

## **CHIEF FAMILY ADVOCATE AND ANOTHER v G 2003 (2) SA 599 (W)**

### **Headnote : Kopnota**

The first applicant, the Chief Family Advocate, brought the present application in a Local Division against the respondent, the father of S, a minor, under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. The Hague Convention on the Civil Aspects of International Child Abduction (1980) had been incorporated into South African law in terms of the Schedule to the Act. He brought the application by reason of the powers and authority conferred upon him by s 3 of the Act for the return of the child to the United Kingdom pursuant to the provisions of art 12 of the Hague Convention. S was born in 1996. His parents were married in South Africa and their marriage still subsisted. They emigrated to Britain in 1997. Their marriage deteriorated some time later and in March 2001 the mother (the second applicant) left the common home. They remain separated. Since their separation S has lived with his father. That arrangement was mutually agreed upon between the parents. On 23 September 2001 the father, unbeknown to the mother, embarked for South Africa with his son, placing him in a school on his arrival. When the mother discovered that the child had been removed to South Africa, she immediately approached the appropriate authorities in England and obtained an order from the High Court of Justice, Family Division, that the child remained a ward of that Court. At the mother's request, the South African authorities in the form of the Chief Family Advocate also initiated the present motion proceedings.

The primary objectives of the Act, as set out in art 1 of the Convention, was to secure the prompt return of children wrongfully abducted from the country where they habitually resided, to ensure that rights of custody and of access under the law of that State were effectively respected by all other contracting States to the Convention, and to give effect to the underlying premise that the child's interests were paramount. In terms of art 2 of the Convention contracting States were to 'take all appropriate measures to secure within their territories the implementation of the objects of the Convention', and for that purpose they 'shall use the utmost expeditious procedures available'. In terms of art 3 of the Convention the removal or retention of a child was to be considered wrongful where '(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised, but for the removal or retention'. In terms of art 5(a), 'rights of custody', for the purpose of the Convention, included 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'.

According to English law each parent has parental responsibility for a child who was born out of their marriage (Children's Act of 1989). 'Parental responsibility' meant 'all the rights, duties, powers, responsibility and authority which by law a parent of a child had in relation to the child and his property'.

*Held*, that the Court was obliged to fulfil two roles in a case such as the present: first, to discharge its functions as upper guardian of minors within its jurisdiction, which it did by acting in the best interests of the child in respect of all matters what were brought before it. Secondly, the Court was entreated by the Convention, which had been directly integrated into South African domestic law, to ensure that every matter brought under its provisions was dealt with using the most expeditious procedures available, whether by giving the matter preference on the roll, making a special order available or treating the matter as one of urgency and out of turn if necessary. It was regrettable that two months had passed since the present matter was first enrolled. That was not in the spirit of the Act. Expedition resulted in less disruption to the minor's life and less uncertainty for the parents. It also reinforced the deterrent aspect of the Convention. A person could not escape the consequences of having issues concerning a child determined by the Court within whose jurisdiction such child had resided and which was in a better position to determine what was in the best interests of that child. That Court was better situated to ensure that relevant evidence could be presented to it. (At 605I - 606H.)

*Held*, further, that the parents in casu were still married to each other, and where parties were still married at the time of the abduction, each parent de facto exercised 'rights of custody' as understood by the Convention, even if it were in a passive form, such as being required to give permission if the other parent wished to take the child out of a school. In those circumstances, acquiescence or non-objection to a decision the other parent had taken in respect of the child did not amount to a non-exercise of 'rights of custody'. As the rights of custody claimed had to be those attributed to the parent 'under the law of the State in which the child was habitually resident immediately before the removal' in terms of art 3(a) of the Convention, rights of custody in casu were determined in accordance with the laws of England. (At 606I and 610E/F - I.)

*Held*, further, that it was common cause that the father had not tried to obtain the mother's consent when he removed the child out of Britain. In terms of the definition of parental responsibility, although each parent might act alone in meeting his or her parental responsibility, both parties' consent would be required when an enactment required such consent in a matter affecting the child. The English Child Abduction Act of 1984 was such an enactment. In its terms, an offence was committed if a parent caused the removal out of the United Kingdom of a child under the age of 16 years without obtaining the consent of the other parent. It was common cause that the child had been habitually resident in England immediately prior to his removal and that both the United Kingdom and South Africa were signatories to the Convention. Accordingly, since the mother also had parental responsibility and her consent was required in terms of the Child Abduction Act before the child could leave the United Kingdom, she qualified as a person who actually exercised, whether jointly or alone, rights of custody under the law of England as envisaged by art 3 of the Convention read with art 5(a). (At 606H/I and 607J - 608D/E.)

