WS v LS 2000 (4) SA 104 (C)

Citation	2000 (4) SA 104 (C)
Case No	6986/99
Court	Cape Provincial Division
Judge	Foxcroft J
Heard	September 17, 1999
Judgment	September 17, 1999
Counsel	M W Verster for the applicant. M Donen for the respondent.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Husband and wife - Divorce - Custody of children - Hague Convention on Civil Aspects of International Child Abduction (1980) - Application of - Application for return of unlawfully removed or retained child in terms of art 13 of Convention as incorporated into South African law in terms of Schedule to Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996 - Article 13 providing that requested State not bound to return child if opposing party establishing that 'grave risk' existed that return of child would expose it 'to physical or psychological harm or otherwise place the child in an intolerable situation' - Words 'grave risk' not imposing *onus* greater than that ordinarily applicable in civil proceedings - Meaning that there has to be serious or well-founded reason why situation of child would be intolerable if application granted - Objective basis required to conclude existence of grave risk - Age of children and nature of undertakings given by applicant to be taken into account.

International law - International treaties and conventions - Hague Convention on Civil Aspects of International Child Abduction (1980) as incorporated into South African law in terms of Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996. *See* Minor - Abduction of - International abduction.

Minor - Abduction of - International abduction - Hague Convention on G Civil Aspects of International Child Abduction (1980) - Application of - Application for return of unlawfully removed or retained child in terms of art 13 of Convention as incorporated into South African law in terms of Schedule to Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996 - Article 13 providing that requested State not bound to return child if opposing party establishing that 'grave risk' existed that return of child would expose it 'to H physical or psychological harm or otherwise place the child in an intolerable situation' - Words 'grave risk' not imposing *onus* greater than that ordinarily applicable in civil proceedings - Meaning that there has to be serious or well-founded reason why situation of child would be intolerable if application granted - Objective basis required to conclude existence of grave I risk - Age of children and nature of undertakings given by applicant to be taken into account.

Headnote : Kopnota

On 4 June 1999 the father of two very young boys applied in a Provincial Division under chap 3 of the Hague Convention on the Civil Aspects of J

International Child Abduction Act 72 of 1996 for the handing over of the children by their mother for the purpose of their return A with the applicant to the United Kingdom. This Act came into operation in October 1997 by virtue of a presidential proclamation that made the provisions of the Hague Convention of 1980 part of South African law. The parties were married in South Africa in April 1996 and had two children (one in June 1997 and another in September 1998) while the parties were living in the UK. The respondent had been granted an B ancestry visa that allowed him to work in the UK for four years and would eventually have been entitled to apply for residency. Domestic difficulties arose between the parties and the respondent and the children left the UK for South Africa in January 1999 for what was supposed to be a holiday. While in South Africa the respondent decided not to return to the UK. She took the attitude that her visa would not permit her to remain there for any length of time even if she C were to return. In March 1999 the respondent informed the applicant that she would not return to the UK and instituted divorce proceedings in South Africa. The applicant then served the Hague application on the respondent. In issue was whether art 13 of the Hague Convention applied. Chapter 3 of the Convention provides for applications by the Central Authority of the child's habitual residence to the Central D Authority of another contracting State for the return of unlawfully removed or retained children and art 13 provides, *inter alia* , that '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 establishes that - . . . *(b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or E otherwise place the child in an intolerable situation'. A number of undertakings were made by the applicant to the respondent both before and during the present hearing. These included offers providing for the payment of the air fares to the UK of the respondent and the children as well as undertakings in regard to the occupation of the former matrimonial home by the respondent and the children and the institution of custody proceedings in the UK. The Court pointed out (at F 5) that, since it was unable to decide on the papers whether the youngest child in particular might suffer any physical or psychological harm if removed from his mother, the question was whether the proposed return would 'otherwise place the child(ren) in an intolerable situation'. The Court referred to certain English cases in which a high risk of an intolerable situation as well as suitable undertakings G to prevent that risk had been required and pointed out (at 112A - B) that, if the requested State only needed to be told to return the child without proffering any undertakings, it was difficult to see why the need for such undertakings arose as a strict matter of law. The Court then

Held , that the word 'otherwise' indicated that the intolerability of the situation did not necessarily have to be based on proof of physical or psychological harm. (At 109F/G.) H

Held, further, that it could for the purposes of the present case be accepted that both the applicant and the respondent were habitually resident in the UK not only when their children were lawfully removed to South Africa but also at the time of the subsequent *prima facie* wrongful retention. This suggested that the children, despite having spent some months in South Africa, were also I still habitually resident in the UK. (At 111B/C - E.)

