IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 2004/2012

In the matter between

THE FAMILY ADVOCATE Applicant

and

G C R Respondent

In re: The minor children, J W R and G J R

JUDGMENT

REVELAS J

[1] This matter concerns a ten-year-old boy, J, and his three-year-old sister G, who were brought to South Africa from the United Kingdom by their mother (the respondent) on 24 December 2011, without the consent of her husband, and the three of them have remained here since. At the behest of Mr Remy, the father of the two children, who is still married to the respondent, the applicant brought this application for the immediate return of the children to the jurisdiction of the Central Authority for England and Wales.

[2] The application is brought in terms article 8 of the Convention on

the Civil Aspects of International Child Abduction, adopted on 25 October 1980 at the Hague ("the Hague Convention" or "the Convention") read with the Children's Act, No. 38 of 2005 ("the Children's Act"). The provisions of the Hague Convention are, in terms of section 275 of the Children's Act, subject to those of the Children's Act.

[3] In terms of article 8 of the Convention, any person, institution, or body who claims that a child has been removed in breach of "custody rights" (rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as defined in article 5), may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the chid or children concerned. Article 3 of the Convention deems the removal or retention of a child unlawful where it is in breach of the custody rights as aforesaid, under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised, but for the removal or retention. It has now been authoritatively established that, for purposes of the convention, a parent's right to prevent the removal of a child from the jurisdiction concerned, or at least to withhold consent to such removal, is a right to determine where the child is to live and thus falls within the ambit of "rights of custody" envisaged in articles 3 and 5 of the Convention. (See: *KG* v *CB and Others* [2012] 2 All SA 366 (SCA) at paragraph 26). It can

therefore be accepted that Mr Remy's custody rights have been infringed under the Convention.

[4] The primary purpose of the convention was summarized in *KG v GB* at paragraph 19 of her judgment by van Heerden JA as follows:

> "to secure the prompt return (usually to the country of their habitual residence) of children wrongfully removed to or retained in any Contracting State, *viz* to restore the *status quo ante* the wrongful removal or retention as expeditiously as possible, so that *the* custody and similar issues in respect of the child can be adjudicated by the courts of the state of the child's habitual residence. The Convention is premised on his assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, in the vast majority of cases, it will be in the best interests of the child to return him or her to the state of habitual residence. The underlying premise is that the authorities best placed to resolve the merits of a custody dispute are the courts of the state to which the child has been abducted".

[5] In terms of article 7(*f*) of the convention, one of the obligations placed upon Central Authorities is to "initiate or facilitate the institution of judicial or administrative proceedings with the view to obtaining the return of the child." Hence this application was brought by the applicant for the return of the children, on the basis that the father's custody rights were breached. In these proceedings, the two children in question were represented by a legal representative (Mr E Dyer of the Port Elizabeth Bar), as provided for in section 279 of the Children's Act.

FACTUAL BACKGROUND

[6] The children's father (Mr Remy), moved to England in 2004 to explore job opportunities with the view to immigrate to that country and as a stonemason by profession found an employment position in England. His mother and sister had also moved to England where they presently

still live. In May 2005, the respondent and J joined him. The respondent never found employment in England and according to her, she had made certain career sacrifices by following her husband to England where she was never really was happy it seems. J, who was born in South Africa, commenced with school in England in 2006. G was born three years later. England thus became the habitual place of residence of this family, although none of them, not even G, became English citizens.

[7] For reasons that are not entirely clear due to factual disputes on the papers, the marriage relationship between Mr Remy and the respondent became an acrimonious one, marked by enmity and frequent bitter fights. According to Mr Remy, the respondent became bored with her life in England, did not want to work and established communications with male acquaintances by way of electronic mail, which he found inconsistent with the conduct of a loving and faithful wife.

[8] According to the respondent, Mr Remy abused her physically and emotionally to the extent that she felt she had to leave England. She also claimed that Mr Remy was emotionally abusive towards J, in that he had unrealistic expectations regarding his achievements in sport, school and other activities. J was under constant pressure from his father to achieve at the highest level in all aspects of his life, which made him very anxious. When the matter was argued, the parties had already been in the process of divorcing each other for some time.

THE RESPONDENT'S DEFENCE AND THE APPLICABLE PRINCIPLES

[9] The respondent challenged the application brought by the applicant by relying on the defences in article 13 (b) of the Convention, claiming that there was a grave risk that the return of the children (and also herself), would expose them to physical and psychological harm or otherwise place them in an in an intolerable situation.