*Held*, further, that art 13 of the Convention unequivocally provided that the parent who abducted the child bore the onus of proving that the other parent 'was not actually exercising the custody rights at the time of removal or retention'. (At 610B/C - C/D.)

*Held*, further, that in order for the Convention to achieve its stated objective through according another contracting State's central authority the power to initiate proceedings in its own name, rights of custody only had to be shown to have been prima facie exercised, jointly or alone, at the relevant time to satisfy the requirements of art 3(b). Such rights were prima facie actually exercised where the affected parent's consent was required before the child could be removed, either because a specific Court order to that effect had been obtained, or because there was a law of general application to that effect, such as the Child Abduction Act of the United Kingdom. (At 610D - E/F.)

*Held*, further, that the Convention had to be purposively interpreted in accordance with the contents of art 1. These objectives could not be achieved if national laws were circumscribed in such a way that a right accorded each parent in relation to the care of the person of the child would not be respected by a foreign court even if the law of the affected State was more expansive. The underlying premise could not be respected if the Convention forced domestic law back to the 'power of control' and away from looking to the child's best interests. It was clear that the Convention accepted that the term 'rights of custody' imparted a general meaning within each of the jurisdictions of the signatory States. However, each signatory State had agreed, by the insertion of those provisions, that however restricted its own jurisdictional application of 'rights of custody' might be, they were to be expanded at least to the extent identified in art 5. Far from the wording of art 5 seeking to restrict the meaning of 'rights of custody' they were either illustrative of what it encompassed or more expansive. (At 609B/C - F/G.)

*Held*, further, that because the father had surreptitiously removed the child from England the mother had been unable to exercise her statutory rights. She was therefore a person who, whether the level of proof was a prima facie one or determined on a balance of probabilities, qualified as a person who exercised or would have exercised rights of custody. That being so, the provisions of art 3 were triggered in the present case. In the result the removal of the child was wrongful. (At 610I/J - 611B.)

*Held*, further, that where the removal of the child was wrongful, and provided a period of one year had not elapsed from the date of the abduction, art 12 of the Convention required a Court to 'order the return of the child forthwith'. Accordingly, the Court was compelled to order the return of the child unless the father could rely on one of the safe harbour defences set out in art 13, in which event the Court was nonetheless left with a discretion whether or not to order the child's return. Obviously if the return of the child was not ordered, the Court's discretion had to be in accordance with the constitutional stricture that a child's 'best interests are of paramount importance in every matter

concerning the child' (s 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996). (At 611B - F.)

*Held*, further, that the Convention sought to ensure that custody issues were determined by the Court in the best position to do so by reason of the relationship between its jurisdiction and the child. The aim of the Convention was also to prevent wrongful circumvention of the Court of the child's habitual residence by the unilateral action of one parent. The provisions of arts 13 and 20 were intended to provide exceptions, in extreme circumstances, to protect the welfare of children. The paramountcy of the best interests of the child had to inform the Court's understanding of the exemptions without undermining the integrity of the Convention. The English Courts and English legislation respected the paramountcy of the best interests of the child. (At 611F - 612A/B.)

*Held*, further, that the Court had to place in balance the desirability, in the interests of the child, of the English Court retaining its jurisdiction on the one hand, and the likelihood of undermining the best interests of the child by ordering his return to the jurisdiction of that Court on the other hand. (At 612A/B - B/C.)

*Held*, further, as to the art 13(a) and 13(b) defences raised by the father, that it was evident that he had simply sought to take every defence available to him, whether it was true or not. On the facts, the defence of consent (art 13(a)) could readily be rejected. The evidence also fell far short of the psychological trauma defence (art 13(b)). (At 612D - D/E and 617F - F/G.)

*Held*, further, that all these considerations directed the Court to order the return of the child to England. The Court accordingly found in favour of the applicant and granted an order for the return of S to the United Kingdom. (At 618E and 619F/G - H.)