Held , further, that the framers of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, knowing of the protection of the child in South African law and the Bill of Rights, could not have intended to impose upon a child, or the mother of a child seeking to protect that child, an *onus* any greater than that ordinarily applicable in civil J

proceedings. The words 'grave risk' did not introduce an *onus* above that normally A

applicable, but meant that there had to be a serious or well-founded reason why the situation of a child would be intolerable if the Hague application were granted. The high test for intolerability set by the English Courts was not, given the provisions of the South African Bill of Rights, required in our law. (At 112I and 113G/H.)

Held , further, that because it was impossible to decide on the papers whether the children might suffer physical or psychological B harm if removed from their mother, the matter had to be dealt with on the basis of intolerability, and that it was clearly intolerable for a child under the age of one year (like the youngest child in the present case) to be parted from his mother. (At 113B.)

Held , further, that, although the undertakings given by the applicant were inadequate (particularly with regard to adequate C provision for the continued support of the respondent in the UK), this did not mean that an intolerable situation would necessarily result for the children: there had to be an objective basis for holding that there was a grave risk of intolerability and the undertakings served only to alleviate the hardship that might ensue. (At 115E/F.) D

Held , further, that, while the harm to the older child might not be as great as that to the younger one, it was well-accepted in our law that very young children could not be separated from each other, and that it was unthinkable to separate the children at a stage when the matter was not yet finally determined. There was thus a grave risk that they would face an intolerable situation if removed from their mother. (At 116A - C.) E

Held , further, that the applicant's undertakings did not make adequate provision for the continued support of the respondent in the UK: she had very real fears that she would not be able to stay in the UK for any length of time and no guarantee of employment there during what could turn out to be protracted custody proceedings. (At 116C - D.) F

Held , accordingly, that the application had to be dismissed. (At 116D/E.)

Cases Considered

Annotations

Reported cases

Re A (Abduction: Habitual Residence) [1996] 1 FLR 1: applied

Re B (Minors: Abduction) No 2 [1993] 1 FLR 995: dictum at 995 applied

C v C (Minor: Abduction: Rights of Custody Abroad) [1989] 2 All ER 465 (CA): distinguished but G dictum at 469 *h* applied

Re F (Minor: Abduction: Rights of Custody Abroad) [1995] 3 All ER 641 (CA): dictum at 645 applied but dictum at 647 *f* doubted

Re H (Abduction: Acquiescence) [1998] AC 72 ([1997] 1 FLR 872): applied

Re I (Abduction: Acquiescence) [1999] 1 H FLR 778: considered

Re J, a minor (Abduction: Custody Rights) [1990] 2 AC 562: dictum at 578 - 9 applied

K v K 1999 (4) SA 691 (C) ([1999] 2 B All SA 193): referred to

Re M (Abduction: Habitual Residence) [1996] 1 FLR 887: dictum at 895 applied

P v B (Child: Abduction: Undertakings) [1994] 3 IR 507 (SC): dictum at 521 applied I

Thompson v Thompson (1995) 34 ILM 1159: considered.

Statutes Considered

Statutes

The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, Schedule chap 3 art 13: see *Juta's Statutes of South Africa 1999* vol 5 at 2-115. J

Case Information

Application in terms of chap 3 of the Schedule to the Hague A Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 for the return of allegedly unlawfully retained minor children. The facts appear from the reasons for judgment.

M W Verster for the applicant.

M Donen for the respondent.

Cur adv vult . B

Postea (17 September 1999).

Judgment

Foxcroft J:

This is an application brought by the father of two very young boys for the handing over by their mother of the children for purposes of return with the applicant C to the United Kingdom. The application is said to be in terms of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

It was not in issue before me that this Act of the South African Parliament came into operation on 1 October 1997 by virtue of a D proclamation issued under the hand of the President in the *Government Gazette* of that date (No 18322).

