

2424B

**CHILDREN CAUGHT IN  
CONFLICT – THE CHILD  
ABDUCTION CONVENTION  
AND AUSTRALIA**

**INAUGURAL PETER NYGH  
MEMORIAL LECTURE**

**HALIFAX, NOVA SCOTIA, CANADA  
23 AUGUST 2009**

The Hon. Michael Kirby AC CMG

**HALIFAX, NOVA SCOTIA, CANADA  
23 AUGUST 2009**

**INAUGURAL PETER NYGH MEMORIAL  
LECTURE**

**CHILDREN CAUGHT IN CONFLICT – THE CHILD  
ABDUCTION CONVENTION AND AUSTRALIA**

The Hon. Michael Kirby AC CMG\*

**AN INTERNATIONAL DIMENSION**

The dimensions of our world are such that it is virtually impossible to traverse a distance further than that from Sydney, New South Wales to Halifax, Nova Scotia. As I travelled across Australia, through Asia and the Arab lands, transiting London and on to New York and last night to Halifax, my mind was fixed on my friend Peter Nygh. And on the great northern federation of the Commonwealth of Nations, Canada, where his name is being justly honoured.

Tomorrow I will return to Australia by way of Los Angeles, crossing the mighty Pacific Ocean. Yet this long journey is worthwhile if it ensures that we do not forget a scholar, judge and admirable human being who selected family law and private international law as the topics of his specialty. We are fortunate in Canada and Australia to live in countries

---

\* Justice of the High Court of Australia 1996-2009; the author acknowledges the assistance of Kristen Murray, Legal Associate, Family Court of Australia in the preparation of this paper.

that share common approaches to constitutionalism and the law. My journey teaches, in the space of a few days, the intimate relationship of human beings everywhere on the planet, by reason of the remarkable advances in the technology of flight and in our capacity, in a matter of hours, to circle the globe in a way previously little more than a vivid fantasy.

Those family law practitioners of Canada and elsewhere who decided to use the occasion of this conference to honour Peter Nygh pay a compliment to the judiciary and legal profession of Australia. For that compliment, I express thanks. Peter Nygh was an internationalist. But he was also a distinguished Australian professor and judge. Many, perhaps most, at this conference will have known him in his lifetime. Perhaps they have known him at earlier conferences of this kind, for he was the director of studies. Those who did not know him personally may know him through his scholarly writings and judicial opinions. However, it is inevitable, with the passing of time, that there will be those who never met him and for whom he is a name no longer of regular acquaintance.

In this inaugural lecture, it is therefore proper to celebrate his life's work, I, a friend and fellow countryman, colleague in universities and the judiciary alike, should remind you of his career and why we honour him at this conference.

Having done that, I will turn (as I have before<sup>1</sup>), to address a topic of current, indeed universal, concern, namely the operation of the Convention on the Civil Aspects of Child Abduction ("the Convention")<sup>2</sup>. That Convention interested Peter Nygh greatly. He wrote on it both as a

---

<sup>1</sup> M.D. Kirby, "Peter Nygh, Family Law, Conflicts and Same-sex Marriages" (Peter Nygh Memorial Lecture), Perth, 23 October 2006, (2006) 19 *Australian Family Lawyer* 4.

<sup>2</sup> Signed at The Hague, 25 October 1980. Described in David McClean "The Hague Child Abduction Convention – The Common Law Response" (1993) 40 *Netherlands International Law Review*, 67 at 75; A.E. Anton "The Hague Convention on International Child Abduction" (1981) 30 *International and Comparative Law Quarterly*, 537.

judge, and as a scholar and as an expert in private international law. I want to reflect on the operation of the Convention in my own country, Australia. I will do so drawing upon some of Peter Nygh's writings and indeed some of my own.

First, I must describe the life of this celebrated expert in family law and demonstrate how worthy he is for our remembrance seven years after his death. The intention of a memorial lecture is to afford an occasion to the speaker to reflect upon a subject of interest for those who hear it. At an international conference concerned with the theme "Children Caught in Conflict", there can be few subjects so relevant as the Child Abduction Convention. Typically, the children in respect of whom the Convention is invoked are caught, almost powerless, in an occasion of acute conflict between the parents, said to have been brought about by the unconsensual removal of a child from one country to another where one of the parents is not resident and claims the return of the child to the place and condition that preceded the removal.

All the ingredients for conflict, stress and disadvantage may be present in that predicament. It was to address these circumstances, and hopefully to deter them from arising in the first place, that the Child Abduction Convention was made, ratified by countries such as Australia and Canada, and brought into force by local law<sup>3</sup>.

### **PETER NYGH REMEMBERED**

It is easy for me to remember Peter Nygh because we were colleagues for more than thirty years. He was born in Hamburg, Germany in March 1933 in a perilous time. His father, a national of the Netherlands, soon brought him there. He received his early education in Rotterdam, for a time under German occupation. As a young man, Peter Nygh was

---

<sup>3</sup> In Australia, the applicable provisions of the Child Abduction Convention have been expressed in the Family Law (Child Abduction Convention) Regulations 1986 (Cth).

appointed lecturer in law at the University of Tasmania in Australia in 1960. He transferred to Sydney University in 1965, at a time when I was myself pursuing post-graduate studies there. He was quickly promoted to professor in 1969. Soon afterwards, he moved to the new Law School at Macquarie University where he became Head of School in 1974. He resigned that post in 1979 when, unusually in the Australian legal tradition for an academic, he was appointed a judge in the Family Court of Australia, a national, federal court concerned with matters of family breakdown and conflict.

Despite his judicial appointment, Peter Nygh continued with his academic interests. His book *Conflicts of Laws in Australia* won him, in 1987, the Doctor of Laws degree of the University of Sydney. However, by that time, he was well and truly engaged in his labours as a judge. By 1983, he had been designated a judge of the Appeal Division of the Family Court. His unquestioned success in the judicial role was a helpful antidote for the common attitude amongst the practising legal profession that tends to be suspicious of academics and doubtful of their capacity to move over to the 'dark side' of the curial resolution of actual disputes.

The daily grind of judicial work was leavened for Peter Nygh by his appointment to chair the Family Law Council of Australia, a national advisory body, and his engagement to serve as a part-time commissioner of the Australian Law Reform Commission. The latter appointment came in 1986, a couple of years after I had moved on from the office of inaugural Chairman of that Commission.

Because of our mutual interests in law reform and legal theory, we often met. He was a spare man and the Netherlands accent persisted with him to remind us of his origins. He looked and sounded like a professor of the European tradition. But in his daily work as a judge, until his retirement

in 1992<sup>4</sup>, he brought his outstanding intellect to bear on family law and the resolution of cases, in which he was acknowledged for his sound and sensible approach. His decisions were rarely disturbed on appeal.

