



15 August 2023

Senator the Hon. Nita Green
Chair, Senate Legal and Constitutional Affairs Legislation Committee
By email: legcon.sen@aph.gov.au

Dear Senator Green

Thank you for the opportunity to appear before the Senate Committee last Friday and for the thoughtful questions put by the Committee. I am writing in relation to the issue raised in your first question to me (p14 of the Hansard transcript): the divergence between the requirements of the 'children's objection exception' in the Hague Child Abduction Convention¹ and the exception as it appears in the Australian Regulations.² I attach to this letter a copy of my article³ published in the *International Journal of Children's Rights* in 2022 which thoroughly traverses the problem and discusses relevant cases.

The Hague Child Abduction Convention includes an exception to mandatory return if the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of their views. If the exception is made out, a court has discretion to not return the child. As set out in our submission to the Committee, the Australian regulations add a requirement that the child's objection 'shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes'.⁴ The 'strength of feeling' addition has been interpreted by many Australian judges as creating an additional hurdle that children must meet before their objection can be taken into account. If a child objects, but the objection does not show the necessary 'strength of feeling', it will not be considered.

The imposition of a threshold which requires children's objections to be of a particular strength before they can be taken into account is problematic. The regulations provide no assistance as to the difference between an objection which does not meet the threshold and an objection that does. Accordingly, my research has shown that Australian judges are more likely to be satisfied that children's objections have reached the required 'strength of feeling' when they are expressed in very forceful or extreme terms and with high emotion, such as with threats of self-harm or physical refusal to board a plane. When children express their objection in a more considered and thoughtful manner, the court has ordinarily found that the objection lacked the requisite 'strength of feeling'. Paradoxically, a child's objection which is expressed in extreme terms can alternatively be viewed as evidence of immaturity or parental manipulation.

UniSA Justice & Society

Amy Wheaton Building
Level 2
Magill Campus
St Bernards Road
Magill
South Australia 5072

GPO Box 2471
Adelaide
South Australia 5001

www.unisa.edu.au/justice-and-society

CRICOS Provider Number 00121B

¹ Hague Convention on the Civil Aspects of International Child Abduction, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 13.

² *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ('the regulations').

³ Michelle Fernando, 'Children's Objections in Hague Child Abduction Convention Proceedings in Australia and the "Strength of Feeling" Requirement' (2022) 30 *International Journal of Children's Rights* 729-754.

⁴ Regulation 16(3)(c) states:

A court may refuse to make [a return order] if a person opposing return establishes that each of the following applies:

- i. the child objects to being returned;*
- ii. the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;*
- iii. the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.*

This approach to the 'children's objection' exception does not accord with the requirements of the Hague Convention. It discounts children's views in a way that conflicts with art 12 of the United Nations Convention on the Rights of the Child, which gives children the right to express their views and have them taken into account in judicial proceedings, within the limitations of the Hague Convention. Moreover, the Australian approach also runs in direct contrast with similar jurisdictions with which there are frequent reciprocal cases, including England and Wales, where children's objections are readily taken into account and aspects such as the strength of the views and the weight to be applied are instead considered and balanced in the exercise of the court's discretion of whether to nevertheless return the child. My research, and that of others researching the child's voice in Hague matters internationally, would support the repeal of the 'strength of feeling' requirement in reg 16(3)(c) of the regulations and s 111B(1B) of the *Family Law Act 1975* (Cth).

Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely

Dr Michelle Fernando | BA/LLB(Hons), PhD | Senior Lecturer in Law
UniSA Justice & Society
T: +
E:



UniSA | Justice & Society

I live and work upon the lands of the Kurna people; the custodians of the lands, waterways and skies of the greater Adelaide region.

This email is intended for the addressee(s) only. Should this email be received in error by a person or company other than those intended, the contents of this email are confidential and must not be released or used by a person or company not authorised to do so.

CRICOS Provider Number 00121B

Children's Objections in Hague Child Abduction Convention Proceedings in Australia and the "Strength of Feeling" Requirement

Michelle Fernando

Senior Lecturer in Law, University of South Australia, Adelaide, Australia

Michelle.Fernando@unisa.edu.au

Abstract

The Hague Convention on the Civil Aspects of International Child Abduction creates an exception to the mandatory return of abducted children if the child objects to being returned to their country of habitual residence and has attained an age and degree of maturity at which it is appropriate to take account of their views. The Australian regulations also require that the child's objection demonstrates a 'strength of feeling beyond the mere expression of a preference or of ordinary wishes.' This article examines this unique requirement and how it has been approached by the Family Court. It finds that many Australian judges treat the "strength of feeling" requirement as an additional hurdle that children must overcome before their objection can be taken into account. This approach is contrary to Australia's international obligations under the Convention. A less restrictive approach, which some other judges follow, is recommended to ensure that the Convention's primary objective of protecting children is met.

Keywords

children – Hague Convention – international child abduction – child's objection – objection to being returned – Australia – strength of feeling – children's views – children's voices

1 Introduction

When a child is wrongfully removed to or retained in any Contracting State, away from their country of habitual residence, the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) requires a court, in most cases, to expedite the abducted child's return to their home country where issues of care and parenting can be decided. The Convention is invoked most often in situations where a parent who is a primary carer for a child unilaterally relocates with the child, often to the parent's country of origin, separating the child from the other parent (Beaumont and McEleavy, 1999; Schuz, 2013).

There are limited exceptions to this general principle which are found in the Convention itself. If one or more exceptions is made out, the court has a discretion not to return the child. One of these exceptions is that a court may refuse to return a child if satisfied that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views. In the Australian regulations, the "children's objection" exception also requires that the objection shows a 'strength of feeling' beyond a mere preference or ordinary wishes.

This article explores the background and intention of the 'strength of feeling' requirement and how it has been interpreted and applied in Australian courts. It finds that many judges interpret the provision strictly and treat the requirement as a test; a threshold that children need to meet before their objection can be taken into account. Where this approach is taken, children must express their objection in extremely strong terms. Children who express their objection in ways that are construed as measured, unemotional or lacking force are often unable to reach the required standard. Arguably, this leads to instances of children's views being ignored where proper application of the Convention would not support that result. This has implications for Australia's obligations under international law and impacts experiences and outcomes for children who are subject to Convention proceedings.

The cases also disclose that some judges take a less restrictive approach to the treatment of children's views and the "children's objection" exception. With this approach, all objections of children who are of sufficient age and maturity are considered, and the objections do not need to be of any particular strength. However, they do need to constitute an 'objection', as opposed to a mere wish or preference. Aspects such as the strength of the objection are reserved to the court's consideration of whether it should exercise its discretion nevertheless to return the child. This approach better reflects the objects of the Convention, and the approach taken in other countries, including in

the United Kingdom. It is argued that, if the ‘strength of feeling’ requirement remains part of Australian law, this less-restrictive approach is to be preferred.

