

**Australian Judicial Approaches to International  
Human Rights Conventions and "Family Law"**

An Address Presented By

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***THE CHANGING LEGAL DEFINITIONS OF FAMILY***

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## **Australian Judicial Approaches to International Human Rights Conventions and "Family Law"**

### **A. "Constituting" the Family**

Unlike South Africa, Canada and other comparable jurisdictions, Australia lacks a constitutionally entrenched domestic Bill of Rights.<sup>1</sup> This is especially problematic because the century old Constitution of the Commonwealth of Australia which established our national federation of six States,<sup>2</sup> later augmented by two self-governing Territories,<sup>3</sup> is principally concerned with power-sharing within that compact and, in my view, is unsuited to the task of providing comprehensive human rights protection to individuals, particularly in the wide range of matters that concern family life.<sup>4</sup>

In this regard, it is instructive to note that that the term "family" appears only once in our Constitution. It is the grant of legislative power in section 51(xxiiiA) to the Commonwealth Parliament to make laws with respect to the provision of *inter alia* "family allowances", (and that provision was only introduced in 1946).<sup>5</sup>

The grants of legislative power that form the "basic" national platform for family law are placitum 51(xxi) which concerns "marriage" and placitum 51(xxii) which refers to "divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of

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<sup>1</sup> M. Wilcox (1993) *An Australian Charter of Rights?* The Law Book Company, Sydney.

<sup>2</sup> Victoria, New South Wales, Queensland, Tasmania, South Australia, Western Australia.

<sup>3</sup> The Australian Capital Territory and the Northern Territory.

<sup>4</sup> I have considered the consequences of federalism in A. Nicholson (2000) 'Family Law in Australia – Bargaining in the Shadow of the Constitution' No. 55 *Family Matters*, 22.

<sup>5</sup> *Constitutional Alteration (Social Services) Act 1946* (Cth).

infants.”<sup>6</sup> As a consequence, public law disputes (those matters in which the state is a party), particularly child protection, juvenile justice and adoption proceedings are excluded from Commonwealth powers and fall to be decided under State and Territory laws by State and Territory courts.<sup>7</sup>

The same was true in respect of children whose parents had never married. Then, between 1986 and 1990, the power to make laws with respect to ex-nuptial children was referred by all States except Western Australia to the Commonwealth under placitum 51(xxxvii). As a result, the private law children’s provisions of the *Family Law Act 1975* (Cth) now applies to all children irrespective of the marital status of their parents, save for in Western Australia where there is mirroring State legislation.<sup>8</sup> Inconveniently for the families concerned, the determination of financial disputes between unmarried parents is a State or Territory matter.<sup>9</sup>

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<sup>6</sup> At the turn of the 20<sup>th</sup> century the proponents of Federalism demonstrated their enthusiasm for various aspects of the *Constitution of the United States of America*. However, they were particularly critical of that document’s failure to grant divorce powers to the Federal government, a failure which has produced the multitude of different State laws seen in the United States today. Fortunately, in Australia the efforts of the ‘Founding Fathers’ to ensure Commonwealth involvement in the areas of marriage and divorce were successful. However, having been granted these powers, the Commonwealth government appeared loathe to exercise them and (apart from some post-First and Second World War measures to protect deserted wives) did not enter the field until 1959, when the *Matrimonial Causes Act 1959* (Cth) was passed in relation to divorce, followed in 1961 by the *Marriage Act 1961* (Cth).

<sup>7</sup> For an empirical illustration of jurisdictional overlap in child protection matters see: B. Fehlberg and F. Kelly (2000) Jurisdictional Overlaps Between the Family Division of the Children’s Court of Victoria and the Family Court of Australia’ Vol 14 No 3 *Australian Journal of Family Law* 211. Refer Fam Law Council re overlap with child welfare matters

<sup>8</sup> The *Family Court Act 1997* (WA).

<sup>9</sup>The Family Court of Australia, is the product of a limited grant of jurisdiction which in turn finds its source in:

- first, the specified grants of legislative power accorded to the Federal Government by the States at the time of federation one hundred years ago;
- secondly, the manner in which past and present federal governments have spliced and twined the jurisdiction to determine controversies arising under federal laws, as between the Family Court of Australia and the other courts which exercise federal jurisdiction;
- thirdly, the Family Court of Australia’s capacity to exercise what is known as “accrued jurisdiction” was recently confirmed by a Full Court of which I was a member: *Re Warby* available at [http://www.familycourt.gov.au/judge/2001/html/warby\\_text.html](http://www.familycourt.gov.au/judge/2001/html/warby_text.html). In *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 475, Barwick CJ described the jurisdiction as follows:

The ‘Founding Fathers’, and indeed they were all men, did not recognise or envisage the diversity of forms which family life can involve. As Professor Reg Graycar has pointed out:

“... the Constitution reflects their view that most issues that affect families are not matters of national importance. For the purpose of delineating the power of the Federal Parliament to legislate, ‘family law’ was limited to marriage, divorce and related children’s issues, and in the year 2000 this is still the scope of federal family law-making power. The Constitution’s vision of the family is not only limited by subject matter: its conception of family was (and remains) anglocentric, nuclear, male-focused and heteronormative.

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Aside from excluding large proportions of the Australian community, there is another fairly obvious gap: generally speaking family law is NOT concerned with the regulation of subsisting domestic arrangements. Rather, it is concerned much more with the breakdown of those arrangements and the consequences of that.

So, in speaking of ‘family law’, we are often talking only about marriage, divorce and its consequences. There are two obvious problems with this: first, it leaves out of account the myriad of laws that regulate many aspects of our family lives and relationships, and secondly, not everyone is married (or a child of a marriage).

In a recent discussion, Professor Carol Smart illustrated the second point very effectively by noting that in the UK (and the same is true in Australia and, I imagine, numerous other countries), on most official forms, we are asked to

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“... when a court which can exercise federal jurisdiction has its jurisdiction attracted in relation to a matter, that jurisdiction extends to the resolution of the whole matter. This accrued federal jurisdiction is not limited to matters incidental to that aspect of the matter which has in the first place attracted federal jurisdiction. It extends, in my opinion, to the resolution of the whole matter between the parties. This accrued jurisdiction carries with it the authority to make such remedial orders as are necessary or convenient for or in consequence of that resolution. For this purpose, the court exercising federal jurisdiction may enforce rights which derive from a non-federal source.” (emphasis added)

While it had been settled law that the High Court of Australia and the Federal Court of Australia may exercise accrued jurisdiction, the situation of the Family Court of Australia had been the subject of longstanding debate for reasons which are explained in *Warby*.

Finally, in addition, Australia’s State and Territory Courts exercise jurisdiction in matters which fall to be decided under the laws of those jurisdictions. This might be thought to be an argument against the setting up of separate family courts but I consider that it rather points to the desirability of such courts having an extended jurisdiction in appropriate cases. This is of course the *de facto* position in the United Kingdom where there is no separate family court as such.

Prior to the High Court of Australia’s decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, the superior courts of the Commonwealth of Australia and the superior courts of the States and Territories could elect to exercise each other’s jurisdiction pursuant to a lattice of “cross-vesting legislation”. In *Re Wakim*, a majority of the High Court held that the scheme was constitutionally invalid in its purported investment of State jurisdiction in federal courts.

nominate single, married, divorced/separated or widowed. With the exception of single, these all presume heterosexuality. Moreover:

All assume that domestic arrangements gravitate around a sexual relationship rather than, for example, care and companionship. ...[T]he central organising principle of these categories is marriage and only marriage. Thus people are assumed inevitably to be in a state of pre-marriage, marriage, or post-marriage.”<sup>10</sup>

### **B. “Un – Conventional” Legal Approaches**

Our lack of adequate constitutional safeguards and Bill of Rights is all the more unsatisfactory for human rights protection because Australian law adheres to the doctrine that the act of ratifying a convention does not incorporate the convention into domestic law. As is the case in other common law countries, unless domestic law is silent or ambiguous in relation to the subject matter of a convention, then the convention has no legal relevance.<sup>11</sup>

Indeed, in Australia, successive Governments have signalled an intention to amend the law to nullify even this limited interpretative operation of conventions, although that has not yet happened.<sup>12</sup> And this approach to

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<sup>10</sup> R. Graycar (2000) 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' Vol. 24 No. 3 *Melbourne University Law Review* 737 at 738-9; the quote is from Carol Smart, "Stories of Family Life: Cohabitation, Marriage and Social Change" (2000) 17 *Canadian Journal of Family Law* 21 at 23.

<sup>11</sup> The Full Court of the Family Court of Australia in *B and B: Family Law Reform Act (1997)* FLC ¶92-755 said at para 10.2:

“Unlike the United States and continental legal systems, where the entry into treaties or conventions creates self executing law, the English and Australian position is that such treaties do not enter into domestic force unless and until there is a legislative act. In *Koowarta v Bjelke Petersen* (1982) 153 CLR 168 at 224 Mason J (as he then was) said:-

“It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia (*Chow Hung Ching v The King* (1948) 77 C.L.R 449, at p. 478; *Bradley v The Commonwealth* (1973) 128 C.L.R 557, at p. 582). In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress (*Foster v Neilson* (1829) 2 Pet.253 at p.314”.

<sup>12</sup> D. Hogan (2001) 'Teoh and Human Rights in Australia' *Australian Children's Rights News* (No, 29), 14 available at - <http://www.dci-au.org/html/acrn.html>.

limiting the current modest impact of international treaties occurs in a context where we generally lack clear and forceful domestic laws which implement relevant international covenants.