[10] A discretion is granted to the judicial or administrative authority (in this case, this Court), to refuse to order the return of a child in article 13 of the Convention. It reads as follows:

> "Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return established that-
>
> a) the person, institution or other body having the care of the person of the child was not actually *exercising* the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence".

[11] Since the respondent removed the children without her husband's

consent the burden of proof is on her to establish her defence in terms of article 13(b) of the Convention on a preponderance of probabilities as determined in *Penello v Penello (Chief Family Advocate as amicus curiae)* 2004 (2) SA 117 (SCA) at paragraph 38. Much evidence was presented in the form of affidavits in support of the defence relied on by the respondent.

In *Sonderup v Tondelli and Others* 2001 (1) SA 1171 (CC) at paragraph 29, the Constitutional Court warned that it would be quite contrary to the intention and terms of the Convention were a court hearing an application brought in terms of the Convention to allow the proceedings to be converted into a custody application.

[12] In *Penello v Penello* (*supra*) at paragraphs 32-34, this point was stressed, with reference to courts in other contracting states where the view is that a restrictive interpretation should be given to the defences in article 13(1)(b) and that efforts to convert article 13(1)(b) into a substitution for a 'best interest determination' were by and large resisted.

[13] Then there are also the provisions of South African legislation which are to be considered, such as section 28(2) of the Constitution which provides that *"[a] child's best interests are of paramount importance in every matter concerning a child",* and also section 9 of the Children's Act which provides that *"[i]n all matters concerning the care, protection and well-being of a child, the standard that the child's best interests is of paramount importance, must be applied*".

[14] In *KG v CB,* (*supra*) at paragraph 48, van Heerden JA referred to the case of the Supreme Court of the United Kingdom (formerly the House of Lords), of *In Re (Children) (Wrongful Removal: Exceptions to Return*), [2011] 4 All ER 517 (SC), where an approach similar to that adopted by the Constitutional Court in *Sonderup v Sondelli* was adopted (courts hearing applications under the Convention should not convert the proceeding into custody hearings). The Supreme Court pointed out that "t*here is no provision expressly requiring the court hearing a Hague Convention case to make the best interest of the child its primary consideration and: still less can we accept the argument . . . that s (1)(1) of the 1989 Act [the United Kingdom Children's Act 1989] applies so as to make them the paramount consideration*". It was also recognized by the judges that the assumption that the immediate return of the child to the country of habitual residence may be rebutted "*albeit in a limited range of circumstances, but all of them inspired by the best interests of the child*." These circumstances were summarised as follows:

> "Thus, the requested state may decline to order the return of the child if proceedings were begun more than a year after her removal and she is now settled in her new environment (art 12); . . . or 'if the child objects to being returned and has exercised an age and maturity at which it is appropriate to take account of her views (art 13); or, if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the

child in an intolerable situation' (art 13(b)). These are all situations in which the general underlying assumptions about what will serve the best interests of the child may not be valid…".

The following statement of the Supreme Court leaves one in little doubt as to the degree of adherence to the prescripts of the Convention which is required when deliberating an application of this nature:

> "We conclude therefore, that … the Hague Convention … [has] been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration".

[15] Van Heerden JA pointed out in *KG v GB* (paragraph 50), that in *Sonderup v* Tondelli (paragraph 44) and *Pennello v Pennello* (paragraph 35), the question whether South African courts should follow the stringent tests set by courts in other countries was left open, and concluded that the correct approach to be adopted was to be found in the judgment of the United Kingdom Supreme Court cited in the aforegoing paragraphs.

THE EVIDENCE

[16] The Evidence presented in support of the respondent's defences in terms of article 13(b) of the Convention were contained in various affidavits.

[17] Mr Dyer deposed to an affidavit wherein he reported on the various consultations he had with psychologists, the respondent and the children.

Mr Dion Swartz, a psychologist, was the first person to speak to Mr Dyer. He reported that G could not truly appreciate the nature of her relationship with her parents. Given her age, that is hardly surprising. It was accepted that because her lot is so inextricably tied to J's, the observations regarding J would necessarily and logically impact simultaneously on her.

