Arrivederci Oz

by Katrina Oner

Italian sisters v the Hague Convention

The custody battle over four Italian sisters attracted world-wide attention, but behind the headlines lies a fascinating study of the judicial process.

On 23 June 2011, Justice Forrest delivered a judgment in the Family Court of Australia in Brisbane, setting in motion a hotly contested Hague Convention matter which would take almost 18 months to reach its conclusion.

The Hague Convention

The *Family Law (Child Abduction Convention) Regulations 1986* (the regulations) give legislative force in Australia to the Convention on the Civil Aspects of International Child Abduction signed in The Hague on 25 October 1980. Commonly known as the Hague Convention, it was ratified by Australia on 29 October 1986.

The Hague Convention is the main agreement that covers international parental child abduction (for children under 16). Its principal object is to secure the prompt return of a child wrongfully removed from one convention country to another, or wrongfully retained in a convention country.

An application under the Hague Convention for the return of a child can only be made to or from a country that is a signatory and which Australia has recognised. Currently, 86 countries have ratified the Hague Convention, of which Australia recognises 78, including Italy.

Each country appoints a central authority to administer the Hague Convention and in Australia this is the Department of Communities, Child Safety and Disability Services (DOCS).

Under the regulations, the Family Court of Australia can order the return of a child to his or her country of habitual residence, as long as the court finds that the conditions of the regulations have been met.

Importantly, all signatories to the Hague Convention accept that the resolution of family law disputes regarding children is best determined in the country with which the child has the most obvious and substantial connection, being the country of the child's habitual residence.

Background

The mother, born in Australia in 1979, travelled to Italy in 1995 aged 16 to study the Italian language, art and culture. The following year, aged 17, she married the Italian father and took up permanent residency in Italy. The couple had five daughters (all born and raised in Italy, with the third dying as an infant from birth abnormalities). In 2007, after a serious incident of domestic violence by the father on the mother, the parties separated when the mother left the family home with the girls.

On 27 November 2008, the parties entered into a 'consensual separation agreement' approved by the relevant Italian court. They agreed to joint custody of the girls and that the girls would reside mostly with their mother, spending time with their father one afternoon a week and each weekend.

Soon after agreeing to the separation arrangement, the mother decided she wanted to relocate permanently to Australia with the girls. In 2010, she was able to secure the father's consent to the issuing of passports for the girls, on the basis that she wanted to fly to Australia with them for a one-month holiday.

The mother booked return airfare tickets, but said she did so because it was cheaper to book return airfares than one-way tickets. They travelled from Rome to Brisbane on 23 June 2010. It was the girls' first time in Australia.

After the one-month holiday, the mother failed to return the girls to Italy, prompting the father to invoke the Hague Convention.

As a result, on 18 February 2011, DOCS filed an application in the Family Court of Australia seeking the return of the girls to Italy.

The four girls were then aged 8, 9, 12 and 14.

16 May 2011 – First Family Court appearance

On 16 May 2011, the DOCS application was heard by Justice Forrest. Specifically, DOCS applied for a return order under regulation 15(1) of the regulations, which gives the court the power to make a return order under the Hague Convention.

The mother argued that:

- The father consented to her bringing the girls to Australia permanently and therefore the removal of the girls to Australia was not in breach of the father's rights of custody.
- Prior to the mother leaving Italy with the girls, the father was not actually exercising his rights of custody pursuant to their separation agreement.
- After the mother relocated the girls to Australia, the father eventually agreed by sms/text message and email to the girls living in Australia.
- Returning the girls to Italy would expose them to a grave risk of physical and psychological harm, or otherwise place them in an intolerable situation.
- The girls objected to being returned to Italy.
- The girls were settled in their new environment.