Applicant states in para 6 of the founding affidavit that:

'I am advised that the Hague Convention entered into force as between the Republic of South Africa and the United Kingdom of Great Britain and Northern Ireland with effect from 1 December 1997.' E

That allegation is admitted in the opposing affidavit.

The parties were agreed that the matter was indeed governed by the Hague Convention. The dispute concerned the meaning and effect of that international agreement, now part of the municipal law of this country. I was also informed that the only reported case in South Africa in F which the Convention was considered is *K v K* 1999 (4) SA 691 (C) ([1999] 2 B All

SA 193), a matter in which the Convention was held not to apply since the abduction in that case occurred before the Convention became operative between the United States of America and South Africa. When that matter came before the Full Bench of this Division on 7 May 1999, the appeal succeeded and the order of the G Court *a quo* was set aside.

I am not aware of any authority in this country dealing with the operation of the Hague Convention, but there have been a number of cases in other parts of the Commonwealth and other countries which have been drawn to my attention. Since these decisions deal with the meaning H and effect of the same Convention, they are of more than usual importance.

The Schedule to the South African Act, which commences with a preamble, declares that

' *(t)* he States signatory to the present Convention firmly convinced that the interests of children are of paramount importance in matters I relating to their custody. Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access'

have concluded an agreement to this effect - the Hague Convention. J

The facts, very briefly, which have given rise to the present dispute are the following. A

In April 1996 the parties, both South African citizens, were married in Cape Town. In September of that year they travelled to the United Kingdom and in May 1997 applicant purchased a house in Surrey. There is a dispute as to the precise intention of the parties, but applicant is B determined to acquire British citizenship, whereas respondent does not wish to return to England and takes the attitude that her visa would probably not permit her to remain in England for any length of time, even if she were to return.

On 24 June 1997 the older boy, A, was born in England and on C 11 September 1998 the younger son, B, was also born in England. After domestic difficulties, which it is not necessary to go into for present purposes, respondent and the two children left England for Cape Town on 19 January 1999. The arrangement between the parties was that this would be a two-month holiday and that respondent and the children would return to the United Kingdom thereafter. On 17 D March 1999 respondent informed applicant that she did not wish to return to the United Kingdom and she commenced divorce proceedings in South Africa. There have been several proceedings in this Court relating to questions of maintenance *pendente lite* and to the issue of whether applicant was in contempt of previous orders of this Court. The latter aspect was resolved on the first day of the E hearing in this matter, when it became unnecessary to decide the question whether applicant had been in contempt upon his payment of all outstanding sums due in terms of orders of this Court.

The narrow issue in this case is whether art 13 of the Hague F Convention applies or not. That article provides that:

'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 establishes that -

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody G rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) 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.' H

This is not to say that counsel did not argue other aspects of the matter. Mr *Donen* , for respondent, contended in passing that the question of wrongful removal or retention was in dispute and that applicant had in any event acquiesced in the removal of the children to South Africa after initially deciding not to pursue the Hague I Convention application. In May 1999 applicant had visited South Africa with a view to a possible reconciliation and had consulted an attorney in regard to the bringing of a Hague application. He was advised, according to his affidavit, that he would lose this application and had therefore entered into negotiations with respondent with a view to settling the divorce. For a period of some J

ten days he did not pursue the Hague application but then, on 4 June 1999, after receiving A other advice from another attorney, served a Hague application on respondent.

Mr *Verster* , who appeared for applicant, referred me to a number of English cases referred to in the Family Law Reports of that country. The matter of *Re I (Abduction: Acquiescence)* , reported in [1999] 1 FLR 778 at 782, records the earlier comments of B Lord Browne-Wilkinson in the matter of *Re H (Abduction: Acquiscence)* [1998] AC 72 ([1997] 1 FLR 872). In the earlier decision, it was stated that the applicable principle when dealing with the question of acquiescence under art 13 of the Hague Convention is whether the wronged parent has 'acquiesced' in removal or retention of the child. The answer to that depends upon his actual state of mind. C The remarks of Lord Browne-Wilkinson continue as follows:

'As Neill LJ said in *Re S (Minors)*

''The Court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.'' ' D

I am of the same view, and indicated during argument that I would be loath to deny applicant the opportunity of placing his argument before me on the basis that he had, on his version, dropped the proceedings for a week or two until being given different advice. I am satisfied that it was always his desire to proceed with a Hague Convention E application and that the entry into negotiations after receiving the first advice should not stand in the way of placing his argument before me.

