

Family Advocate v B

SOUTH EASTERN CAPE LOCAL DIVISION

D CHETTY J

Date of Judgment: 20 OCTOBER 2006

Case Number: 2095/06

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Summarised by: D HARRIS

Children – Abduction – Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 – Application by Family Advocate for return of child to habitual place of residence from whence the child had been unlawfully removed – Court refusing application on ground that there was a grave risk that the child’s return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

Editor’s Summary

The respondent had a child out of wedlock. The father of the child had obtained parental responsibility for the child in terms of an order of an English court. This meant that all rights such as custody and guardianship vested in him. As the child’s habitual place of residence at the time was England, his removal from that country required the father’s consent or a court order. Although she had obtained neither, the respondent removed the child to South Africa. The unauthorised removal constituted abduction.

In light of the above circumstances, the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 was applicable. The Family Advocate (applicant) was charged with ensuring that the provisions of the Convention are implemented.

Held – The Convention, which became law in terms of section 231(4) of the Constitution, aims to protect children from the harmful affects of their wrongful removal or retention and to ensure their prompt return to the state of their habitual residence. It provides for a mandatory return procedure whenever a child has been removed or retained in breach of the rights of custody of any person under the law of the state in which the child was habitually resident immediately before the removal.

In deciding whether to grant the child’s return to his father in England, the Court took into account the evidence of the respondent regarding the violence which she experienced at the hands of the boy’s father, the boy’s own evidence in that regard, and psychological reports. The boy expressed a strong desire not to be separated from the respondent, with whom he had a strong bond. He wished to visit England only if the respondent could go with him. That was not possible as the boy’s father had instituted a Penal Order against the respondent which would effect her immediate arrest on arriving in England. The Court noted that the experts and the curator *ad litem* were all unequivocally *ad idem* that, in their opinion, the best interests of the child demanded that he remain in South Africa.

The Court then considered whether the respondent had established, under article 13 of the Convention that there was a grave risk that the child’s return to England would expose him to physical or psychological harm or otherwise

place him in an intolerable situation. The evidence placed before the Court by the various witnesses satisfied it that such risk was indeed significantly present. The Court also emphasised that it was influenced by its belief that the boy had made an informed decision to remain with his mother. The application was dismissed.