



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 1876/2014

**CENTRAL AUTHORITY FOR THE REPUBLIC
OF SOUTH AFRICA**

APPLICANT

and

A[...] K[...] N[...]

RESPONDEDNT

REASONS JUDGMENT

Delivered on: 07 January 2015

MBATHA J

These are my reasons for judgment for an order delivered by this court on the 8th of December 2014.

1.

INTRODUCTION

The Applicant is the Central Authority for the Republic of South Africa designated as such in the terms of the Hague Convention on the Civil Aspect

of Child Abduction(the Convention) which authority is the office of Chief Family Advocate of South Africa, whose authority is delegated to the Family Advocate Antonio Rodriques Correia.

2.

The Respondent is A[...] K[...] N[...], an adult female currently resident at C[...], 80 L[...] D[...], U[...] R[...], Durban, KwaZulu-Natal. The Respondent is the mother of a minor child, S[...] S[...] R[...] a girl born on the [...] 1997 in Belfast, Northern Ireland. The father of the child is the ex-husband of the Respondent, F[...] R[...], an Algerian /Irish citizen, who is resident in Belfast, Northern Ireland.

3.

BACKGROUND

3.1 The Respondent and F[...] were married to each other in accordance with the civil laws of Northern Ireland on the 21st of February 1997. The marriage produced three minor children, namely, H[...] -E[...] a boy born on [...] 1998, Y[...] M[...], a girl born on [...] 1999 and S[...] S[...], a girl born on [...] 2007, who is the subject matter of this application. They were divorced from each other on 30 July 2008.

3.2 The first Respondent was previously married prior to her marriage to F[...], which marriage had produced a son, namely, R[...] M[...], who lives with his parental family.

3.3 After the parties divorced the three children remained in the residence of the Respondent and F[...] exercised contact with them. On or about September 2010 H[...] - E[...] left to live with his father F[...], He was subsequently followed by Y[...] on or about March 2012. S[...] remained with her mother and F[...] continued to have regular contact with the minor child. The parties lived in the same area of Finaghy in Belfast, Northern Ireland.

3.4 The Respondent without notice or consent from F[...] removed the minor child S[...] from her school on Finaghy and moved her to Brookeborough County. F[...] as a result of the move could not exercise his rights of access to S[...]. Consequently, F[...] applied for a Residency Order where he sought an order that the minor child S[...] should live with him and her siblings. On the 20th of September 2012, the Family Proceedings Court in Dungannon Northern Ireland granted an interim Residence Order in favour of F[...], commencing with effect from December 2012. In terms of the order the three children born of the marriage were to live with F[...].

3.5 The Respondent immediately filed a notice of appeal which had the effect of suspending the interim order. The Respondent abandoned the appeal and left for the Republic of South Africa with the minor child S[...] and her new husband. On 31 December 2012 the removal of the minor child took place

without the knowledge and consent of F[...] and the Family Proceedings Court. The Respondent has failed to return the child to the jurisdiction of the Central Authority of Northern Ireland.

3.6 The Respondent is now married (married in May 2012) to G[...] N[...] a South African and they are resident at Umhlanga, Durban, in Kwazulu-Natal. S[...] was enrolled at school in 2013, the H[...] Primary School, where she is doing grade two. The N[...]’s attend the G[...] F[...] Church, in Umhlanga Durban together with S[...] on a regular basis.

3.7 F[...] subsequently turned to courts of Northern Ireland whereby on 26 February 2013 the Family Court Centre at Fermanagh and Tyrone sitting at Dunganan Court, Belfast, struck off the respondents appeal and granted a final residence order, in favour of F[...] in respect of S[...]. The order stipulated that S[...] had to reside with her father until the age of sixteen (16) years.

4.

Consideration of the law and the application thereof to the facts:

The application is brought in terms of Article 12¹ of the convention which reads as follows:

‘where a child has been wrongfully removed or retained in terms of Article 3 and at the time of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is for a period less

¹ Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Convention”) as incorporated into South African Law by section 275 of the Children’s Act (Act No: 38 of 2005)

than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority even where the proceedings have been commenced after one year referred to in the preceding paragraph shall also order the return of the child unless it is demonstrated that the child has now settled in its environment.'

And Article 3 of the Convention provides as follows:

'The removal or retention of a child is to be considered wrongful where:

- a) It is in breach of the rights of custody attributed to a person or 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 exercised but for the removal or retention'.

4.2 The Applicant submits that the Respondent is in breach of the court orders dated 20 December 2012 and 26 February 2013 in that the Respondent has unlawfully and wrongfully removed the child S[...] from the jurisdiction of Northern Ireland Courts. The Applicant therefore bears the onus to prove that the removal and retention of the child in the Republic of South Africa without the consent of F[...] and the courts of Northern Ireland is in breach of Article 3 and 5 of the Convention.