In *Re I* , a similar argument as to the effect of negotiations amounting to acquiescence was rejected in the Family Division by Hogg J.

To return to what I regard as the essential issue in this case, ss *(b)* of art 13 deals with the grave risk of exposure of a F child to physical or psychological harm, or that the proposed return would 'otherwise place the child in an intolerable situation'. The significance of the word 'otherwise' seems to me to be that the intolerability of the situation would not necessarily be based upon proof of physical or psychological harm. G

I also bear in mind that art 17 of the Hague Convention provides that:

'The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.' H

I was not referred to any South African authority in regard to the meaning of the words

'grave risk that his or her return would . . . place the child in an intolerable situation'. Mr *Verster* referred me to an article by one Neville Botha of the University of South Africa in (1996) 21 *South African Yearbook of International* I *Law* . At 185 of that article, dealing with foreign judicial decisions, the writer says the following:

'Under the convention, harm must be such that it places the child in an intolerable situation (for case law see ILM 1177). In *Re A (a Minor) (Abduction)* [1988] 1 FLR 365 it was held that

''The risk has to be more than an ordinary risk or something greater than J

would be normally expected on taking a child away from one parent and passing him to another (at ILM 1177).'' ' A

Although conceding that from a child's perspective harm is harm whatever its source, the Judge felt that the normal trauma associated with relocation did not constitute the degree of harm envisaged in the Convention. B

In the case of *Thompson v Thompson* (1995) 34 ILM 1159 in the Canadian Supreme Court the Court took the view that, although the removal of a child from Canada to Scotland would be accompanied by an element of harm, the Court had the father's undertaking that this would be kept to a minimum in that he agreed not to take physical C custody of the child until the Scottish Court had finally decided on custody and that he would institute the necessary proceedings without delay. Botha points out that one of the major aims of the Convention is to stop the 'cycle of kidnappings and re-kidnappings' which prevailed before its adoption. The earlier Hague Convention of 5 October 1961 had failed to prevent this, since there was a tendency on the part D of Courts to regard the 'kidnapped' home as a child's new place of habitual residence. This meant that the child's best interests were judged from the perspective of the culture of its new country. The child's loss of contact with its abandoned culture (its roots) and any possibility of a relationship with the parent left behind were therefore often undervalued. The protagonists of the new Hague E Convention have been concerned to stress that the Convention does not aim at deciding custody, but rather at returning a child to its former residence, where custody will be determined by the appropriate body.

The question of habitual residence was also raised before me, and I F was also referred to English decisions in *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887 and *Re A (Abduction: Habitual Residence)* [1996] 1 FLR 1. In these cases the English Courts laid down that habitual residence is a question of fact and not to be treated as a legal concept. Habitual or ordinary residence refers to a person's abode in a particular place or country. As Millett LJ G said in the English Court of Appeal in *Re M* ,

' *(t)* he question whether the person is or is not habitually resident in a particular country is a question of fact. . . . The concept of habitual residence is not an artificially legal construct.' H

(At 895.)

These decisions follow the well-established meaning of 'habitual residence' which appears in the speech of Lord Brandon in *Re J, a Minor (Abduction: Custody Rights)* [1990] 2 AC 562 at 578 - 9, where it was stated that the expression 'habitually resident' in art 3 of the Convention, namely a child who was habitually resident I immediately before the wrongful removal or retention, is not defined in the Convention and must therefore be given its ordinary and natural meaning. In *Re A* [1996] 1 FLR 1 Cazalet J at 6 of the report, refers to authority stating that the habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves. J

FOXCROFT J

There is some debate in the papers before me, as also at the Bar, as to whether the parents were habitually resident in England during the A relevant period, but I am satisfied, to use the words of Waite J that

' *(h)* abitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their lives for the B time being whether of short or of long duration'.

(See *Re B (Minors: Abduction) No 2* [1993] 1 FLR 993 at 995.)