After Peter Nygh's retirement from the Bench, he continued decision-making work in the Refugees' Review Tribunal and renewed academic work in a number of universities. He appeared before the High Court of Australia in two important family law cases<sup>5</sup>. Much of his post-judicial work was in international law. He played a leading part in the Australian branch of the International Law Association, which has honoured his name with prizes and an internship<sup>6</sup>. He was an Australian delegate to the Hague Conference on Private International Law. He was elected an associate of the International Academy of Comparative Law. That conference witnessed his participation over many years. The invitation from the Academy of International Law at The Hague to give lectures there he considered the "summit"<sup>7</sup> of his intellectual career.

Peter Nygh died in Australia on 19 June 2002. The national Family Law Conference of Australia established a memorial lecture in his name and, in 2006, I delivered that lecture on the subject of conflicts of laws and same-sex marriages<sup>8</sup>. Unsurprisingly, before his death, he had written on that topic too, alerting family lawyers to the need to get ready for its many interesting legal controversies<sup>9</sup>.

Before his death, Peter Nygh formed a friendship with my partner, Johan van Vloten, also born in the Netherlands. They tried to teach me the correct pronunciation of the peculiar "ij" sound in Peter Nygh's name (the

---

<sup>4</sup> Obituary, D. Bennett (2002) 76 ALJ 595 at 596.

<sup>5</sup> *Henry v Henry* (1996) 185 CLR 591; *Harrington v Lowe* (1996) 190 CLR 311.

<sup>6</sup> Bennett, above n 4, 596.

<sup>7</sup> Ibid, 596.

<sup>8</sup> M.D. Kirby, Peter Nygh Memorial Lecture, above n 1.

<sup>9</sup> P. Nygh, "The Consequences for Australia of the New Netherlands Law Permitting Same-Gender Marriage" (2002) 16 *Australian Journal of Family Law* 139.

“y” in the common spelling of the name was an Anglicised version for those many monolinguals who could not get their tongue and lips around the correct diction). It was typical of him that he showed not the slightest opposition to the enacted Netherlands law “opening up” marriage to same-sex partners<sup>10</sup>. And what to some was radical, even outrageous, a decade ago has spread rapidly in many lands, by a combination of judicial decisions and legislative enactment.

Peter Nygh did not waste time railing against this legal development as a departure from the hallowed traditions of family law, as hitherto practised. He simply examined the consequential legal clashes between jurisdictions which ordinarily left the validity of a marriage to be determined by the laws of the place where it was conducted but in this case, instead, sometimes forbade locals from granting any recognition to such marriage forms<sup>11</sup>. Whereas Canada and the Netherlands have been in the forefront of according full dignity and rights to the marriage of same-sex couples, Australia (copying initiatives first introduced in the United States of America) enacted an amendment to the *Marriage Act* in 2004<sup>12</sup> to forbid such marriages at home and to deny them recognition in Australia, even if celebrated and legally respected in the country of the marriage.

Sadly, Australia has fallen behind others in this respect, whilst more recently correcting financial, taxation and other monetary disadvantages of same-sex couples<sup>13</sup>. One jurisdiction in the nation, the Australian

---

<sup>10</sup> *Wet Openstelling Huwelijk* of December 21, 2000 which provided that from 1 April 2001, two persons of the same sex could marry under Netherlands law. The title of the law may be translated as “Act on the Opening Up of Marriage”. See K. Waaldijk, “Others May Follow: The Introduction of Marriage, Quasi-marriage and Semi-marriage for Same-sex couples in European Countries” (2004) 38 *New England Law Review* 569 at 572.

<sup>11</sup> The problem arose under The Hague Convention on the Celebration and Recognition on the Validity of Marriages which entered into force on 14 March 1978 and the *Marriage Act* 1961 (Cth) as amended by the *Marriage (Amendment) Act* 1985 (Cth).

<sup>12</sup> *Marriage Amendment Act* 2004 (Cth) inserting s88EA in the *Marriage Act* 1961 (Cth)

<sup>13</sup> *Same-sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act* 2008 (Cth) which amended a large number of Australian federal statutes in ??? and other financial matters

Capital Territory, sought by legislation to provide not for marriage but for a recognised form of legal partnership, falling short of marriage. During the previous federal government in Australia, a law providing for civil union in the Capital Territory was disallowed by the Governor-General on the advice of the federal government. Notwithstanding a change of federal government in November 2007, a revised law providing for a form of civil partnership in the Capital Territory was ultimately abandoned when the new Labor government made it clear that it, too, would not support that law.

The sticking point on this issue in Australia appears to have been a concern in some quarters that civil unions or civil partnerships might seem too close to marriage and so, in some unexplained way, might damage or diminish that institution. As a person who has enjoyed the benefit of a same-sex domestic de facto partnership over more than forty years, I never cease to be puzzled by the notion that its legal recognition or celebration would, in some way, undermine or lessen the legal respect given to the formalised married relationships of others. Apart from personal dignity, human and health advantages and civic equality, the status of marriage is one afforded by law. It affords important protections, including access to independent courts and tribunals such as, in Australia, the Family Court of Australia. I take the occasion of this conference in Canada to pay my tribute, and to express my thanks, to the judges, lawyers and legislators of Canada who have removed this element of inequality in the legal treatment of citizens from the law of this country<sup>14</sup>.

Significant though these developments are for the future contours of family law – and for fresh issues concerning children within new family

---

<sup>14</sup> See e.g. *Halpern v Toronto (City)* (2003) 65 OR 3d 161 (OntarioCA); *EGALE Canada Inc. v Canada (Attorney-General)* 226 and *EGALE Canada Inc v Canada (Attorney-General)* 13 (2003) BCLR (4<sup>th</sup>) 226 (BCCA); *Dunbar v Yukon Territory* (2004) 122 CRR (2d) 149 (Yukon SC) and *W(n) v Canada (Attorney-General)* (2004) 255 SaskR 298 (Sas.QB)



arrangements – they are not the subject of this memorial lecture for Peter Nygh. Those who are interested can read my earlier memorial address on those themes, given in Australia. Instead, I want now to address some issues that have arisen in Australia in the application of the Child Abduction Convention, upon which Peter Nygh also wrote during his lifetime. In 2002, Peter Nygh prepared a report for the fourth Special Commission reviewing the operation of that Convention in Australia. In the course of that report, he discussed interpretations of the Convention offered by the High Court of Australia. He suggested that such interpretations constituted<sup>15</sup>:

“... a regrettable departure from the general consensus underlying the Convention that the exceptions in Art.13 should be narrowly construed ...”

