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Life After “DP and JLM”: How have Australian Courts approached Hague matters after the High Court’s Majority Judgment in 2001.

Over the past decade the High Court of Australia has abandoned the strict application of the purposes of the Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”); especially when dealing with the exceptions to mandatory return. The spring-board for non-conformity with international consensus was the 1996 decision of the majority of the High Court in *De Lewinsky*³ which broadened the meaning of “objection” to return. Although subsequent legislation reversed the test⁴ in the case of *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services (“DP and JLM”)*⁵ the High Court re-enforced a “federal” approach in interpreting the “grave risk” exception in regulation 13(b)(3)⁶ by looking to the “ordinary meaning” of the domestic Hague Convention Regulations rather than considering the importance of international consensus and comity which supports a narrow construction of the exceptions to return. This approach stimulated a number of papers at the last Biennial Conference in Melbourne 2002 as well as concerns raised by external legal commentators at the time of the judgement.

Having regard to subsequent Full Court judgements it appears that the decision of the majority in *DP and JLM* has “opened the doors” to the Family Court assessing the merits of the underlying “custody” or “residence” disputes at the time of the Hague proceeding. This

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2 + Sally would like to acknowledge Georgette Antonas in researching and contributing to this advice. BA, LLB (Hons), (Melbourne); Solicitor at Middletons Lawyers (Melbourne).

3 (1996) [187 CLR 640]

4 See Section 111B (1B) of the Family Law Act inserted in 2000

5 (2001) 206 CLR 401

6 Regulation 16 (3)(b) provides as follows:
“there is a grave risk that the return of the child to a country in which he or she is habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

approach has placed additional requirements on the Central Authority when conducting Hague Matters. The practical speed and effective resolution of Hague Cases and thus Australia's obligations pursuant to the Hague Convention and other international instruments promoting children's rights have been subsequently compromised as a result of the majority decision.

1. DP and JLM

1.1 Facts in DP

In *DP*, the child was born in Greece. The parties separated when the child was 4 years old and the mother brought the child to Australia without the father's consent. The father applied for the child to be returned to Greece. The child was diagnosed as being autistic shortly after his arrival in Australia and the mother produced evidence of a specialist paediatrician to say that the child's home town in Greece would not have the same facilities as Australia to care for the child's autism but that other areas of Greece would have adequate facilities. The Central Authority did not provide evidence of the facilities available in Greece, nor challenge the contention that a return of the child to Greece meant to the area where the father lived.

The primary judge held that there was not a grave risk and that the child should be returned to Greece. The Full Court upheld this decision and found that there was an onus on the mother to demonstrate a lack of appropriate services in Greece and the mother had not discharged this onus.

1.2 Facts in JLM

In *JLM*, the child was born in Mexico. The mother and father travelled to Australia, a short time after which the father subsequently returned to Mexico. After the father's return, the mother informed the father that she and the child would not be returning to Mexico. The father sought an application for the child to be returned to Mexico and the mother opposed the order on the basis that she would commit suicide if the child was returned to the father and that she would not receive a fair trial.

The trial judge held that there was a serious risk of the mother committing suicide in the event that the child was returned to Mexico and that such an event would create a grave risk of psychological harm to the child, which would justify a non-return. The trial judge was critical of the Central Authority for not challenging the hearsay evidence of the mother that the system in Mexico was corrupt. On appeal, the Full Court held that there was no evidence that the mother would commit suicide rather than return with the child to Mexico and furthermore, no evidence that she would not return to Mexico with the child. As a result, the Full Court allowed the appeal and made an order for the return of the child to Mexico.

1.3 Summary of the Majority's Judgment in DP & JLM

The majority consisted of Gaudron, Gummow, Hayne JJ and Callinan J (who made a separate judgment) upheld the appeals. Gleeson CJ and Kirby J dissented. In summary:

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- (a) The 3 majority judges emphasised that Australian Courts must focus on the Australian Regulations and not the Convention itself when deciding applications. One of the results of this approach is that “*the construction of the regulations cannot proceed from a premise that they are designed to achieve return of children to the place of their habitual residence for the purposes of the Courts of that jurisdiction conducting some hearing into what will be the child’s best interests*”⁷ [emphasis added].
- (b) Having rejected the Hague Convention as an interpretive tool, although the majority stated that they were not choosing between a broad or a narrow construction of the “grave risk test” the practical effect of the majority insisting that the test be interpreted by the ordinary meaning of Regulations meant the grave risk exception was broadened.
- (c) Assessing the ordinary meaning of “grave risk” included making an inquiry into the following:
- an inquiry into the proceedings in the subsequent jurisdiction;
 - seeking evidence and making some prediction based on that evidence of what may happen if the child is returned. In a case where the person opposing return raises the exception, a Court cannot avoid making that prediction by repeating that it is not for the Court's of the country to which or in which a child has been removed or retained to inquire into the best interest of the child. The exception requires inquiry and prediction that will inevitably involve some consideration of the interest of the child;
 - what is required is not certain but the "persuasion that there is a risk" which warrants the description "grave" not limited to harm that will actually occur, but extends to a risk that the return would expose the child to harm;
 - a mere assertion of grave risk is not sufficient; it requires clear and compelling evidence sufficient to persuade the Court that there is real risk of exposure to harm.
 - (although subsequent cases have rejected that a two stage factual investigation is required when making the assessment of grave risk (see majority in RSP dealt with at page 9 below) the majority in *DP* and *JLM* set out two stages to answer factually when assessing a claim of grave risk. First, that there will be judicial proceedings in the country of return and second that the feared harm which is alleged can be a matter relevant to those proceedings. The majority considered that both parts of that answer are important if it is to meet a contention that return will expose the child to grave risk of harm.

