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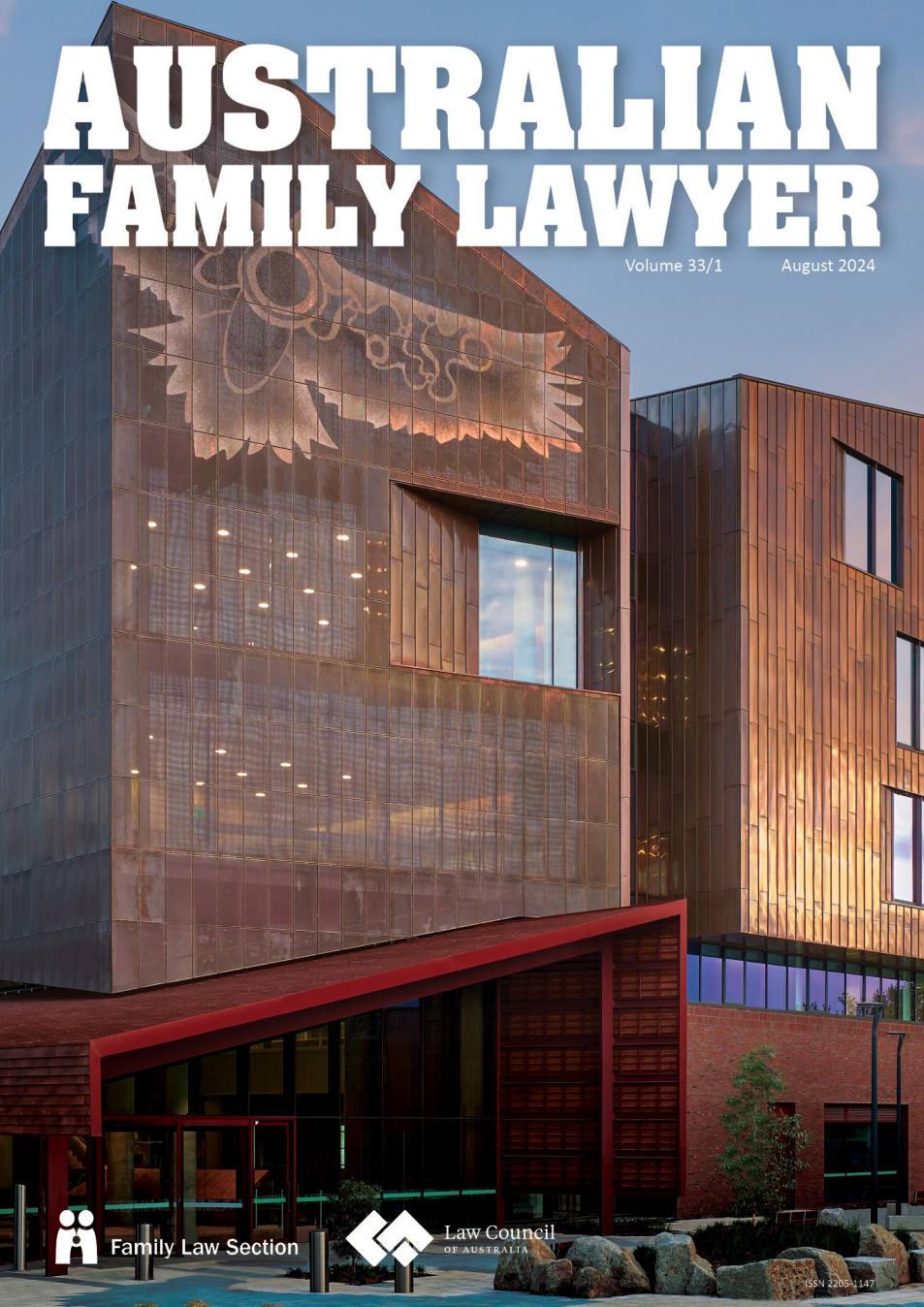

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Cover photograph: *Bendigo Law Courts* taken by Tim Griffith.

SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE & MERCADO: A CASE STUDY OF THE 8 DECEMBER 2022 CHANGES TO THE *FAMILY LAW (HAGUE CONVENTION) REGULATIONS 1986*

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Rosa Saladino has been working with international conventions concerning children for most of her legal career. Her major focus is the *1980 Hague Convention on the Civil Aspects of International Child Abduction*. She worked as a Family Law Solicitor in the ACT before joining the Attorney- General's Department in Canberra where she held various positions including acting head of the domestic and international Family Law Sections and a period as head of the secretariat for the Family Law Council.

She has worked in the Australian Central Authority, the Central Authority for England and Wales and the NSW Central Authority. Rosa has also worked with International Social Services (ISS) Australia. Upon retiring from ISS Australia in 2017, Rosa established a one-woman specialist firm dealing with International Child Abduction cases with a specific focus on acting for the taking parent. In this capacity she has acted in a number of high-profile cases including *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 (25 March 2020).

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Prior to coming to the bar, Ben was the Associate to Justice Gummow of the High Court of Australia and was a senior associate at Freehills (now Herbert Smith Freehills).

In the recent case of *Secretary, Department of Communities and Justice & Mercado* [2023] FedCFamC1F 874 heard by the Hon Justice Christie, submissions were made by both the Applicant Central Authority and the Respondent as to the impact of the recent changes to the *Family Law (Child Abduction Convention) Regulations 1986* ('the *Regulations*').

The *Regulations* govern the conduct of cases under the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* ('the *Convention*').

The reforms

On 8 December 2022, the *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* were made, amending the *Regulations* with effect from 10 December 2022.[1] Four changes were made.

Item 1 inserted 3 new sub regulations:

The new **Regulation 15(5)** makes clear that the court has power to impose conditions when making an order that a child be returned to the country from which they were wrongfully removed or retained, and the court has identified a risk if they are returned.

The purpose of any condition imposed is to reduce the risk if the child is returned.[2]

1 Regulation 2, *Family Law (Child Abducton Convention) Amendment (Family Violence) Regulations 2022.*

2 New Regulation 15(5) states that the condition is "for the purpose of reducing a risk" of that kind.

The conditions imposed on returning children have two aspects.

- The first is to protect children in cases where a risk is identified but where that risk cannot be described as "grave".
- The second and more contentious aspect is where a risk might be characterised as "grave", but the imposition of conditions reduces the risk to one which is not grave.

As far as the court proceedings go, the consequences of the second aspect of the reduction of the risk is that the defence commonly referred to as "the grave risk defence" under Regulation 16(3)(b) is not triggered, and the court is not able to exercise the discretion in Regulation 16(3) as to whether or not to return the child. Rather, the return of the child becomes mandatory under Regulation 16(1). Relevantly, Regulation 16(3)(b) provides:

> 16 (3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:
>
> (a) … or
>
> (b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;

The new Regulation 15(5) does not aim to change the defence but is inserted "as an avoidance of doubt provision".[3]

Courts have been imposing conditions in these circumstances for some time, so this provision does not provide any real change to how the grave risk defence is applied in *Hague Abduction Convention* cases.

The second and third changes to Regulation 15 might be helpful in increasing the safety of women and children when they return to the overseas country but may also ground objections made by requesting parents to conditions which they consider onerous.

New **Regulation 15(6)** permits the court to consider four things:

(a) whether compliance with the condition "will be reasonably practicable",

(b) whether the condition "is proportionate",

(c) whether the condition "would usurp the regular functions of the courts or authorities in the child's state of habitual residence", and

(d) whether the condition imposed would be enforceable in the overseas jurisdiction.

New **Regulation 15(7)** makes clear that the court is not limited to the above four matters when considering imposing conditions. This sub-regulation is otiose because Regulation 15(6) already uses the words "the court may have regard to", and could have been better expressed as additional words at the end of Regulation 15(6), perhaps "the court may have regard to any relevant matter including".

Item 2 amends Regulation 16(3) by adding a note to the effect that, when considering whether or not to return a child where a grave risk has been made out, the court may consider any risk that the child may be exposed to, and the extent to which the child could be protected from such risk, regardless of whether the court is satisfied that family violence (as defined in s 4AB of the *Family Law Act 1975*) has occurred, will occur or is likely to occur.