He declared that, following its original examinations of the operation of the Australian Regulations giving effect to the Convention, the High Court had “continued on its march away from the international consensus”<sup>16</sup>.

In the balance of these remarks, I will seek to explore the reasons for those concerns. To examine whether they were justifiable. To look at more recent cases to see whether they tend to confirm or deny, Peter Nygh’s opinion. And to consider the extent to which, in Australia, the Child Abduction Convention is being implemented in practice. And, if it is not, whether this reveals a tendency that national courts, evaluating the conduct of national abductors in their own jurisdiction, may be reluctant to send the abductor and the abducted child back to the country of abduction, given the inescapable elements of uncertainty as to what might then happen to the child once returned.

This is a large subject but an important one. Self-evidently it is not my purpose to criticise Australian or any other courts. Nor is it my objective

---

<sup>15</sup> P. Nygh “Review of The Hague Convention on Civil Aspects of Child Abduction” (2002) 16 AJFL 67.

<sup>16</sup> Ibid.

to re-argue opinions in which I participated judicially. As befits the honorand, the object of my enquiry is a deeper one. It is how far the international community can expect municipal judges to fulfil the objectives of the Child Abduction Convention. And how far experience has demonstrated that those objectives are being met, especially in the decisions of the courts of Australia.

### **OBSTACLES TO THE CHILD ABDUCTION CONVENTION**

The Child Abduction Convention was opened for signature at The Hague, the Netherlands, on 25 October 1980. So far, eighty countries have ratified, or acceded to, the Convention. Australia did so on 29 October 1986. It thereby agreed with the other participating countries to cooperate, in the ways defined, for the specific and limited purpose of returning abducted children to their country of habitual residence so that any contested custody proceedings would be heard and determined *there* rather than in the country to which the child has been taken by the alleged abductor. In the circumstances of fast international travel, that country is normally (although not uniformly) the country of nationality and ordinary residence of the abducting parent. That parent is normally (although not always) a national of that country. He or she thus typically shares the nationality and cultural attitudes of the courts from whom the order for return of the child is sought.

To give effect to the treaty obligations created by the Child Abduction Convention in Australia, a provision (s.111B) was inserted in the *Family Law Act 1975* (Cth). This provided for the making of regulations “to enable the performance of the obligations of Australians [and] to obtain for Australia any advantage or benefit under [the Convention]”<sup>17</sup>. The applicable Regulations were then duly made.

---

<sup>17</sup> The history of the Convention and Australian law is explained in *De L v Director-General NSW Department of Community Services* (1996) 187 CLR 640 at 671.

The Convention itself is contained in a schedule to the Regulations. Its preambular statements declare the purposes of the states parties as being:

“firmly convinced that the interests of children are of paramount importance in matters relating to their custody ...” and “desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access ...”

The objects of the Convention are stated in Art.1 to be:

- “(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State”.

In this way, the Child Abduction Convention aims to restore the *status quo ante*. This approach is founded on the principle that abduction, in itself, is normally disruptive and upsetting to the child who is subject to it; frequently puts the non-abducting parent at a great physical, litigious and emotional disadvantage; and, unless quickly repaired, tends to reward abducting parents, confirming their action in taking the law into their own hands.

A legitimate source of anxiety about an international treaty providing for the rapid return of a child to another country, to be subject to the orders of the courts of that country, is the common knowledge that, in some nations, cultural and legal norms are observed significantly different from one’s own. Thus, in some countries the rights of women might be subordinated by law to those of men. Very strong feelings concerning religion and apostasy<sup>18</sup> (refusing to acknowledge the rights of persons to change their religion or to abandon that religion) may sometimes make it appear risky to order the return of the child to the country from which it

---

<sup>18</sup> *Lina Joy v Federal Territory Islamic Council* (2009) 1 LRC 1 (FC Malaysia). Cf M.D. Kirby, “Fundamental Human Rights and Religious Apostasy. The Malaysian Case of *Lina Joy*” (2008) 17 *Griffith L Rev* 151.

was abducted. A consideration such as this appears to have been in the mind of Justice Gummow, a judge of the High Court of Australia, during the hearing of argument in the most recent decision under the Convention: *LK v Director-General, Department of Community Services (NSW)*<sup>19</sup>. His Honour is there recorded as saying<sup>20</sup>:

“Under some legal systems in some of these Convention countries, some of which are quite remarkable, as we have observed from time to time, the father might have the sole right, but we do not need to go there.”

Inferentially, the Court did not “need to go there” in that case both because a different issue was presented for decision (namely whether the subject children were ‘habitually resident’ in Israel and thus liable to be returned there at the request of the non-abducting father). But also because Israel was not such a country as would disrespect the rights of a mother in a court contest between parents as to the custody of a child, heard and determined in Israel).

However, there is another, more fundamental, unstated reason why the Australian court did not “need to go there”. This was that the Convention (and in Australian the Regulations giving it effect<sup>21</sup>), make it perfectly clear that:

“The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention, after an accession”.

Thus, for example, the Child Abduction Convention is not in force between Australia and all of the eighty signatory countries to the Convention. It is not in force, for example, between Australia and Albania, although both countries have acceded to the Convention. This is because the accession

---

<sup>19</sup> [2009] HCA 9; (2009) 83 ALJR 525.

<sup>20</sup> [2009] HCA Trans.7. 5 February 2009.

<sup>21</sup> Child Abduction Convention, Art.38.

by Albania on 4 May 2007 has not [yet] been accepted by Australia. In that sense, the Executive Government of Australia (and ultimately the Parliament) have the last say as to whether, in respect of other signatory countries, Australia's judges will deem such countries' judges to have sufficient integrity, lawfulness and due process in their courts and appropriate procedures to establish the relationship of reciprocity envisaged by the Child Abduction Convention, available for the high purposes the Convention sets out to achieve.

A further complication intrudes in the case of signatory countries that have accepted, in respect of each other, an obligation to provide for return of an abducted child. This complication derives from the fact that in some, but not all, signatory countries, including Western countries, international child abduction is a criminal offence. Thus, it is so in the United States of America and in the United Kingdom. But it is not in Australia. This is so although strong arguments have been advanced for the imposition of criminal sanctions on abducting parents, on the footing that such conduct generally needs to be carefully planned over an extended time; it has been demonstrated often to occasion long-lasting psychological damage to most of the children affected; and is rarely in the best interests of maintaining relationships between children and both their parents, that constitute one of the most important objectives of family law in all jurisdictions<sup>22</sup>. In *United States v Amer*<sup>23</sup>, an Egyptian father abducted his children from the United States to his home county, Egypt. There, he elected to serve a prison sentence rather than to return the children to the United States. From Biblical times, the tensions raised by such cases are amongst the strongest known to the courts.