The divergence in practices and attitudes in relation to the “children’s objection” exception was highlighted by a recent British Academy project involving an international review of literature and case law, a global survey, interviews with family justice professionals and family members, and specialist workshops (Taylor and Freeman, 2018). This article adds to that contribution to the global understanding of the use of the exception, including the challenges, tensions and divergence in practices between jurisdictions, in circumstances where the Hague Conference on Private International Law has not yet published a Guide to Good Practice.

While much has been written about the operation of the Convention in Australia (eg, Kirby, 2010; Kay, 2005; Nygh, 2002; Fernando and Ross, 2018), this is the first analysis focussing on Australia’s unique ‘strength of feeling’ requirement and how it has been applied in the cases. The analysis is restricted to how the Family Court¹ has treated evidence of children’s views in considering whether a child has ‘objected’ in the sense required by the Australian regulations. It does not engage with the question of how courts determine whether children have attained an age or degree of maturity at which it is appropriate to take account of their views, which is also required for the “children’s objection” exception. Nor does it engage with how the court exercises its discretion to return a child, even when the exception has been made out. In this sense, the article is not focussed on the *outcome* of Convention proceedings, but only on the court’s determination of whether a child’s views constitute a relevant ‘objection’ which could influence that outcome.

2 Operation and Objectives of the Convention and Exceptions to Mandatory Return

The Convention states that its objects are to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States (Article 1). However, as Schuz

1 On 1 September 2021 the Family Court of Australia merged with the Federal Circuit Court of Australia to become the Federal Circuit and Family Court of Australia. Nevertheless, all Australian decisions considered in this article are decisions of, or appeals from, the former Family Court of Australia.

(2013) explained, those express objectives must be understood in light of the Preamble and the provisions of the Convention itself. The Preamble states:

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
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,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

This makes clear that the underlying objective of the Convention is to protect the interests of children (Schuz, 2013 citing Perez-Vera, 1982) and to protect them from the harmful effects of abduction. ‘Accordingly, the expressed “object” of prompt return is really the method of achieving the wider objective of protecting children and not an objective in its own right’ (Schuz, 2013: 96). This understanding is reflected in judicial comments such as by the Full Court of the Family Court of Australia in *Gazi and Gazi* (1993) FLC 92–341 which said:

The primary purpose of the Convention... is to provide a summary procedure for the resolution of the proceedings and, *where appropriate*, a speedy return to the country of their habitual residence of children who are wrongfully removed or retained in another country in breach of rights of custody or access (at 79, 623, emphasis added).

There are several other objectives of the Convention which are said to be achieved through the remedy of prompt return. These include protecting abducted children from further harm by restoring the status quo, enabling adjudication in the *forum conveniens*, deterring potential abductors, achieving justice between parents and upholding the rule of law (Beaumont and McEleavy, 1999; Schuz, 2013).

If an application is made to a relevant court in a Contracting State within one year of a child’s removal to or retention in that country, and the child is under the age of 16, and the court is satisfied that the removal or retention was wrongful, the court *must* generally make an order that the child be returned forthwith to their country of habitual residence (Articles 4, 3, 12). There are limited exceptions to this general rule which appear in Article 13 of the Convention. These are if the “left behind” parent was not actually exercising

custody rights at the time of removal or retention, or had consented to or subsequently acquiesced to the removal or retention, if there is a grave risk that returning the child would expose them to physical or psychological harm or otherwise place them in an intolerable situation, or if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views.² If one or more of these exceptions is made out, the court is not bound to order the return of the child. It should be noted, however, that the exceptions in Article 13 create a *discretion* for the court to make a return order, and a court may decide to do so to preserve the objects of the Convention (Articles 13, 18).

The exceptions are an important part of the Convention. The High Court of Australia described them as ‘important qualifications to the general rule for returning a child to the place of its habitual residence’ (*DP v. Commonwealth Central Authority* (2001) 206 CLR 401 at [36], also later cited in *RCB v. The Honourable Justice Forrest and Ors* (2012) 247 CLR 304 at [19] (*RCB*)). The exceptions reflect a “compromise” between the general principle that children should be returned to their home country forthwith without the court considering the merits of any custody dispute and recognition that, in certain cases, a departure from this principle may be justified (*De L v. Director-General, New South Wales Department of Community Services and Anor* (1996) 187 CLR 640 (*De L*)). The Convention operates on an assumption that the protection of children from harm is best achieved by restoring the *status quo ante*. However, by providing exceptions to mandatory return, the Convention’s drafters recognised that there will be situations where restoring the status quo will not protect the child from harm and that returning the child may even cause greater harm (Schuz, 2013). ‘Thus, the objective of protecting children from the harmful effects of abduction will be achieved by ensuring the speedy return of *those children whom the Convention requires to be returned*’ (Schuz, 2013: 97 (emphasis added)). Where one of the exceptions is established, the policy of the Convention does not require a return order be made. In the Convention’s Explanatory Report, Perez-Vera warned that the exceptions are to be interpreted restrictively if the Convention is not to become a ‘dead letter’ (Perez-Vera, 1982: 34). However, she also identified that the exceptions form an important element in understanding the extent of a court’s duty to return a child (at 27). As Schuz wrote, ‘to rely on the purpose of returning children in

2 A further exception appears at Article 20 which states that a court may refuse to return a child if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. This exception is rarely invoked (Schuz, 2013).

interpreting the scope of the exceptions is to resort to circular reasoning' (2013: 97–98). The exceptions play an important role in the effective operation of the Convention, and applying an exception does not automatically detract from the Convention's objectives.

3 The “Children’s Objection” Exception

The “children’s objection” exception is found in Article 13 and states, ‘The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views’. The usual approach is to divide the inquiry as to whether the exception is to be applied into two stages. The first has been described as the “gateway stage” where the court will determine whether the requirements for the “children’s objection” exception exist. If they do, the court will move to the “discretion stage” where it determines whether, notwithstanding the previous finding, the court will exercise its discretion to return the child (outlined by Black L.J. in *Re M (Republic of Ireland) (Child’s Objections) (Joinder of Children to Appeal)* [2015] EWCA Civ 26 (*Re M*)).

3.1 *The Gateway Stage*

The gateway stage involves a two-part test. First, the court must be satisfied that the child objects to being returned. Second, the court must be satisfied that the child has attained a sufficient age and degree of maturity so that it is appropriate to take account of their views. As mentioned in the Introduction, the issue of what it means to have attained an ‘age and degree of maturity at which it is appropriate to take account of [a child’s] views’ will not be discussed in this article.

In 1996, in the case of *De L*, the High Court of Australia discussed what it meant for a child to ‘object’ to being returned. An Australian mother living in the USA brought her two children, aged ten and nine, to Australia and remained, without the permission of the children’s father who remained in the USA. The primary judge, Moore J., refused to make a return order because her Honour found that the children objected to being returned and that they had attained an age and degree of maturity at which it was appropriate to take account of their views. The Full Court reversed the decision on appeal, the plurality holding that there should be a ‘strict and narrow’ reading of the exceptions to the court’s obligation to order the prompt return of abducted children. The plurality appeared to accept the dicta of Bracewell J. in *Re R (A Minor:*

Abduction) [1992] 1 FLR 105 that, ‘there must be more than a mere preference expressed by the child. The word “objects” imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of a child in a custody dispute’ (at 108).