5.

5.1 The parties were divorced on 30 of July 2008, wherein the three children continuously resided with the Respondent. F[...] exercised his rights of reasonable access to the children. The two older children out of their own volition left to live with F[...]; S[...] the youngest remained in residence with the Respondent but F[...] exercised his rights of access to her. The problem started when the Respondent removed the child to a different school in a different town where F[...] could not exercise his rights of access to S[...]. The removal was done without the consent of F[...].

5.2 None of the parties have provided the court with an order defining the residency of the children born from the marriage in terms of their decree of divorce. It is clear from what is stated in both F[...] and the Respondent's affidavits that the children resided with the Respondent and that F[...] exercised contact with them. It was also not an issue with the parties when the two older children changed residence and moved in with their father and their step siblings. It is clear to me that the parties were content with whatever arrangement unfolded as long as each one of them could exercise contact with the children.

5.3 However, when the Respondent moved S[...] to Brookeborough County F[...] could not exercise contact with S[...] as a result that he applied for a residency permit in respect of all the three children including S[...]. The Respondent also applied for a residence order in respect of S[...] and a contact order in respect of H[...] and Y[...]. The court sitting at Dungannon on the 20th December 2012 issued an interim residence court order, ordering that S[...] will reside with her father as from the 28th of December 2012. The application was adjourned until 22 January 2013. The interim order which appears as annexure AR C3 to the Applicants' affidavit comes with the following warning:

“Where a residence Order is in force; no person may cause the child[ren] to be known by a new surname or remove the children from the United Kingdom without the written consent of every person with parental responsibility for the child[ren] or without the leave of the court.

It may be a criminal offence under the Child Abduction (Northern Ireland) order 1985 to remove the child[ren] from the United Kingdom without the leave of the court”.

5.4 The notice of appeal filed by the Respondent appealing against the interim order, which is also dated the 20th December 2012, indicates that the Respondent was represented by her Solicitor a Mr Reggie Ferguson of Ferguson Solicitor's. The court can infer that she was aware of the terms of the interim residence order, which, even if she had no legal representation are

couched in a simple and straightforward language. Irrespective of the warning on the court order she left the United Kingdom without leave of the court and without notifying F[...]. She left for South Africa where she registered the child in her new husband's name, which was also contrary to the warning stated in the court order.

5.5 The warning on the court order further went on to state that that if no court order is obtained, the offender may be committing an offence. Irrespective of the terms of the order the Respondent abandoned the appeal, abducted the child S[...] and left for South Africa without informing anyone about her departure. This had the effect of not only abandoning her two older children, but depriving S[...] of contact with her siblings and father.

5.6 I will not accept the submission made on her behalf that since the interim order was suspended pending the appeal there was no existing order. It is my view that even if the interim order had not been in existence, the parties shared rights of residence and contact with their children. There are natural rights emanating from the marriage which existed between the parties prior to the divorce and after the divorce.

5.7 Furthermore, F[...] was awarded interim residence of S[...] with effect from the 28 December 2012. The order was not set aside, but suspended pending the appeal. This meant that the status quo remained. This did not give the Respondent the right to remove S[...] from the jurisdiction of the courts in Northern Ireland.

5.8 Article 3 categorically states that the removal of the child is wrongful and in breach of the rights of custody attributable to a person in this case, under the law of the state in which the child was habitually resident immediately before the removal or retention and at the time of the removal or retention those rights were exercised either jointly or alone or wanted have been so exercised but for the removal or retention. The Respondent cannot say she had sole custodial or residence rights over S[...], as these rights were exercised jointly by her and F[...]. Even if that was not the case, Article 3 states that “or would have been so exercised but for the removal or retention” (my underlining for emphasis) F[...] was to exercise his rights of residence with S[...] as from the 28 of December 2012.

5.9 When it was clear to the Family Court in Dungannon Northern Ireland that the appeal had been abandoned and the Respondent was in default the appeal was struck off the roll. The court also granted a final residence order in favour of F[...] in respect of S[...].

5.10 It is in my view that in light of their aforementioned circumstances the removal and retention of the minor child in South Africa is unlawfully wrongful in terms of Article 3 and 5 of the Convention.

6.1 The Respondent submits that F[...] knew of the disappearance of the Respondent's departure with the child at least by January 2013 but the proceedings were instituted in March 2014 more than 12 months later. In this regard the court was referred to Article 12 of the Convention which states that where proceedings had been commenced after the expiration of the one year from the date of the alleged wrongful removal the judicial authority *"shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment"*.