23 June 2011 – First judgment

On 23 June 2011, Justice Forrest delivered judgment, ordering that the children be returned to Italy within 30 days of the mother receiving $8000 in financial support from the father to aid with the return to Italy (as long as the mother returned to Italy with the girls).

timeline

16 May 2011 First Family Court appearance
23 June 2011 First judgment
5 September 2011 Appeal to the Full Court
9 March 2012 Appeal decision
2 May 2012 Enforcing the original order
14 May 2012 Urgent hearing
14-21 May 2012 The girls in hiding
16 May 2012 Mother's discharge application
21 May 2012 Girls found
22 & 25 May 2012 High Court proceedings
6 July 2012 Hearing on living with the mother
7 August 2012 High Court hearing
16 August 2012 Further stay ordered
3 October 2012 The final decision
October 2012 Return to Italy

Justice Forrest found/noted that:

a. The mother's arguments were not made out on the evidence.
b. Critically, regulation 16(1) of the regulations mandated a return order if the court was satisfied that:
   - an application for a return order had been made and filed within 12 months after the children's removal, and
   - the central authority satisfied the court that the children's removal was wrongful under regulation 16(1A), with the following criteria needing to be met:
     i. all four children were under 16 years of age
     ii. all four children habitually resided in Italy immediately before they were removed to and retained in Australia
     iii. Italy was a convention country
     iv. the children's father had rights of custody of the children in Italy immediately before their removal to and retention in Australia.
c. The mandatory return order was made subject to conferral of discretion not to order the return, if the person opposing the return of the children established one or more of the matters prescribed in regulation 16(3) (being the arguments raised by the mother listed above, which she failed on).
d. As regulation 16(1) was ultimately made out, and as the mother failed to convince the court that one or more of the matters prescribed in regulation 16(3) were applicable, the return order was made.

Importantly, his Honour found that "these four girls were all born in Italy and have lived in the same village since their birth until coming here to Australia ... In my opinion, the mother's unhappiness with the parenting arrangements that pre-existed her return to Australia should, most appropriately, be dealt with, if at all, through the courts of Italy where the family habitually resided. I would, in all the circumstances, order the return of these four girls to Italy even if my discretion not to was enlivened".

5 September 2011 – Appeal to the Full Court

On 5 August 2011 an appeal of the decision was filed by the mother. On the same date, Justice Forrest granted a stay of the return order, pending determination of the mother's appeal.

On 5 September 2011, the appeal was heard by the Full Court of the Family Court of Australia.

The appeal challenged only one of the findings made by Justice Forrest, namely that the father did not consent to the mother permanently relocating the children to Australia at any time or to their retention in Australia.

The mother argued that Justice Forrest wrongly rejected evidence from a witness that was available and that if the Full Court now allowed the admission of the further evidence in affidavit form, the evidence would demonstrate the order under appeal was erroneous and require a re-hearing on the issue of the father's consent.

The alleged evidence was that a third party overheard the father giving the mother his consent to the children permanently relocating to Australia and had recorded that conversation in a "note". At the 23 June 2011 hearing, this alleged evidence was raised by the mother, but it was not put before the court in sworn affidavit evidence.

9 March 2012 – Appeal decision

On 9 March 2012, the Full Court, in a unanimous decision, dismissed the mother's appeal and upheld the order of Justice Forrest that the girls return to Italy.

The Full Court found that the mother's appeal could not succeed and noted that "his Honour did not fail to provide the mother an opportunity to obtain evidence in affidavit form, it is apparent that she had ample opportunity to do so. She provided no explanation as to why she had not."

The effect of the appeal being dismissed was that the stay order made by Justice Forrest on 5 August 2011 was no longer operative and the girls were again required to return to Italy.

2 May 2012 – Enforcing the original order

On 20 April, DOCS filed an application in a case in the Family Court. The application sought further orders to facilitate the timely return of the children to Italy.

DOCS indicated to his Honour that the mother had no intention of returning to Italy herself and advised that the father planned to travel to Brisbane arriving on 9 May and could depart with the children on 16 May. DOCS sought an order from the court that the mother deliver the children to the Brisbane International Airport not before 16 May so that they could return to Italy with their father.

On 4 May, Justice Forrest delivered judgment on the 2 May hearing, and ordered that the mother deliver the children to the Brisbane International Airport into their father's care, on a date and time to be nominated by DOCS.

14 May 2012 – Urgent hearing

On the afternoon of 14 May DOCS made an urgent application to the Family Court for a warrant to issue pursuant to regulation 31 of the Hague Convention, authorising law enforcement officers to take possession of the girls as soon as they were able to be located and that once recovered, the children live with a person nominated by an officer of DOCS, pending their return to Italy. DOCS was successful in its application.