[18] According to Mr Swartz, J displayed dismay at the thought of returning to the United Kingdom. It was not mentioned in Mr Swartz' report, but the latter reported to Mr Dyer that J had mentioned to him that his father verbally and physically abused him. Mr Swartz recommended that J be permitted to stay with his mother and not be returned to England, as that was his express wish as well as in his best interests.

[19] Mr Dyer initially formed the opinion during his own personal interview with J, that he was influenced by his mother, having been exposed only to her for one year, but upon more probing, he nonetheless established that the information and opinions J provided him with, were his own. Mr Dyer concluded that J's ability to reason and express himself on a number of topics indicated that he was capable of expressing an opinion of his own which differed from that of his mother, if that were the case. Therefore, based on the information available to him, Mr Dyer concluded that J was mature enough to express an opinion, which should be taken into account and accorded due weight.

[20] The psychological reports of a clinical psychologist (Ms Wendy Nunn) and a counselling psychologist (Ms Tamara Jakins) were also placed before me. Ms Nunn was told by J of incidents during which his father had insulted him and had once given him a hiding with a belt because he tripped a boy at school. Other than that, J's hidings from his father were given by using his hand. Ms Nunn concluded that the presence of a mild anxiety condition in J was probably the result of his failed attempts and helplessness about fixing things in his life. She noted that he was reluctant to admit to even slight shortcomings, which he perceives to be weak and demeaning. Confirming what the respondent had deposed to in her affidavit, J had told Ms Nunn that if he lost at sport his father would become upset. His father also hit him if he cried about something. He feared his father whenever the latter said: "we need to have a talk" because inevitably that foreboded a hiding. He was also reluctant to speak to his father over the telephone because of the verbal abuse. For instance he reported that his father was often angered by his son's so-called "big boy attitude" which he always said he would sort out "when I get back home". J expressed fear at returning to his father, also because of his father's threats of what he might do to his mother, and added that "he treated me badly but my mother even worse".

[21] Ms Nunn also noted that there would be little or no emotional support for his mother in England in the event of further incidents of domestic violence occurring, which, given the history of the parties, is highly likely. Ms Nunn was of the opinion that these incidents will

worsen. There have been ample indications that telephonic contact with his father sets J back emotionally and he continues to have nightmares. She believes him to be vulnerable and emotionally fragile and not robust enough to deal with the fears associated with being with his father.

[22] Ms Nunn agreed with the suggestion of supervised contact with his father if he were to be returned to the United Kingdom, but emphasised the lack of emotional support the family could draw on in the United Kingdom. She was of the view that the absence of such support would have serious psychological consequences for them, because such isolation, was already experienced before their return to South Africa.

[23] Most importantly, Ms Nunn observed that J had adapted well in South Africa, as being here has placed a safe distance between him and his perceived danger from his father. She noted that J "*flourished under the support and care from his extended family and school, both of which have provided a safe environment where he is supported and affirmed, by whom he is and guided and disciplined in ways that are not threatening or humiliating*". These optimal circumstances she stressed could only continue in the United Kingdom if the aforesaid circumstances could be duplicated there. For obvious reasons that is no longer possible.

[24] Mr Dyer was of the opinion that a return to the United Kingdom, would in all likelihood leave the respondent without a support structure

and the resulting stress will impact negatively on J, who has his own existing fears about contact with his father.

[25] The family advocate, Ms Botha, was of the view that J was not mature enough to form his own independent opinion, which should inform my decision in this matter.

[26] Ms Nunn initially stated that J did *"not have the mental capacity to understand the gravity of making his own submissions and to understand the potential consequences".*

> "J is ten years old and does not have the mental capacity to understand the gravity of making his own submissions and to understand the potential consequences. He is anxious about returning to the United Kingdom and his father, and is also protective of his mother, so he will make statements reflecting these particular concerns which could be distorted as a result of his anxiety and fear of what will happen if he, his sister and his mother are forced to return to the United Kingdom. He already believes, as a result of what his father said, that she will be sent to jail when she returns there. It took me three sessions to break through that fear and anxiety to uncover the truth about what is happening and not just what he is hearing from the adults, i.e. his mother and father and possibly family members as well. He will speak his "truth" as he understands it, and thus not capable of understanding that there could be consequences".

