FOLEY'S | LIST

THE HAGUE ABDUCTION CONVENTION

- some practical issues

Author: Holly Renwick

Date: 10 September, 2015

The Hague Abduction Convention – some practical issues

By Holly Renwick, Barrister, Foley's List

This paper provides a brief overview of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* ("the Convention") and the matters solicitors should address when a client seeks the return of a child or seeks to resist an order for a return.

The Convention was ratified by Australia on 29 October 1986, and the Convention entered into force on 1 January 1987.

The two primary provisions that deal with international child abduction are contained in s 111B of the *Family Law Act 1975* (Cth) ("the Act") and the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ("the Regulations"). The Convention itself is not a part of Australian law. Accordingly, while international authorities may be relevant, your focus should be on Australian case law, and in particular, on judicial interpretation of the Regulations and the relevant provisions of the Act.

APPLICATION FOR THE RETURN OF A CHILD WHO HAS BEEN TAKEN OVERSEAS

Is the country to which the child has been removed a member of the Hague Abduction Convention?

When a child has been taken overseas and your client seeks the return of the child, the immediate issue that arises is whether the country to which the child has been removed is a contracting state.

As at 28 August 2015, there are 93 contracting states to the Hague Abduction Convention. A full (and updated list) of the contracting states can be located at http://www.hcch.net.

However, not all Convention countries are considered equal. It is also prudent to consider:

a) how long the party has been a signatory to convention;
b) whether the Convention has been introduced into domestic law; and

c) whether the country has the legal infrastructure in place to deal with the Convention.

By way of example, Japan signed the Hague Abduction Convention on 26 January 2014. The domestic legislation adopting the Convention in Japan significantly altered the "grave risk" exception in Article 13(b) of the Convention.

Article 13(b) provides:

> *"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person…which opposes its return establishes that –*
>
> *(a) …*
>
> *(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."*

In Japan, that exception is significantly wider. The relevant Japanese domestic law removed the word "grave" and includes among the "risks" of the child's return "the child being subject to violence" and "whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence." Further, Japan makes this exception an absolute defence, meaning that if an element of the defence is made out, the Court cannot exercise discretion, and cannot order the return of the child.[1]

In the United States, the Department of State completes a report each year on the countries, which are considered not to be compliant or that demonstrate patterns of non-compliance with the Convention. The report considers three areas of performance: Central Authority performance, judicial performance and law enforcement performance. The 2014 report cites Costa Rica, Guatemala, and Honduras as being non-compliant.[2]

Closer to home, the Honourable Michael Kirby has expressed concern that Australian decisions do not always promote the spirit of the Convention, noting that

[1] Article 28 of Japan's Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (English translation can be located at http://www.mofa.go.jp/fp/hr_ha/page22e_000250.html)

[2] United States Department of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (2014), http://www.travel.state.gov/pdf/2014ComplianceReport.pdf viewed 28 August 2015, p 3

the five cases determined by the High Court of Australia dealing with the Convention all overrode decisions of the Full Court of the Family Court not to return the children.[3]

Who should bring the Application?

Regulation 11 prescribes the steps that must be taken if a child has been removed from Australia.

A parent who makes an application with respect to a child who has been removed from the Commonwealth of Australia is called the "requesting parent". A requesting parent, or their solicitor, must notify "the Central Authority" about the wrongful removal as soon as possible.

In Victoria, the Central Authority is the Department of Human Services,[4] which will bring the application on behalf of the Commonwealth Central Authority.

However, following a change in the regulations in December 2004, it is also possible for an individual to make an application for the return of a child. This means that applications can also be made by a requesting parent, institution or another body which has "rights of custody".

Which Court?

Jurisdiction under the Regulations can be exercised by any court that exercises jurisdiction under the *Family Law Act 1975* (Cth).[5] This includes the Family Court of Australia, the Federal Circuit Court and courts of summary jurisdiction.

Should you bring an application?

Regulation 16(1) provides that where certain requirements are met, the Court must make a return order unless one of the exceptions applies. The onus is on the Applicant to establish the requirements.

Are the Requirements met?

[3] Kirby M, "Policy and the Family 2010 Children Caught in Conflict – The Child Abduction Convention and Australia" (2010) 24(1) International Journal of Law, Policy and the Family 95 at 104-105. (See: *De L v Director-General Department of Community Services* (NSW) [1996] 187 CLR 640, *DP v Cth Central Authority* [2001] 206 CLR 401*, LK v Director-General, Department of Community Services* [2009] HCA 9, *MW v Director-General, Department of Community Services* [2008] HCA 12)

[4] Appointed pursuant to regulation 8(1) of the Regulations as the Central Authority

[5] See Regulation 2 (1) definition of a "Court"

Is the child under 16?