De L was appealed to the High Court of Australia which held that the Full Court’s interpretation was wrong. After considering the wording and intention of the regulations and the Convention, the plurality confirmed that there is no reason why the children’s objection exception should be construed strictly or narrowly and, following the dicta of Balcombe L.J. in *S v S (Child Abduction) (Child’s Views)* [1992] 2 FLR 492, no ‘additional gloss’ is to be supplied. The plurality of the High Court in *De L* said:

[T]here is no particular reason why [the exception] should be construed by any strict or narrow reading of a phrase expressed in broad English terms such as ‘the child objects to being returned’. The term is ‘objects’. No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition (at 655).

The plurality confirmed that the policy of the Convention is not compromised by hearing what children have to say and by taking a literal view of the term “objection”. This is because a finding that a child objects to being returned does not determine the matter. The court must still make an assessment of whether the child has attained an age and degree of maturity at which it is appropriate to take account of their views. Even if those matters are satisfied, the consequence is not that a return order will automatically be refused, but that the court is no longer obliged to return the child and has a discretion whether or not to do so.

It is submitted that the approach taken by the High Court in *De L* represents the approach generally followed in other jurisdictions and is ‘undoubtedly to be preferred’ (Beaumont and McEleavy, 1999: 188). Cases in the United Kingdom and New Zealand, for example, have consistently established that ‘no gloss’ should be added to the concept of objection (Caldwell, 2001). One notable exception is the USA, where many courts do not recognise children’s objections at all and the exception, when raised, is strictly interpreted and routinely denied (Greene, 2005).

The widespread ratification of the United Nations Convention on the Rights of the Child (UNCRC), several years after the commencement of the Hague Convention, has strengthened the argument that a literal interpretation of the word ‘objects’ should be taken. Article 12 of the UNCRC gives children a right to

express their views freely in all matters affecting them, the views of the child to be given due weight in accordance with their age and maturity. It states that children must be given an 'opportunity to be heard' in any proceedings affecting them. However, the requirement for a child to 'object' in Article 13 of the Hague Convention sets the Convention apart from both the UNCRC and from domestic children's proceedings, which generally refer to the child expressing 'views' or 'wishes'. Article 12 of the UNCRC is not irrelevant to Convention proceedings (discussed further below), but it does not change the requirement that a child must 'object'. An 'objection' is a different concept from a mere view, wish or preference (*Re M* per Black L.J.; *De L* per Kirby J.). An objection 'should be a feeling beyond ordinary wishes, where the child displays a strong sense of disagreement to the return' (Fenton-Glynn, 2014: 134). 'It must, at the very least, involve the expression of a negative view not to return to the [home country]' (Nygh, 1997: 3). A mere voicing of a wish to remain with the abducting parent, for example, will not be enough to constitute an objection (Beaumont and McEleavy, 1999).

It is generally accepted that the child's objection must be to being returned to their country of habitual residence, and not to being returned to the left-behind parent (*Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 per Butler-Sloss L.J.; *Department of Community Services v. Crowe* (1996) 21 Fam. L.R. 159). However, it has been acknowledged that 'there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated' (*Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 per Ward L.J. at 203; *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 per Balcombe L.J.). The Full Court in *De Lewinski v. Director-General, New South Wales Department of Community Services* (1997) FLC 92-737 warned against imposing this requirement too strictly, saying:

We would not suggest that children must articulate that they object to being returned to the country of their habitual residence for the purpose of enabling the courts of that country to resolve the merits of any dispute as to where and with whom they should live in order to come within the provisions of [Article 13]. That is not the language of children and the Court should not expect them to formulate and articulate their objection ... in that manner. The Court must have regard to the whole of the evidence and determine, no matter how the children articulate their views, whether the children object in the relevant sense (at 83, 939).

Hearing children's objections also leads to a question of what methods are employed to ascertain the child's objections and to sufficiently and fairly

apprise the court of the necessary information (plurality of High Court in *RCB*). The method by which evidence of children's views is ascertained may be pertinent to the question of whether a relevant "objection" is found. In Australia, evidence of children's views is most often presented through an expert report. I have discussed the advantages and limitations of the methods of hearing from children in Convention matters elsewhere and argued that greater use of judicial meetings with children and independent legal representation may lead to better evidence of children's views and objections, and greater compliance with the UNCRC (Fernando and Ross, 2018).

The requirements for satisfaction of the "gateway stage" disclose that, even without the added "strength of feeling" requirement as found in the Australian regulations, children have a difficult task in establishing that their views should be taken into account. The child's views must be capable of constituting an "objection", as opposed to a mere wish or preference. The "objection" must be able to be interpreted as an objection to being returned to their country of habitual residence, rather than merely an objection to being returned to a parent. The court must be satisfied that the child has attained an age and degree of maturity at which it is appropriate to take account of their views. Further, the collection and presentation of evidence for all of these matters is reliant on the court's chosen method for the ascertainment of the child's views, which may have limitations.

3.2 *The Discretion Stage*

Once a court is satisfied that a child objects to being returned to their country of habitual residence and that the child has attained an age and degree of maturity at which it is appropriate to take account of their views, the court then moves to the "discretion stage" (*Re M* per Black L.J.). At this stage the child's objection is only one factor to take into account. The court considers not only the nature, basis and strength of the objections expressed, but also a much wider range of considerations including matters relating to the child's welfare and the objectives of the Convention (*Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716; *De L*). Even when the "children's objection" exception has been made out, the court retains a discretion to order that the child be returned. The court's discretion is unconfined (*De L*), however '[i]t must at all times be borne in mind that the Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly' (*Re M* per Black L.J. at 71).

Determining whether the discretion to return a child ought nevertheless to be exercised presents a difficult task for judges who must balance important,

potentially competing interests, including the rights and interests of abducted children, the rights and interests of parents, respect for the laws of other countries, the overriding objective to protect children from harm, and the Convention's general aim to return abducted children.

4 The Australian "Strength of Feeling" Requirement

The Convention is not directly incorporated into Australian law. Instead, it is given effect by way of s. 111B of the Family Law Act 1975 (Cth) (FLA) through the Family Law (Child Abduction Convention) Regulations 1986 (Cth) (the regulations). The wording of the regulations, however, differs from the Convention itself and there are aspects of the regulations that do not appear in the Convention. The Convention is set out in a schedule to the regulations and regard can be had to it for the purposes of interpreting the regulations and for aspects where the regulations are silent (Kay, 2005). However, because the Convention has not been legislated in Australia, the regulatory provisions prevail over the Convention itself, and the regulations must be interpreted according to Australian legal standards (Nygh, 2002).