---

<sup>22</sup> A. Sapone, *Children As Pawns of their Parents' Fight for Control*, 2000 at 129.

<sup>23</sup> 110 F.3d 873 at 882 (2<sup>nd</sup> Cir 1996); Cert denied 118 S Ct 258 (1997).

In November 2006, the fifth meeting of the Special Commission to review the operation of the Child Abduction Convention reaffirmed a recommendation it had made in its 2001 meeting<sup>24</sup>:

“The impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which should be taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw charges”.

Many countries which are not willing to accept the possibility of returning children abducted into their jurisdiction to other countries have not joined the Convention system. Thus Lebanon is a non-signatory country, although it has a sizeable population of expatriates living in Australia. The difficulty of securing the return to Australia of children abducted to Lebanon by either parent, is therefore obvious. It is for this reason that Australia has pressed ahead with attempts to create a dialogue and to build co-operative bilateral relationships with judicial systems in non-Convention countries for default of Convention procedures.

Thus, in October 2000, Australia and Egypt signed an agreement on co-operation for the protection for the welfare of children. That agreement came into force in 2002. The intention of the agreement was to establish formal procedures to assist Australians whose children had been abducted to Egypt, through a joint consultative commission<sup>25</sup>.

Those judges and lawyers in developed countries, like Canada and Australia, who are sceptical about the fate that awaits attempts in signatory countries, having different cultural and religious attitudes, to reciprocate whole-heartedly in ordering the return of abducted children, must squarely face the alternative that exists where *no* treaty provision applies. In such circumstances, there will ordinarily be absolutely no

---

<sup>24</sup> 5<sup>th</sup> Meeting of Special Commission 1.8.4. (November 2006); re-affirmed 2001 report Rec.5.2.

<sup>25</sup> Agreement between the Government of Australia and the Government of the Arab Republic of Egypt regarding co-operation in protecting the welfare of children (Cairo 22 October 2000).

effective legal or political sanction or remedy for the parent or child who is a victim of an abduction. The Convention system is intended to replace this legal wasteland by enforceable reciprocal entitlements. The need for such procedures is particularly acute in countries such as Canada and Australia which are common destinations of migration and are multi-racial in composition. Obviously, respect and reciprocity in the operation of the Child Abduction Convention will only apply if those countries that are parties to it conform both to its letter and spirit. If they do not, this fact will soon become known, with the resulting destruction of the reciprocity principle.

There is a further practical impediment to the operation of the Convention that needs to be faced. This is that some countries have very slow judicial and administrative arrangements, so that the Convention objective of speedy action to restore the situation existing before the abduction is easily frustrated. This may not be a deliberate course of action. It may simply be the outcome of local procedures and multiple rights of appeal or review. Partly to respond to this problem, an international informal network of liaison judges, having responsibilities under the Convention, exists to encourage cross-border judicial communications. The aim is to afford information on foreign legal systems, the likely progress of a case if a child is returned, and details of the appropriate local authorities who might be of assistance to the abducting parent in pursuing a claim for custody of the child. Practical measures of this kind are to be welcomed as making the Convention system operate more transparently and equitably for parties whose love for a child may blind them to the need to respect legal remedies for custody disputes and against unilateral international child abduction.

Conferences such as these, and the personal and informal communications that they encourage across national borders, help to reinforce respect and confidence towards foreign judges and officials,

including those operating in legal systems significantly different from one's own. A sense of national superiority and a lack of respect for the legal systems of other nations will evidence an attitude that strikes at the heart of the Child Abduction Convention and, given effect, would be destructive of the attainment of its worthwhile objectives.

Yet is there any reason to fear that this type of attitude is undermining the effective operation of the Convention in participating nation states? Specifically, is there any reason for fear that it is a problem so far as Australia is concerned?

### **FIVE AUSTRALIAN CASES ON THE CONVENTION**

Since Australia's decision to participate in the Child Abduction Convention system, five appeals have been heard by the nation's highest court, the High Court of Australia. I took part in four of them. In three of the four, I dissented from the result favoured by the majority. In two of the three, I was joined in dissent by Chief Justice Gleeson. A table illustrates the outcomes of the appeals. They were selected for hearing by the Court by a procedure called 'special leave' by which the Court itself selects the cases that it will hear by reference to their importance, suggested miscarriages of justice and legal novelty.

**Table of HCA Cases on the Child Abduction Convention**

<b>Name</b>	<b>Year</b>	<b>Country</b>	<b>Appeal Outcome</b>	<b>Returned</b>
<i>De L</i>	1996	USA	Allowed	No
<i>DP</i>	2001	Greece	Allowed	No
<i>JLM</i>	2001	Mexico	Allowed	No
<i>MW</i>	2008	NZ	Allowed	No
<i>LK</i>	2009	Israel	Allowed	No

As this table shows, the result is that, in not a single case which has come before the High Court of Australia in more than a decade, has the order of



that court affirmed the order of the Family Court of Australia, the specialised federal court dealing with cases under the Convention. Decisions of the Family Court, ordering the return of the child to the country designated, have been uniformly reversed with consequential orders requiring either reconsideration of the case by the Family Court or actual dismissal of the application for return orders under the Convention.

The first of the cases was *De L v Director-General, NSW Department of Community Services*<sup>26</sup>. This was a case involving an Australian woman, married to a United States citizen. She removed the two children of the marriage from the United States of America and returned with them to Australia. An application for the return of the children was filed for the father with the relevant Australian Central Authority. The children were aged 11 and 9 years. The wife asserted that the children were mature enough to express their views, antagonistic to return. The trial judge dismissed the application for return. The Full Court of the Family Court ("the Full Court") overturned that decision. By majority, it ordered the return of the children to the United States. This was done by what was described as a "narrow reading" of the exception to return, allowed for in the Convention, referring to the consideration of an "objection" by the child to being returned.

The majority of the High Court of Australia overruled the notion that there should be a "strict and narrow reading" of the Convention exception, so as not to undermine the attainment of the objects of the Convention. I disagreed with this reasoning. I did so on the basis that the structure and purpose of the Convention ordinarily required the return of the child. An overbroad interpretation of the word "objects" would tend to undermine the achievement of the Convention's core purposes and defeat its underlying policy. By reference to background material and a comparison of the expression used in the French and English language texts of the

---

<sup>26</sup> (1996) 187 CLR 640.