For the purposes of the Regulations, a "child" means a person under the age of 16.[6]

Was the child habitually resident?

A party to the Convention must honour the objective of the convention, i.e to return a child, only when the child is deemed to be habitually resident in the country from which the children was removed. This approach is taken with the view of ensuring that the parenting dispute is determined in the same jurisdiction where the child is habitually resident.

The habitual residency of the child is determined at the time of the alleged wrongful retention/removal.

The High Court decision of *LK v Director-General, Department of Community Services*[7] remains the leading authority on determining a child's habitual residency. This case concerned four boys who were aged 10, 7, 5, and 3. The family had lived in Israel all their lives. The mother, who was an Australian citizen, travelled with the children from Israel to Australia in May 2006 with a return flight purchased for August 2006. Upon arrival in Australia the children were enrolled into school. The case focused on the disagreement about the terms on which the mother left Israel to come to Australia. The mother asserted she left on the understanding that the marriage was over and that she and the children would settle in Australia. The father asserted that they left for a fixed period and he did not consent to them settling permanently in Australia.

The High Court dismissed the application for the children's return on the basis that at the time of the retention the children were habitually resident in Australia, not Israel.

The High Court held that here is no exhaustive list of criteria from which habitual residence can be determined. The determination of that issue will depend on a wide range of circumstances. In particular, the High Court looked at whether the parents acted with a "settled purpose" and whether the parents of the children had a shared

[6] Regulation 2(1)
[7] 237 CLR 582

intention to reside in a particular place for a period of time.[8] It has been accepted, in one case, that a child's habitual residency can be altered in one day.[9]

In *Punter v Secretary for Justice*[10] the New Zealand Court of Appeal held that:

> *Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, SK v KP* [2005] 3 NZLR 590 *held that settled purpose (and with young children the settled purpose of the parents) is important, but not necessarily decisive. It should not in itself override what McGrath J called at [22], the underlying reality of the connection between the child and the particular state.*

Does the requesting parent have "rights of custody?"

Regulation 14 requires that a requesting party must have "rights of custody" of the child.

"Rights of custody" is defined in Regulation 4 to include, inter alia, rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child. Section 111B(4) further elaborates on the meaning of "rights of custody" in Australia. Section 111B(4) provides:

> *(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;*

[8] *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at [44]
[9] *C v S (Minors: Abduction: Illegitimate Child)* [1990] 2 FLR 442; *C v T* [2001] NZFLR 1105.
[10] [2007] 1 NZLR 40 at para 61.

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:*

(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)).

Accordingly, if you are a parent of a child in Australia, it would be assumed pursuant to Section 111B(4) that you have rights of custody, unless an order provides otherwise.[11]

Case law suggests that even if a requesting party is not the biological parent of a child or is an extended family member (and did not have orders for parental responsibilities) the requesting parent may still be considered to have "rights of custody" for the purposes of the Convention. In *Re Flack*,[12] the father made an application for the return of his youngest child, who had been removed from England and taken to Australia. The issue was whether the father had custodial rights, even though he was not the biologically related to the child. The judge found that regardless of whether he was the biological father, he had custodial rights, finding "*there are circumstances in which a person who is not related by blood to the child who has been in his care may nonetheless be found to have inchoate rights of custody*."

[11] However, even an order granting sole parental responsibility to one parent, does not rule out the other parent from having "rights of custody" for the purpose of the Hague Abduction Convention, see *State Central Authority v LJK* (2004) FLC 93-200

[12] Unreported, High Court of Justice (Family Division)(UK) Bulter-Sloss P, 12 December 2002.

However, this issue has not been addressed in Australia, nor has the approach taken in *Re Flack* been applied here. The case of an extended family member or a non-biological parent will, however, obviously be stronger if they have an order that confers upon them parental responsibility.

However, if the child has been removed from Australia to a country that is a signatory of the Hague Child Protection Convention, unless urgency is established, it may be too late to bring an application to obtain an order for parental responsibility. [13]

For example, in *Bunyon & Lewis (No. 3)*[14] an extended family member (a cousin of the child's late mother) bought an application on behalf of the maternal family to obtain parenting orders for the child who was aged 4 at the time of the application, with the hope of strengthening an application under the Hague Abduction Convention. The child had been removed from Melbourne to The Netherlands by the child's father. The Court dismissed Ms. Bunyon's application on the basis that the child was habitually resident in The Netherlands and as a result of the Hague Child Protection Convention, the Court could not make orders about the child unless a court or a competent authority in The Netherlands agreed the Australian Family Court should assume authority.