Until 2004, the "children's objection" exception as it appeared in reg. 16(3)(c) resembled the exception in the Convention. However, the Family Law Amendment Act 2000 (Cth) (Amendment Act) inserted a new s. 111B(1B) with the intention of modifying the exception by requiring that the child's objections 'import a strength of feeling beyond the mere expression of a preference or of ordinary wishes.' Regulation 16(3)(c) was subsequently amended in 2004 to give effect to that section. It states that a court may refuse to make a return order for a child if a person opposing return establishes that each of the following applies:

- i) the child objects to being returned;
- ii) the child's objection shows a *strength of feeling beyond the mere expression of a preference or of ordinary wishes*;
- iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views (emphasis added).

The result is that, along with the Convention's requirements that a child objects and is of a sufficient age and maturity, the Australian regulations impose an additional "strength of feeling" requirement.

Neither the Revised Explanatory Memorandum accompanying the Amendment Act, nor the Explanatory Statement to the 2004 amending

regulations provided any explanation for the inclusion of the “strength of feeling” requirement. The Revised Explanatory Memorandum only made the following observation in relation to the requirement:

[G]enerally a country is required to send a child abducted to its jurisdiction back to the country of habitual residence ... This means that there is generally no determination whether or not the child is to be returned to the former country. There is generally no need, therefore, to inquire into the reasons for the abduction or into the wishes of the child in such cases

Revised Explanatory Memorandum, Family Law Amendment Bill 1999 at 278

This is a statement of the general understanding as to how the Convention interacts with issues such as the child’s best interests, the reasons for the abduction and the child’s views. To the extent that the statement suggests that the general requirement to return children is a reason not to inquire into the wishes of children, it subscribes to the circular reasoning identified by Schuz (2013), discussed above. In any event, the statement does not address why the “strength of feeling” requirement was imposed.

Despite no explanation being provided in legislative documents, commentators such as Nygh (2002) and Kirby (2010) have noted that the purpose of the amendments was to counteract the effect of the High Court’s judgment in *De L*, which established that a literal interpretation of the word “objects” should be taken. It must be the case that the Australian Parliament intended to make the “children’s objection” exception more onerous and require that the threshold be higher than that envisioned by the High Court. There would otherwise be no reason for the amendment, because it is accepted across jurisdictions that an objection is different from a mere wish or preference. The requirement that the child’s objection ‘shows a strength of feeling beyond a mere expression of a preference or of ordinary wishes’ is contrary to comments such as those by the High Court in *De L* that the word ‘objection’ is to be given its ordinary meaning and that no ‘additional gloss’ is to be supplied. In amending the regulations and the FLA, an ‘additional gloss’ was statutorily enshrined.

To my knowledge, Australia is the only jurisdiction which has made the “children’s objection” exception more onerous through legislative amendment. However, in Israel the Supreme Court has held that the child’s wishes must be ‘dominant and of special force’ (RFamA 672/06 *TAE v PR*, PD 61(3) 24), and this remains the leading approach in that country (Freeman *et al.*, 2019). In some other jurisdictions, legislation and regulations do more to acknowledge the importance of children views than the Convention itself. For example, s. 278(3) of the South African Children’s Act 38 of 2005 states that the court must

afford to the child ‘the opportunity to raise an objection to being returned to their home country’ and ‘must give due weight to that objection’, taking into account the child’s age and maturity. Further, the Brussels II bis Regulation applicable in Europe states that children must be given an opportunity to be heard in the proceedings unless this appears inappropriate having regard to the child’s age or maturity (Article 11(2)).³

This article now examines how the “strength of feeling” requirement has been interpreted and applied and, in particular, whether approaches taken by Australian courts have led to the “children’s objection” exception being rejected at the “gateway stage” in circumstances where proper application of the Convention would not support that result.

5 Application of the “Strength of Feeling” Requirement

In looking at the cases decided since the regulations were amended in 2004 to include the “strength of feeling” requirement, different approaches emerge. It appears that some Australian judges take a strict interpretation approach to the regulation, while others take a less-restrictive approach, considering only whether the child objects to returning to their country of habitual residence and whether they have obtained a sufficient age and degree of maturity.

5.1 *Strict Approach*

The majority of judges considering the children’s objection exception in Australia have treated the “strength of feeling” requirement as an additional hurdle that needs to be met before the court’s discretion to refuse to make a return order arises. The “gateway stage” is effectively transformed from a two-part to a three-part inquiry. This was described by the High Court in *RCB* where the plurality said, ‘The court may also refuse to make a return order if a person opposing return establishes that the child objects to being returned, that the objection shows a strength of feeling beyond a mere expression of a preference or of ordinary wishes and that the child has attained an age and a degree of maturity at which it is appropriate to take account of his or her views’ (at 19).

There are many instances of this approach being applied in practice. For example, in the primary judgment which led to *RCB*, four Italian sisters were

3 The Brussels II bis Regulation will be replaced by the Brussels II ter which begins operation in August 2022. It similarly states that a child who is capable of forming their views must be provided with a ‘genuine and effective’ opportunity to express them (Article 21). This specifically extends to Convention proceedings (Article 26).

wrongfully retained in Australia by their mother. Forrest J. accepted that all four children objected to being returned to their home country, but said, ‘Certainly though, I get no impression ... that the girls’ objection to being returned to Italy shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes, as is the requirement in order to give rise to the defence’ (*Department of Communities (Child Safety Services) v. Garning* [2011] FamCA 485 at 116).

The imposition of a threshold which requires a child’s objections to be of a particular strength before they can be taken into account creates a high bar for children to meet. It is perhaps not surprising, then, that in cases where the “gateway stage” has been accepted, the child’s objections have often been expressed in very forceful terms. In *Colak v. Viduka* [2016] FamCAFC 79 (*Colak*), a 13-year old child was observed to be ‘agitated and adamant’ and said that he would kill himself if required to return to Croatia. In *Northern Territory Central Authority v. Gambini* [2008] FamCA 544 (*Gambini*), a nine-year old child said that she would ‘cry to death’ if required to return. In *Department of Family and Community Services v. Evelyn* [2014] FamCA 1107 (*Evelyn*), a 12-year old child said, ‘I’m not going back [to Canada]. No-one can make me. I will demolish my passport and documents ... I’ll be the most upset person on earth ... I’d probably commit suicide’ (at 39).

In contrast, in cases where children expressed an objection in less forceful, or more equivocal terms, the court has ordinarily found that the objection lacked the requisite “strength of feeling”. In *Director-General, Dept of Communities, Child Safety and Disability Services and Hughes* [2017] FamCA 509, for example, the child was aged nearly 16 and had been in Australia for almost two years. He expressed that it was ‘his decision’ to live in Australia because he had better educational and employment opportunities and that Argentina (his country of habitual residence) was unsafe. He wanted to attend university in Australia. The child talked positively about his mother (the left-behind parent) and said that he would be very disappointed if she didn’t allow him to stay in Australia, but said that he would ‘have to’ accept returning to Argentina if an order was made. Hogan J. accepted that the child gave calm, considered and independently formed responses about his family relationships, the current situation and possible future scenarios. However, her Honour found that the child’s objection was ‘more about his preference to live in Australia than reflective of his experience of a poor problematic relationship with his mother’ and was ‘predominantly based upon the differing lifestyle factors which he believes exist in each country’ (at 46(e)). Her Honour was therefore not satisfied that the child objected to being returned to Argentina, and placed particular reliance on the fact that he accepted the possibility of return. Her Honour said

that, even if the child did object, 'I am not persuaded that any objection he has expressed to returning to Argentina currently shows strength of feeling beyond the mere expression of a preference or of ordinary wishes' (at 49).