Worryingly, in the eyes of commentators such as Professor Hilary Charlesworth, our Federal Government has given the appearance of being what she has termed “Janus-faced” with respect to human rights treaties:

“The internationally-oriented face enjoys the international status it receives from being a party to the treaties; while the nationally-turned face refuses to acknowledge the domestic implications of its international obligations.”<sup>13</sup>

### **Children's Conventions**

In some family law related areas, conventions have been implemented domestically, for example, the Hague Convention on the Civil Aspects of Child Abduction. However even on this subject, it has been done in Australia by regulations, which purport to re-state the effects of the Convention and this has given rise to problems when the Regulations are silent, or when there is a possible conflict between their wording and that of the Convention.<sup>14</sup>

Another illustration may be seen in the Convention on the Rights of the Child. It was given a measure of recognition within domestic family law but here, the incorporation of convention rights was also selective and in my view therefore unsatisfactory.<sup>15</sup> Indeed in *B and B: Family Law*

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<sup>13</sup> H. Charlesworth (2000) ‘The UN and Mandatory Sentencing’, *Australian Children's Rights News* (No. 25), Defence for Children International - Australia.

<sup>14</sup> See the discussion by the Full Court of the Family Court of Australia in *Laing v The Central Authority* (1999) FLC ¶92-849. Comment re protection convention

<sup>15</sup> See *B and B: Family Law Act 1995* (1997) FLC ¶92-755 particularly pars 3.30-3.33. At pars 10.9ff, the Full Court rejected an argument by the Attorney-General that “while [the Convention]

*Reform Act 1995*,<sup>16</sup> a relocation case which *inter alia* analysed the effect of amendments which were intended to reflect Convention articles, the Full Court cited the following extract from Australia's First Report under the Convention which was submitted in December 1995:

"6. Australia does not propose to implement the Convention on the Rights of the Child by enacting the Convention as domestic law. *The general approach taken in Australia to human rights and other conventions is to ensure that domestic legislation, policies and practice comply with the convention prior to ratification.*" (p 2, emphasis added by the Full Court).

Leaving aside whether it was an overstatement to claim that compliance had been achieved prior to ratification,<sup>17</sup> the extract suggests a static view of the ongoing obligation to fulfil human rights commitments in a changing environment. The curious aversion to enacting human rights treaties through domestic law did not prevent earlier governments introducing legislation into the Parliament so as to produce dedicated statutory schemes such as the *Sex Discrimination Act 1984* (Cth) which purports to give effect to the Convention on the Elimination of Discrimination Against Women and the *Race Discrimination Act 1975* (Cth) which purports to give effect to the Convention on the Elimination of Racial Discrimination.

I think it also apposite to mention that the Concluding Observations of Committee on the Rights of the Child were critical of Australia's First Report on the implementation of the Convention over, amongst other things, our lack of community knowledge and understanding of the

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may have [provided some of the material from which the Act was drawn, it was not open to look at the Convention as a whole."

<sup>16</sup> (1997) FLC ¶92-755 at par 10.12

<sup>17</sup> See for example: The Australian Section of Defence for Children International (1996) *Australia's Promises to Children - The Alternative Report*; G. Brewer and P. Swain (1993) *Where Rights are Wronged - A Critique of Australia's Compliance with the United Nations Convention on the Rights of the Child*, National Children's Bureau of Australia, Melbourne; J. Harvey, U. Dolgopol and S. Castell-McGregor (Eds) (1993) *Implementing the U.N. Convention on the Rights of the Child*, Children's Interests Bureau, Adelaide.

Convention.<sup>18</sup> It seems to me that this criticism remains valid and is likely to continue in circumstances where a country lacks a wholesale commitment to giving effect to the entire binding treaty.

Against this backdrop, Australian courts dealing with human rights issues are heavily reliant upon the application of common law principles or statutory interpretation rather than international instruments. The attendant challenges are especially acute within the broad domain that “family law” encompasses. My presentation today focuses upon Australian court decisions that I think are instructive in different ways to the topic of this session and I conclude with some broader justice system concerns associated with the limited force of ratified treaties.

### C. *Asylum Seekers*

I would like to begin with a series of cases associated with significant recent controversy over the plight of refugees and the human rights that are supposedly protected by the 1951 United Nations Convention on the Status of Refugees. The issue is, I think, a salient illustration of how what a broader conception of family law should be appreciated to encompass

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<sup>18</sup>Available at: <http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/3d744477ea59fdaf8025653200508bb8?OpenDocument> The Committee said at pars 27 and 28

"27. The Committee recommends that awareness-raising campaigns on the Convention on the Rights of the Child be conducted, with a particular focus on its general principles and on the importance the Convention places on the role of the family. The Committee suggests that the Convention be disseminated also in languages that are used by Aboriginals and Torres Strait Islanders, and by persons from non-English-speaking backgrounds. The Committee also suggests that the rights of the child be incorporated in school curricula. It further recommends that the Convention be incorporated in the training provided to law enforcement officials, judicial personnel, teachers, social workers, care givers and medical personnel.

28. The Committee believes that there is a need for an awareness-raising campaign on the right of the child to participate and express his/her views, in line with article 12 of the Convention. The Committee suggests that special efforts be made to educate parents about the importance of children's participation, and of dialogue between parents and children. The Committee also recommends that training be carried out to enhance the ability of specialists, especially care givers and those involved in the juvenile justice system, to solicit the views of the child, and help the child express these views."



and also of the relative irrelevance of international treaties in Australian litigation. To my mind, decision-making about asylum seekers ought to be properly understood as an aspect of family law. For Australia, this is not the least because:

- refugees usually consist of families including children and young people and also of unaccompanied minors;
- in respect of unaccompanied minors, the federal Minister for Immigration is the guardian of any "non-citizen" child who enters Australia and is intended to become a permanent resident;<sup>19</sup> and
- the Commonwealth *Family Law Act* 1975 grants a statutory form of the ancient *parens patriae* jurisdiction which might be utilised in respect of asylum seekers.<sup>20</sup>

The date of the Refugee Convention is instructive. It followed the failure during the 1930s of so called civilised nations to face up to and deal with the refugee problems arising out of the rise of Naziism and the enormous refugee problem generated by the end of World War 2. It was a constructive attempt to deal with the problem, but sadly, it might be thought that the lessons that we learned then have either been forgotten or need to be re-learned.

The extent to which the full range of human rights is met for asylum seekers is clearly affected by national refugee policies. Different

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<sup>19</sup> *Immigration (Guardianship of Children) Act* 1946 (Cth). See the discussion by M. Rayner 'Political Pinballs - The Plight of Child Refugees in Australia' Walter Murdoch Lecture 31 October 2001 available at [www.dci-au.org/html/pinballs.html](http://www.dci-au.org/html/pinballs.html)

<sup>20</sup> Section 67ZC. I floated the idea of a challenge under the welfare jurisdiction to the detention of asylum seekers, particularly children, some seven years ago in A. Nicholson (19 July 1995) "Children First! The State of Young Australians" unpublished speech, available from the Chief Justice's Chambers, Family Court of Australia, p. 4; extract cited in R. Ludbrook (1995) "Young Asylum Seekers - Haven or Hell?" in R. White and C. Guerra (Eds) *Ethnic Minority Youth in Australia : Challenging the Myths*, National Clearinghouse for Youth Studies, Hobart, p. 103. I am unaware of the avenue having been tested.

countries have adopted different policies in this regard, often paying only lip service to the applicable conventions.

## **Immigration Detention**

Australia is currently adopting a "hard line" on this issue, as did Great Britain when it was responsible for the administration of Hong Kong, and I am sure you are aware that Australia has been the subject of very significant domestic and international criticism concerning its policy of mandatory incarceration of undocumented arrivals who claim asylum.<sup>21</sup>

It suffices to say that there is deep concern within Australia over the harms and deprivations experienced by children and young people in detention prompted calls for a Royal Commission.<sup>22</sup> Although this was refused by the Federal Government, the Human Rights and Equal

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<sup>21</sup> See for example: R. Manne "What if the refugees were a bit more like us?" *The Sydney Morning Herald* 7 May 2001 at: <http://www.smh.com.au/news/0105/07/text/features2.html>; R. Paddock "The "crime" of being a young refugee" *The Los Angeles Times* 5 January 2002 at: [http://www.latimes.com/news/print/edition/la-000001034jan05\\_story](http://www.latimes.com/news/print/edition/la-000001034jan05_story) and a response by the Minister for Immigration, The Hon. Philip Ruddock, is at [http://www.abc.net.au/news/politics/2002/01/item20020110065255\\_1.htm](http://www.abc.net.au/news/politics/2002/01/item20020110065255_1.htm); J. Davie "Advisor quits over Howard's asylum policy" *The Age* 23 January 2002 at: <http://www.theage.com.au/news/national/2002/01/23/FFXATEJKQWC.html>.

In one particular incident involving the Tampa, the rescuees were reported to have "thrown their children overboard". Warning shots had been fired by an Australian Navy vessel to deter the Tampa from approaching the Australian territory of Christmas Island. The allegations have recently been found to have been false and the Government's knowledge on this subject is now the subject of public controversy and also a Senate Inquiry; see for example: ABC Television *The 7:30 Report* 'Govt wrong on asylum seeker allegations', 13 February 2002 at <http://www.abc.net.au/7.30/s481361.htm>; M. Forbes "From the Adelaide Commander's mouth: it never happened" *The Age* 22 February 2002 at <http://www.theage.com.au/articles/2002/02/21/1013132465528.html>; A. Clennell and C. Skehan "I knew story was false but didn't tell PM, Reith admits" *The Sydney Morning Herald*, 22 February 2002 at <http://www.smh.com.au/news/0202/22/national/national6.html>. The characterisation of the parents by some politicians as using their children for blackmail is discussed in C. Goddard (2001) 'Can you imagine...?' No. 31 *Australian Children's Rights News*, 10. At the time the allegations were made, Dr Goddard made the point at 11:

"Yet it is equally possible that those children were thrown into the sea in the forlorn hope that they would be granted a new life. Half a million children in Iraq have died in recent years. If you and I can imagine that, then perhaps we can imagine this: "Look after these children, even if you won't look after me." Imagine the desperation of a parent at such a moment."