Convention, I preferred the view that a narrower meaning of “objects” should be adopted by Australian courts. That was the approach that had been taken in decided cases in the United States, Israel and Switzerland. My approach did not prevail.

Commenting on the *De L* decision, Peter Nygh preferred the approach that I had taken. He was concerned that the contrary approach would virtually oblige the preparation of a full family report in every case in every abduction case. This would add to the time of local disposition. It would tend to undermine the repeated references in the Convention (and Regulations) to the need for urgency in the hearing and disposition of such applications.

Following the decision of the High Court, s111B of the *Family Law Act* was amended to provide specifically that “an objection” to return under Australian law must import “a strength of feeling beyond the mere expression of a preference or ordinary wishes”<sup>27</sup>. In so providing the Australian Parliament sought to achieve the narrow reading of “objection” that Dr. Nygh and I had favoured.

The second time the High Court of Australia addressed the operation of the Convention was in 2001 in two cases heard concurrently. In *DP v Commonwealth Central Authority and JLM v Director-General, NSW Department of Community Services*<sup>28</sup>, the Court addressed what was meant by the exception provided where a child, the subject of an application, would be “exposed to a grave risk of harm” if returned to the country from which it was abducted.

The majority of the Australian court rejected the argument (upheld in the Full Court of the Family Court) that the language and purpose of the

---

<sup>27</sup> *Family Law Act 1976* (Cth), s111B(1B).

<sup>28</sup> (2001) 208 CLR 401.

Convention required that a narrow and not a broad construction should be given to the ambit of this “risk”. The Full Family Court had favoured a narrow view, in part because what was in issue was an exception to the ordinary operation of the mutuality envisaged by the Convention. After all, the very purpose of requiring custody proceedings to take place in the country from which the child was abducted envisaged that questions of harm would ordinarily have to be determined there.

In *DP*, the mother, who had taken the child from Greece, argued the “grave risk” defence<sup>29</sup>, because the child suffered from a form of autism and the mother claimed that there were no treatment facilities for the child in the part of Greece to which he would be returned. The majority in the High Court concluded that the approach of the Family court envisaged an overly narrow view of the relevant “risk”. The fact that there would be judicial proceedings in the country to which return was sought did not provide an answer to the contention of grave risk.

Chief Justice Gleeson and I, separately, dissented. The Chief Justice accepted that it was “unhelpful” to talk in terms of “narrow” or “broad” constructions. But he insisted that the task of the decision-maker was to give effect to the Regulations according to their terms and their purpose. He denied that the Full Court had misunderstood the governing law so that there was no error warranting intrusion by the High Court.

In my dissenting opinion, I said<sup>30</sup>:

“Unless Australian courts, including this Court, uphold the spirit and the letter of the Convention as it is rendered part of Australian law by the Regulations, a large international enterprise of great importance for the welfare of children generally will be frustrated in the case of this country. Because Australia, more than most other countries, is a land with many immigrants, derived from virtually every country on Earth, well served by international air transport, it

---

<sup>29</sup> Regulations, Reg.16(3)(b).

<sup>30</sup> (2001) 206 CLR 401 at 449 [155].

is a major user of the Convention scheme. Many mothers, fathers and children are dependent upon the effective implementation of the Convention for protection when children are the victims of international child abduction and retention. To the extent that Australian courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (and residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular.”

The same difference emerged in the interpretation of the applicable law in *JLM*. That was a case where the abducting mother asserted that the grave risk of harm would be that she would commit suicide if the child were returned to the father’s care in Mexico. The trial judge had found in favour of her but that decision was reversed on appeal. The Full Court’s decision was, in turn, overturned by the majority of the High Court of Australia.

Once again, Chief Justice Gleeson dissented. He contested the majority’s decision which was largely one on the facts. He said<sup>31</sup>:

“The mother threat to harm herself directly, and to harm the child indirectly, was taken seriously by the Full Court, but, between the return of the child and the exposure to harm there was an intermediate step, which was the operation of the law of Mexico. ... The mother was, in effect, inviting the Australian courts to resolve the custody issue and therefore pre-empt the decision of the Mexican courts.”

In my opinion, I stressed the high particularity in which the exception was drawn in the Convention and the Australian Regulations. And the use of restrictive words such as “grave” and “intolerable” [“grave risk” and “intolerable situation”]<sup>32</sup>. In support of the view I favoured, I referred to

---

<sup>31</sup> (2001) 206 CLR 401 at 410-411 [21].

<sup>32</sup> (2001) 206 CLR 401 at 441 [130].

similar approaches adopted by courts in England, the United States, New Zealand and in academic writing.

Peter Nygh, in a report for the fourth special commission to review the Child Abduction Convention, provided similar criticisms for the approach favoured by the majority in *DP* and *JLM*. However, this type of criticism was not universal. Another writer on the decisions, Jodi Anne Gray, was critical of the text of the Convention, contending the protection of women from domestic violence had not been directly accommodated in the drafting process<sup>33</sup>. She saw the majority approach in the High Court of Australia as “an emerging recognition that courts cannot merely assume, as a matter of law, that the Requesting State is able and willing to protect the child upon return, but that this is a question of fact to be decided in the light of the evidence presented in the case”.

These considerations were not up front in the reasoning of the judges in *DP* or *JLM*. As is so often the case, hidden behind legal texts and judicial opinions are occasional assessments of deep running values, specifically how best to protect children following an event of international abduction.

The fourth case in the series is *MW v Director-General of the Department of Community Services*<sup>34</sup>. That was a case involving the removal of a child by the mother from New Zealand to Australia. Under New Zealand law and orders of a New Zealand court, the father claimed rights of custody in relation to the child whom he wished to raise in the Maori tradition which the child derived through the ethnicity of his father. Once again, the High Court of Australia divided, with Chief Justice Gleeson and myself in dissent. To a large extent, the debates in the case concerned the adequacy of the factual evidence to sustain the Full Court’s order that

---

<sup>33</sup> J.A. Gray, “Respecting Human Rights in the Drafting and Interpretive Stages of The Hague Convention on Civil Aspects of Child Abduction” (2002) 17 AJLF 270.

<sup>34</sup> (2008) 82 ALJR 629.

the child be returned to New Zealand where issues of custody could be decided in New Zealand courts, already seised of the conflict. The majority, whilst acknowledging the imperfect factual evidence presented by the mother, insisted on<sup>35</sup>:

“ ... the need for prompt, but, so far as the circumstances permit, thorough examination on adequate evidence of the issues arising on wrongful removal applications under the Regulations.”