The requirement for a child to object to being returned is clear. However, what these cases do not disclose is the difference between an objection that does not meet the threshold and an objection that does. Would the "gateway stage" have been accepted in *Colak*, *Gambini* and *Evelyn* even if the children had expressed themselves less forcefully? As Gill J. said in *Department of Communities and Justice v. Sarapo (No. 2)* [2019] FamCA 829, 'The strength of feeling [requirement] ... does not create a clear standard with a readily identifiable border between ordinary wishes and wishes that are not ordinary, or when something moves beyond mere preference' (at 18). Some light may be shed by looking at three cases where the court had two separate occasions to examine the child's objections and how they had developed over time.

In *In Re F (Hague Convention: Child's Objections)* [2006] FamCA 685 ("*In Re F*") the appeal court reviewed the evidence of the child's views that had been before the preliminary judge. The child, aged 12, had said that if he was ordered to return to the USA he would 'scream and yell so they couldn't put me on the plane.' Lawrie J. was not satisfied that the child's objection showed a strength of feeling beyond the mere expression of a preference or of ordinary wishes. Her Honour said, 'I think that the child's objections are to separation from the people he wants to live with, in an environment where he is happy and where he wishes to stay and would prefer to stay, not to the idea of returning to the United States as such' (at 38 of the preliminary judgment).

After the return order was made the child was twice taken to the airport but on both occasions physically refused to board the plane, even with a degree of physical force applied by Federal Police officers. The return order was appealed and in a subsequent interview with a psychologist the child said that he would resist any attempts to force him onto the plane by kicking and screaming, and that if he was forcibly taken back to America he would run away. The psychologist concluded that the child had a 'very strong objection' to returning and that there would be negative and ongoing effects if forced to return, including depression, breakdown of relationship with his father, self-harm and school failure. The Full Court accepted that the evidence was 'now overwhelming' that the child objected to being returned to the USA and was satisfied that the objection showed a strength of feeling beyond a mere expression of a preference or an ordinary wish. Other relevant matters being satisfied, the return order was overturned.

In *Department of Community Services v. Tarritt* [2007] FamCA 1400, Cronin J. found, '[t]here can be little doubt that the child does object to a return to

America but in reality that should be read as an objection to returning to her father' (at 24). The 11-year old was interviewed by a family consultant (child welfare expert), who reported that the child's objections included that she liked school in Australia, that she would not need to deal with her mentally ill and delinquent brother if she was allowed to stay, and that she had negative feelings towards her father. Cronin J. accepted that the child viewed things as 'a lot better with her mother in Australia' (at 43) but was not satisfied that her views were strong enough to satisfy the relevant test.

The return order was appealed and, before the appeal was heard, the child was again interviewed by the family consultant who had prepared a report for the preliminary hearing. The child told the family consultant that she still wanted to remain in Australia and that her reasons remained the same. She also reported that since the return order had been made she had been feeling very 'stressed'. The stress had taken the form of her 'throwing chairs around' and 'getting stomach aches'. When asked about how she would feel about going back, the child said, 'Last time I felt like I wanted to kill myself ... It was just a feeling of wanting to be dead. I would feel the same again'. She said that she would 'start crying a lot' because she really wanted to stay. The family consultant concluded the child had a strongly held wish to remain with her mother in Australia, that she was very much invested in that outcome and was becoming 'more emotional and almost desperate' (*Tarritt v. Director-General, Department of Community Services* [2008] FamCAFC 34 at 59 ("*Tarritt*"). The family consultant concluded that the child's increasing resistance was such that there would be considerable negative impact on her should she be forced to return. The Full Court said that this second report showed an increased strength in the child's objection to the point that it was a 'matter of concern' (at 33). It was satisfied that each of the required limbs of reg. 16(3)(c) was made out and exercised its discretion to overturn the return order.

In *Department of Communities (Child Safety Services) v. Garning* [2011] FamCA 485, discussed above, the children expressed that they wished to remain living in Australia, were happy, enjoyed school and new friends and felt that their mother was happier. Each child missed aspects of her life in Italy and said they would accept returning if their mother also returned and they lived with her. Forrest J. accepted the family consultant's view that the children's objections to return were predominantly related to their perception that their father had been violent to their mother, had subjected them to inappropriate physical discipline and was not an active and involved parent. Forrest J. was not satisfied that the children's objections showed a strength of feeling beyond the mere expression of a preference or of ordinary wishes (at 116).

Following the order for mandatory return there were several other events and court proceedings, including an unsuccessful appeal to the High Court of Australia. Eventually, Forrest J. had the opportunity to consider the matter again when the mother applied for the return order to be discharged.⁴ The mother argued, *inter alia*, that the current state of the children's views made it impracticable for the return order to be carried out, or that they constituted 'exceptional circumstances' which would justify the order being discharged. The children were re-interviewed by the same family consultant, who reported that all four children 'strongly object' to being returned to Italy. The children told her that they would not get on a plane. The second eldest child, then aged 14, said that she would run away and that, 'I'd probably end my life I'm feeling so strong'. The same child had threatened self-harm in the intervening period and had written a letter to 'Dear Someone' in which she said, 'I don't think I could even survive in Italy. I would just cry and cry all day. I'd die of pain'. The youngest child, aged only nine, had said that Italy was a scary place and that she would stab herself if forced to return.

Forrest J. accepted that the children's expressed level of objection to being returned to Italy had increased, and that the objections were strong, manifesting in escalating psychological distress and threats of self-harm (*Department of Communities, Child Safety and Disability Services & Garning (Discharge application)* [2012] FamCA 839 at 43–44). Nevertheless, his Honour was not satisfied that the children's views made the order impracticable to be carried out, or constituted 'exceptional circumstances' and, regardless, would not have exercised his discretion to discharge the return order. The accuracy of that decision is not questioned and this case differs from the two preceding examples because, despite the children's objections having intensified, the return order was not disturbed. However, it remains a useful example of where it was accepted that the children's views, having initially been discounted as lacking the requisite "strength of feeling", had indeed strengthened, presumably to a degree where the threshold would have been reached, had that been the issue being decided.