The application was filed due to evidence given by Ms F, an employee within the Court Services Branch of DOCS.

Importantly, Ms F deposed:

- That Ms F was advised by the solicitor acting for the mother that she had been contacted by senior counsel acting for the mother and told by him that he had been contacted by Ms X (the maternal grandmother of the girls), who informed him of a meeting that was to take place that same afternoon (14 May) and that if the meeting was not successful, she would murder the children.
- The solicitor for the mother reported to Ms F that senior counsel also told her that Ms X told him she would encourage her daughter (the respondent mother in the proceedings) to kill herself.
- That Ms F asked the mother's solicitor to phone the respondent mother and request that she deliver the children to a named Child Safety Service Centre immediately.
- The mother refused to deliver the children as requested.

After considering the evidence, Justice Forrest was satisfied that there was a real risk the girls would not be delivered to the airport on 16 May, as he had previously ordered.

14-21 May 2012 – The girls in hiding

From 14 to 21 May 2012, the girls were unable to be found, and were in effect 'in hiding and on the run' with their great-grandmother to avoid the mother complying with the orders of 4 and 14 May.

16 May 2012 – Mother's discharge application

On 15 May, while the girls were in hiding, the mother filed an application in Form 2D pursuant to the regulations. The application, heard on 16 May, sought an order pursuant to regulation 19A for a discharge of the original return order.

At the time of the hearing, the mother asserted that she did not know where her children were and had not known where they were since 14 May.

His Honour said: "Prima facie, I am satisfied that the mother is in contravention of this Court's orders, yet at the same time that she is in contravention of this Court's orders, she appears before the Court asking that the Court give her the indulgence of hearing her application for discharge of the return order…

"I do not for one moment even begin to consider that these four girls could be in hiding without any form of adult intervention and assistance. I do not accept that such adult intervention and assistance would be being provided by persons unknown to the mother."

Ultimately, his Honour found that he had good reason to be highly suspicious that the mother was not complying with the court's orders and therefore was in contempt. As a result, he found that no proper consideration should be given to her application until there was compliance with his orders.

21 May 2012 – Girls found

On 21 May the girls were found by police in the care of their maternal great-grandmother after raiding a property on the Sunshine Coast. At the time, the great-grandmother was recorded by police saying to one of the children: "How exciting. Who's going to play you in the movie?" She also said to the police in the presence of the children, "everyone is on their side except their father. He doesn't love them … please tell me you're not Italian – because he is a liar, and all Italians are bloody liars…".

After being found, pursuant to the order of Justice Forrest made 14 May 2012, the girls were placed with a foster carer.

22 & 25 May 2012 – High Court proceedings

In a bid to keep the girls in Australia, the maternal aunt of the girls filed an appeal application with the High Court of Australia.

Justice Kiefel, whom the matter was initially listed before, needed to rule on whether the application should proceed to a hearing before the full bench of the High Court.

In essence, the argument for the applicant was that the return order made by Justice Forrest was unconstitutional and that the girls had been denied natural procedural fairness and natural justice in not being appointed independent legal representation.

Counsel for DOCS argued the application should be thrown out on the basis that children in Family Court matters could only be heard under exceptional circumstances.

During the hearing, counsel for DOCS also advised the High Court that DOCS would provide an undertaking not to remove the children from Australia until the High Court matter was finalised. Justice Kiefel was therefore not required to make a decision on the issue of whether the girls needed to return to Italy immediately pursuant to the return order made by Justice Forrest, which was still in full effect at the time High Court proceedings were commenced.

After considering the respective parties' submissions, Justice Kiefel ordered that the matter should proceed to a hearing before the full bench of the High Court. That hearing was to take place on 7 August 2012. As a result, the girls were permitted to remain in Australia (in foster care) until at least 7 August 2012.

6 July 2012 – Hearing on living with the mother

On 6 July, an application filed by the mother in the Family Court seeking orders that the girls live with her pending the High Court proceedings being finalised, was heard by Justice Murphy. The children were still in foster care at the time of hearing.