Chief Justice Gleeson described the absence of factual detail presented by the mother as a “striking and disconcerting” feature of the case.

Nevertheless, as it seemed to me, this was a reason why the final national court would not intrude, substituting factual conclusions of its own. Particularly where doing so would involve effectively expanding the Australian proceedings “into full fledged contests amounting to contested custody suits [which] would operate to defeat the purposes of the Convention”<sup>36</sup>.

Rightly or wrongly, I concluded that the fact that the child was of Maori descent, acknowledged as such by the mother, was a particular reason why Australian courts, especially the final court, would not disturb an order returning the child to the custody disposition of the courts of New Zealand<sup>37</sup>:

“Those courts were earlier seised of the issues and are best placed to resolve them. The patriotic language of the United States courts, cited in the joint reasons, does not reflect the obligations stated in ... the law applicable in this country ...

Reservations that might sometimes, exceptionally, arise about returning a child for decision-making in the courts or other bodies of Convention countries<sup>38</sup>, can have no application whatever in the case of the courts of New Zealand. Indeed, the “Maori heritage” of the father and of [the child] arguably reinforces the conclusion that,

---

<sup>35</sup> (2008) 82 ALJR 629 at 650 [118].

<sup>36</sup> (2008) 82 ALJR 629 at 663-664 [200]-[202].

<sup>37</sup> (2008) 82 ALJR 629 at 666-667 [221].

<sup>38</sup> A reference to *ibid* 640 [50] in the joint reasons in *MW*.

once “grave harm” and other grounds for refusing a return order are put aside, as here they must be, the [Convention] ought to be given [its] intended effect. The verb used ... is imperative (must)<sup>39</sup>. Unfortunately, in not a single case in which the Convention and Regulations have come before this Court has the Court upheld a decision of the Full Court of the Family Court of Australia ordering the return of an abducted. ... In the result, the objective of the Convention has been defeated or delayed. Australian courts have assumed a fact-finding role which, in my view, the Convention and the Regulations, commit to the courts of the country from which the child was taken. With all respect to those of a different view, it is important for judicial attitudes to be adjusted in such cases or the Convention (ratified by Australia for high national and international purposes) will lose much of its efficacy so far as the courts of this country are concerned. ... When mutuality between Convention countries breaks down, the Convention’s arrangements are likely to be defeated. Abduction is rewarded. The ultimate victims are the children.”

The fifth decision in this series is *LK v Director-General, Department of Community Services*<sup>40</sup>. That case was decided in 2009, after both Chief Justice Gleeson and I had departed the judiciary. In many ways, the issue in the case was different from that in the earlier cases. It concerned the pre-condition that children, the subject of an application under the Convention, must be habitually resident in the country from which they were taken. The primary judge (Justice Kay<sup>41</sup>) held that they were habitually resident in Israel before being taken to, and retained in, Australia. The Full Court of the Family Court affirmed this conclusion and dismissed the mother’s appeal. The High Court concluded that the Family Court had applied notions of “domicile” (which imports parental intention) instead of “habitual residence” (which is primarily factual).

Statistics from the fifth special commission on the Child Abduction Convention, mentioned below, indicate that contests over the “habitual residence” of children are becoming much more common as an effective

---

<sup>39</sup> Regulations, Reg.16(1).

<sup>40</sup> (2009) 83 ALJR 525.

<sup>41</sup> Justice Kay was the Hague Abduction Convention liaison judge for Australia until his retirement in February 2008.

defence against return, as the Convention ordinarily envisages. This means an increase in the number of applications to adduce fresh evidence on the "residence" question and on the connection with the country to which the children have been brought. If, having regard to steps taken to establish a new and permanent home for the children in a new country becomes the focus of Convention proceedings, there is an obvious risk that this strategy too may conflict with the substantive and procedural objects of the Convention. The notion that decisions of foreign courts on "habitual residence" questions will ordinarily be unhelpful as confined to a purely factual enquiry runs a risk that Australia's contribution to the development of an international jurisprudence around the concept of habitual residence will likewise be sidelined as avowedly factual. As Professor Linda Silberman has said<sup>42</sup>:

"Because the core concept of the Convention is preserved only if unilateral moves by one parent are resisted, an international and autonomous concept of habitual residence needs to be shaped".

Commentary on the decision in the case of *LK*, has tended to confine the refusal of return of the children to Israel to the peculiar facts of the case. Professor Richard Chisholm (a former judge of the Family Court of Australia) has latched onto the comment:

"What is decisive is that the children left Israel with both parents agreed that unless there were a reconciliation they would stay in Australia and their mother, both before and after departure, set about effecting that shared intention."

On this basis, Professor Chisholm concluded that the insistence on the determination of the child's habitual residence "seems orthodox and unlikely to lead to a major change in outcomes. Upon his view, the Court's comments merely correct what the High Court considered to have

---

<sup>42</sup> L. Silberman "Interpreting The Hague Abduction Convention: In Search of a Global Jurisprudence" 38 UC Davis L Rev 1049 (2005).



been an approach that gave undue weight to one factor, namely the intention of the parties.”<sup>43</sup>

### **JUSTICE NYGH’S DECISIONS**

Apart from the decisions of the High Court of Australia that I have now described, and the academic writings (including of Dr. Nygh), there were several important decisions of the Full Court of the Family Court of Australia, in which Peter Nygh participated, that touched upon the meaning and application of the Child Abduction Convention.

In *Director-General of the Department of Family & Community Services v Davis*<sup>44</sup>, in an *ex tempore* decision given by Justice Nygh, the Full court ordered the return of two children aged 8 and 4, who had been abducted by their mother to the United Kingdom, where they had been habitually resident. At trial, a family report was ordered that described the younger child as “most anxious” and seeking to ascertain his mother’s whereabouts. The trial judge relied on the family report in finding that an order to return the youngest child to the United Kingdom could expose him to a grave risk of psychological harm if ordered to return. The Full Court allowed the appeal, finding that the child’s anxiety, as described, did not warrant the conclusion that he would be at a grave risk of psychological harm. The object of the Convention to discourage, if not eliminate, the harmful practice of unilateral removal was emphasised by the Full Court. This early decision became a frequent foundation for decisions of the Family Court in this area. It was referred to by me in my minority opinion in *De L* and described as consistent with the writing of courts of other Convention countries.

---

<sup>43</sup> R. Chisholm, “The High Court Rules on Habitual Residence” (2009) 23 AJFL 71.  
<sup>44</sup> (1990) FLC 93-182.

In *Graziano v Daniels*<sup>45</sup>, a Full Court decision of 1991, four children were returned to the United States, and once again the test laid down in *Davis* was regularly applied thereafter.