[27] Ms Nunn then filed a supplementary report wherein she revised her views as aforesaid and stated as follows:

> "Undersigned would like to stress that she was under the impression that the above question related to the minor child making a legal submission in court hence the concerns expresses above. In terms of Mr Naidu's request for

clarification, particularly regarding section 10 of the Children's Act 38/2005, undersigned would like to stress that the minor child complies with the requirements of the above section i.e. that his is of an age, maturity and stage of development as to be able to participate in this matter that concerns him and has participated in an appropriate way. It was clear from the evaluation process that he has the maturity to formulate his feelings and opinions about his situation, particularly about returning to the United Kingdom, as well as the ability to understand the consequences of his feelings and opinions".

[28] The different opinions regarding J's level of maturity persuaded me to interview J myself. Futhermore, many of Ms Nunn's observations would have been of more assistance in a custody hearing. After the matter was argued, Mr Dyer fetched J (who did not attend the proceedings), and brought him to my chambers where the two of us had an informal conversation which lasted no more than 30 minutes.

[29] As did Mr Dyer, I also observed the respondent's strong influence on her son. However, he was also quite capable of expressing his own independent views. J was quite willing to concede that his father had good points. In my view, Ms Nunn's and Mr Dyer's observations could not be faulted, particularly regarding the pressure placed on J by his father to achieve on so many levels and always unsuccessfully seeking his father's approval. This I observed from his tendency to boast.

[30] J did not strike me as particularly mature for his age. He seemed troubled and anxious, but nonetheless very talkative and friendly. In my

opinion, he was sufficiently mature for a court to take his views into account. He firmly believes that once they are returned to England their father will not allow them to come home. J is adamant that he does not want to go to his father under any circumstances and dreads the prospect of returning to England. Apart from fearing retaliation from his father against him for not wanting to return, he feared the same fate would also befall his mother. The telephonic interactions with his father on the telephone is very hurtful to him. He said his father even told him once that he wants nothing to do with him and must "get off the line" and put his sister "on the phone". He also told me that his father often called him a "moffie" (derogatory term for gay persons). According to the respondent, he referred to her family as "hotnots" (a derogatory and racist term for South African coloured persons). All the evidence presented suggested when he speaks to J, that Mr Remy is prone to belittling his son as a method of communication. J expressed the hope that one day in the future, it would be possible to visit his father though, but was adamant that it could not happen at present. It is also significant that the respondent said that one of the main reasons why she left her husband was his treatment of J and the impact that this treatment had on him.

[31] Based on what J had told me, I concluded that his objections are genuine and that he actually dreads the prospect of going back to his father. I believe that it would be detrimental to J, who has settled in well

in his new home and school to order the immediate return of the children to England. J told me that he enjoys his school and participates in several activities. According to him, his life has improved since being back in South Africa. He told me that G also enjoys her play school. He clearly is very protective of his little sister, which impression is corroborated by other evidence in the affidavits.

DISCUSSION

[32] In my view, the fact that a child who has reached the required level of maturity objects to being returned to the country from which he was unlawfully removed is *per se,* is no reason for refusing to grant the relief sought under the Convention. There must be clear and discernable grounds which, if assessed objectively, would justify such a refusal. Based on what I was told by J and the evidence led, J's fears and anxieties which lie at the heart of his objections to return, are very real and ought not to be discounted in these deliberations. I am convinced that to send J back to England, would be a great emotional setback for him. This is something which inevitably occurs to a certain extent in most matters of this nature, but J's objection is not the only factor I had to consider.

[33] The applicant accepted that the respondent's complaints regarding Mr Remy's abuse of her was not without substance. Counsel for the applicant, Ms Beneke, proposed a draft order containing a myriad of

prescriptive and restrictive conditions pertaining to *inter alia*, separate accommodation for the respondent to allay all concerns regarding the abuse as aforesaid.

[34] Mr Remy has however, made it plain that he would not be willing to provide financial aid of any kind to the respondent to facilitate her return to England. More importantly, he is not prepared to finance separate accommodation for the respondent. He gave undertakings only in respect of the children's return by aeroplane and their accommodation in England. It was submitted by the applicant that the obstacle presented by Mr Remy's uncooperative stance in this regard, could be overcome by ordering him to provide separate accommodation for the respondent pending the outcome of this issue in the English Courts.

[35] With regard to the shaping of aforesaid type of order, the following passage in *Sonderup v Tondelli* at paragraph 35, is instructive:

> "(T)he court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such a child caused by a court ordered return. The ameliorative effect of art 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain. The ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important

purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain".