In each of these three cases the court accepted, on the first occasion, that the children 'objected' to being returned. In considering the "children's objection" exception, the court should therefore have accepted that the first part of the "gateway stage" had been made out. Nevertheless, the children's views

4 In Australia, a court has discretion to discharge a return order if all the parties consent, if circumstances have arisen that make it impracticable for the order to be carried out, if there are "exceptional circumstances" that justify the return order being discharged, or if more than one year has elapsed since the order was made or any appeal was determined (reg. 19A).

were dismissed on the basis that their objections did not meet the “strength of feeling” threshold purportedly required by the regulations. When the views became extreme, with aspects such as threats of self-harm or actual or threatened refusal to board a plane, a later court found that the objections met the required “strength of feeling”.

The problem with this approach is that it can lead to thoughtful, maturely expressed objections being discounted because they are not conveyed with high emotion. In *Secretary, Department of Communities and Justice v. Paredes* [2021] FamCA 128, a ten-year old child who was wrongfully retained in Australia by her mother objected to returning to Brazil, which was her country of habitual residence and where her father lived. A family consultant who interviewed the child was satisfied that her objections to returning to Brazil were more than a ‘mere expression of a preference or ordinary wish’ and that the child’s views should be afforded ‘considerable weight’. The family consultant considered that the child’s views were ‘consistent and mature’ and that she was able to articulate why she wanted to stay in Australia with detailed, nuanced reasons (at 244). However, Williams J. referred to *Tarritt* and *Re F* which her Honour said ‘demonstrate the sufficient gravity or seriousness required to establish what is contemplated by the relevant regulations’ (at 250). Her Honour summarised the children’s statements and behaviours in those two cases as discussed above, including the child’s suicidal thoughts in *Tarritt* and the child’s physical refusal to board a plane in *Re F* despite some force being applied by police officers. Williams J. concluded, ‘The child’s objections in this case fall far short of such gravity or seriousness and to the contrary, demonstrate her engaging in discussions with her mother and the family consultant in a polite and courteous manner rather than demonstrative of extreme or emotionally dysregulated behaviour, as was the case with both the authorities cited’ (at 253). Her Honour found that the child had been directly or indirectly influenced by her mother and the main focus of her objections was to express a preference to remain living with her mother, rather than objecting to return to Brazil. ‘Her comments cannot possibly be construed as demonstrating a strength of feeling beyond the expression of a preference or of ordinary wishes and do not satisfy the regulatory requirements’ (at 254).

With respect, the discounting of a child’s objections to being returned on the basis that they are not extreme or have been expressed politely and courteously, or because the child’s objection focusses on being separated from a parent over being returned to their country of habitual residence does not pay adequate respect to the objects of the Convention or to how children may express themselves. On Williams J.’s reasoning, a child’s objection could only meet the requirement of showing a strength of feeling beyond a mere

preference or ordinary wishes if expressed in extreme terms or with high emotion. Paradoxically, objections expressed in this way can alternatively be viewed as evidence of immaturity or parental manipulation (Hale, 2018).

5.2 *Implications*

The “strength of feeling” requirement, if applied strictly as a threshold test, creates a high hurdle for children to meet before their objections can be taken into account. This is despite children being given no advice or information about what level of objection is required.⁵ Rather than accepting that a child ‘objects’ to being returned and leaving aspects such as the strength, basis and weight to be given to the objection for the ‘discretion stage’, judges taking this approach will strictly analyse the child’s language and demeanour to determine whether their objection meets the requisite standard. If the objection does not carry the requisite “strength of feeling”, it will not be taken into account at all. This narrow focus ‘runs the risk of the court fixating on applying a technical test, rather than trying to hear exactly what the child is trying to articulate’ (Cullen and Powers, 2018: 56). As Baroness Hale wrote, ‘Children will not necessarily use the language of objection or preference or mere unhappiness with the precision required by courts ... But very often a judge’s refusal to return a child will be based on a strict analysis of the language used’ (Hale, 2018: 43). For example, if the child expresses something that may appear to dilute the strength of their views, such as accepting the possibility of return or articulating the advantages and disadvantages of remaining in each country, this will be taken as evidence that the ‘objections’ are not stronger than a wish or preference. Parents who are aware of this approach may seek to manipulate or coach children to articulate their objections in very strong terms. This could be harmful for children and risks their genuine views being discounted if manipulation or coaching is suspected.

Schuz wrote, ‘[W]hen analysing the way in which the Abduction Convention has been applied to particular situations, the focus must be on the extent to which the actual results are consistent with the objectives of the Convention’ (2013: 94). A strict application of the “strength of feeling” test may lead to situations where children are returned to their home countries in contravention of their true objections and in circumstances where the first part of the “gateway stage” would ordinarily apply. This approach is not in keeping with the intended operation of the Convention. As discussed earlier, the overarching aim of the Convention is to protect children from the harmful effects of

5 In Australia, a child’s best interests may be represented by an Independent Lawyer for the Child, but only in ‘exceptional circumstances’ (Family Law Act 1975 (Cth) s. 68L(3)).

international child abduction. The Convention aims to ensure that children are returned when this will protect them from harm and are not returned where return is liable to cause them harm (Schuz, 2013). Adherents to a strict approach to the “strength of feeling” requirement are not applying the “children’s objection” exception correctly, and are potentially causing children harm. Baroness Hale warned against this result in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 saying, ‘No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm’ (at 52). If the effect of the “strength of feeling” requirement is to hamper the operation of the “children’s objection” exception and to potentially cause harm to children, it is contrary to the Convention.

Some have expressed concern that applying the exceptions to mandatory return readily undermines the principle of reciprocity between member countries that also underpins the Convention. As Kirby J. said in *De L*, ‘Putting it quite bluntly, Australia cannot expect other Contracting States to trust its courts to determine lawfully and fairly the best interests of abducted children, where such children are returned to Australia, if our courts do not accord a similar reciprocal respect to the courts of the other Contracting States, exceptional cases aside’ (at 685). However, reciprocity cannot be prioritised over the other objectives of the Convention, and particularly the overarching objective to protect children from the harmful effects of child abduction, which includes not returning children if it would be harmful to do so.

Taking a strict approach to the “strength of feeling” test also robs children of a voice in a situation where they have a right to be heard and, subject to their age and degree of maturity, have weight accorded to those views. Numerous authors have discussed the importance of upholding the principles of the UNCRC in Hague Convention matters (eg, Elrod, 2011; Boezaart, 2013; Schuz, 2013; Fenton-Glynn, 2014; Fernando, 2020). A tension emerges between the requirements of the “children’s objection” exception in the Convention and Article 12 of the UNCRC, which gives children a right to be heard, and have those views be given ‘due weight’ in *all proceedings* affecting them (Schuz, 2013; Fernando and Ross, 2018). However, even if one subscribes to a narrow view that children’s views in Convention proceedings should only be heard if they constitute a relevant “objection”, a refusal to take children’s views into account on the basis that their objection does not show the requisite “strength of feeling” is a denial of their rights (Fenton-Glynn, 2014).