<sup>22</sup> For example by the National Council of Churches; see <http://www.abc.net.au/lateline/s215597.htm>.

Opportunity Commission has launched a public Inquiry under its enabling legislation<sup>23</sup> into:

“the adequacy and appropriateness of Australia’s treatment of child asylum seekers and other children who are, or have been, held in immigration detention”.<sup>24</sup>

If the Inquiry is able to translate standards into properly resourced and enforced implementation, it will make a practical difference to the quality of life of detainees. Importantly, the Inquiry’s first term of reference concerns:

“[t]he provisions made by Australia to implement its international human rights obligations regarding child asylum seekers, including unaccompanied minors.”

Such considerations do not seem to have featured in Australian litigation. A sharp example was seen in actions launched to challenge the Australian Government’s determination to prevent asylum-seekers rescued from a sinking ship from landing on Australian territory.

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<sup>23</sup> *Human Rights and Equal Opportunity Act* 1986 (Cth). The Human Rights Commissioner’s powers fall short of those which would be enjoyed by a Royal Commissioner.

<sup>24</sup> See [http://www.humanrights.gov.au/human\\_rights/index.html](http://www.humanrights.gov.au/human_rights/index.html). The terms of reference specify attention to the following matters:

- The provisions made by Australia to implement its international human rights obligations regarding child asylum seekers, including unaccompanied minors.
- The mandatory detention of child asylum seekers and other children arriving in Australia without visas, and alternatives to their detention.
- The adequacy and effectiveness of the policies, agreements, laws, rules and practices governing children in immigration detention or child asylum seekers and refugees residing in the community after a period of detention, with particular reference to:
  - The conditions under which children are detained;
  - Health, including mental health, development and disability;
  - Education;
  - Culture;
  - Guardianship issues; and
  - Security practices in detention.
- The impact of detention on the well-being and healthy development of children, including their long-term development.
- The additional measures and safeguards which may be required in detention facilities to protect the human rights and best interests of all detained children.
- The additional measures and safeguards which may be required to protect the human rights and best interests of child asylum seekers and refugees residing in the community after a period of detention.

## **The Tampa Cases**

The Norwegian vessel the MV Tampa saved 433 people from a sinking boat on 26 August 2001. Then on 3 September 2001, those people were transferred to the Australian Navy vessel the HMAS Manoora, in Australian territorial waters off Christmas Island. The Australian Government's subsequent direction that the asylum seekers be diverted away from Australia was challenged by way of the prerogative writs of *mandamus* and *habeas corpus* in the Federal Court of Australia.<sup>25</sup> If they had been allowed on shore, the *Migration Act* 1958 (Cth) would have permitted them to make a claim for asylum.

The primary Judge, North J held that the Government was acting unlawfully and ordered that the rescuees were entitled to be released and brought to the Australian mainland. On appeal, the Full Court of Federal Court held by a majority (Beaumont and French JJ; Black CJ dissenting) that the Government had acted lawfully and set aside North J's orders.<sup>26</sup>

The summary issued by the Full Court of the Federal Court following the appeal reads in part:

"2. Justice North's order was by way of habeas corpus and was granted on the basis that the Commonwealth had detained without lawful authority the people rescued by MV Tampa. The orders were made on applications by the Victorian Council of Civil Liberties Inc and by a Victorian solicitor, Mr Eric Vadarlis.

3. The Commonwealth and the Ministers concerned have appealed against his Honour's decisions. An application for an urgent hearing of the appeals was

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<sup>25</sup> *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* [2001] FCA 1297 (11 September 2001) at

<sup>26</sup> *Ruddock v Vadarlis* (2001) 183 ALR 1 at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/1329.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1329.html).

granted on Wednesday 12 September and the Full Court sat until late on the following day to hear the submissions of the parties.

4. Because of the undoubted urgency of these cases, the need for the legal questions to be resolved and for the parties to know what their positions are with the least possible delay, the members of the Court, having reached a clear view about the outcome, have decided to announce the decision of the Court today. They have decided to do so, and to make orders on the appeals, in advance of the publication of their reasons for judgment. Those reasons are lengthy and will be published tomorrow. Another factor that has persuaded the Court to take this course is that information provided to it during the hearing of the appeals suggested that HMAS Manooora is likely to arrive at Nauru today, and she may already have done so.

5. By a majority, comprising Justices Beaumont and French, the Court has determined that the appeals should be allowed and has set aside the decisions made by Justice North. The majority judges have concluded that the Commonwealth was acting within its executive power under s 61 of the Constitution in the steps it took to prevent the landing of the rescuees. The closure of the Christmas Island port was done under a statutory authority which was not challenged. The majority has also concluded that the rescuees were not detained by the Commonwealth or their freedom restricted by anything that the Commonwealth did.

6. The Chief Justice has dissented. He has taken the view that whilst the power to expel people entering Australia illegally is undoubted, it is a power that derives only from laws made by the Parliament and not from powers otherwise exercisable by the executive government. He has taken the view that since the powers provided in the Migration Act 1958 have not been relied upon, the Commonwealth government had no power to detain those rescued from the Tampa. He considers that on the facts of the case there was a detention by the Commonwealth and that since it was not justified by the powers conferred by the Parliament under the Migration Act it was not justified by law. He would therefore dismiss the appeals.

7. The appeals will therefore be allowed and the orders made by Justice North set aside. The parties will have liberty to make submissions on the question of costs.

8. The judges wish to make it plain that the Court's decision is not, and cannot be, concerned with either the policy or the merits of the Commonwealth's actions. That is a debate for other forums. The questions before the Court are questions of law."

An application for special leave to appeal was then brought to the High Court of Australia but by that time, the rescuees had been unwillingly transported to Nauru or New Zealand. The application was refused by

the Court (per Gaudron, Gummow and Hayne JJ). Gaudron J on behalf of the Court *inter alia* said:

“Upon the present application to this Court, the applicant's claim to orders compelling the Commonwealth respondents to bring the persons concerned to Australia is central. Without such an order, the applicant's other claims to relief have either been overtaken by events or would be of no practical significance.

In so far as the applicant now seeks to pursue a claim to or in the nature of habeas corpus, it is common ground that the essential claim made at trial and in the Full Court of the Federal Court, namely, the detention of the persons concerned aboard the MV Tampa can no longer be made. None of the persons concerned is now aboard either the MV Tampa or the HMAS Manoora, the vessel to which they had been transferred by the time the trial judge made his orders; all have now gone either to Nauru or to New Zealand pursuant to arrangements made with the governments of those countries.

If the persons concerned are now detained (a question about which there has been no trial) each would be detained in a foreign country subject to whatever is the law of that country touching that question. That detention, if any, was not the subject of the proceedings in the Federal Court, and, the agreement dated 10 September 2001 between the governments of Australia and Nauru notwithstanding, habeas corpus cannot now issue with respect to that detention, at least in these proceedings. Habeas corpus issues to require justification for the continued detention of a person who is in detention at the time the writ issues; it does not issue to inquire into the lawfulness of detention that is at an end.

So far as the applicant seeks mandamus, he points to no present duty, the performance of which could be compelled by that remedy.

There is a further point. If, as the applicant contends and the Commonwealth respondents deny, an agreement of the parties, made during the course of the trial before North J, obliges the parties to seek to have this Court determine whether facts which no longer exist would have warranted the issue of a writ of habeas corpus, the dispute is hypothetical. It gives rise to no matter constitutionally cognisable in a court exercising the judicial power of the Commonwealth."<sup>27</sup>

The Court made no orders as to the costs of the special leave application but did not give reasons on that issue.

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<sup>27</sup> *Vadarlis v MIMA & Ors* M93/2001 (27 November 2001) at <http://www.austlii.edu.au/au/other/hca/transcripts/2001/M93/3.html>

There is a last instalment in this saga. Following the special leave application, the successful appellants (being Ministers and Officers of the Commonwealth of Australia) then sought an order from the Full Court of the Federal Court that the Victorian Council for Civil Liberties and Mr Vadarlis pay the costs of the appeal and of the proceedings before North J.<sup>28</sup> By a different majority (Black CJ and French J; Beaumont J dissenting) the parties were ordered to each bear their own costs with majority giving weight to the fact that there was no financial gain to the initiating parties in bringing the original claims and that their legal representation had been provided free of charge. Black CJ and French J, whose views I respectfully prefer, held at paragraph 29:

"29 This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the Commonwealth to act as it did with respect to the rescued people was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist. The case is quite different in character from the predominantly environmental litigation in which may (sic) of the previous decisions concerning the impact of public interest considerations on costs awards have been made. Having regard to its character and circumstances the appropriate disposition is that there be no order as to the costs of the appeal or the application before North J."

Beaumont J was unpersuaded that there was "good reason" to depart from the general rule that the Commonwealth as wholly successful defendant should be compensated by an award of taxed costs.<sup>29</sup>

While much could be said about the reasons of the Courts, for today's purposes I would highlight only the fleeting mention which is made of

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<sup>28</sup> *Ruddock v Vadarlis* at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2001/1865.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1865.html)

<sup>29</sup> At par 73 his Honour commented "whilst the fact of pro bono representation may be important for other purposes in the administration of justice, it cannot bear upon the specific question of the allocation of costs as between the parties."