For example, the High Court criticised the Full Court in *JLM* in wrongly assuming that residence proceedings would commence in the requesting country if the child was returned, as the mother had given unchallenged evidence that she had no financial resources to fund proceedings and

7 *DP and JLM*, 412

that based on the experience of a friend, she may have to pay bribes to be successful in residence proceedings.

- the majority acknowledged that in cases of return there would be some degree of disruption, anxiety and concern which will be heightened by the return. The Regulations refer to more than this result when considering grave risk of harm.
- (a) in exercising the discretion after grave risk was established, the majority questioned the enforceability of conditions. In the factual circumstances of *JLM* an undertaking from the father that he would co-operate with the mother to ensure that residence proceedings were issued in Mexico was considered insufficient given the Court's doubts regarding enforceability.⁸

1.4 Outcomes of the Remitted Cases

In both remitted cases the Family Court followed the High Court majority reasons in assessing the defence of grave risk. The remitted judgements support the concerns raised at the time of the High Court decision that the effectiveness of the Hague Convention in securing prompt return was now reduced by way of a broader inquiry into the circumstances of return and welfare considerations.

JLM

In *JLM*, the High Court did not decide the issue of whether the grave risk exception had been made out, but said that the Family Court was clearly wrong to say that there was no evidence of grave risk. The matter was remitted to the Full Court⁹, who re-enforced the majority judgment and in light of that judgement determined that the Trial Judge had exercised his discretion appropriately and gave appropriate weight to the Affidavit material and oral evidence to determine that there was sufficient evidence of grave risk to the child.

DP

In *DP*, the High Court did not make a finding that the grave risk exception was made out, but rather the Family Court should have accepted the mother's evidence of lack of facilities in Greece, when the State Central Authority had not provided any evidence to the contrary. This matter was remitted to the Full Court on 8 August 2001, who subsequently remitted it back to a single judge, Justice Jordan, for re-hearing at first instance¹⁰. By this time the father had relocated from the regional town where the child was born to Thessaloniki, the second largest city in Greece. The State Central Authority produced evidence from a child psychiatrist in Thessaloniki regarding the facilities available for autistic children. Whilst outlining the various

8 Add at [41] to [44] DP *JLM* loc at

9 Director- General, NSW Department of Community Services and *JLM* (2001) FLC 93-000

10 Commonwealth Central Authority v Dimitra Plomaritis [2001- (unreported, Justice Jordan 19 December 2001)

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facilities available, the child psychiatrist for the mother effectively conceded that the facilities were not as advanced as in Australia.

Justice Jordan made reference to the purpose of the Hague Convention to ensure the prompt return of abducted children. He stated that the Regulations were designed to give the Family Court the necessary power to enable performance of those obligations. He referred to the High Court in *DP* and *JLM* where the majority acknowledged the need for speedy return but that there were also important exceptions to the general rule that an order should be made for the return of the child to the country of habitual residence and that “the exceptions extend to matters touching the welfare of the child”.¹¹

Assessing Grave Risk in DP

Justice Jordan summarised the principals that emerge from the High Court decision and the application of Regulation 16(3)(B) as follows:

- “(i) the determination of the issue of whether the return of the child exposes that child to a grave risk of psychological harm or otherwise places the child in an intolerable situation is a question of fact, not law, to be determined on the evidence on a case by case basis;
- (ii) Regulation 16(3)(B) is not to be narrowly construed but is to be given its plain meaning which requires the Court “to make the kind of enquiry and prediction that will inevitably involve some consideration of the interest of the child;
- (iii) the onus of proof on that issue rests with the party opposing the return;
- (iv) if the evidence establishes that such risk of harm exists, then discretion to refuse to return the child is enlivened;
- (v) in determining how that discretion may be exercised, it may be appropriate to consider, amongst other matters, conditions which might be imposed in relation to such return to address issues such as minimising the identified risk, the interim arrangements and the overseas judicial process;
- (vi) the mere fact that proceedings are contemplated in the overseas jurisdiction which might address, amongst other matters, questions of risk of harm “does not relieve the Court of its obligation to give effect of the whole of the regulations including, where applicable, the provisions of Regulation 16(3)(B).”¹²

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11 [At para 20, loc cit]

12 [Para 21, loc cit]

In assessing the grave risk based on the guidance of the majority, Justice Jordan considered questions of fact raised by the mother including:

1. The risk of removal by the father;
2. Avenues of support, that is the mother's inability to support herself;
3. Access to appropriate schooling and health facilities and that the child would not have access to such facilities in Thessaloniki region.

Justice Jordan considered that the only evidence of real value in this case drew His Honour to the clear conclusion that adequate facilities are available in the Thessaloniki to meet the child's special needs to the extent that such needs exist. The evidence submitted did not discharge the onus of satisfying the Judge that the child would be exposed to some grave risk of physical or psychological harm because the mother did not satisfy the Judge that the child's needs could not be adequately met in Thessaloniki.