This approach contrasts with what is happening in other international jurisdictions where more is being done to acknowledge children’s rights to participate in Convention cases. Aside from the legislative provisions in South Africa

and Europe mentioned above, Baroness Hale has held that there is a presumption that the child will be heard in every Convention case unless it would be inappropriate to do so (*Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619). At the 6th meeting of the Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions in June 2011, the Commission welcomed the ‘overwhelming support for giving children ... an opportunity to be heard in return proceedings ... independently of whether an [exception] has been raised’ (at 50).

5.3 *Less-Restrictive Approach*

It is apparent that some Australian judges do not take a strict approach to the “strength of feeling” requirement and approach the issue of the child’s objections in a way that is more general and less prescriptive. Judges subscribing to this less-restrictive approach treat the “strength of feeling” requirement as an ordinary corollary of an investigation into whether the child ‘objects’, rather than an extra hurdle that must be met before the objection can be taken into account. This is because an objection is, by definition, different or stronger than a mere wish or preference. Therefore, if the child is expressing only a wish or preference, this will not constitute an objection and the “children’s objection” exception will be rejected at this first part of the “gateway stage”. With this less-restrictive approach, judges will need to be satisfied that child objects to being returned and that the child has attained an age and degree of maturity at which it is appropriate to take account of their views. Issues such the strength of the objection will be left to a consideration of whether the court ought to nevertheless exercise its discretion to return the child.

The Hon Justice Bennett is a Hague Network Judge for Australia and has written on the topic of the child’s objection, including her recommendations for how children can best be heard and their interests best served in this complex jurisdiction. Bennett J.’s holistic approach extends beyond her treatment of the child’s views to the conduct of the case in general, through appointment of an Independent Children’s Lawyer and promotion of mediation to settle disputes (Bennett, 2018). From examining her judgments, it is clear that her Honour does not subscribe to the ‘strict’ approach to the “strength of feeling” test and instead employs a less-restrictive approach to the consideration of a child’s objections.

In *Commonwealth Central Authority v. Sangster* [2018] FamCA 765 (*Sangster*), Bennett J. was satisfied that X (aged 14) objected to being returned to the Netherlands and that her objections were reasonable and authentically her own. Her Honour readily accepted that the objection showed a strength of feeling beyond the mere expression of a preference or of ordinary wishes

based on the family consultant's evidence that X's objection was felt at the highest level and 'in every fibre of her being' (at 204). The case contained elements that, had a strict approach been taken, would have diluted the 'strength' of the child's views. These included that X presented as thoughtful, measured and co-operative, and that she expressed a balanced view of her life in The Netherlands and Australia, expressing positives and negatives of each. She also accepted the possibility of return. Bennett J. said,

The fact that X says that she will return to The Netherlands with her mother and sisters if her sisters are ordered to return does not, in my view, lessen the strength of her objection to return. It merely indicates that she views life without her mother and young siblings to be intolerable and worse for her than her negative view of life in The Netherlands (at 206).

In *Hotzner No. 2* [2010] FamCA 104, Bennett J. also considered a 15-year old child's objections carefully and respectfully, taking into account things such as the child's ability to clearly appreciate the consequences and outcomes of the proceedings and to identify differences between his life in Australia and in Israel. The child did not speak in extremes or absolutes and did not blatantly object to returning to Israel. For example, when describing how he would feel if returned, he used the word 'uncomfortable'. Bennett J. said the child's thoughtful responses 'ought not to be discounted merely because they were not conveyed in desperation or with high emotion' (at 150). Bennett J. said that it was not necessary to show vehemence or to add a "gloss" to fall within the meaning of objection and she was satisfied that his views were more than a mere preference or ordinary wish (at 157).

From cases such as these, it is clear that Bennett J. attributes an ordinary meaning to the word "objects". She does not treat the regulations as imposing an additional requirement that the objections meet the necessary strength of feeling. Instead, her Honour needs to be satisfied that the child objects in a way that is stronger than a mere wish or preference. For example, in *SCA v. Castillo* [2015] FamCA792 Bennett J. found that a 10-year old child's expressed desire to remain in Australia 'lacked consistency and clarity and reflects a preference rather than an objection that can be said to meet the requirements set out in reg 16(3)(c)' (at 238). This accords with the accepted authorities from England and Wales on the recommended approach to the "children's objection" exception which Bennett J. frequently cites. For example, in *Sangster*, Bennett J. said, 'I do not draw a distinction between the principles and points articulated by Black L.J. in *Re M (Republic of Ireland) (Child's Objections)* (*Joinder of Children*

to Appeal) and by Ward L.J. in *Re T (Abduction: Child's Objections to Return)* and the current state of Australian law and jurisprudence under [reg] 16(3)(c). These are the principles which I will apply in this case' (at 54).

Like Bennett J., Gill J. in *Department of Communities and Justice v. Sarapo* (No. 2) [2019] FamCA 829 (*Sarapo*) adopted an ordinary meaning of the word "objects" as approved by the High Court in *De L.* Relying on the plurality's comments in that case, including its reference to Balcombe L.J.'s judgment in *S v. S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, Gill J. noted, '[A] qualified objection can still constitute an objection. The objection is to be to return as contemplated, as opposed to requiring an objection under any circumstances' (at 16).

Gill J. described the "strength of feeling" requirement as a 'qualitative threshold expressed against standards which, of themselves, lack clarity'. Gill J. held that the "strength of feeling" requirement means establishing, factually, that the strength of feeling in respect of an objection is beyond the mere expression of a preference or of ordinary wishes. 'This enquiry is not directed to whether X's feelings are rationally connected to his circumstances, but merely as to their intensity' (at 19).

Gill J. said (at 27):

[E]ven in the context of the Hague Regulations that have the purpose of protecting children from wrongful removal or retention, to ensure their prompt return and to 'ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting State', there is no high threshold before a child's view is to be at least taken into account. If it is to be taken into account, the assessment of weight is a matter for the discretion. The establishing of the exception requires merely that it be appropriate to take the view into account, not that it also be capable of bearing ultimate or even significant weight in the discretionary assessment.

This statement highlights the significance of taking a less-restrictive approach. Taking a child's objections into account does not mean that the child's views are automatically followed. As discussed above, the court has a wide discretion to decide whether a child should nevertheless be returned. Leaving the question of the weight to be given to children's views to the "discretion stage" gives the court the opportunity to weigh that question alongside all of the other matters that may be relevant to the exercise of the discretion in the circumstances of the case. Adherents to the "strict" approach may deprive themselves of that opportunity because, should it be found that the child's objection does not display the necessary "strength of feeling", the views cannot be considered

at all. It also deprives children of an important opportunity to have their views heard and be given ‘due weight’ as is required by Article 12 of the UNCRC.