Australia's obligations under any international human rights instrument.<sup>30</sup> The most apposite may be said to be in what Beaumont J said at par 126 in what is titled a “postscript” to his reasons for judgment in the substantive appeal:

“126 Finally, it should be added that this is a municipal, and not an international, court. Even if it were, whilst customary international law imposes an obligation upon a coastal state to provide **humanitarian assistance** to vessels in distress, international law imposes no obligation upon the coastal state to **resettle** those rescued in the coastal state's territory. This accords with the principles of the Refugee Convention. By Art 33, a person who has established refugee status may not be expelled **to a territory where his life and freedom would be threatened for a Convention reason**. Again, there is no obligation on the coastal state to resettle in its own territory. Any extra-judicial assessment of Executive policy in the present circumstances should be seen in this context.” (emphasis in the original)

I do not want to be understood as being critical of the minimal attention to international human rights instruments in the judgments of these Courts; rather, they underscore the point that such instruments can safely be ignored in the determination of most legal issues under Australian law precisely because they provide little or no protection to those who would seek to rely upon them. If such instruments did hold legal force, the scope of argument and the process of determining claims would encompass issues which fall within an extended understanding of family law and the human rights associated with the enjoyment of family life.

#### **D. Domestic Violence**

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<sup>30</sup> At trial, per North J at pars 67, 79, 100; Full Court, per Beaumont J at 126 and French J at pars 199 and 203



While minds may differ, speaking for myself, I see no difficulty as a Judge in referring to the international human rights dimension to a case even where counsel have not adverted to it. The Full Court matter of *T and S* over which I presided is a useful illustration.<sup>31</sup>

This was an appeal by the Mother against orders made by Buckley J on 11 August 2000 in respect of the parties' cross applications for residence, contact and specific issues concerning the one child of the relationship, a boy aged approximately 2 years at the time of his Honour's orders. The effect of his Honour's orders was that:

- Both parents are to be jointly responsible for the long term care, welfare and development of the child;
- The Father is to have residence of the child and to be responsible for the child's day to day care, welfare and development;
- The Mother is to have specified contact with the child.

The trial hearing occupied six sitting days. The Father and the Child Representative were represented by Counsel throughout. The Mother was not represented during the first five days. At the conclusion of those five days, the hearing was adjourned for a period of approximately five weeks. On the resumed hearing, the Mother was represented by Counsel. Before the Full Court, she was represented by Senior Counsel.

A claim by the Mother of domestic violence at the hands of the Father was raised to some extent before the trial Judge. However his Honour did not accept her evidence and found much of her affidavit evidence inadmissible. The case against the Mother that his Honour eventually accepted was:

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<sup>31</sup> [http://www.familycourt.gov.au/judge/2001/html/ts\\_text.html](http://www.familycourt.gov.au/judge/2001/html/ts_text.html). An application for leave to appeal to the High Court of Australia is scheduled for 19 March 2002.

- That she had always led an erratic lifestyle
- That she had been ambivalent about her emotional attachment to the child from the time of his birth
- That she suffered what a local doctor described as a histrionic personality disorder which was debilitating and pervasive and substantially impaired her capacity to attend to all of the child's needs
- That she was prone to exaggerate and give lurid accounts of events as well as being impulsive and unpredictable
- That as a result her allegations about being a victim of domestic violence should be discounted, particularly as these accounts were contradictory and different at various times
- That her behaviour in returning to a country town to resume cohabitation with the Father was inconsistent with her expressed fear of her life in being in that country town.

A major ground of appeal advanced on the Mother's behalf was that she did not receive a fair trial and that a new trial should be ordered. The gravamen of the Mother's case as it was formulated before the Full Court was that because she was a victim of domestic violence who was unrepresented at trial, she was unable to effectively meet the case of the Father and present her own case. As a consequence thereof and because, on his Honour's view, the Mother suffered from a personality disorder it was submitted on her behalf that his Honour was thus led into making negative findings against her, and in particular against her credibility.

The Mother's appeal also contended that the Child Representative had failed in his duty to place the issues of domestic violence clearly before the Court and that the trial Judge had erred by failing to further inquire into the issue of domestic violence.

Before the Full Court, the Mother sought leave to adduce further evidence.<sup>32</sup> Such evidence consisted of affidavits sworn by the Mother and other witnesses that had appeared at the trial hearing. The mother also sought to rely on affidavits from a social worker and from a psychologist, neither of whom had given evidence at trial. Their affidavits addressed matters of family violence and its impact both generally and upon the appellant in particular.

In a joint judgment, the Full Court applied High Court of Australia authority<sup>33</sup> in deciding to admit the further evidence. We found ourselves satisfied that the further evidence as to domestic violence was credible and that, if accepted, it would have produced a different result if it had been available at trial. Given the background to the matter and the difficulties under which the Mother laboured at trial, the Full Court was of the view that it would be unreasonable to give any significance to the fact that most if not all of the evidence would have been available at trial. The matter was remitted for retrial.

An application by the Father for special leave to appeal to the High Court of Australia was refused with costs on 19 March 2002.<sup>34</sup>

### **Gender and Disability; Justice and Legal Aid**

I provided additional reasons for judgment in which the other two members of the Full Court did not join. In them, I remarked that the case

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<sup>32</sup> Pursuant to the provisions of s93A(2) of the *Family Law Act* 1975

<sup>33</sup> *CDJ v VAJ* (1998) FLC ¶92-828

<sup>34</sup> By the time this paper is delivered, the transcript of the hearing will be available at <http://www.austlii.edu.au/au/other/hca/transcripts/recent-transcripts.html> under the case name of *DJS v LJT* B95/2002 (19 March 2002).

highlights a serious problem affecting the administration of justice in family law proceedings and the fact that, as also occurs on occasion in the area of criminal law, women who have suffered serious domestic violence may be unable to present their cases unaided in family law proceedings. I went on to observe that the present legal aid system in Australia does not appear to be able to cope with these problems,<sup>35</sup> that it is not possible for the Court to provide a "level playing field" in cases such as this to self represented persons, and that the issue of providing procedural fairness creates great difficulties.

I then explained that the denial of legal aid in the circumstances seen in the case appears to infringe the practical enjoyment of rights which are meant to be assured under both the Convention on the Elimination of Discrimination Against Women 1981 and the Declaration on the Rights of Disabled Persons 1975. As a member of that Bench, it appropriate that I do not elaborate my thinking in the case beyond quoting the pertinent paragraphs of my remarks which were as follows:

“212. Again, although it was not the subject of specific argument, I consider that it is of some relevance to consider the effect of international instruments to which Australia is a party as a case such as this.

213. While treaties do not form part of domestic law unless specifically incorporated, it is apparent from the High Court's decision in Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 that regard can be had to them in circumstances where this is not excluded by the relevant domestic law. Upon this basis, I think it is appropriate to refer to two relevant instruments which Australia has committed to. The denial of legal aid in the circumstances seen in the present case appears to infringe the practical enjoyment of rights which are meant to be assured under both the Convention on the Elimination of Discrimination Against Women 1981 (CEDAW) and the Declaration on the Rights of Disabled Persons 1975 (DRDP).

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<sup>35</sup> See for example B. Clarke and H. Matthews (1999) *Trial by Legal Aid - A legal aid impact study*, Crossroads Family and domestic Violence Unit and Victorian Women's Refuges and Associated Domestic Violence Services Legal Sub-Group, Melbourne.

214. Looking first to CEDAW, I note that Article 2 sets out a broad obligation, namely:

*'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end undertake:*

...

*(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;*

*(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;''*

215. Article 15(1) enshrines the principle of women having "equality with men before the law" and provides in paragraph (2) that:

*"States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity."*

216. Family law is the specific concern of Article 16 which states *inter alia*:

*"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations..."*

217. In respect of the DRDP, I would draw attention to Article 11 which states:

*"Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account."*

218. These matters reinforce my concerns about the administration of justice in this area and I feel it appropriate to say so in the context of this case.

219. In the present case I think that the denial of legal aid or representation to a person in the circumstances of the appellant, may constitute a breach of obligations created under those instruments.

220. The "Battered Woman Syndrome" is now well-recognised internationally (see the decision of the Supreme Court of Canada in R v Lavallee [1990] 1 SCR 852) and expert evidence concerning the syndrome has been accepted "in all Australian states and territories and in a range of contexts" (see Julie Stubbs and Julia Tolmie (1999) 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' Vol. 23 No. 3 *Melbourne University Law Review* 709 at 720 and the cases cited there).

221. While there is a question of fact as to whether the Mother is such a victim, its elucidation was rendered impossible by her lack of representation in these proceedings. It is therefore difficult to see how her rights were protected as required by CEDAW Article 2(b)(c). Similarly it is difficult to see how she was given the opportunity to be equal before the law with men or that she had the same opportunities as men to exercise her legal capacity in civil proceedings, which these were.

222. I consider that her lack of representation involved discrimination against her in these proceedings that is of serious concern. No doubt the same could be said in respect of a man if the circumstances were to be reversed, but there are fewer examples of battered men in male/female relationships.

223. Finally, on any view, the Mother would fit the definition of a "disabled person" for the DRDP in that she, in his Honour's view, suffered from a histrionic personality disorder or, on the basis of an alternative assessment, suffered from a post traumatic stress disorder.

224. The joint reasons of this Court have already commented upon the Mother's difficulties in dealing with the evidence of [the local doctor] and I am of the view that in general, the Mother's lack of proper representation amounted to a breach of Article 11 of the DRDP.

225. I do not suggest that the fact that these international obligations were breached in this case is determinative of the matter, but I consider that it lends strength to this Court's conclusion that there should be a new trial.

226. Further, I am of the view that it also suggests the need for a re-think by Government and legal aid authorities as to the sort of cases in which legal aid should be granted.”

## **Media Reaction**

There is also what I consider to be a telling postscript. A media release summarising the decision was issued from the Court as is frequently done when a decision is thought to be of public interest. It attracted an opinion piece from a lawyer and journalist, Ms Janet Albrechtsen, published by a major Australian newspaper<sup>36</sup> in which I think it can be fairly said that the author levelled significant and rather offensive criticisms against:

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<sup>36</sup> J. Albrechtsen "Men deserve quid pro quo in custody legal aid" *The Sydney Morning Herald*, 13 November 2001 available at <http://www.smh.com.au/news/0111.13/opinion/opinion3.html>

- The timing of the handing down of the decision during the lead up to a federal election in circumstances where federal legal aid funding has been the subject of political comment; and
- What she interpreted as a decision that brought in a rule that legal aid will be automatically granted to women when they allege domestic violence and that this will lead to "allegations in every family law case".