Item 3 amends Regulation 16 to require the court to consider whether it would be appropriate to include any condition raised by an independent children's lawyer for the purpose of reducing a risk of harm.

Item 4 adds a savings provision that the amendments do not apply to any application for return made before the commencement of the amending regulations.

What the changes to the *Regulations* did **not** do is lower the threshold required to be reached before a "defence" under Regulation 16(3). If the threshold is not reached the court has no discretion not to return the child to the country of their habitual residence. Regulation 16(1) requires that the court order the children to be returned to the requesting country.

So far as the "grave risk defence" is considered, Regulation 16(3)(b) remains unchanged and therefore the test remains as set out in the majority judgment of Gaudron, Gummow and Hayne JJ in *DP v Commonwealth Central Authority and JLM v Director-General Department of Community Services* (2001) 206 CLR 401 at 417-8 [41]-[43]:

> 41. ….. On its face reg 16(3)(b) presents no difficult question of construction and it is not ambiguous… What must be established

3 Explanatory Statement, p.4

> is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in "an intolerable situation"….
>
> 43. Because what is to be established is a grave risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.

The facts of *Mercado*

The case arose from an application made by the father seeking the return of his 3 children aged 11, 7 and 6 years. The children had been brought to Australia by their mother on 30 October 2022. The children's father applied to the English Central Authority on 3 November 2022. The father's application was forwarded to the Australian Central Authority and in June 2023 an Application seeking the return of the children was brought by the NSW Central Authority in the Federal Circuit and Family Court of Australia (Division 1). The final hearing took place almost 11 months after the father's application to the English Central Authority.

The mother did not dispute the jurisdictional facts but raised two 'defences' to the children's return:

- the children wished to remain in Australia, the "wishes defence" [Regulation 16(3)(c)], and
- the children would be exposed to a grave risk of physical or psychological harm if they were returned to the United Kingdom (UK), "the grave risk defence" [Regulation 16(3)(b)].

The wishes defence

The wishes defence was abandoned at the hearing after the court-appointed expert's report did not support the defence. The expert found that the children had expressed a preference to live in Australia rather than an objection to return to the UK, and that their wishes did not reach the standard required by Regulation 16(3)(c)(ii), namely "a strength of feeling beyond the mere expression of a preference or of ordinary wishes". The expert also found that the children were not sufficiently mature for their wishes to be given any weight.

The changes to the *Family Law Act 1975,* which came into force in May 2024, to repeal section 111B (1B)[4] removed one disconformity between the Australian legislative provisions and the *Convention*. Article 13 of the *Hague Convention* permits a court to refuse return of a child "if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views". Section 111B(1B) provides that the *Regulations*:

> 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.

The repeal of section 111B(1B) will permit the *Regulations* to empower a court to take account of the wishes of a child regardless of the level at which they are expressed, although Regulation 16(3)(c)(ii) (which states that a court may refuse return only if "the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes") would also have to be repealed to change the current status quo. It is hard to identify a principled reason why the Australian position should differ from the *Convention*, and in a way that reduces the ability of a child to have a say in their immediate future.

The dissonance between the Australian provisions and *Convention* position has been observed by Michelle Fernando. In her paper, 'Children's Objections in *Hague Child Abduction Convention* Proceedings in Australia and the "Strength of Feeling" Requirement',[5] she comments that the Regulation

> "… requires children to meet an additional hurdle before their views can be taken into account …. When this strict approach is taken, children must not only object to being returned to their country of habitual residence, but they must object strongly. Otherwise, their views cannot be considered. This approach is not required by the Convention itself and runs the risk of children being denied the opportunity to have

4 *Family Law Amendment Act 2023*, Section 7.
5 Fernandes, Michelle, 'Children's Objections in *Hague Child Abduction Convention* Proceedings in Australia and the "Strength of Feeling" Requirement' (2022) 30 *The International Journal of Children's Rights* 729–754.

> their views considered at the "gateway stage", in circumstances where proper application of the Convention would, subject to the child having attained a sufficient age and degree of maturity, allow those views to be taken into account."[6]

The grave risk defence

The grave risk defence was based on the mother's allegations of

- a history of domestic violence including:
  - physical violence
  - financial control
  - threats against her family of origin
- the status of the children as indigenous

as well as the mother's evidence that she was not prepared to return to the UK with the children if return was ordered.