Other matters

Do you need the help of an Independent Children's Lawyer?
Pursuant to section 68L(3)(a) of the *Family Law Act 1975* (Cth) the Court may order a children's interest in the Convention proceedings to be independently represented by a lawyer only if it considers that there are exceptional circumstances.

In *State Central Authority v Quang,*[15] Bennett J held:

> *"To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be only that is regularly, routinely or normally encountered."*

Protecting your client's position

[13] See section 111CD-CE of the *Family Law Act 1975* (Cth). It provides that a Court must not, other than in the case of urgency, exercise jurisdiction in respect of the personal protection measure where the child has been removed to a Hague Protection Convention country.
[14] [2013] FamCA 888
[15] (2009) 237 FLR 166 at paragraph 12

It is important to advise your client to protect his or her rights under the Hague Abduction Convention, by doing the following:

a) notifying the Central Authority immediately;
b) collating all required documents including the application form, birth certificates for the children, photos of the children, and copies of court orders (if any);
c) ensuring your client has been in written correspondence with the other parent asking for the immediate return of the child to Australia;
d) ensuring your client continues to attempt to contact the parent and the children for their return and if the return is resisted, for telephone contact and Skype contact to continue while the application is being processed; and
e) not engaging in Court proceedings in the country where the children have been taken (other than the Hague Abduction Convention proceedings).

DEFENDING A HAGUE ABDUCTION APPLICATION

Has the Authority made out the "requirements"?

In the event the requesting parent/Central Authority has met the requirements in Regulation 16(1) and (1A) and the children have been wrongfully removed from or retained in the Convention Country, it is open for the Court not to order a return of the children in the event that one of these six exceptions are made out:

a) the application was made over one year since the date of the wrongful removal/retention and the children are "settled" in the country;
b) the requesting parent was not actually exercising rights of custody when the child was removed to, or first retained in, Australia;
c) the requesting parent consented to or subsequently acquiesced to the children being removed to or retained in Australia;
d) there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;
e) the child has expressed a strong objection to the return and the child is of an age that it is appropriate to take account of his or her views;
f) the return would not be permitted by the fundamental principles of Australia relating to human rights and fundamental freedoms.

Is the child settled in Australia?

Regulation 16(2) deals with the (uncommon) situation where the application has been filed more than a year after the removal or retention. In such cases there is an important qualification to the court's obligation to make a return order: the court is required to do so *only if* the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment.

The test to be applied is whether the child has settled in his or her new environment. The word "settled" is to be given its ordinary and natural meaning.[16]

The onus of establishing whether the child is settled requires evidence that the children are settled as a matter of fact on the balance of probabilities.[17]

While the court is not obliged to make a return order where the client is 'settled'; there remains a conflict of authority as to whether, in that situation, the court is obliged to dismiss the application for the return of a child or whether the Court continues to hold a discretion to make an order for the child's return.

The decision in *State Central Authority and Hajjar*[18] is authority for the position that if the children have settled in Australia, the Court's powers under the Regulations are exhausted and there is no further discretion for the Court to exercise.

In contrast the decision of Justice Le Poer Trench in *Department of Family Community Services and Raho* [19] provides that the Court continues to hold a discretion to order a return for the children pursuant to Regulation 15(1).

Was the requesting parent exercising "rights of custody"?

The expression "rights of custody" is defined in reg 4(2) of the Regulations. This states that "rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child". This definition restates, almost verbatim, the definition of "rights of custody" in Art 5(a) of the Convention.

[16] *State Central Authority and Hajjar* [2010] FamCA 648 at paragraph 156
[17] *SCA & CR* [2005] FamCA 1050 at paragraph 39
[18] [2010] FamCA 648
[19] [2013] FamCA 530

The expression "rights of custody" has no necessary connection with rights of "custody" as this term (was) understood under Australian domestic law. This point was made clear in *In the Marriage of McCall; State Central Authority (Applicant): Attorney-General (Cth) (Intervener)* [20] where the Full Court observed that "the expression 'rights of custody' as used in the Convention encompasses a broader range of rights than is contemplated by the expression 'custody' (was) defined in Australian domestic law".

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. Accordingly, an enquiry into the law of the country in which the children habitually reside will suggest whether that parent has rights of custody.