For the purposes of this decision I am prepared to accept that the applicant and respondent were habitually resident in England at the time when the children were taken to South Africa. At that time there was no wrongful removal, but two months later there was, *prima* C *facie* , a wrongful retention. In the case of the younger boy, he had resided in England for four months before the holiday and then two months in South Africa after that, but I am prepared to accept that his mother, at the time of the wrongful retention, was still habitually resident in England, where the father certainly was habitually resident D at the time. This would seem to suggest that, although the child had spent some months in South Africa, the place of habitual residence was probably still England. The case for the return of the older boy is, of course, stronger. He had spent some two years in England, apart from a short holiday in South Africa, at the time of the wrongful retention. E

I make this comment only because the word 'habitual' carries with it the idea of some reasonable period of time during which some form of habit can arise. To speak of the habitual residence, for instance, of a child of a few days in age is, on the facts, a difficult one.

Returning to the article by Neville Botha, he makes the point that, F while lower courts often misinterpret the Convention, this is invariably corrected on appeal. He refers to the English case of *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 2 All ER 465 (CA), where the initial finding that the mother's refusal to return with the child to Australia - from where she had abducted him - would subject the child to excessive harm, was reversed on appeal, the Court holding that: G

'The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. . . . If the grave risk of psychological harm to the child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return.' H

(At 471 *a* - *c* .) The case *C v C* contains many similarities with the matter before me, but there is one important difference. That case concerned a boy of six whose mother said that she could not for emotional reasons go back to Australia. The Court imposed extensive conditions to alleviate any possibility of harm to the child and took the view that in the light of those guarantees for the I well-being of the child the mother's obdurate refusal to go would be the cause of any psychological damage to the child. With that reasoning I have no quarrel.

Are the undertakings in the present matter suitable and compelling in the same way as in *C v C* , accepting for the moment that such undertakings are necessary? J

I raised with counsel the problems which I have with the decisions in A the English Courts, where on the one hand a high risk of an intolerable situation is required, and yet suitable undertakings to prevent that risk in practice also seem required. If a requesting State need only say to a requested State, 'Send back the child', without proffering undertakings, it is difficult to see why the need for the undertakings arises as a strict matter of law. The *onus* is said, by the B English Courts, to be upon the respondent to show a high risk of harm before a return can be prevented.

Undertakings have been referred to by Butler-Sloss LJ in *C v C* (*supra* at 469 *h*) as
'crucial to the welfare of the child who has been sufficiently disrupted in his removal from his home and his country and needs as a C priority an easy and secure return home'.

After undertakings which the Court required as a prerequisite for the return of the child were given, the Court ordered the return of the child to Australia. D

In *P v B (Child: Abduction: Undertakings)* [1994] 3 IR 507 (SC) the Supreme Court of Ireland at 521 said, *per* Denham J:
'I am satisfied that undertakings may be given by a party to proceedings under the Act. . . . They are entirely consistent with the Act . . . and the Hague Convention. They are for the welfare of the child during the transition from one jurisdiction to another. Undertakings may be of particular relevance to very young children.' E

This is an urgent matter, and I do not wish to delay the giving of judgment by examining the constitutional question which might arise in South Africa between any possible conflict between s 28 of the South African Constitution adopted on 11 October 1996 by the Constitutional Assembly (the Constitution of the Republic of South F Africa Act 108 of 1996) and therefore in force at a time when the Hague Convention Act came into operation. Chapter 2 of the Bill of Rights contained in the Constitution requires in s 28(2) that
' *(a)* child's best interests are of paramount importance in every matter concerning the child'. G

I have referred to the view of the framers of the Convention that it is in the best interests of children generally for them to be returned to their country of origin, and the suggestion in some of the cases that the Court is not concerned, save in some limited respect, with the interests of individual children. I have also given some thought to the H fact that I am bound to protect children in matters concerning their welfare as upper guardian in accordance with South African law, but I do not think it is necessary for me to resolve any possible difficulty in that regard. Suffice it to say that I am satisfied that the framers of the Hague Convention Act, knowing of the protection of the child in I South African law in the Bill of Rights, could not have intended to impose upon a child, or the mother of a child seeking to protect that child, an *onus* any greater than that ordinarily applicable in civil proceedings.

Counsel were agreed that the words 'grave risk' do not introduce some elevated *onus* above that normally applicable, but that the words mean J

that there must be a serious or well-founded reason why the situation of a child would be intolerable if the Hague Convention A application were granted.