Assessing the Discretion

His Honour then considered how he would have exercised his discretion if grave risk had been established.

- (i) His Honour referred to the analysis of the High Court that some disruption was almost inevitable in the experience of a child wrongfully removed from his or her place of habitual residence and who might then be forced to return to such country against the apparent wishes of the parent who reared the child. In this case, Justice Jordan commented that given the child's condition and special needs in this matter the impact upon him would be heightened. Thus the continuing impact was relevant to the consideration of the discretion.
- (ii) An analysis of the best interests of the child including an inquiry as to whether his day-to-day needs could have been largely met by the mother and an assessment of other significant advantages in returning to Greece.
- (iii) His Honour would have needed to be satisfied that the Greek legal system is well equipped to deal with the issues raised in this case in a timely way, applying principals which appear to be largely identical with those applied by Courts in Australia. On the material before His Honour he was satisfied that the Greek Courts would be able to determine whether it is in the best interest of the child to remain in Greece with his mother and father or to be permitted to relocate to Australia with his mother".
- (iv) His Honour also needed to be satisfied that any risks identified by the mother were indeed grave to justify exercising his discretion against the broad philosophy of the Convention

and Regulations¹³.

2. Recent Decisions

There have been two recent Full Court decisions of the Family Court which have considered the majority decision of *DP and JLM* in detail and have broadened the courts inquiry into the welfare issues that were previously the domain of the returning jurisdiction.

2.1 *Genish-Grant v Director-General, Department of Community Services*¹⁴

In this matter the mother argued that returning the children to Israel would expose them to physical or psychological harm or otherwise place them in an intolerable situation (within the meaning of Reg 16(3)(b) of the Child Abduction Regulations).

The mother appealed the orders of O’Ryan J who had ordered return and sought to adduce further evidence of a recent travel advice warning issued by the Australian Department of Foreign Affairs and Trade. The travel advice was admitted to evidence by consent. The travel advice stated that “Australians should defer all travel to Israel”.

Finn and Barlow JJ, applying *DP and JLM* considered regulation 16(3)(b) and noted that the majority of *DP and JLM* were adamant that their analysis did not support a narrow construction but gave the words their ordinary meaning and that this analysis requires some prediction of what may happen to the child and assessment of risk if the child was returned to Israel.¹⁵ The Full Court majority were persuaded that the travel warning constituted clear and compelling evidence of a grave risk that the return of the children to Israel would expose them to harm. They also determined that the mother, seeking to rely on the ‘grave risk’ exception did not need to prove that such a return would expose the children “*to a grave risk of direct harm over and above the risk of harm to which any individual in Israel is exposed.*”¹⁶ This is because:

...when the relevant harm sought to be relied on for the purpose of establishing the defence under reg 16(3)(b) is in the nature of warfare or civil unrest, we do not think it necessary or possible to draw any distinction between a direct risk to a particular individual and the risk to which the relevant population is generally exposed.¹⁷

In this matter the DFAT travel advice was admitted to evidence by consent. The majority noted that the Central Authority did not seek the opportunity to obtain updated evidence regarding the safety or otherwise of Israel. The only evidence before the appeal court regarding the current situation in Israel at the time of the appeal was the DFAT travel warning.

Justice Holden, dissented and denied the appeal. In considering the evidence lead at first instance Justice Holden considered the mother’s argument that the Central Authority did not answer the mother’s claim of grave risk and that the Central Authority as model litigant should have lead evidence on the issue. Justice Holden found that the onus is on the respondent to demonstrate a grave risk of exposure to harm and that:

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13 Ibid, at 36

14 (2002) 29 Fam LR 51

15 The Full Court quoted in detail the comments of the majority in *DP and JLM* (above n1) at page 414-415.

16 Above n 8, 56.

17 Ibid.

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The Central Authority is only required to produce an “answer” once the respondent has established the grave risk. In this case his Honour was not satisfied that the mother had established a grave risk, which leads me to a consideration of the evidence that was before his Honour and the fresh evidence.¹⁸

Justice Holden found that as the travel advice is directed at Australian travellers and not at Israeli residents, the children would be placed at no greater risk than other Israeli children resident in Israel. He was not satisfied that the ‘grave risk’ exception had been made out by the respondent.

Justice Holden referred to the similar facts in the matter of *DP* where the Central Authority had not challenged the premise upon which the respondent mother’s contention was based (that the return of the child to Greece meant the child returning to the area in which his father lived) was too late on appeal to the Full Court to attempt to do so. Justice Holden was thus persuaded against grave risk of return to the area where the father lived and referred to the evidence that there had not been a terrorist attack in the area where the father lived in the last twenty-five years. It has been described by one of the experts as “one of the most secure and trouble-free areas of Israel” and this is reflected in the large number of Israeli tourists that spend weekends in this area.

2.2 Director General, Department of Families v RSP¹⁹

The Full Court of the Family Court considered the ‘grave risk’ exception in reg 16(3)(b) as determined by the High Court in *DP and JLM*. In this case the mother wrongfully removed the child from the United States to Australia. Justice Warnick at first instance was satisfied that the grave risk exception had been satisfied and the child should not be ordered to return to the United States. The Central Authority appealed the decision and the appeal was heard by Justices Ellis, Finn and May. The Full Court dismissed the appeal and upheld the grave risk defence.