Australian academic Ms Jenni Millbank provided an alternative view of the judgment which was submitted as a reply opinion piece to the newspaper but somewhat surprisingly, having regard to notions of media balance, was not published. With Ms Millbank's permission, it has been posted as an article of the website of the Family Court of Australia.<sup>37</sup>

Of Ms Albrechtsen's first significant criticism, Ms Millbank wrote:

“Perhaps most gratuitously, the author asserts that the court deliberately handed down the judgment during the lead up to a federal election in order to generate publicity. This allegation is a particularly irresponsible one for a lawyer to make for two reasons. First, it would have been unconscionable to withhold delivery of the decision because of the pending election. To have done so would not only be unfair to the parties but a deliberate transgression of the separation of powers doctrine. Secondly, Albrechtsen must or should know that her unsubstantiated allegation can't be answered by the court because they are not permitted to explain how individual judgments are decided beyond what is contained in the official record.”

As to the second significant criticism I have identified, Ms Millbank wrote:

“Albrechtsen's article seriously distorts the truth when she brands the Chief Justice as making "the headline-grabbing claim that women who allege domestic violence must receive legal aid". His judgment actually said that "[t]his case highlights the fact that, as also occurs on occasion in the area of criminal law, women who have suffered serious domestic violence may be unable to present their cases unaided in family law proceedings. The present legal aid system does not appear to be able to cope with these problems." The Chief Justice acknowledged that men can also be the victim of such violence

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<sup>37</sup> <http://www.familycourt.gov.au/papers/html/millbank2.html>.

and called for "a re-think by Government and legal aid authorities as to the sort of cases in which legal aid should be granted."

It is, perhaps, instructive for today's purposes that Ms Albrechtsen took the view that my judgment made a "headline-grabbing claim".<sup>38</sup> Let us leave aside the accuracy of her summary of my additional comments in the judgment. What is disturbingly relevant to today's topic is her seeming disapproval of reference to a widely ratified human rights treaty that deals with about half of the world's population within a family law judgment concerning family violence issues from a court within a nation state that has ratified that treaty.<sup>39</sup> Some might also think it is concerning that a judgment's consideration of the domestic obligations arising from such an instrument is characterised as sensationalist or even sensation-seeking.

I would be interested in your views on this matter but will leave my discussion of *T and S* and turn now to another area of the law where human rights and family law have converged with CEDAW as an element – applications (almost always) by a separated mother seeking permission to relocate with the children.<sup>40</sup>

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<sup>38</sup> My reference to the DRDP went unmentioned.

<sup>39</sup> In August 2000, the Commonwealth Government announced that it would not ratify the Optional Protocol.

<sup>40</sup> Kirby J in *AIF v AMS; AMS v AIF* (1999) 199 CLR 160 noted at par 140:

"Relocation cases have long presented special problems for judicial decisions concerning the custody of children. ... Two particular features of Australian society may be noted. The first is that, overwhelmingly, women constitute the residence parent to whom, in the old nomenclature, "custody" is granted. Of single parent families, the mother is reportedly the residence parent in approximately 84% of cases. Accordingly, in practical terms, court orders restraining movement of a custodial (or residence) parent ordinarily exert inhibitions on the freedom of movement of women, not men. Another feature of the Australian scene, not necessarily reflected to the same degree in other jurisdictions, is the very large proportion of the population born overseas, with family links to which a party to a marriage or relationship which has broken down may return with their child." (footnotes omitted).



### **E. Relocation of Children's Residence**

"[F]eminist commentators have pointed to the differential impacts on women of restrictions on mobility as they are the substantial majority of residence parents and relocation may be particularly important for them after the breakdown of a relationship. Feminists have also pointed out that contact parents (usually fathers) cannot (or at least will not) be restricted in their movement. In addition, international human rights law recognises a right to freedom of movement, and decisions to (in effect) restrict where a parent can live, are obviously serious."<sup>41</sup>

Relocation cases add difficult overlays to meeting the human rights of all family members after parents separate, particularly the right of contact between the child and the parent with whom the child will not reside.<sup>42</sup> Sometimes there are real risks associated with children moving to live in a country which has a significantly different legal system. Also, within a large geographical nation such as Australia, the tyranny of distance can be a significant practical problem.

Legally, relocation cases are a species of cases where a Court is asked to make parenting orders because the parents cannot come to their own arrangements; they are not a separate category of cases *per se*.<sup>43</sup> Following the amendments that were introduced by the *Family Reform Act 1995* (Cth), and which commenced on 11 June 1996, a court is required to examine the facts of a case with particular regard to three provisions that have general application to parenting cases. It will be helpful to set them out for the discussion which follows.

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<sup>41</sup> P. Easta, J. Behrens and L. Young (2000) 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' Vol 14 No 3 *Australian Journal of Family Law*, 234 at 235.

<sup>42</sup> It is established that it is the right of the child to have contact not the right of a parent: see the Full Court decision of *Brown and Pedersen* (1992) FLC ¶92-271.

<sup>43</sup> *B and B: Family Law Act 1995* (1997) FLC ¶92-755 par 9.61; *A v A: Relocation Approach* (2000) FLC ¶92-035 at par 56.

- Section 60B is a new provision which was not found prior to the amending Act.<sup>44</sup> It sets out the object of the part of the *Family Law Act* 1975 (Cth) dealing with parenting orders, including orders as to the residence of a child, and sets out the principles underlying the Part:

"60B(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

60B(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children. "

- Section 65E expresses the well known paramountcy principle using the phraseology of "best interests" whereas the provision it replaced spoke in terms of the "welfare" of the child.<sup>45</sup>

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<sup>44</sup> In (1997) FLC ¶92-755, the Full Court observed at par 3.28

"The Reform Act employed a new form of drafting which is different from that found previously in the Family Law Act or related legislation. In an apparent effort to ensure that its philosophy is explicit, s 60B(1) is expressed to provide an object, and s 60B(2) sets out four principles underlying that object. Section 60B(2)(a) and (b) reflect articles from UNCROC [the United Nations Convention on the Rights of the Child], while s 60B(2)(c) and (d) provide what may be described as exhortations to those caring for children to act in a manner which is consistent with those children's best interests.

The inclusion of the proviso in section 60B(2), that these are rights "except when it is or would be contrary to the child's best interests", is discussed by the Full Court in *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755 at pars 3.28ff, particularly 3.33; see also S. Armstrong (2001) 'We told you so... Women's legal groups and the Family Law Reform Act 1995' Vol 15 No 2 *Australian Journal of Family Law*, 129.

<sup>45</sup> At par 3.35, the Full Court in *B and B* commented:

"The Explanatory Memorandum to the Bill indicated that the intention was that the substantive law remained unchanged, despite the change in phraseology, although the wording in that memorandum - "the change is not intended to invoke the presumption that a change in wording must mean that a different concept was intended. The term 'best interests' is used as a more appropriate description in accordance with the advice of the Family Law Council" - is perhaps not as clear as might be wished."

"65E In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

- Section 68 was modified by the *Family Law Reform Act 1995 (Cth)* to incorporate a consistent reference to best interests, and the list of factors which must be considered was augmented to include pars 68F(2)(d),(f),(g),(i) and (j) as they appear below:

"68F(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

68F(2) The court must consider:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  - (i) either of his or her parents; or
  - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
  - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
  - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

68F(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

68F(4) In paragraph (2)(f):

**Aboriginal peoples** means the peoples of the Aboriginal race of Australia;

**Torres Strait Islanders** means the descendants of the indigenous inhabitants of the Torres Strait Islands."

The leading Australian judgment on applications to relocate the residence of a child is the High Court's 1999 decision in *AIF v AMS; AMS v AIF*.<sup>46</sup> For reasons that are unnecessary to elaborate here, the case concerned the State legislation of Western Australia, the *Family Court Act 1975 (WA)* which relevantly mirrored the *Family Law Act 1975 (Cth)* prior to the *Family Law Reform Act 1995 (Cth)*.

Their Honours there held that a court must regard the welfare/ best interests of the child as the paramount but not sole consideration in determining these applications.<sup>47</sup> Thus, a court must apply the statutory direction in the Commonwealth *Family Law Act 1975* to treat the child's best interests as paramount and also take account of the rights of others.

In this regard, the main legal argument that has advanced by the "moving" party has been her mobility rights as understood with reference to two legal platforms:

- section 92 of the Commonwealth *Constitution*,<sup>48</sup> and,

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<sup>46</sup> (1999) 199 CLR 160.

<sup>47</sup> *AIF v AMS; AMS v AIF* (1999) 199 CLR 160. For a comparison with the approaches found in Canada, and the United States of America see M. May (2001) 'Children on the Move: Relocation cases: 2001' at [www.familycourt.gov.au/papers/html/may.html](http://www.familycourt.gov.au/papers/html/may.html)

<sup>48</sup> 'Section 92 guarantees that "trade, commerce, and intercourse among the States ... shall be absolutely free." The first issue that arises is whether "intercourse" includes moving one's place of residence from one State to another. It is not in doubt that, in s 92, "intercourse" includes passage

- more relevantly for today's purposes, the International Covenant on Civil and Political Rights and CEDAW.

The arguments were agitated both prior to and then in the High Court's decision and I turn now to how they were treated.

### **B and B: Family Law Reform Act 1995**

This appeal case over which I presided concerned an application to relocate the residence of the children from one end of Australia (Queensland) to the other (Victoria). While the factual circumstances were unexceptional, *B and B: Family Law Reform Act 1995* became a landmark case because of its timing. The 1997 decision of *B and B* was the first time that the Full Court of the Family Court of Australia was required to consider the impact of the *Family Law Reform Act 1995* (Cth) and the relevance of *inter alia* international instruments.