This would appear to be the first case to squarely engage the amendments to the Regulation made in December 2022.

The opposing arguments concerning the amendments

The Applicant department argued that the changes merely codified the existing law and made no substantive change. The Respondent argued that if the amendments were not intended to change the existing law there would have been no need for the transitional provision in Regulation 33 of the *Amending Regulation*, limiting the application of the amended provisions to applications filed after the commencement of the amendments. In addition, the references in the Explanatory Memorandum to the changes being intended to "enhance"[7] the protection offered to women fleeing family violence suggested some change was intended to the existing law. The Respondent further submitted that, based on the statement in the Explanatory Memorandum that:

> The Instrument serves to enhance the safety of women and children fleeing family violence by clarifying the protections available to them against any arbitrary or unlawful interference that could be associated with a return to an intolerable situation. Where allegations of family violence are substantiated, these amendments affirm that the court has discretion not to return children to an unsafe environment, which positively engages the right of the children to be protected by the law from unlawful interference.

> If the Respondent establishes that family violence has occurred and there would be a risk of an unsafe environment on return, then the Court should conclude that a grave risk has been established.

The judgment

Justice Christie found that the defence of grave risk had not been made out and ordered the return of the children to the UK.

At paragraph 113 her Honour comments:

> [113] Doing the best I can in the absence of any previous judicial consideration and having regard to the Explanatory Statement ('ES') and the very helpful submissions of counsel, I have formed the view that if I were to conclude that family violence had occurred then I would be obliged to take it into consideration when evaluating prospective risk of exposure to "grave risk". In those circumstances I would likely take into account the nature of the family violence, such as, whether the incident was a one-off event or a pattern of conduct, whether the children were exposed directly or indirectly and/or what the perpetrator has done since. While I accept as a general proposition that amendments to regulations would ordinarily be thought to affect change I am not satisfied that the Regulations as previously drafted precluded consideration of allegations of violence. In a similar vein, I am satisfied that under the Regulations which existed prior to amendment I would have been obliged to consider evidence relating to family violence in any case where a party said that history was relevant to a defence.

6 Ibid 751-752.
7 Explanatory Memorandum, p 8.

At paragraph 114, her Honour addressed the unhelpful wording of the note added to Regulation 16(3), saying:

> [114] If I were to take into account family violence absent evidence it had occurred, or will occur I am at a loss as to how I would evaluate the absence of evidence in terms of what it means for the assessment of risk. Given my findings in this case this issue does not, fortunately, arise. It is also necessary to consider the submission that the notes to the Regulation require the court to have regard to "any risk" when evaluating the evidence. This is not novel.

Her Honour's response cannot be faulted. It seems that the language of the note was intended to provide some "avoidance of doubt" meaning, but given its over-drafting — which is sadly all too common in modern Commonwealth drafting — it is, on close examination, impenetrable. Finally, at paragraph 118, her Honour concluded:

> [118] I accept that the introduction of specific reference to "family violence" as defined by s 4AB of the Act does enhance the rights and safety of women and children, not by introducing substantive change to the law relating to reg 16(3)(b) of the Regulations, but rather by, as the ES itself makes plain, codifying and clarifying the manner in which the issue can be raised and considered. The plain terms of reg 16(3)(b) of the Regulations remain unchanged. The notes provide guidance about consideration of the subject matter which may constitute the asserted grave risk or intolerable situation. This is consistent with the observations in the Statement of Compatibility of Human Rights as part of the ES to the effect "[w]here allegations of family violence are substantiated, these amendments affirm that the court has discretion not to return children to an unsafe environment." This discretion has always existed if the court concluded that a return order would expose the child to a grave risk or otherwise place the child in an intolerable situation: see *Walpole & Secretary, Department of Communities and Justice* (2020) 60 Fam LR 409; *Harris & Harris* [2010] FamCAFC 221; (2010) FLC 93-454.

This is not an unexpected interpretation of the December 2022 amendments to the *Regulations*, although it calls into question whether the amendments effected any true "enhancement", as it did not alter the existing substantive law and at most confirmed (in confusing language) what had already been stated to be the case.