggested that children only need to be heard when an objection (or other exception in reg 16(3)) is raised, and the only purpose of hearing from children is to undertake the forensic exercise of determining whether the exception is met. Further, it was found that the information can be adequately conveyed by a third party who speaks with the child and reports to the court, along with their assessment of the strength of the objections and the child’s maturity. In finding that this case, which involved older children who were objecting to being returned, was not ‘exceptional’ to justify the appointment of an ICL, the judgment suggested that the threshold for ‘exceptional circumstances’ is high.³⁰

Discounting or not listening to children’s views because they are not considered relevant to the court’s task clearly violates art 12 of the *CRC*, which gives children the right to express their views in ‘all matters’ affecting them. As Fenton-Glynn wrote,

The principles of natural justice cannot be ignored simply because it would have made no substantive difference if they had not been observed ... It is a measure of human dignity that we are able to be involved in decision-making concerning our lives, and children cannot be denied this.³¹

The failure to give children an opportunity to be heard in circumstances that involve upheaval of all aspects of daily life, separation from a parent and intractable parental conflict appears a gross injustice. Children have a right to be heard in all proceedings, and not just proceedings where one of the ‘exceptions’ is raised.³² A narrow approach to children’s views fails to consider children as autonomous rights-bearers³³ and treats them as objects, rather than subjects of law.³⁴

iv A Children’s Rights Approach to the Hague Convention

There is nothing preventing Australian courts from ensuring that children are given opportunities to express their views in Hague matters. In the minority judgment of the Full Court in *De Lewinski*, Nicholson CJ (as he then was) said:

I consider that the Court has an obligation to give the child an opportunity to be heard in an appropriate manner and that is a right of the child independent of the person opposing return... I consider that the Court’s responsibility to hear the child and, of its own motion if the question of an objection appears on the material, to seek a report, is also to be found in Article 12 of the [*CRC*].³⁵

In that case, Nicholson CJ said that, in his view, art 12 was not inconsistent with the *Hague Convention*,³⁶ but in fact complemented the requirement to ‘take account of children’s objections subject to their age and maturity’.³⁷ Nicholson CJ was the minority judge but his comments were cited with approval by the High Court in a successful appeal,³⁸ in particular, the plurality said, ‘the policy of the [*Hague*] Convention is not compromised by hearing what children have to say’.³⁹ It was a differently constituted High Court which issued the later judgment in *RCB*, however there is nothing in *RCB* that conflicts with Nicholson CJ’s views about the importance of hearing from children.

A children’s rights approach to the *Hague Convention* is taken in other jurisdictions. In the United Kingdom, Baroness Hale in *Re D*⁴⁰ said that there is a presumption that the child will be heard in every *Hague Convention* case (and not only when one of the exceptions is raised) unless it would be inappropriate to do so.⁴¹ ‘It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto’.⁴² The *Brussels II bis Regulation*, applicable in Europe, states that children must be given an opportunity to be heard in the proceedings unless this appears inappropriate having regard to the child’s age or maturity.⁴³ In South Africa, s 278(3) of the *Children’s Act 2005* (South Africa) states that the

court must afford to the child the ‘opportunity to raise an objection to being returned to their home country’ and, in doing so, ‘must give due weight to that objection’, taking into account the child’s age and maturity.

At its 6th meeting in June 2011, the Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions welcomed the ‘overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings ... independently of whether an [exception] has been raised.’⁴⁴

It is possible to give children a voice, whilst still ensuring that the principles of the *Hague Convention* are upheld. Hearing from children can include commissioning a report from a child welfare expert to ascertain and include the child’s views, and ensuring that the child’s interests are represented by a lawyer.⁴⁶ This would require a repeal of the legislative requirement that ICLs be appointed only in ‘exceptional circumstances’, or a willingness for judges to more readily accept that circumstances are ‘exceptional’. Although not common in Australia, it is also within a judge’s discretion to meet with a child directly to hear their views.⁴⁷

v Conclusion

Abducted children interviewed by Taylor and Freeman in 2017 expressed that children need to be heard and use their own voices, and that courts need to understand that *Hague Convention* proceedings are a defining moment in a child’s life.⁴⁸

It may be difficult to navigate the tension between children’s right to be heard and the principles of the *Hague Convention*. However, this difficulty does not create an exception to the requirement to listen to children. We must find ways to uphold the principles of the *Hague Convention* while acknowledging children’s autonomy and their right to be heard.

- 44 Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions, ‘Conclusions and Recommendations’ (Conference Paper, Hague Conference on Private International Law, 1–10 June 2011) 7 [50] <https://assets.hcch.net/upload/wop/concl28sc6_e.pdf>.
- 45 Trynie Boezaart, ‘Listening to the Child’s Objection’ [2013] 3 *New Zealand Law Review* 357, 365.
- 46 Victoria Bennett, ‘A Better Place for the Child in Return Proceedings under the 1980 Convention: A Perspective from Australia’ (2018) 12 (Summer–Fall) *The Judges’ Newsletter on International Child Protection* 20, 21.
- 47 Fernando and Ross (n 13) 100. For discussion of the ways children’s voices can be heard in *Hague Convention* proceedings and the potential advantages and disadvantages of each, see Fernando and Ross (n 13) 99–105.
- 48 Nicola Taylor and Marilyn Freeman, ‘Outcomes for Objecting Children under the 1980 Convention’ (2018) 12 (Summer–Fall) *The Judges’ Newsletter on International Child Protection* 8, 11.