In this case the mother secretly removed the child from the United States and brought her to Australia. The mother had been diagnosed with post natal depression and neurological problems. She was eventually diagnosed as having arterio-venous malformation. The mother submitted evidence that she was suicidal during the relationship in the United States and that she had come to Australia for family support. She led evidence from her treating psychiatrist that she was a high suicide risk if her daughter was ordered to return to the United States. She led further evidence from a psychologist of the grave risk to the child should her mother commit suicide.

The Full Court noted that the psychological evidence led by the mother at trial was not challenged by the Central Authority and upheld the trial judge’s decision that there was sufficient evidence to satisfy the “grave risk” exception. The Court commented on the two-stage approach in *DP* and *JLM*. The Court upheld the mother’s argument that there were obvious factual differences between this case and *JLM*.

The majority rejected the temptation to extract a “two step” process of factual inquiry from *DP* and *JLM* in assessing the facts of Hague cases.

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18 Ibid, 70.

19 (2003) 30 Fam LR 566

At paragraph 28, the majority stated:

“We take the opportunity to emphasise what should be the self-evident proposition, that each application under the Regulations must be decided on the basis of the evidence available in the particular case. A trend to extract principals from the particular facts of a particular case will only, in our view, cause further unnecessary complexity and confusion in this area of law.”

The mother’s case in *RSP* was considered to be stronger than the mother’s case in *JLM* because the direct evidence of the mother in *JLM* was that the mother would return to Mexico with the child if the child was returned pursuant to the Hague Convention. It is that evidence which gave rise to the two-stage analysis of the Judges in that decision. That analysis was not considered applicable by the Full Court in *RSP* as the mother’s evidence was that she could not return to the USA because of her need for support from her family in Australia and her desire to retain treatment from her current treating doctors and a further lack of support in the USA. Suicide by the mother as a result of an order for the return of the child was regarded by her treating psychiatrist as a serious risk and in light of that evidence the question of whether the mother might be prompted to take such a course that she ultimately lost custody in New Jersey did not assume the same importance in *RSP* as the apprehended response of the mother to unfavourable outcome in Mexico.

The Court in *RSP* reiterated the principals set out by majority the High Court in considering Regulation 16 (3)(b) paragraphs 41 to 45 as being the necessary guidance in relation to the application of this Regulation and noted that little was to be gained by establishing whether any comments by the previous Full Courts in respect of Regulation 16(3)(b) which pre-date *DP and JLM* would continue to have validity²⁰.

The Full Court noted that there was a degree of prediction involved in assessing grave risk and the High Court majority have recognised this as necessary. Obviously the risk of harm to the child in this case was more than “the disruption, uncertainty and anxiety, which the High Court majority described as inevitable” when a child is taken from one country to another without the agreement of one parent.²¹

The Full Court then went on to consider whether in exercising its discretion whether there could be any conditions that would “ameliorate that risk” to the child. The only condition that Counsel suggested to the Trial Judge was that if the mother was to return to the United States then His Honour might “consider imposing condition on the father to make available some of the matrimonial funds before the mother departs”. The Full Court considered that this condition requiring the provision of funds to the mother were she to accompany the child on return to the USA would not alleviate the grave risk found to exist in this case. Further the Central Authority proposed a condition in the Full Court proceedings that they require the variation in favour of the mother of an interim custody order which the father had obtained from the USA Court after the mother took the child to Australia and denied the undertaking on the part of the father to ensure that the expeditious return of the resolution of the final custody proceedings and again the Court found that this would not mitigate a risk in relation to suicide.

The Full Court determined that there may be some cases where it is appropriate to impose

20 [At 576 loc cit]

21 [At 577 loc cit]

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conditions on the return to mitigate the risk, but that this case was not one of them. The Full Court further found that an undertaking ‘to ensure the expeditious resolution’ of the United States proceedings was likely to be unenforceable.

3. Implications for the State Central Authority and Requesting Parents

3.1 Grave Risk exception: Interplay between the Convention and the Regulations and the Impact on International Comity and Recognition of Human Rights.

The impact of the majority’s decision in *DP and JLM* has provided a further justification for future Family Courts retreating away from our obligations under international treaties when determining matters before the majority Nygh describes the “impatience” of the majority in *DP and JLM* discounting reference to international consensus including those cases sourced at the website “Hilton House” where the majority chose to rely upon the Regulations within their natural meaning²². Subsequent cases such as *RSP* have likewise rejected the merits of Full Court decisions prior to *DP* and *JLM* which previously involved a significant reliance upon international comity by drawing upon other countries applications of their international obligations and the purpose behind the terms of the Hague Convention and other international treaties.²³

This approach has hampered on the speedy return of children to their country of origin by setting up greater scope for delay whether it be by increasing the level of cross-examination and evidence lead at trial as well as broadening the scope for appeal which follows the broadening of the defence of grave risk. A speedy resolution was considered to comply with the best interests of children in compliance with the UN Convention on the Rights of the Child (“CROC”). In dissuading reference by Courts to our obligations under international treaties which promote the human rights of children such fundamental rights of children can be ignored if they are not expressly provided for in the domestic Regulations.