[36] Such an order, in whatever shape, may not be effective if Mr Remy cannot afford two separate households and has expressly refused to do so. Since neither of the parties have permanent residence permits in England, it is not a certainty that the British authorities will provide the respondent with proper accommodation for the unspecified period being the outcome of the matrimonial dispute. The respondent might ultimately have to fend for herself in England pending the divorce if Mr Remy is financially unable to comply with such an order. The respondent had never been employed in England and is gainfully employed in South Africa. Also, the children will be in the effective care of Mr Remy's mother and sister during the day when he is at work, if the respondent has to remain behind in South Africa pending the divorce, because she cannot afford to stay in England. I doubt whether this type of hardship can be in the interests of anyone in this matter, let alone the children. For obvious reasons, an order that the children return without their mother is out of the question.

[37] G is too young to be returned to England without her mother and J has expressed strong resistance to return to England, with or without his mother.

[38] The absence of proper undertakings by Mr R renders this matter rather complex. The respondent has indeed acted wrongfully within the meaning of article 3(b) of the Convention and I am mindful not to treat this application as a custody hearing. There are however, several considerations which indicate that a return order is not appropriate in this matter.

[39] Article 12 of the Hague Convention provides that, where a child has been unlawfully removed or retained in terms of article 3, and a period of less than a year after the removal or retention has elapsed, the judicial or administrative authorities of the requested State (*in casu,* South Africa) is obliged to and '*shall order the return of the child forthwith*'.

[40] This application was heard twenty days short of a year having elapsed after the removal of the children from England without their father's consent. When the application was argued on 5 December 2012, Mr Remy's statement had not yet even been attested to, although this was corrected a few days after the matter was argued. It may have been mere technicality or an unperfected formality, but it nonetheless contributed to the general absence of expediting matters in this application. In my view, both parties were to blame therefore, but the respondent more so. I am not convinced that the respondent was of such poor health that she could not deal with this very important matter. The delay had consequences in this matter, given the provisions of article

12 of the Convention, which envisages that after a year has gone by since the removal of a child, he or she may become sufficiently settled, and to a degree where a court is no longer as strictly bound to order the return of the child in question.

[41] The children have undoubtedly settled in well in South Africa after eleven months and ten days. A return order will undoubtedly have a disruptive and detrimental effect on J's educational progress and development, leaving his personal fears aside for the moment.

[42] A further important factor to be considered is that Mr Remy, the respondent, and the children, even though England was their habitual place of residence, are still immigrants in that country, albeit for six years. The children would have a much weakened, or no emotional support system in England pending the outcome of the matrimonial dispute, as pointed out by Ms Nunn. The fact that Mr Remy's mother and sister also relocated to England, does not assist the applicant. They do not constitute a significant support system there, compared to what the children have presently in the form of family and friends in South Africa.

[43] It was submitted by the applicant that the abuse of the respondent was no justification for removing the children without Mr Remy's consent, because it was always open to her to seek protection from the British authorities and welfare institutions. I respectfully agree with that

submission, but for purposes of article 13(b), the same does not apply to J's objections. Also, several practical obstacles (as illustrated above) to granting the order sought are presented by the absence of proper undertakings by Mr Remy, who has expressed his uncooperative attitude in clear terms. I doubt that a carefully shaped order with many prescriptive and protective provisions would remedy or ameliorate these problems. The factors relied on by the respondent in this matter, viewed individually, may not justify a dismissal of the application before me. However their cumulative effect constitutes an intolerable situation, for J in particular.

[44] I have given careful consideration to the assumptions upon which the Convention proceeds and found that even on the very strictest interpretation of article 13(1)(b), circumstances were established in this matter, which rebut the aforesaid assumptions sufficiently to justify not ordering the return of the children.

Costs

[45] Even though the respondent successfully resisted an order for the relief sought by the applicant, she is not entitled to a costs order following the result in this case, since she resorted to self-help and wrongfully removed the children when she could have persued lawful solutions to her problems. In my view, she was less than truthful about her health

problems which she proffered as an excuse for some of her actions.

Accordingly, the application is dismissed.

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E REVELAS
Judge of the High Court

Appearance

Adv Beneke for the Applicant, instructed by the State Attorneys, Port Elizabeth, Mr Naidu for the Respondent instructed by Legal Aid Board, Port Elizabeth, Adv Dyer for the minor children, instructed by O'Brien Incorporate, Port Elizabeth.

Argument : 5 December 2012
Order : 12 December 2012

Reasons : 15 February 2013