In *Gazi v Gazi*<sup>46</sup>, an appeal against orders returning three children to France was refused by a Full Court including Justice Nygh. Once again, the purpose of the Convention was a cardinal element in this decision, although the majority of the High Court of Australia in *MW* later doubted some of the language used in that case<sup>47</sup>.

Throughout Peter Nygh's treatment of the Convention and its application in Australian law, he adopted, in judicial as well as in scholarly writings, an approach that I found persuasive. It was an approach influenced (as mine was too) by his knowledge of, and experience in, international law, including in the drafting and development of international treaty law and the challenging endeavour to find mutuality between often very differing legal systems. In earlier times, such efforts could be ignored. But in modern times, with a growing body of international law, fast transport and consequent international problems, national courts need to adjust their thinking to the new challenge. That challenge is, where appropriate, that of seeing the local court as exercising a kind of international jurisdiction. There will never be enough international courts and tribunals to interpret and administer international law, including treaty law. The responsibility of doing so substantially falls upon national courts. In this sense, municipal courts become partakers in the growth and application of international law, which is one of the most striking legal phenomena of the present age.

---

<sup>45</sup> (1991) FLC 92-212.

<sup>46</sup> (1993) FLC 93-341; (1992) 11 FLR 425 at 428.

<sup>47</sup> *MW* (2008) 82 ALJR 629 at 640 [49]; cf. *van Rensburg v Paguay* (1993) FLC 92-321; overruled *ZP v PS* (1994) 122 ALR 1.

## **CONSEQUENCES OF THE DECISIONS**

Trial judges and intermediate courts are naturally affected by the instruction of the nation's final court. They are inevitably influenced, not only by the letter of the law as expressed by the ultimate judges, but also by the attitudes and approaches that they discern in the final court's binding authority.

In *Zaphiropoulos v. Secretary, DHS State Central Authority*<sup>48</sup>, in 2006, the Family Court of Australia had another case involving an application that a mother return to Greece with three children whom she had brought to Australia. The mother alleged a grave risk if the children were returned. The case was in many ways similar to *DP*.

The mother appealed against an order for return. She complained that she had been subjected to physical and verbal abuse by the father. The trial judge upheld that complaint but ultimately rejected the exception on the footing that the mother could live separately in Greece. The Full Court dismissed an appeal. It held that it was for the Greek courts to decide whether the children would be at an unacceptable physical or emotional risk. It cited Canadian, United States and United Kingdom authority. It invoked reasoning from a dissent in *DP*, which led to criticism in academic commentary<sup>49</sup>. Professor Frank Bates declared that the case showed "the unsatisfactory nature of the way in which the law has developed in this increasingly more important area in Australia".

In *Director-General of the Department of Community Services v Timms*<sup>50</sup>, a case of removal from New Zealand, the Full Family Court was critical of the trial judge for what they felt was his inclination to step into the role of the New Zealand court and, effectively, to determine the prognosis of that

---

<sup>48</sup> (2006) FLC 93-264.

<sup>49</sup> Frank Bates, "The Child Abduction Convention: Trouble in Australia" (2007) 1 FL 24.

<sup>50</sup> (2008) FLC 93-376.

court's likely ruling on custody. The Full Court was vigilant to the need for judicial obedience to the approaches taken by successive majorities of the High Court of Australia. So it was also in *Director-General, Department of Community Services, NSW v Frampton*<sup>51</sup>, a decision of 2007. That was a case involving a Kenyan mother and a Scottish father where the trial judge had dismissed the application for the return of the child to the United Kingdom. The Full Court found error and re-exercised the jurisdiction of the trial judge, ordering the return of the child, conditional upon the mother's applying for, and receiving, a visa to proceed to the United Kingdom and the father's paying the necessary airline tickets.

In *Tarrit v Director-General, Department of Community Services*<sup>52</sup>, in 2008, another Full Court criticised a trial judge for reaching his conclusion upon the basis of the persuasive opinion that I had written, in dissent, in the High Court. This was a case involving a child's "objection" to return. The Full Court concluded that it was appropriate that the child's views should be taken into account and rejected the return order.

A fair reading of cases in the Family Court of Australia since the series of decisions in the High Court that I have described, indicates a much greater vigilance on the part of Full Courts to the factors favouring non-return than was earlier the case.

### **STATISTICS IN RETURN CASES**

By comparison with the published statistical information, it is possible to deduce general trends in Australian compliance with the Child Abduction Convention. A report by Professor Nigel Howe to the permanent bureau monitoring the Convention, provided to the fifth meeting of the Special

---

<sup>51</sup> (2007) FLC 93-340.

<sup>52</sup> (2008) Fam.CAFC 34.

Commission of 2006<sup>53</sup>, indicates that first instance applications resulting in a return order are now taking significantly longer to complete their hearings in Australia than they originally did. So are appeals resulting in a refusal to return.

One trend in the data between the most recent report and Peter Nygh's report to the fourth special commission, held in March 2001, is the doubling of cases where the taking person is of the same nationality as the requested state. That is, 47% were Australian citizens removing children into Australia. Typically, the taking parents were mothers (in 81% of cases). Only one of the taking fathers was an Australian national. Most of the children were very young, 66% of them being aged between 1 and 6 years. This compares with a global average of 54% in that category. The outcomes of the Australian applications are worth noting.

#### **Outcome of applications: dispositions**

<b>Outcome</b>	<b>Number</b>	<b>Percent</b>
Rejection	3	7%
Voluntary return no court orders	2	5%
Judicial order for return by consent	10	23%
Judicial order for return not by consent	6	14%
Judicial refusal	7	16%
Access agreed or ordered	3	7%
Application pending	1	2%
Withdrawn	11	26%
<b>TOTAL</b>	<b>43</b>	<b>100%</b>

- Overall, 42% of applications made to Australia ended in the child being returned, either by court order or voluntarily. This is *below* the global rate of 51%.

---

<sup>53</sup> Report of Professor Nigel Howe, consultant to Permanent Bureau for the 5<sup>th</sup> Meeting of the Special Commission to Review the Operation of The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Preliminary Document No.3, Pt.II of October 2006) (October-November 2006); (2007 Update, September 2008).

- The proportion of returns by judicial consent (23%) was significantly *above* the global rate of 9%.
- The proportion of judicial refusals (16%) was *above* the global rate of 13%.
- 25 applications (57%) went to court.
- Of those 25 applications, 64% ended in judicial return.
- 28% of applications ended in judicial refusal. This is *inconsistent* with the global average.