In *Secretary, Department of Family and Community Services v. Zadeh* [2017] FamCA 44, McClelland J. followed the approach to the “gateway stage” as laid out by Black L.J. in *Re M* and also adopted ‘the ordinary meaning of the word “object”’ from the High Court in *De L* (at 194). In relation to whether the children’s objections satisfied the requisite “strength of feeling”, McClelland J. accepted evidence of the report writer that, ‘These are gentle, compliant, polite children so, while the content of what they say is strong and beyond the mere expression of a preference or of ordinary wishes, the manner of their expression is not ...’ (at 206). Referring to the children’s experiences in New Zealand, including physical discipline and feelings of fear, his Honour said,

The circumstances giving rise to the children’s objection ... could reasonably be expected to give rise to a strength of feeling beyond the mere expression of a preference or of ordinary wishes. Despite the manner in which they have expressed that feeling, I accept that the children’s strength of feeling is one that satisfies the requirements of regulation 16(3)(c)(ii) (at 214).

A less-restrictive approach to children’s objections aligns with the principles and objectives of the Convention itself and is therefore the superior approach. It is consistent with international jurisprudence and a growing awareness globally of the importance of listening to children in Convention proceedings. It ensures that Australia’s international obligations are met and conforms with Australian High Court authority about the interpretation of domestic laws in relation to international treaties. As articulated by Mason C.J. and Deane J. in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, ‘If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail’ (at 287, Gaudron J. agreeing). This approach demonstrates respect for children’s views. It gives children an opportunity to be heard and have their views taken into account, as required by the UNCRC, within the restrictive context of the Convention’s exceptions to mandatory return.

6 Conclusion

The “strength of feeling” requirement in the Australian regulations invites an interpretation that requires children to meet an additional hurdle before their

views can be taken into account as part of the “gateway stage” of the “children’s objection” exception. When this strict approach is taken, children must not only object to being returned to their country of habitual residence, but they must object *strongly*. Otherwise, their views cannot be considered.

This approach is not required by the Convention itself and runs the risk of children being denied the opportunity to have their views considered at the “gateway stage”, in circumstances where proper application of the Convention would, subject to the child having attained a sufficient age and degree of maturity, allow those views to be taken into account. It denies abducted children in Australia a voice where, even within the restrictive operation of the Convention, they would otherwise have a right to be heard. Further, with judges interpreting the “strength of feeling” requirement differently, children’s experiences and outcomes are likely to be different depending on the judge before whom the case is heard. On these bases, the “strength of feeling” requirement in reg. 16(3)(c) ought to be repealed.

In the absence of repeal, judges are urged to adopt a less-restrictive approach to the treatment of children’s objections, with the “gateway stage” being limited to an inquiry of whether the child objects to being returned (rather than expressing a mere wish or preference to remain), and whether the child has attained the requisite age and degree of maturity.

The “children’s objection” exception and the other exceptions to mandatory return are an important part of the Convention’s operation and must be applied where the interests of the child require. They are not only to be applied in extreme circumstances. The main objective of the Convention is not to return children at any cost, but to return them in situations where, under the Convention, they ought to be returned. The child’s objection exception should be viewed as an opportunity for children’s objections to have proper weight in the court’s determination and not as a hurdle for children to surmount in order for their views to be heard.

Acknowledgement

The author acknowledges the research assistance of Anja Pich with gratitude.

References

- Beaumont, P. and McEleavy, P., *The Hague Convention on International Child Abduction* (New York: Oxford University Press, 1999).

- Bennett, Hon. Justice, "A Better Place for the Child in Return Proceedings under the 1980 Convention: A Perspective from Australia", *The Judges' Newsletter on International Child Protection* 2018 (12 (Summer–Fall)), 20–24.
- Boezaart, T., "Listing to the Child's Objection", *New Zealand Law Review* 2013, 357–372.
- Caldwell, J., "Child Welfare Defences in Child Abduction Cases – Some Recent Developments", *Child and Family Law Quarterly* 2001 (13(2)), 121–136.
- Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility [2003] OJ L 338/1 art 11(2), repealing Council Regulation (EC) No. 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses [2000] OJ L 160/19 (Brussels II bis Regulation).
- Council Regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (recast) (Brussels II ter Regulation).
- Cullen, S. and Powers, K., "The Role of Children in 1980 Hague Child Abduction Convention Proceedings: A Perspective from Scotland and the USA", *The Judges' Newsletter on International Child Protection* 2018 (12 (Summer–Fall)), 55–58.
- Elrod, L., "'Please Let Me Stay': Hearing the Voice of the Child in Hague Abduction Cases", *Oklahoma Law Review* 2011 (63), 663–691.
- Fenton-Glynn, C., "Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings", *Journal of Comparative Law* 2014 (9(1)), 129–144.
- Fernando, M., "The Child's Voice in International Child Abduction Cases in Australia", *Court of Conscience* 2020 (14), 35–38.
- Fernando, M. and Ross, R., "Stifled Voices: Hearing Children's Objections in Hague Child Abduction Convention Cases in Australia", *International Journal of Law, Policy and the Family* 2018 (32(1)), 93–108.
- Freeman, M., Schuz, R. and Taylor, N., *The Voice of the Child in International Child Abduction Proceedings under the 1980 Hague Convention: A Project Funded by the University of Westminster* (Project Report, November 2019).
- Greene, A., "Seen and Not Heard? Children's Objections under the Hague Convention on International Child Abduction", *University of Miami International and Comparative Law Review* 2005 (13(1)), 105–162.
- Hague Convention on the Civil Aspects of International Child Abduction opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983).
- Hale, Baroness of Richmond, "Child Abduction from the Child's Point of View", *The Judges' Newsletter on International Child Protection* 2018 (12 (Summer–Fall)), 40–45.

- Kay, Hon. Justice, "The Hague Convention: Order or Chaos?", *Australian Journal of Family Law* 2005 (19(3)), 245–282.
- Kirby, Hon. M., "Children Caught in Conflict: The Child Abduction Convention and Australia", *International Journal of Law, Policy and the Family* 2010 (24(1)), 95–114.
- Nygh, Hon. P., "The High Court Considers the Hague Child Abduction Convention in *De L v Director-General, New South Wales Department of Community Services*", *Australian Journal of Family Law* 1997 (11(1)), 1–4.
- Nygh, Hon. P., "Review of the Hague Convention on the Civil Aspects of Child Abduction", *Australian Journal of Family Law* 2002 (16(1)), 1–10.
- Perez-Vera, E., "Explanatory Report on the 1980 Hague Child Abduction Convention", in *Proceedings of the Fourteenth Session (1980)*, Tom 111, *Child abduction*, The Hague, Imprimerie Nationale, 1982 available at: <https://assets.hcch.net/upload/expl28.pdf>.
- Schuz, R., *The Hague Child Abduction Convention: A Critical Analysis* (Oxford: Hart Publishing, 2013).
- Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions, "Conclusions and Recommendations" (Conference Paper, Hague Conference on Private International Law, 1–10 June 2011): https://assets.hcch.net/upload/wop/concl28sc6_e.pdf.
- Taylor, N. and Freeman, M., "Outcomes for Objecting Children under the 1980 Convention", *The Judges' Newsletter on International Child Protection* 2018 (12 (Summer–Fall)), 8–12.