3.1.1 Interpretation of Hague Convention: International Comity

Nygh refers to the Special Commission held in March 2001 where questions of interpretation in specific areas including the “grave risk defence” were raised²⁴. Nygh noted that prior to *De Lewinsky* and *DP and JLM* such exceptions to return had generally been interpreted narrowly in Australia in accordance with the Perez-Vera Report. Australian Courts had previously relied upon the ability to of the Courts in the country of habitual residence to resolve disputed allegations and to take necessary steps to protect the child. Nygh referred to the majority in *DP and JLM* and likened the result to the majority finding in *De Lewinsky*, supra where the High Court relied upon the natural or ordinary meaning of the words to broaden the application of the defence of objection to return and rejected notions of international comity. Instead of trusting the institutions and procedures of the return country to resolve custodial issues; the

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22 [At page 4 loc cit]

23 [At 577 loc cit]

24 Nygh P. “Review of the Hague Convention on the Civil Aspects of Child Abduction – the March 2001 meeting of the Special Commission” <http://www.familycourt.gov.au/papers/html/nygh.html>. See also “International Child Protections; The Judges’ Newsletter” Volume III/Autumn 2001.

majority in *DP and JLM* had taken the view that the grave risk exception requires the Court in which return is sought to make the kind of enquiry which will involve consideration of the best interest of the child.

Prior to *DP and JLM* the Australian position was set out in *Murray's Case* in that “it would be presumptuous and offensive in the extreme, for a court in this country to conclude the [child] is not capable of being protected”²⁵ in the requesting country. In his dissenting decision in *DP and JLM* Justice Kirby argued that the objectives of the Hague Convention will be defeated if the courts consider ‘custody type’ arguments in Hague matters. He noted that the Hague Convention contemplates a return order even if some harm is possible or likely on the return of the child.

The position of the majority in *DP and JLM* is also contrary to Article 16 of the Hague Convention that prevents the returning court from determining the merits of the underlying custody dispute. Although Article 16 has not been explicitly adopted in the Regulations, the structure of both the Hague Convention and the Child Abduction Regulations stress the need for a speedy resolution of the jurisdictional issue. This means that questions of residence and contact should be left to the court of the child’s pre-abduction habitual residence.

Until *DP and JLM* Family Court Judges interpreted the Regulations in the context of the Hague Convention and the intention of the nations adopting it.²⁶ Although Justice Jordan in the remitted case of *JLM* referred to the Regulations as empowering the purpose of the Hague Convention; such obiter is restricted by the literal interpretation of the Regulations where those Articles of the Hague Convention not dealt with by the Regulations can be ignored by the Courts.

3.1.2 The Hague Convention and Compliance with CROC

- (a) CROC clearly contemplate a negative impact on children in respect of their abduction or non-return and encourages signatory countries to conclude or enter into bilateral or multilateral agreements to prevent such occurrences.

Article 11 states:

- “1. The parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end states, parties shall promote the conclusion of bilateral or multilateral agreements or exception to existing agreements.”

Article 35 states:

“the parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of the sale of or trafficking children for any purpose or in any form”.

25 *Murray v Director, Family Services ACT*, (1993) FLC 92-416;80259; see also *Gsponer v Director General Department of Community Services*, Victoria (1989) FLC 92-001 and *De L v Director General, New South Wales Department of Human Services and Another* 139 ALR 417.

26 Justice Kay in *State Central Authority v Ayob* (1997) FLC 92-746 at 84,072 and 84,074

(b) The joint judgement of *Nicholson CJ and Fogarty J in Murray's Case*²⁷ (with whom Finn J relevantly agreed) held that the provisions of CROC did not give rise to an inconsistency with the Hague Convention. In their joint opinion, *Nicholson CJ and Fogarty J* recognised that international law, unless incorporated, was not as such part of Australian domestic law. However, that did not prevent the use of international law:

4. to help resolve ambiguities in the interpretation of domestic primary or subordinate legislation²⁸;
5. to fill in gaps in such legislation²⁹; and
6. to elucidate and develop the common law³⁰.

The Full Court concluded that in its view and in accordance with the views expressed in *Gsponer's case*³¹, that the circumstances referred to in reg 16(3)(b), should be largely confined to situations where protection Orders are not available, though another situation would be where the prospective harm cannot be remedied by any judicial or administrative remedy (eg where it is psychological). The purposes of the regulations are not for the children to be returned to a parent but to the Country so there would need to be a deficiency in the Country at hand.

Their Honours found that the Hague Convention is predicated upon the paramountcy of the rights of the child. It proceeds upon the basis that those rights are best protected by having issues as to custody and access determined by the Courts of the Country of the child's habitual residence subject to the exceptions contained in Article 13.

(a) Some commentators have argued that by that by the *DP and JLM* majority narrowing the application of the Hague Convention in child abduction matters, the Court is actually prioritising the rights of the child pursuant to CROC; that the child's best interests should always be of primary consideration and that these rights are often best protected in the 'abducting country'.³² This type of analysis has been criticised by His Honour Justice Kirby in his recent Valedictory address at Melbourne University on 15 April 2004 where His Honour stated:

"The Hague Convention is an important achievement for the protection of vulnerable children and the safeguarding of their interests and those of their parents and families. It would be a tragedy if this important achievement of international law were undermined by parochial, and even xenophobic, decisions of municipal courts, asserting that the abducted child is better off

27 *Nicholson CJ and Fogarty J in Murray vs Director, Family Services ACT (1993) FLC 92416*

28 [At page 8255 loc cit]

29 [At page 8257 loc cit]

30 [At page 8257 loc cit]

31 [1989) FLC 92001]

32 J A Gray, " *Respecting Human Rights in the Drafting and Interpretive Stages of the Hague Convention on the Civil Aspects of International Child Abduction*" (2003) Australian Journal of Family Law, 1.

as a result of the abduction and should not be returned as the Convention and local law contemplate will happen virtually as a matter of course³³.”