**Outcome of applications: 1999 and 2003 compared**

<b>Outcome</b>	<b>1999%</b>	<b>2003%</b>
Rejection	13	7
Voluntary return	11	5
Judicial return	41	37
Judicial refusal	13	16
Access agreed or ordered	0	7
Pending	5	2
Withdrawn	19	26

- The number of judicial returns (this includes orders made with and without consent) ordered *decreased* between 1999 and 2003 (from 41% to 37%).
- The number of judicial refusals *increased* between 1999 and 2003 (from 13% to 16%).
- The number of voluntary returns *decreased* between 1999 and 2003 (from 11% to 5%).
- The *overall* return rate *decreased* between 1999 and 2003 (from 52% to 42% - presumably this is attributable to the decrease in voluntary returns).

## Reasons for judicial refusal

- In 2003:
  - 1 application was refused on the grounds that the child was not habitually resident in the requesting state
  - 1 application was refused on the grounds the child was settled in the new environment
  - 3 applications were refused on the grounds that the non-removing parent had acquiesced
  - 2 applications were refused on the grounds of an Article 13B/Reg 16(3)(b) defence
- 43% of refusals in 2003 were on the grounds of acquiescence, compared with a global average of 5%
- 29% of refusals in 2003 were on the grounds of Reg 16(3)(b) defences, compared with the global average of 18%

## Speed

### **Mean number of days from filing to outcome**

<b>Outcome</b>	<b>Mean no. of days</b>
Judicial return by consent order	98
Judicial return order	163
Judicial refusal	118
Access agreed or ordered	166

- Where proceedings result in a judicially determined order, on average proceedings that result in a refusal are determined more quickly than proceedings that result in a return

### **Judicially determined outcomes – 1999 and 2003 compared (Mean number of days)**

<b>Outcome</b>	<b>1999</b>	<b>2003</b>
Judicial return	91	131
Judicial refusal	220	118

- From filing to order, the length of proceedings which result in a return have *increased* by 69%
- From filing to order, the length of proceedings which result in a refusal have *decreased* by 53%

Appeals (from Part I, global report)

- Globally, 118 cases were appealed
- In 2003, 10% of all cases were appealed. This compares to 6% in 1999
- In 2003, 22% of cases that went to court were appealed. This compares with 14% in 1999
- In 2003, 81% of appeal decisions upheld first instance judgments. This compares with 72% in 1999.

**Mean number of days on appeal – 1999 and 2003 compared**

<b>Outcome</b>	<b>1999</b>	<b>2003</b>
Judicial return	208	206
Judicial refusal	176	296

- The mean number of days to conclude an appeal resulting in a refusal to return increased by 595 between 1999 and 2003

A study of the statistics does not appear to bear out any major trend away from return orders in Australia. Between 1999 and 2003 the percentage of cases in which such orders were made fell from 41% to 37%. This is significantly lower than the global average of 51%. However, the numbers are small and, as has been shown, the circumstances of the cases are unique or at least distinctive.

Comparing the mean lapsed time in achieving judicial outcomes the figures appear to point in conflicting directions. Where orders for return have been made, the time increased from 91 days in 1999 to 131 days in



2003. Where return was refused, the lapsed time fell by nearly half from 220 in 1999 to 118 in 2003. All of which shows, perhaps, the danger of attempting to derive lessons from a relatively small number of applications and in cases, most of which were decided before the majority of the decisions of the High Court of Australia might be expected to have maximum impact. Clearly, it will be necessary for Australian lawyers to continue their scrutiny of the success of the Child Abduction Convention, measured by the number of return and refusal orders each year. Likewise, lawyers in every Convention country need to be attentive to the overall trends and to the successful operation of the Convention principles to secure the high objectives of that part of international law protective *inter alios* of the children involved.

## **CONCLUSIONS**

Peter Nygh was a brilliantly successful scholar and Australian judge. His life's journey was virtually bound to make him more internationalist in outlook than was typical of the lawyers of the Australia to which he came in the 1960s. His particular discipline of private international law was the gateway through which he entered his association with family law, as a commentator and then as an appellate judge. He had a deep interest in the legal rights of children. He repeatedly wrote on the impact of international law on those rights, including the impact of the Convention on the Rights of the Child (1990)<sup>54</sup> and The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children<sup>55</sup>. However, possibly his most significant contributions in this field were to be found in his academic and judicial writings on the Child Abduction Convention.

---

<sup>54</sup> P. Nygh, "The International Recognition of Children's Rights", paper delivered at the 11<sup>th</sup> Commonwealth Law Conference, Vancouver, Canada, 1996.

<sup>55</sup> P. Nygh, "The New Hague Child Protection Convention" (1997) 11 *International J of Law, Policy & the Family* 344.

That Convention addresses a significantly new international phenomenon, substantially brought about by the rapid expansion of affordable international, indeed intercontinental, travel. The speedy recognition of the devastating impact that international child abduction can occasion to children, parents, the wider family relationships, friends and the community, necessitates a whole-hearted effort on the part of municipal judges to ensure that the Convention operates in a way that achieves its manifest objectives. This does not mean overlooking the text, pre-conditions to, and exceptions from, the requirements for return. But it does require municipal judges to put aside nationalistic approaches (sometimes evident in the authorities). It requires the rejection of prideful judicial opinions reflecting a view that only the courts of one's own country can truly be trusted to do justice to the parties and especially the children before them.

The tendency of lawyers raised before the present era in the comparatively comfortable, but parochial, world of local jurisdictionalism needs to be adjusted to the global realities of today's world and the rapid advance of international law to serve today's needs. Municipal lawyers must, of course, obey the interpretations of the law pronounced within their own court systems. However, in the field of the Child Abduction Convention, as earlier in the field of refugee cases, municipal courts can learn from the wisdom of their counterparts in other countries, especially those with similar legal traditions and cultures.

Despite the best efforts of courts, and the urgency with which they typically address issues of this kind, they can never know fully the long term impact of child abduction upon the children concerned. The Convention is not expressed in absolute terms. But it was decidedly intended to discourage child abduction and to do so by encouraging or requiring the parents concerned to resort to local courts in the relevant Convention states. Looked at as a matter of high international and

municipal legal policy, this is clearly a desirable objective. National courts must keep the objective in mind in the individual decisions that they make. To the extent that they do not exhibit reciprocity, they undermine the mutuality upon which the Convention relies; they expand the time typically taken to decide Convention cases; and they add to the confusion and pain generally caused to the children by this form of unilateral, extra-legal conduct.

Peter Nygh, the internationalist, scholar and judge, saw all this very clearly. His insights continue to have relevance for lawyers today. And not only in the land that he made his home, Australia.

\*\*\*\*\*