As to the inter-relationship of the provisions, the gravamen of the Full Court's holding may be said to be found in pars 9.53 and 9.54 of *B and B*:

"9.53 The wording of s 68F(2) makes that clear the Court "*must* consider" the various matters set out in (a)-(l) of that sub-section. That sub-section sets out a list of matters which the Court is required to consider to the extent that they are relevant to the particular case. The weight which is attached to any one consideration will depend upon the circumstances of the individual case and is a discretionary exercise by the trial Judge. The list is similar to the list contained in previous legislation but with the additions previously referred to. The list is not intended to be exhaustive. That is made clear by par (l) "any other fact or circumstance that the court thinks is relevant" . This simply underlines the circumstance that the facts in individual cases may vary almost infinitely, that the inquiry is a positive one tailored to the best interests of the particular children and not children in general, and that the Court is required to take into account all factors which it perceives to be of importance in determining that issue.

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across State borders. There is no reason, in point of principle, to distinguish between passage for limited or temporary purposes and passage for more permanent reasons, including to take up residence in another State.' Per Kirby J in *AIF v AMS; AMS v AIF* (1999) 199 CLR 160 at par 97.

9.54 Section 60B is important in this exercise as it represents a deliberate statement by the legislature of the object and principles which the Court is to apply in proceedings [concerning children] under Part VII. The section is subject to s 65E. Nor does it purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests. The object contained in sub-section (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases. The principles contained in sub-section (2) are more specific but not exhaustive and their importance will vary from case to case. They provide guidance to the Court's consideration of the matters in s 68F(2) and to the overall requirement of s 65E. The matters in s 68F(2) are to be considered in the context of the matters in s 60B which are relevant in that case. But s 65E defines the essential issue."

The Full Court later turned to the issue of the effect of CEDAW and the ICCPR saying:

"10.29 Also under consideration before us were several other human rights instruments, namely: -

- the International Covenant on Civil and Political Rights (ICCPR) which is a declared instrument under the Human Rights and Equal Opportunity Commission Act and appears as a schedule to it; and
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which appears as a schedule to the Sex Discrimination Act 1984 which in s 48 confers certain functions and powers of scrutiny upon the Human Rights and Equal Opportunity Commission.

10.30 In this appeal the former was relied upon both by the Commission and the wife, and the latter by the wife, in support of the recognition of the rights of freedom of movement and the protection of women against unequal treatment. Reliance upon these instruments proceeded on the basis that the relevant provisions had not been specifically incorporated into domestic law but were scheduled to domestic law.

10.31 Mr Rose, for the Commission, submitted that domestic law recognises a general right to freedom of movement. We have already summarised his submissions on these issues in Section 6(d) and need not repeat them.

10.32 He also pointed out that s 3 of the Human Rights and Equal Opportunity Commission Act, which is an interpretation provision, states, *inter alia*, that unless a contrary intention appears, for the purposes of the Act:-

**"human rights'** means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument; "

10.33 Section 3 also provides that:-

**"Covenant'** means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2, as that

International Covenant applies in relation to Australia; "

10.34 From this footing, Mr Rose submitted that the Court should read s 60B on the basis that it is a common law rule of statutory interpretation that a court is to interpret statutes in light of a rebuttable presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms [*Re Bolton; Ex parte Beane (1987) 162 CLR 514 at 523* and *Nationwide News Pty. Ltd. v Wills (1992) 177 CLR 1 at 43*] of which freedom of movement is one such right and freedom. He also referred to *Mabo's case*, *supra*, at 42 in support of an argument that the ICCPR, having entered into force in Australia, is a legitimate and important influence on the development of the common law.

10.35 Mr Rose accepted that the best interests of children remain the paramount consideration in cases such as the present one. The point of these submissions was to buttress the Commission's argument against suggestions that parental wishes, circumstances or actions as they relate to relocation ought not form part of the consideration of what is in the children's best interests because of the changes effected by the Reform Act. He submitted that as a fundamental human right, freedom of movement had not been abrogated by the changes to the Act and ought to be given recognition and appropriate weight in determining the question of what will be in the children's best interests.

10.36 In addition to adopting the Commission's submissions, Ms Pagani, for the wife, submitted that, in taking account of the right to freedom of movement in its interpretation of s 60B, the Court should also have regard to CEDAW. Her submission identified that CEDAW reiterates the freedom to choose the place of residence and domicile [article 15(4)] and rights associated with marriage [article 16] and enjoins States Parties to act equally as between men and women.

10.37 Against this backdrop, Ms Pagani urged the Court to take judicial notice, in the sense discussed by this Court in *Mitchell's case*, *supra*, of the economic and social consequences upon women generally which may flow from preventing their relocation.

10.38 In *Mitchell* at 81,997-81,998, after discussing the Canadian decision of *Moge v Moge*, *supra*, the Full Court said:-

"Australia has a body of research indicating that mothers who are the primary carers of dependent children inevitably drop out of the paid workforce and consequently suffer financial deprivation which is exacerbated by marriage breakdown: see the Australian Institute Of Family Studies publications, McDonald (Ed.) (1986) *Settling Up : Property and Income Distribution as Divorce in Australia* ; Funder Harrison and Weston (1993) *Settling Down : Pathways of Parents After Divorce* . In our view there are significant advantages to the Court being able to take judicial notice of research concerning the economic consequence of marriage and its dissolution.

We also agree with the caution contained in *Moge* against judicial notice being perceived as a substitute for evidence in the particular case. In this regard, we note that in *Patsalou and Patsalou (1994) FLC ¶ 92-580*, the Full Court approved of the trial Judge making reference

in her reasons for judgment to relevant literature - in that case, on the subject of the effect of inter-spousal violence upon children. The Full Court rejected a complaint that the parties should have been invited to make submissions on this body of research. As we see it, the trial Judge in that case effectively took judicial notice of the research as a form of "background information" within which to then construe the evidence on the record. We recommend a similar approach in spousal maintenance cases. "

10.39 As to the content of the judicial notice to be taken in a case such as this, as we previously pointed out, Ms Pagani drew upon the factum submitted by the Women's Legal Education and Action Fund in Canada for submission to the Supreme Court of Canada in the appeal of *Gordon and Goertz*, *supra*, and which we briefly summarised in Section 6(b).

10.40 While it is only the last two of those matters referred to there which are relevant in the present appeal, the others may arise where relocation is motivated by employment considerations.

10.41 In the end result, the submission for the wife, as we understand it, was not that any individual right to freedom of movement held by a parent prevails over the best interests of the children or that the taking judicial notice of the matters referred to above should result in any presumption in favour of relocation for caregiving mothers.

10.42 Rather, Ms Pagani said that the best interests principle is the overarching principle, but that when the best interests of children are being considered, the fundamental rights and freedoms of the parents, and the consequences of denying those freedoms, must be appreciated having regard to the gendered differences in the social and economic consequences of caregiving which we referred to and the background information of which, she submitted, the Court should take judicial notice.

10.43 There can be little doubt that a general right of freedom of movement is a right recognised by Australian law, but in proceedings under Part VII it is a right that cannot prevail over what is considered to be in the best interests of the children in a particular case.

10.44 The rights of women to live their lives free of discrimination would appear to be similarly recognised, and a doctrinaire approach to the question of relocation may, in practice in some cases, for the reasons argued by Ms Pagani, have the effect of discriminating against women.

10.45 Further, we think that the economic factors referred to by her as affecting women who are the sole caregivers of children are also relevant and should not be overlooked by a court when considering a child's best interests.

10.46 Nevertheless the essential point is that the question must always come back to the best interests of the particular child in each case, and rights of the type discussed above must give way to those best interests."



The relevance of international instruments was also raised in argument before the High Court in *AIF v AMS; AMS v AIF*.<sup>49</sup> None of the seven of the Justices considered that reliance on such instruments advanced the mother's case for permission to relocate the residence of the child. Kirby J's reasons were I think, with respect, the most detailed on this point. His Honour said:

"166. The mother argued that, because an ambiguity arose concerning the exercise of a discretion by reference to the paramount consideration of the welfare of the child which nonetheless also affected the rights of other members of the child's family, it was permissible to have recourse to applicable principles of international law for the purpose of determining how the statutory powers should be exercised. Upon this footing, the mother invoked several international instruments to which Australia is a party. She did so to advance her argument that her right to freedom of movement was an important one which the law should, wherever possible, uphold and protect.

167. The mother's arguments, in this regard, did not pay sufficient attention to the United Nations *Convention on the Rights of the Child*. Although not reflected in the provisions of FCA 1975 [the Western Australian *Family Court Act* 1975] at the time of the proceedings between the parties, that Convention includes articles obliging States Parties to ensure that, where the child's parents are separated, the child's right to "maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests" shall be respected.

168. I would certainly hold that a judge, exercising jurisdiction of the kind invoked here, may properly inform himself or herself of the general principles of relevant international law. This is especially so where those principles are stated in international human rights instruments to which Australia is a party. However, the difficulty in the present case is that any such consideration would not take the judge very far. Certainly, it would not assist in the discharge of the functions assigned by local law, such as FCA 1975. In a sense, the international conventions relevant to this subject merely express the sometimes conflicting principles which are already reflected in Australian law and court decisions: a general recognition of the importance of freedom of movement; an appreciation of the tendency of orders restraining the movement of custodial parents to fall unequally on women; and an acknowledgment that the right of access to the non-custodial parent is not only valuable to that parent but is an important right of the child concerned, to be upheld for that reason in all but exceptional circumstances.

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<sup>49</sup> (1999) 199 CLR 160.