- (b) The Full Court of the Family Court and the High Court on appeal in *Minister for Immigration and Multicultural and Indigenous Affairs v B³⁴* (“B and B”) recently considered the weight which should be given to international conventions when considering the scope of the Family Law Act. The Full Court of the Family Court found that although CROC had not been expressly referred to in the legislation, various Articles of CROC had been incorporated into the Family Law Act by virtue of an implied intention on the part of the legislature when the 1995 amendments to the Act were passed. The High Court unanimously reversed the majority decision of the Full Court of the Family Court. Although different Judges of the High Court took different positions in leading to the conclusion that the Family Court did not have jurisdiction and power asserted under the expanded powers of the Family Court with respect to the welfare of children, most Judges did not elaborate upon the claim that Nicholson C J and O’Ryan J had made, that the Family Court’s welfare jurisdiction was expanded under Australian legislation when reading the context of relevant international law. Callinan J reserved expressly whether the welfare of children in Australia could truly be “an external affair” attracting federal legislation power under the constitution³⁵. Justice Kirby accepted the provision of mandatory detention of unlawful citizens in section 196 of the *Migration Act* should be read as far as this language permitted, to ensure conformity of Australia’s treaty obligations³⁶. However when examining the language of the Migration Act, Justice Kirby’s analysis was that the Australian law was clear that it made no distinction for children. In his speech to the University of Melbourne in 2004 he stated:

“It [the Migration Act] appeared to involve a deliberate decision of our parliament with their eyes wide open. In such a case, the specific provisions of detention in the Migration Act excluded the general welfare provision. As a result there was no application in international law”

The approach of the High Court in *B and B* is consistent with the federal approach of the majority in *DP and JLM*. In *DP and JLM* the High Court expressly stated that the Hague Regulations comprised the law in respect of international child abduction in Australia and not the Hague Convention. In considering the exception in reg 16(3)(b) the court is limited to the regulations and must give them their ‘ordinary meaning’. The High Court’s approach is limiting the scope of the application of the Hague Convention and accompanying explanatory memorandum and is concentrating the ability to determine issues of ‘custody and residence’ in the Australian Courts. This approach is counter to the accepted

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33 The Hon Justice Michael Kirby, “*Nicholson CJ, Australian Family Law and International Human Rights*” test of a public Valedictory address at the Faculty of Law, the University of Melbourne, 15 April 2004, p30-31.

34 [2004] HCA 20 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby Hayne, Callinan and Heydon JJ, 29 April 2004).

35 Constitution Section 51 (XXIX) see 2004 HCA 20 [220]

36 At 142, loc cit

international jurisprudence on this issue and the importance of article 16 of the Hague Convention in determining Hague cases but lack of conformity with international consensus is “justified” by the majority in that it does not form part of the regulations.

- (c) In delving into child welfare issues and broadening the exceptions to return the High Court is making a value judgement that the Family Court of Australia at times is the appropriate body to determine these issues and not the requesting state. The Family Court in applying *DP and JLM* have fulfilled His Honour Justice Kirby’s prediction in his dissenting judgement in that subsequent Full Court decisions have reflected a more insular or narrow approach to the applicability of the Hague Convention by a broader application of the regulations.

3.2 Grave Risk and War Zones

In *Genish Grant* the majority of the Full Court considered the “established” grave risk exception, of placing the child in imminent danger, because of warfare, famine or disease prior to the resolution of the custody dispute³⁷. The issue in *Genish Grant* was whether Israel could be considered a ‘war zone’ and whether the DFAT warning is sufficient evidence of the risks to the child. Commentators have disputed that Israel can be considered a war zone, and Schuz notes that

... it should be remembered that the phrase “war-zone” does not appear in the Convention and is purely a gloss on Art 13(b), and example of a situation where the conditions of that provision might be satisfied...the debate as to what are the characteristics of a war zone is unhelpful and unnecessary. A court should always go back to the actual wording of the article and determine whether the return presents a grave risk or not³⁸.

The difference between the majority and Holden J’s decisions lie in the weight given to the DFAT warning. Justice Holden focused on the likely risks to the individual children over and above the risks of the general Israeli population and the majority focused on the risks to the children in comparison to the general population in Australia as well as assessing evidence submitted in respect of where the father lived in Israel. The majority’s approach broadened the ‘grave risk exception’ in examining the relative safety between two countries in general and did not consider the reality of the individual children. For example, evidence was lead that the particular area of Israel where the father resides is safe and has not been the subject of a terrorist attack in 25 years. This evidence influenced Justice Holden in his dissenting judgement. He noted that it appeared contradictory for the abducting parent to rely on the political instability of the country of habitual residence where before the abduction presumably that parent had consented to raising children in that country, despite the risks.