The mother was successful in obtaining the interim order, mainly due to concerns his Honour had for the children's well-being in being separated from their mother for a prolonged period. The order was conditional on a number of undertakings provided by the mother, including but not limited to, refraining from making comments to the media and not allowing the girls to have any form of contact with the maternal grandmother, or the maternal great-grandmother.

The father, who was in Australia at the time, also sought orders that he spend time with the girls. His Honour ordered that the girls spend weekend time with their father.

7 August 2012 – High Court Hearing

The main thrust of the applicant's case was that, for the concept of natural justice to be given full weight, each person must have the right of a citizen to litigate in the courts. Counsel argued that children must have the opportunity for representation, but must not be obliged to take it. However, justices of the High Court queried the ability of a child to form a view in such cases and whether a child was of an appropriate age to form a view. Their Honours were also very concerned about placing children in the witness box, where they would in effect be an active litigant against their parents.

In a unanimous decision, the High Court dismissed the application and found the girls had suffered "no want of procedural fairness".

16 August 2012 – Further stay ordered

On 9 August 2012 the matter was again before Justice Forrest. The mother sought a discharge of the original return order made. His Honour adjourned the application for hearing to 27 September, as his Honour wanted the family consultant who had previously interviewed the girls to again interview them and provide an updated report, mainly addressing the girl's wishes as to where they wanted to live and how much weight should be placed on those wishes.

The mother also sought a stay of the return order pending the discharge application being heard on 27 September. His Honour granted the stay.

3 October 2012 – The final decision

On 27 September 2012, Justice Forrest heard submissions from all parties on the mother's discharge application. His Honour delivered his decision on 3 October 2012. This was to be the final time the matter was to come before the Family Court, or any other court in Australia.

The legal basis on which a previous return order can be discharged is found in regulation 19A of the regulations.

Regulation 19A(2) states:

> The Court may make an order discharging a return order, or a part of a return order, only if it is satisfied that:
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> (a) all the parties consent to the return order being discharged; or
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> (b) since the return order was made, circumstances have arisen that make it impracticable for the order to be carried out; or
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> (c) exceptional circumstances exist that justify the return order being discharged; or
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> (d) the day on which the application for the discharge of the return order was made is more than 1 year after the return order was made or any appeal in relation to the return order was determined.

The mother argued that she met three pre-conditions as per (2)(b) – (d) and that therefore the discharge order should be made. His Honour considered each pre-condition and the submissions made on behalf the mother and was not persuaded that any of the pre-conditions were met. In making the findings, Justice Forrest took into account the updated family report which stated that all four children strongly objected to being returned to Italy.

His Honour found that the children's wishes did not constitute an exceptional circumstance. Importantly, his Honour noted that considerable influence had been placed on the children by the maternal family and stated he was "satisfied that little restraint in respect of these matters is likely to have been demonstrated around these children and that this has impacted upon them in significant ways".

With regard to (2)(d), it was the case that the mother's application for the discharge order was made more than one year after the return order was originally made. However, after consideration of (2)(d) and its meaning, his Honour found that the relevant date to work from was the date of the delivery of the judgment of the Full Court of the Family Court – 9 March 2012. As the mother filed her application for the discharge of the return order on 16 June 2012, his Honour found that pre-condition (2)(d) was not met.

Accordingly, he was required to dismiss the application to discharge the return order. The girls therefore had to return to Italy as originally ordered.

Justice Forrest ordered that a warrant be issued authorising Australian Police to locate the girls, that the girls be returned to Italy as arranged by DOCS as soon as practicable and that a DOCS officer accompany the girls to Italy.

October 2012 – Return to Italy

As widely reported in the media, within two days of Justice Forrest delivering his final judgment on 3 October all four girls were on international flights back to Italy and have since been reunited with their father. The mother chose not to return to Italy and remains in Australia.

Whether the mother will now pursue the matter in the Italian courts remains to be seen.

Katrina Oner is an QLS Accredited Family Law Specialist and the principal of Oner Family Law. Katrina points out that she has relied heavily on the published judgments in preparing this article.