Did the requesting parent consent to, or subsequently acquiesce to, the children being removed to or retained in Australia?

The defences of "consent" and "acquiescence" are distinct. Regulation 16(3) makes clear that mere "acquiescence" in the removal of the child would not enliven the discretion of the court to refuse an order for the return of the child. As Wall J said in *Re M (Abduction)(Consent: Acquiescence)*[21] "consent has to arise before the act of removal or retention; acquiescence can only arise after such an act."

It is recommended that when pleading this defence, the defence should be broken down, to either:

a) the requesting parent consented to the permanent removal of the child from their place of habitual residence; and/or
b) following the child's removal from their place of habitual residency, the requesting parent acquiesced to the child remaining permanently in Australia.

Consent

In *Wenceslas & Director-General, Department of Community Services* [22] the Full Court summarised and compared the divergent authorities on what would amount to

[20] [1995] FLC 92-551
[21] [1991] 1 FLR 171 at p173
[22] [2007] FamCA 398

sufficient conduct for a Court to find that a parent had consented to a child's removal or retention.

This case concerned a ten-year-old boy who had lived in New Zealand his whole life. His parents were not married. The child had lived primarily with his mother, but had spent substantial time with his father. In 1999 the father applied for, and was successful in obtaining orders restraining the mother from removing the child from New Zealand. In 2005, the parties jointly applied for the order restraining the child leaving New Zealand to be discharged. As part of the process discharging the injunction, the father signed an affidavit that stated "both parents agree that it is best for their son to have the freedom to travel out of New Zealand with either parent and that all prior grievances have since been resolved." On appeal, the mother argued that consent to the permanent removal of the child was to be inferred from what the husband had sworn in his affidavit.

May and Thackery JJ said "*we are of the view that consent can be inferred from conduct; however, we are also of the view that the consent must be real and unequivocal and can only be made out by clear and cogent evidence*".[23] In that case, applying that principle, they held that consent "could not possibly be inferred" from what the husband had sworn in his earlier affidavit.

Acquiescence

In *State Central Authority v Ayob*[24] Kay J considered whether a requesting parent had acquiesced in the retention of a child in a country. He discussed the English authorities at some length.

In this case the child was born in the United States in 1990. After separation in 1994, orders were made in the United States that the child would live with the mother, that the father would have visiting rights and that the mother could take the child to Malaysia once a year for up to three weeks upon giving advance notice to the father.

The mother breached those orders by moving to Malaysia with the child without the father's knowledge. Because Malaysia was not a signatory to the Convention, the father was unable to bring an application under the Convention for the child's return. In 1997, the father, at the mother's request, signed visa documentation stating that

[23] [2007] FamCA at [264].
[24] [1997] FLC 92-746

he consented to the child travelling to Australia for a visit and that he guaranteed her departure. The father then filed an application with the State Central Authority which led to the mother and child being apprehended as they entered Australia. Interim orders were then made to ensure that the child remained in Australia until this application could be heard.

The mother argued that the father acquiesced to the child remaining in Malaysia in two ways. The first was the father's non-action while the mother was in Malaysia, coupled with his visits to Malaysia to see the child. The second was the father's signing of the immigration forms for the child to leave the United States.

In this case Kay J accepted that acquiescence could be inferred from conduct alone. He held, however, it had to be clear that the requesting parent had conducted himself in a way which would be inconsistent with them later seeking a summary order for the child's return. In this case the father's delay and signing of the immigration forms was not sufficient to make out the defence of acquiescence and on order was made for the return of the child.

Would the return of the child cause a "grave risk" to the child or otherwise place the child in an intolerable situation?

In making a "grave risk" defence, the burden of proof is imposed on the parent who is opposing the return. What must be established is clearly outlined in the exception: that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The defence focuses on the "risk of harm". In *Re E(Children)(Abduction: Custody Appeal)*[25] the court found that where the a parent has a fear of violence, that were genuinely held (but not objectively established by facts and evidence) the fears were of such an intensity, the parent's psychological state would create a risk of harm to the children, should the fear continue.

The High Court decision of *DP v Commonwealth Central Authority*[26] remains the leading Australian authority on the "grave risk" defence. In this case, the mother was resisting a return to New Zealand on the basis that the children and she would be subject to a grave risk of violence from of the children's father (who was a

[25] [2011] UKSC 27
[26] (2001) 206 CLR 401;

member of the bikie gang "the Mongrel Mob"). Despite showing a risk, the High Court found that the New Zealand authorities could address the risk.