3.3 Grave Risk and threat of Suicide

In his dissenting Judgement of *DP and JLM* Justice Kirby support the Trial Judge’s position that Courts of law must be particularly cautious before permitting parents, in the highly charged circumstances of international child removal of retention, to attempt to dictate the outcome of

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37 *Freiderich and Freiderich* 78 F 3d 1060 (6th Cir 1996)

38 Rhona Schuz “*Returning abducted children to Israel and the Intifada*” (2003) 17 Australian Journal of Family Law, 4.

proceedings by threatening that if a Court decisions goes against them, they will commit suicide to the great risk of harm to the child concerned.

Justice Kirby referred to the volatility in Hague cases that are also prevalent in residence disputes. In many cases of this type, the very circumstances that have driven a party, typically a parent, to cross or refuse to cross the world with the child will be such as to engender the deepest feelings. If such threats were easily upheld as attracting the exception in Regulation 16(3)(B) in particular Justice Kirby was concerned that like claims would multiply enormously³⁹. Such heightened emotions and threats applicable to domestic residence disputes. At first blush one would speculate that a Judge may refuse to be “blackmailed” by a threat of suicide in deciding where a child should be placed. Surely these types of considerations would be best dealt with on a non-summary basis. Such threats of suicide would themselves add to the disruption occasion to children of such international abduction or retention. Justice Kirby did not abrogate the threat of suicide by an abducting or retaining parent from an assessment of “grave risk” but not in the case of *JLM* where a series of events needed to occur post judgment for the threat to crystallise.

The majority in *RSP* distinguished the factual matrix from *JLM*. In *JLM* the mother argued that because she was not able to access appropriate legal representation and would not receive a fair trial, she would not be successful in any custody proceedings in Mexico, and would therefore be at risk to commit suicide. The risk to the child crystallises at that point. In *RSP* the mother argued that an order to return the child in itself will create a real risk of suicide.

The Full Court heard submissions from the Central Authority that *JLM* required the risk inherent in the threat of suicide to be assessed at two stages. The first, being if and when an order to return is made, and the second being when the court in the returning country makes a decision concerning the residence of the child. The Full Court found that the evidence in this case did not require a two stage approach as the evidence suggested that the mother’s risk of suicide arises if and when the child is ordered to return to the United States and thus there was no need to consider the second stage. The court found that “*each application under the regulations must be decided on the basis of the evidence available in that particular case. Attempts to extract principles from the particular facts of a particular case will only, in our view, cause further unnecessary complexity and confusion in this area of law.*”⁴⁰

The Full Court then considered the issue of the nature or the gravity of the risk posed to the child by the mother’s threats of suicide. The Court found that following *DP and JLM*, the trial judge needed to be satisfied that “*there was a grave risk that the return of the child would expose the child to a physical or psychological harm or otherwise place the child in an intolerable situation*”⁴¹. It was so satisfied based on the evidence lead by the mother.

The Full Court was satisfied that the Trial Judge had considered the purpose of the convention in exercising his discretion as he stated:

I do not reach these findings without disquiet. Courts will understandably have a real concern about the disingenuous adoption of stances designed to achieve the purposes of abductors in resisting orders for the return of children. But the response to this concern

39 [At 153 loc cit]

40 Ibid, 575.

41 Ibid, 576.

cannot be to disregard evidence, but rather to scrutinise it with great care⁴².

The Full Court found that the Trial Judge had “balanced” the nature and severity of the risk identified in this case against “*the purposes of the convention as reflected in the regulations*”⁴³ and was persuaded that the grave risk outweighed the benefits of a speedy return to the habitual residence.

3.4 Importance of commencing custody proceedings in the requesting country

As stated above, in his paper at the last Biennial Conference in 2002, Murray Green was concerned that the Central Authority would now have to be able to demonstrate to the Court that custody and access proceedings have commenced or will definitely commence in the requesting country to avoid arguments of grave risk in respect of the provisions of due process or access to justice. In Dr Nygh’s view, requiring judicial proceedings “*is an unwarranted gloss of the Convention*”⁴⁴ and the nature of the return would therefore set the breadth of enquiry undertaken by the Court when considering any exceptions raised.

The subsequent Family Court decisions have assessed the status of proceedings in the return country. In *RSP* unlike in *JLM* the father had commenced custody proceedings in the United States so there was an available forum to determine the competing residence arguments but the Court did not consider whether the mother would be compromised in these proceedings as the issue before the Court was the risk to the child of grave harm and the point of the return order to the US and not in respect of the US proceedings.

Justice Jordan in the remitted case of *DP* considered that the fact that the mother could participate in custody proceedings on her return to Greece alleviated the risk of harm to the child.

4. Obligations on the Central Authority

4.1 Importance of Evidence lead by the Central Authority

The cases since *DP* and *JLM* highlight the need for the Central Authority to actively lead evidence to counter the proposition that the child will be subject to a grave risk of harm in the event the child is ordered to return as the Courts have determined matters based on evidence unchallenged by the Central Authority. The majority in *DP* and *JLM* placed a greater responsibility on the Central Authority to respond to allegations raised by a respondent even if those allegations are not supported by evidence. In *DP* and *JLM*, the State Central Authority did not refute the mother’s allegations about bribery in the Mexican court system. In addition, the Central authority did not cross examine the mothers’s psychiatrist or produce an expert of their own.