169. Knowledge of the principles of international law may be useful where the amendment of Australia's family law has occurred in ways to bring it into conformity with international law. Awareness of international law may also sometimes assist a judge to exercise the applicable statutory powers in a way conformable with basic principle, given the high measure of compatibility which usually exists between the common law of Australia and international statements of fundamental human rights. But save to the extent that the international principles invoked by each party help to put their controversies into a conceptual context and express the basic values which must be taken into account, I do not consider that examination of the international instruments, or the jurisprudence which has gathered around them, assists to resolve the problems faced here. International law merely reflects, and repeats, the considerations which give rise to those problems. In this case, it does not throw much light on how they should be resolved."

Following the High Court's decision concerning the Western Australian legislation in force at the time, a number of differently constituted Full Courts sought to explain how *AIF v AMS; AMS v AIF* should be viewed in light of the sections 60B, 65E and 68F introduced by the *Family Law Reform Act 1995*.<sup>50</sup> In an attempt to provide some consistency, *A v A: Relocation Approach* established a guideline judgment for decision-making in relocation cases.

### ***A v A: Relocation Approach***

In *A v A: Relocation Approach*<sup>51</sup> and *H and E*<sup>52</sup> a Full Court over which I presided heard the two cases in the same sittings and asked counsel in both cases to distill the *ratio* and *obiter dicta* from *AIF v AMS; AMS v AIF* and to consider any ways in which *B and B* and the Full Court decisions subsequent to *AIF v AMS; AMS v AIF* were congruent or incongruent with the new High Court authority.

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<sup>50</sup> *Martin v Matruglio* (1999) FLC ¶92-876; *Paskandy v Paskandy* (1999) FLC ¶92-878; *SMG and RAM* (2000) FLC ¶93-020.

<sup>51</sup>(2000) FLC ¶93-035.

<sup>52</sup>(2000) FLC ¶93-036.

The reasons we provided explicitly laid down a guideline approach to relocation cases, both as to law and also as to the way in which a decision should be structured. At paragraph 108, the Court summarised the correct approach in the following way:

"Courts of first instance faced with cases involving a proposal to relocate the residence of a child should adopt the following guidance and should be able to expect that cases are presented in a way which addresses the following matters to the extent that they arise:

In determining a parenting case that involves a proposal to relocate the residence of a child either within Australia or overseas, the following principles apply:

- The welfare or best interests of the child, as the case may be under the relevant legislation remains the paramount consideration but it is not the sole consideration.
- A court cannot require the applicant for the child's relocation to demonstrate "compelling reasons" for the relocation of a child's residence contrary to the proposition that the welfare of the child would be better promoted by maintenance of the existing circumstances:
- It is necessary for a court to evaluate each of the proposals advanced by the parties.
- A court cannot proceed to determine the issues in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no dissection of the case into discrete issues, namely a primary issue as to who should have residence and a further or separate issue as to whether the relocation should be 'permitted'."
- The evaluation of the competing proposals (properly identified) must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests.
- It is necessary to follow the legislative directions espoused in s.60B and s.68F of the Family Law Act (Cth) 1975. The wording of s.68F(2) makes clear that the Court must consider the various matters set out in (a) – (l) of that subsection.

- The object and principles of s60B provide guidance to a court's obligation to consider the matters in s68F(2) that arise in the context of the particular case.
- It is to be expected that reasons for decision will display three stages of analysis and:
  1. A court will identify the relevant competing proposals;
  2. For each relevant s68F(2) factor, a court will set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the Court thinks fit having regard to s60B;
    - As one, but only one, of the matters considered under s68F(2), the reasons for the proposed relocation as they bear upon the child's best interests will be weighed with the other matters that are raised in the case, rather than treated as a separate issue. Paragraph 9.63 of *B and B: Family Law Reform Act 1995* is no longer an accurate statement of the law.
    - The ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way.
    - Even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child's contact with, and access to, the other parent.
  3. On the basis of the prior steps of analysis, a court will determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount but not sole consideration.
- The process of evaluating the proposals must have regard to the following issues:
  - a) None of the parties bears an onus:
    - In determining a parenting case that involves a proposal to relocate the residence of a child, neither the applicant nor the respondent bear the onus to establish that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child. That decision must be made having regard to the whole of the evidence relevant to the best interests of the child.
  - b) The importance of a party's right to freedom of movement:

- In determining a parenting case that involves a proposal to relocate the residence of a child, care must be taken by a court to ensure that where applicable, it frames orders which in both form and substance are congruent with a party's rights under s92 of the *Constitution*, where applicable.
  - In determining a parenting case that involves a proposal to relocate the residence of a child and in deciding what is in the best interests of the child, the court must consider the arrangements that each parent proposes for the child to maintain contact with the other and, if necessary, devise a regime which would adequately fulfil the child's rights to regular contact with a parent no longer living permanently in close physical proximity. If the Court is not satisfied that suitable arrangements have been made for the child to have contact with the other parent, it may be necessary for the Court to order a regime which would best meet the right of the child to know and have physical contact with both its parents.
- c) Matters of weight should be explained:
- In determining a parenting case that involves a proposal to relocate the residence of a child, a court must consider all the relevant matters referred to in ss60B and 68F(2) and then indicate to which of those matters it has attached greater significance and how those relevant matters balance out.
  - In a parenting case that involves a proposal to relocate the residence of a child, no single factor should determine the issue of which proposal is preferred by a court."

Again, as a member of that Bench, I am constrained in the comments I may make on the decision. For today's purposes, I would only highlight the following three points.

### **Some Implications**

First, consistent with the lack of legal relevance accorded by the High Court in *AIF v AMS; AMS v AIF* to CEDAW and the ICCPR to relocation applications, such instruments do not feature as a consideration in *A v A*. The protection of a person's freedom of movement is founded on section 92 of the *Constitution* which must be considered in the framing of orders which must be in the best interests of the child. The freedom of

movement right of the applicant for relocation is subordinated to the best interests of the child and orders permitting relocation of the child are granted only where those best interests are met by giving effect to the applicant's right. Interestingly, and the point has not arisen yet, mobility rights conferred by section 92 of the *Constitution* only guarantee the freedom to move within Australia. Whether this has any practical implication for international relocation cases is yet to be decided. Kirby J's comments on the issue of international relocation in *AIF v AMS; AMS v AIF* did not advert to the issue. His Honour said at par 147:

"147. ... in evaluating disputes concerning an expressed desire of a custodial (or residence) parent to relocate the residence at which the child will reside in circumstances which necessarily diminish the opportunities of the other parent to have access to, and contact with, the child, courts have suggested, rightly in my view, that a more relaxed attitude should be adopted to relocation within Australia than relocation overseas. This approach is connected with the ready availability of reliable transport and telecommunications, social and cultural factors, the absence of many dangers which exist in other parts of the world and notions of national community. But even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child's contact with, and access to, the other parent. Proof that the custodial (or residence) parent has remarried and wishes to join a new spouse overseas; wishes to return to a supportive family in the land of origin, or has a well thought out and reasonable plan of migration may suffice to convince the court having jurisdiction over the child, that the best interests of the child favour continuance of the custodial (or residence) arrangement in another jurisdiction but with different orders as to access and contact." (footnotes omitted).

In *A v A*, the Full Court remarked of this paragraph:

"95. We respectfully agree with the approach suggested by his Honour, adding only that the opportunities for contact will be a question of fact in the particular case."

This brings me to the second point I would wish to make - that notwithstanding the lack of relevance of CEDAW *per se* to relocation applications, I would suggest that the approach which is to be taken to the

facts is now more consistent with CEDAW than had previously been the case.

In *Holmes and Holmes*,<sup>53</sup> the Full Court set out what came to be known as a three tiered test which required attention to the following issues:

- "1. Is the application to remove the children from their previous environment made bona fide? We have already referred to aspects of this. If it is not, then that would usually be the end of the application.
  2. If it is bona fide, can the Court be reasonably satisfied that the custodian will comply with orders for access and other orders made to ensure the continuance of the relationship between the children and the non-custodian? If the Court is not satisfied about this, this would be a weighty, although not decisive, matter against the success of the application.
  3. The general effect upon the welfare of the children in granting or refusing the application. Such a consideration would include reference to the effect on the children of deprivation of, or diminution of, access and general association with the non-custodian and his family, and any disadvantages to the welfare of the children in the proposed new environment in isolation or in comparison with the previous environment. (see *Kuebler (supra)* at pp.77,205-77,206.)
- In this context the genuine wishes of an unchallenged custodian is an important consideration. That is so partly because the unhappiness of the custodian is likely to impinge upon the happiness and welfare of members of that person's household, and partly for reasons that are expressed in a number of cases including the well known passage in the judgment of *Sachs LJ in P v. P* (1970) 3 All ER 659 at p.662: ..."

The Full Court in *B and B: Family Law Reform Act 1995* did not disturb the authority of *Holmes*. It said at paragraph 9.63:

"It is important for the court to consider whether the reasons to relocate are genuine, whether they are optional or whether they are seen as important or essential for the orderly life of that parent. The three-tiered test in relation to this referred to in *Holmes* above, remains a valid guide to these aspects."

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<sup>53</sup>(1988) FLC ¶91-918

The more recent authorities disapprove of placing an onus of the applicant to demonstrate "compelling reasons" for the proposed relocation and of a focus on the reasons themselves. The Full Court in *A v A* explained the shift in approach as follows:

"85. The remarks in *B and B: Family Law Reform Act 1995* (supra) regarding the "reasons" or "*bona fides*" of relocating the child require some reconsideration in light of *AMS v AIF; AIF v AMS* (supra). It is beyond doubt that the party advancing the relocation proposal is not required to demonstrate "compelling reasons" (save perhaps for where the new location is found to present dangers to the child – Kirby J at paragraph 192). That leaves, however, the question of how a court should take account of the reasons or "*bona fides*" of the party seeking the relocation in other circumstances.