I am unable, on the dispute of fact which arises on these papers, to decide whether B in

particular might suffer any physical or psychological harm if he was removed from his mother. I prefer to deal with the matter only on the basis of intolerability. To my mind, it is B clearly intolerable for a child under the age of one year to be parted from his mother. Applicant's case in this regard is that the mother can accompany him and the children back to England pending custody proceedings in that country.

As in *C v C* and in *K v K* , I was invited to impose a myriad of undertakings upon applicant for the protection of C the children.

The question of intolerability was dealt with in the English case of *Re F (Minor: Abduction: Rights of Custody Abroad)* [1995] 3 All ER 641 (CA). In that matter Butler-Sloss LJ held that it is the duty of the Court to construe the Convention in a purposive way and to make the Convention work. She went on at 645 to say: D

'It is repugnant to the philosophy of the Convention for one parent unilaterally, secretly and with full knowledge that it is against the wishes of the other parent who possesses rights of custody, to remove the child from the jurisdiction of the child's habitual residence.' E

There are then references to other English cases dealing with the further disruption suffered by children when taken from their settled environment for the sake of finding 'a supposedly more sympathetic forum or a more congenial base'. In dealing with the question of an intolerable situation under art 13 *(b)* of the Hague Convention, the learned Judge continues at 647 *f* : F

'Mr *Munby* recognised that a very high standard is required to demonstrate grave risk and an intolerable situation.'

Again against the letter *j* there is reference to a 'high test of intolerability required to establish art 13 *(b)* '.

Whether the English Courts have accepted that the words 'grave risk' import this high test of intolerability or not is not for me to G express any opinion. Given the South African Bill of Rights, I am not persuaded that any such high test is required in our law. The matter to which I have just referred, namely *Re F* , seems to have been the first case in England where this high standard was reached (at 648 *f*). Millett LJ was a reluctant concurrer, expressing the H view that he was not wholly convinced by the evidence that

'there is a grave risk that the return of the child to his home in Colorado would expose him to physical or psychological harm or place him in an intolerable position within the meaning of art 13 of the Convention, but I am not prepared to press by doubts to a dissent'. I

The third member of the Court, Sir Christopher Slade, was of the view that

'the Courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the Court's discretion under art 13 *(b)* are satisfied. They are in my view quite right to be cautious and to apply a stringent J

test. The invocation of art 13 *(b)* with scant justification is all too likely to be the last resort for parents who have wrongfully removed their child to A another jurisdiction.'

As a result the child was not sent back to the United States.

A number of undertakings were made to respondent before and during the hearing before me. Apart from certain offers which might be B construed as undertakings in the affidavits, a number of documents were tendered by applicant's counsel to respondent's counsel.

The first was a so-called 'with prejudice tender in terms of Rule 34' handed to Mr *Donen* ,

according to his note on the document, at Court on 8 September while argument on the matter of the payment of sums due in terms of previous Court orders was being dealt with. That offer changed to an unconditional tender in terms of C Rule 34 and was handed to respondent's counsel at Court at 10 o'clock on the second day of the hearing. Later in the day yet another unconditional tender was handed up to me, providing for the return of the children, an undertaking by applicant to pay for the children's air fare to England and an offer that respondent be entitled to accompany the children to the United Kingdom at her own expense. There D were then suggested undertakings in regard to occupation of the former matrimonial home by the minor children and the respondent and undertakings by applicant to institute proceedings for the determination of the custody issue in England within two days of arrival of the children in England. E

During argument this offer improved to include the payment of an air ticket for respondent to accompany the children. At first the offer was limited to that of a one-way ticket to London. A little later in the argument the offer was improved to include a return air ticket which would enable respondent, if she should so wish, to return to Cape Town for the divorce proceedings which are presently set down for F hearing in this Court in Cape Town on 5 November 1999.