Whilst the Court confirmed that the onus of proof to establish an exception to a return lies with the Respondent, the Court accepts the evidence (and in some instances mere unsubstantiated

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42 Ibid,

43 Ibid.

44 Ibid.

allegations lead by the Respondent) when unchallenged by the Central Authority, should effectively be accepted. In cases such as *RSP* it may be necessary to seek leave for the respondent and child to undergo an independent psychological and/ or psychiatric assessment.

This approach has lengthened Hague proceedings and compelled the Central Authority to cross examine witnesses and no longer rely on written submissions and evidence which has increased the costs to the Central Authority in litigating these matters.⁴⁵ The very nature of the delay caused by the appeal process in *Genish* and *RSP* were arguably facilitated in broadening the scope of appeal and increasing the burden upon all parties including the Central Authority where expert witnesses were produced by both sides and cross-examined.

4.2 The role of the Central Authority

The apparent need to cross examine witnesses, and adduce further evidence may well have the effect of limiting the neutrality of the Central Authority and its role as “model litigant” identified in *Laing*.⁴⁶ However the Full Court made no comments in respect of these issues in *Genish-Grant* and *RSP* cases save for Justice Holden. In his dissenting judgment *Genish-Grant* Justice Holden noted there may be circumstances where the Central Authority is required to perform the role of ‘honest broker’ by investigating the services available to alleviate the risk to the child, however this case was not one of them. He says:

this obligation does not, however, in my view, extend to making enquiries as to whether or not there may be evidence upon which a respondent may rely to bring himself or herself within the exceptions of reg 16.⁴⁷

Justice Holden was in the minority in this case, however the other members of the court did not specifically address this issue.

It remains to be seen whether the courts will require the Central Authority to conduct “grave risk” cases with a more adversarial approach (as raised by Jenny Degeling in her paper to the previous Biennial Conference in Melbourne in 2002) or whether the special advantage of being a “repeat” player in Hague matters will require evidence to be lead in support of the various defences as sought by the mother in *Genish-Grant*.

4.3 Undertakings

In considering *DP*, the High Court majority were critical of the undertakings provided by the father, in particular the undertaking to provide a declaration pursuant to Greek law, which would be enforceable by that law in the same terms as the undertakings in the Australian Family Court. The majority indicated that if undertakings are to be provided by a party in relation to future conduct in another country, evidence should be produced that the undertakings are actually in place and enforceable. The obligation that any undertakings given by the requesting applicant be enforceable prior to the order for return is made may delay the physical return of

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45 See also, *Graham Morris as delegate of the Secretary of the Department of Human Services, State Central Authority and Belinda Elissa Jachim* heard at the Family Court, Melbourne, by Smithers J. Judgement delivered 13 November 2001, quoted in International Child Abduction News No 23 April 2002

46 *Laing v The Central Authority* (1999) FLC 92-849

47 Above n 8, 69.-

the child and increase the work of the Central Authority.

The case of *RSP* highlights the problems the Central Authority will face when attempting to rely on undertakings or conditions with the intention of alleviating the risk of harm to the child. In this case the Central Authority proposed conditions that the father would alter US interim custody order in the mother's favour and an undertaking on the part of the father to ensure the expeditious resolution of the final custody proceedings. The Full Court commented that it failed to see how the undertaking would be enforceable and that in any event the conditions and undertakings would not alleviate the grave risk to the child.

In his 2002 paper, Nygh promoted a general ratification of the 1996 Hague Child Protection Convention would alleviate the problems of enforceability under the Convention as the Courts will have the power to make decisions in relation to child present in the jurisdiction in cases of urgency. These Orders would continue to have effect and international recognition until the return Court was seized of the matter⁴⁸. It also allowed for the registration of interim orders.

Australia ratified the Hague Child Protection Convention in April 2003 and amendments to the Family Law Act took effect as of 1 August 2003 which incorporated the provisions into domestic legislation. As at 12 June 2003 twenty-five countries have signed the convention. As far as the author is aware no search uncovered a judgement to date dealing with those new sections to the Family Law Act. At present, the use may be limited by the relatively small number of fellow signatory countries to secure enforceability.

5. Conclusion

DP and JLM highlights a growing tension in international jurisprudence. A conflict is developing between securing the purpose of the Hague Convention to ensure the prompt return of children to their country of habitual residence and the "literal" interpretation of the Regulations allowing a degree of latitude which will inevitably delay proceedings. An interventionist approach to our judgements is taking precedence over notions of international comity. Given the ever decreasing size of the world, where international travel is easier and marriage and/or cohabitation between persons of different cultural backgrounds and origins is increasing; it is imperative that Australia strictly adheres to the terms of international treaties signed. By ignoring those treaties the Courts are limited in their judgements by not being able to fully recognise and consider those fundamental human rights Australia was honouring when signing those treaties in the first place. This shift in focus has resulted in an increased burden on the Central Authority to actively litigate and cross examine respondents and detracts from developing relationships with foreign governments as "model litigants". Instead, diplomatic relations must be strained by Australian Courts showing a lack of trust in foreign jurisdictions by imposing on matters that should be rightly within the returning countries' domain.

26 May 2004

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48 [At page 6 loc cit]