86. Kirby J touched on the issue at paras 188 and 189 of *AMS v AIF; AIF v AMS* (supra). He there cautioned that consideration of the *bona fides* of the parent proposing relocation "*may divert attention from the child's welfare, to the competing needs and demands of the parents in conflict*". Referring to the Full Court decision of *Holmes and Holmes* (supra) at 76,663 and its treatment of the matter of *bona fides*, his Honour said he was "*unpersuaded that it is relevant of itself*". A similar view is to be found in *Paskandy v Paskandy* (supra) (see paras 63-64) and in *SMG and RAM* (supra) at paragraph 64.

87. We think it appropriate to recall that paragraph (1) of s68F(2) affords consideration of "*any other fact or circumstance that the court thinks is relevant*". Consistent with the purpose of the subsection, we would read this sentence as "*any other fact or circumstance that the court thinks is relevant in determining what is in the child's best interests*". This reading accords with what the Full Court in *K v Z* (1997) FLC ¶92-783 said of s68F(2)(1) at paragraph 7.9:

"7.9 *In every case concerning the best interests of children it is essential that the trial Judge remain focussed entirely on the primary directive of the legislation which is "what is best for the child the subject matter of the litigation?" S 68F(2) specifies matters that the Judge must consider. The list is only exhaustive in the sense that it contains a catch-all clause in sub-clause (1). Some most significant factors which are not spelt out specifically in s 68F(2) include the child's happiness and contentment. If both parents offer reasonable homes for a child with comparable standards of excellent child care, then the child's level of contentment and happiness in one household as compared with that in the other must become a most significant, and almost determinate factor in deciding with which parent the child should live. The Court should avoid the spectre of placing or leaving a*



*child in a situation of sadness and continued unhappiness where it is able to so do consistently with otherwise meeting the "best interests" criteria."*

88. It therefore seems to us that the appropriate point at which to consider disputed facts and arguments as to the reasons for the proposed relocation lies in s68F(2)(1) if such matters have not been advanced as relevant to another paragraph of s68F(2) or seen by the Court as such. In light of *AMS v AIF; AIF v AMS* (supra) it is also our view that **the reasons for the proposed relocation should only feature in the trial and in the judgment to the extent of their impact, if any, upon the child's best interests.**" (emphasis added)

We went on to hold as follows (at par 89)

**"As one, but only one, of the matters considered under s68F(2), the reasons for the proposed relocation as they bear upon the child's best interests will be weighed with the other matters that are raised in the case, rather than treated as a separate issue. Paragraph 9.63 of *B and B: Family Law Reform Act 1995* is no longer an accurate statement of the law. "** (emphasis in original)

Thus, an approach which created a legal and evidentiary burden on the party seeking to relocate with the child has been discarded. In a social context where the bulk of applicants are mothers, this may be seen as a significant correction, consistent with the spirit of CEDAW, to an approach which, in effect, had gender-biased consequences that disadvantaged women. Correctly understood, it is also a deterrent to relocation cases becoming a vehicle for free-standing inquiries into the reasons and motives for a proposed relocation. Avoiding such interrogation is especially important when the respondent to the application is a litigant in person

The third and final point to highlight about the Australian approach to relocation applications is a practical one about the guideline nature of the *A v A* decision. It is prescriptive in its expectation that courts of first instance will record and weigh the evidence and submissions in a

structured format of reasons for decision. Importantly, there is also an expectation that cases are presented to a court in a way which addresses the key issues to the extent that they arise.

In a recent conference paper, my colleague, the Honourable Justice Michelle May commented on *A v A* as follows:

"From the perspective of a trial Judge who, on a regular basis, is faced with the task of determining relocation matters, I believe that whilst the Australian approach is a very thorough and comprehensive one, it ignores the practical reality of time constraints which all members of the Bench are already burdened with in this jurisdiction.

The demands of extensive guidelines, and steps to be followed in a relocation case have not simplified the task of a trial judge and are particularly burdensome on the Court's already limited time. They can only generate further delay for the Family Court's endless list of litigants.

Whilst judges are spending long periods of time in determining and providing detailed reasons, more of the Court's limited financial resources are being directed to these types of cases.

The Full Court of the Family Court of Australia's recent guidance regarding the resolution of relocation disputes in *A v A: Relocation Approach*, whether the desire to relocate is domestic or international, can be contrasted with the approaches other countries have pursued. Largely, we are all on the same track. There can be no doubt that the decision of *A v A* very carefully explains the intellectual process behind such decisions. As a matter of style, I would suggest the less cluttered approach adopted in England will usually lead to the same result, retaining, of course, the principle of the best interests of the child.

There can be no challenge to the first four dot points of the summary of *A v A*. It is the remaining requirements which demand an onerous and unnecessarily lengthy decision producing no better result from some of us than a first year university paper. No doubt that was not the intention. In particular, the requirement that the submissions must be set out is not understood. It is essential for practitioners and Judges to understand what principles must be followed to do our best work."

One would not cavil with the need to strike a balance between efficiency and transparency of decision-making in the high volume and also highly discretionary field of children's cases. However, it might be said that

May J's comments overestimate the burdens associated with the requirements introduced by *A v A* following the High Court's dicta concerning the setting out and evaluation of the proposals. The Full Court in *A v A* said at par 74:

"In our view, the use of a structured series of analytical steps is an aid to the decision-making transparency and minimises the risks of a court falling into appellable error of the kind discussed in *AMS v AIF; AIF v AMS* (supra). In weighing the advantages and disadvantages of the proposal, we agree with the recent observations made by a differently constituted Full Court in *Findlay and Boniface* [2000] FamCA 676 (unreported). In dismissing a ground of appeal that challenged the adequacy and clarity of the steps taken by a trial Judge in reaching her decision in a parenting order case, the Full Court said at paragraph 109:

*"Her Honour's obligation was not to laboriously and exhaustively set out each and every advantage and disadvantage which she saw in each proposal put forward by the parties for the residence of/contact with their child. Her obligation was to deduce, from the evidence, and from her assessment of the parties and their witnesses, the essence of their competing proposals, and to decide, having considered the relevant matters referred to in s 68F(2) of the Act, which of those proposals would be more likely to advance the child's best interests, which she was required to regard as the paramount consideration. Her further obligation was to give adequate reasons to enable the parties, and any appellate court called upon to review her decision, to understand how she arrived at her decision and to demonstrate that in arriving at it she did indeed regard the child's best interests as paramount and did consider the relevant matters arising under s 68F(2)."*

While it may be true for all highly discretionary decisions about children, I think it is appropriate that the very serious implications of children's relocation strike the balance between efficiency and transparency in a way that favours the latter in a reasonable way. Often, there is the practical consideration that the moving party is anxious to join a new partner, commence new employment or meet the timing of the school year. Appeals (which in children's cases may be brought as a matter of right to the Full Court of the Family Court of Australia) can be very disruptive to the best interests of the children and it would be hoped that a

thorough exposition of the reasons for granting or refusing the application will deter spurious appeals.

It must also be noted that the latitude of discretion afforded to a trial judge in family law proceedings is very wide. In the context of a relocation case, the following remarks of Kirby J in *AIF v AMS; AMS v AIF* at par 150 were adopted by the Full Court in *A v A*:

"...an appellate court, invited to review the exercise of discretion at first instance will avoid an overly critical, or pernicky, analysis of the primary judge's reasons, given the large element of judgment, discretion and intuition which is involved. Only if a material error of the kind warranting disturbance of a discretionary decision is established is the appellate court authorised to set aside the primary decision, to substitute its own exercise of discretion or to require that it be re-exercised on a retrial." (footnote omitted)

### **F. Conclusion**

This paper has sought to highlight some differing judicial approaches to international human rights treaties by Australian Courts. In none of the three family law related contexts I have selected to discuss were such conventions part of the *ratio* of the decisions; at best the instruments were supportive of conclusions reached under municipal law. This is legally correct in circumstances where no automatic domestic effect is given to international conventions in Australia (and also other common law jurisdictions) but I question whether the interests of justice are handicapped as a result. My concern extends beyond the ability of courts to promote human rights outcomes in individual cases.

Where there is no domestic implementation, countries can posture as supporters of human rights while effectively ignoring them so far as executive decisions and their internal legislation is concerned. It is also unsatisfactory that countries can be selective about the human rights which they incorporate for practical purposes thereby detracting from the holistic intended impact of the instruments from which those rights are drawn.

I therefore consider that the effect of these legal doctrines should be abrogated and that countries should truly commit themselves to the international conventions to which they are parties. In the absence of a self-executing approach, the whole movement to protect human rights is endangered by the ease with which the countries that pay scant regard to human rights can excuse their more extreme actions by means of comparison with the actions of countries that normally do respect human rights, but may find it expedient not to do so in particular circumstances.

This was a matter that I raised at World Congress on Family Law and the Rights of Youth held in September last year at Bath and I was pleased that the following resolution, albeit limited to one particular convention, was passed by consensus:

**"2. The United Nations Convention on the Rights of the Child**

This Congress urges all States Parties to the United Nations Convention on the Rights of the Child to take, as soon as practicable, all steps necessary according to their constitutional requirements to incorporate or otherwise give effect to, the provisions of that convention as part of their domestic law."<sup>54</sup>

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<sup>54</sup> All the congress resolutions are available at [www.lawrights.asn.au/html/resolutions.htm](http://www.lawrights.asn.au/html/resolutions.htm)

Finally, for an educational event such as today's, it is perhaps appropriate that I finish with what may be seen as a pedagogical concern that flows from the marginal legal importance of international human rights instruments in Australia. Speaking in generalities, I think it is troubling that compared with practitioners who are accustomed to domestic cases involving United Nations' and regional treaties, our lawyers have less need to incorporate an international human rights dimension to their analysis of cases and thus have less experience with them. An entire field of international jurisprudence is diminished in practical importance. This limitation inevitably affects the whole Australian justice system, including courts, and presents worrying risks of stagnation in the broad and dynamic domain of what should be understood as "family law".