Gaudron, Gummow and Hayne JJ at paragraph 40 said:

> *So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that "there is a grave risk that [his or her] return … would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced*.

In *Department of Community Services v Harris*,[27] Ryan J dismissed an application for the return of child to Norway on the basis that it was shown that despite laws in Norway designed to protect the mother and the child from serious violence, given the husband's past violent conduct (including a threat to kill) she would be at serious risk if she returned.

At paragraph 189, Ryan J held:

> *Although on return to Norway the mother would be likely to seek police protection and orders which on their face would protect her and the child from the father and keep the child safe, I am not satisfied the orders would achieve their intended effect. For the child, the reality would be that he would primarily be reliant upon a personally isolated primary carer who historically has been unable to protect him from the risk of harm discussed earlier. The mother's personal isolation increases the gravity of risk of harm to the child. This is because her isolation would mean that there would be*

[27] (2010) 43 Fam LR 170 at [189].

> *few people intimately involved in her and the child's life who could themselves intervene if her will to take further necessary action failed her. The evidence suggests that the violence which the father inflicted upon the mother ceased primarily because the mother moved to another country. There is a real risk that the type of violence which the father may inflict is not amenable to the type of constraints which the interim orders and the criminal law would impose. In this regard it is noteworthy that even after the mother had removed herself and the child from Norway the father's threats to her continued. His threat to kill her is a threat with the potential of the gravest consequences to her and the child. I am not confident that the father's apology and his failure to act in accordance with the threat, means it has abated.*

Whether the child has expressed a strong objection to the return and the child is of an age that it is appropriate to take account of his or her views

Regulation 16(3) provides that a judge may refuse an order for the return of a child, if they find that:

a) the child objects to being returned;
b) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes; and
c) has attained an age and degree of maturity at which it is appropriate to take account of their views.

The defence does not require the judge to automatically accede to the child's wishes, but allows the child's views to be taken into consideration in the proceedings.

Re S (a Minor)(Abduction: Custody Rights)[28] outlines the principles that should be applied when dealing with a child's alleged objection to returning to his or her place of habitual residence. These principles include:

a) A child's objections to being returned is completely separate from the "grave risk" exception.
b) The questions whether: (i) a child objects to being returned; and (ii) has attained an age and a degree of maturity at which it is appropriate to take account of its views, are questions of fact which are to be determined by the trial judge.

[28] [1993] Fam 242.

c) It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because he or she wants to remain with the abducting parent, who is asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.
d) Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. If the Court should come to the conclusion that the child's views have been influenced by some other person, for example the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views.
e) On the other hand, where the Court finds that the child has valid reasons for her objection to being returned, then it may refuse to order the return.
f) Nevertheless it is only in exceptional cases under the Convention that the Court should refuse to order the immediate return of a child who has been wrongfully removed.

<u>The return would not be permitted by the fundamental principles of Australia relating to human rights and fundamental freedoms.</u>

Regulation 16(3)(d) adopts Article 20 of the Convention.

The Report of the Second Special Commission meeting to review the Convention's operation describes Article 20 as being inserted "*to be used on the rare occasion that the return of a child would utterly shock the conscience of the court*".[29]

In *Director-General, Department of Families, Youth and Community Care v Bennett*[30] the mother submitted that a return order should not be made as the child was of Torres Strait Islander descent.

It was submitted that an English court could not properly understand the ramifications of the child's cultural heritage as there was no equivalent in the English family law to s 68F(2)(f) of the *Family Law Act* 1975 (Cth), which specifically required a Court in Australia when determining what was in a child's best interest to consider "*the child's*

[29] Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction – 21 January 1993.
[30] [2000] Fam CA 253

… background (including any need to maintain a connection with the lifestyle, culture and traditions of … Torres Strait Islanders) … " The argument was unsuccessful. The Full Court held:[31]

> *Generally, however, it would be presumptuous to believe that a foreign court could not adequately and properly deal with these issues. That said, there may very well be a narrow band of cases where it would be appropriate to give some consideration to the likely special expertise of an Australian court in dealing with issues relating to Aboriginality or Torres Strait Islander heritage.*
>
> *In this case, however, the threshold of needing to determine that consideration has never arisen. This child has one great-great-grandparent who was a Torres Strait Islander. The mother emphasises her heritage and indicates that it is an important part of the child's life. It cannot, however, be said to be likely to be so dominant an element in the child's life that only an Australian court could evaluate the significance of it.*

HOLLY RENWICK
FOLEY'S LIST

[31] [2000] Fam CA 253 at paragraphs 59 and 60