As far as entitlement to going to England is concerned, respondent says at p 107 of the papers that applicant was granted an ancestry visa which allows him to work in the United Kingdom for four years, whereafter he has to re-apply for a visa to stay and work G there for a further year. Only then would he be entitled to apply for residency in the United Kingdom. Respondent's position is that she is only entitled to remain in the United Kingdom with her husband subject to his legitimate expectations of citizenship. She adds that

' *(t)* his places me in a precarious position in regard to my expectation of residency in the United Kingdom. I have been advised by H the British consular authorities that upon divorce from applicant in the United Kingdom I will have no right to remain there and that even though both my children were born there, if I were granted custody of them in England upon divorce I would have to leave the United Kingdom with them.' I

She adds that in her view the parties did not emigrate to England, but only relocated. In her affidavit at para 41.4 respondent points out that

'I respectfully submit that it will cause considerable psychological harm to the minor children to be returned to Ms D's house which is not the former common home into which they were born where they were initially reared, nor will it be in their interests to be placed in the care of a woman with whom they are barely J

acquainted and with whom their father conducts an adulterous relationship not to A mention the adjustment they will be obliged to make to the presence in the same household of another and utterly strange child'.

She adds in the next paragraph:

'I do not have the wherewithal to return to the United Kingdom to fight the divorce action and custody dispute there. It is my intention to remain permanently in South Africa.' B

She adds that the applicant has made no tender to accommodate her together with the children in the United Kingdom and to maintain them for the duration of the divorce action.

The undertaking in its present form goes some way to meet this C difficulty, providing as it does for the children and the respondent to occupy the former matrimonial home where they will presumably not be faced with the problem of Ms D. The question of adequate maintenance has not been dealt with in the undertaking and it is unfair for applicant to suggest through counsel that with the money that he has now paid her by way of arrear maintenance she would be able to support herself. The money which he should have paid

her is hers to D spend as she chooses and, in any event, might already have been repaid to a lender of funds during the period when she was without funds through his non-payment of these amounts ordered by this Court.

I do not regard the undertakings as adequate in the circumstances, but I do not agree with Mr *Donen's* submission that just E because the undertakings are inadequate an intolerable situation results for the children. There must, in my view, be an objective basis for holding that there is a grave risk of intolerability. The undertakings only serve to alleviate the hardship which might ensue. The grave risk that a child would be placed in an intolerable situation arises from the uncontested facts of the matter and the view of Mr F Larry Loebenstein, a clinical psychologist practising in this city with 20 years' experience, who reported to this Court that he consulted with respondent and the two boys on 13 August 1999 at the home of her parents in Sun Valley, Fish Hoek. Mr Loebenstein expresses the opinion that: G

'It is trite that most developmental and other psychologists will support the tender age doctrine. This essentially espouses that very young children, all things being equal, are best left in the care of their mothers. The necessity for appropriate mothering for children of this age is considered crucial to their psychological wellbeing. A corollary of the tender age doctrine is that access by non-custodial parents of young children is usually granted for relatively short H times, in order to ensure that infants are not away from a custodial parent (mother) for any protracted period of time.'

There is no doubt that respondent has been the principal caregiver since January of this year to the two boys and Mr Loebenstein refers to the literature which demonstrates that emotional distress following short term deprivation will be most marked in children I between the age of six months and four years. His closing sentence is:

'The psychological wellbeing of the two boys will be seriously imperilled, given their age and life experience, if substantial provisions for the continuance of the attachment they have with their mother is not assured.'

In the case of B, not yet one year old, I cannot conceive of any court J

removing him from his mother to another country unless proper steps are taken to ensure the mother's continued presence with the A child until final determination of the matter. While the harm to A might not be so great as that to B, it is also well accepted in our law that very young children particularly are not separated from each other. In a situation where the matter is not finally determined and where this may not be the eventual result, it would, to my mind, be B unthinkable to separate the two boys now.

In the result, I am satisfied that there is a grave risk that the boys, and particularly B, will face an intolerable situation if removed from their mother. I am not satisfied on the papers and undertakings that there is adequate provision for the continued support of their C mother in England. This is not a case like *C v C* where the English mother simply refused to go back to Australia for 'emotional reasons'. This is a case where, on the face of it, the mother has very real fears that she may not be able to stay in England for any length of time, has no guarantee of employment in England and has no means to D remain in England during what might be protracted proceedings.

In the result, the application for the relief sought in the notice of motion is dismissed with costs. I do not regard this as a case which is suitable for an award on the attorney and client scale. In addition, applicant is to pay the costs incurred by respondent in the application to accelerate the hearing of the Hague Convention E application.

Applicant's Attorneys: *Crossley & Dykman Inc* . Respondent's Attorneys: *Abe Swersky & Associates.* F

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