6.2 Before I consider whether the child has settled in the environment I have taken cognisance of the fact that the destination of the respondent was unknown to F[...], she had enrolled the child in a different surname, tracing agents had to be used to locate their whereabouts, the respondent did not communicate her intention to settle in South Africa and after settling in South Africa she never communicated even with her children. The Respondent did not want to be found.

6.3 It is trite that the courts in South Africa consider what is in the best interests of the child. I have kept the principle at the back of my mind when I considered all the evidence presented in this regard. I have taken into account S[...]’s tender age, the environment in which she lives, the social workers report the, church reports, the school reports and the environment in which she currently lives in.

6.4 The Respondent and her family whilst married to F[...] were practicing Muslims and embraced the Muslim faith even after their divorce. Christianity was only introduced to the child S[...] when the Respondent moved with her husband, Mr N[...] to South Africa. The other children of the Respondent and their father practice the Muslim faith and I cannot see why this child should denounce her faith and be raised as a protestant. The Respondent has not even reverted to her own faith, Catholicism, but has chosen to raise this child in a different faith. The long term effect of this is to separate the siblings from each other. It is also now that she is in South Africa that she sees her family religion as fanatic, compared to the European types of religions. There is an emphasis that the child has formed a close loving bond with her stepfather, and she is doing very well at school both socially and academically. Nothing is said about encouraging S[...] to know her own father and siblings. The impression gained by this court is that the Respondent does not want to have any contact with her other children. The question I have is whether it will be in S[...]’s interests not to know her own family, I do not agree. S[...] is placed in a school where children normally thrive in the company of other children. She will thrive in similar environment in Northern Ireland taking into account her age and that she will be with her siblings in a familiar place too.

6.4 The court is also vested with discretionary powers in terms of Article 12 of the Convention where the proceedings have been commenced after the expiration of the period of one year referred in the proceedings where it is

demonstrated that the child has now settled in its new environment. I have objectively considered the respondent's case in determining whether the child has settled in its environment. The minor child is being forced to a new culture, new identity and a new parent. The contact between her biological father and her siblings has been cut off without any consideration for her welfare. In all matters concerning the children the best interests of the child are protected in Section 28(2) of the Constitution. The child needs both father and mother it cannot be at the discretion of the mother to sever such contact.

7.

7.1 The Respondent has for the first time in this application raised the issue that his son R[...] M[...] from the first marriage was sexually abused by her ex-husband F[...]. This should be raised by the Respondent to the Family Court in Northern Ireland where the court granted the orders. It is my view that it can still be brought to the attention of the courts in Ireland, who will have the capacity to investigate the allegations and decide on the effect that it will have on all the children and not only S[...].

7.2 I have also considered Article 13(b) which states that the State is not bound to order the return of the child if existence of grave risk of physical or psychological harm or that child would otherwise be placed in an intolerable situation. The minor child is not returned to the father but the child is returned

to the Central Authority for Northern Ireland. Provision is made in the order that the child may be accompanied by the mother to Northern Ireland and that should she be unwilling to accompany the child to Northern Ireland the Family Advocate is authorised to make such arrangements as may be necessary to ensure that the minor child is safely returned to the care of the Central Authority for Northern Ireland.

7.3 This takes care of any kind of exposure to physical harm or emotional harm. Nothing has been suggested in the Respondent's affidavit that suggests that the father exposed his children to any harm. F[...] has denied the allegations of sexual assault on his stepson. The only courts which would be in a position to deal with these allegations are the courts in Northern Ireland. This has created a dispute of facts. This dispute of facts and other disputed facts relating to the suitability of the parties as residence or custodial parents can only be dealt with by the courts in Northern Ireland. ***Sonderup v Tondelli and Another*** [2000] ZACC 26 2001(1) SA 1171(CC)².

8.

8.1 I could not find a dispute of facts in this matter which necessitated the referral of this matter to oral evidence; the sole issue is whether the Respondent acted unlawfully in terms of Article 12 read with Article 13 of the

² ***Sonderup v Tondelli and Another*** [2000] ZACC 26 2001(1) SA 1171(CC)

Convention. I am satisfied that the applicant has proved the unlawful removal of the child from Northern Ireland to South Africa. ***Smith v Smith*** 2001(3) SA 845³

8.2 The Respondents remedy lay in the United Kingdom courts and not in the abduction of the minor child. She has also failed to discharge the onus that it is in the best interest of the child to remain in the Republic of South Africa. Her submission that there was no order, does not hold water, as she cannot explain what she was appealing against, if there was no order.

8.3 Firstly, my duty is to decide whether the removal was wrongful or not and not to hear evidence as to who is it be vested with custody/residence of the minor child. Secondly, by their nature such applications under the Convention are intended to be heard expeditiously to enforce the terms of the Convention. Even in terms our laws such matters require expeditious attendance. Oral evidence is restricted to exceptional cases. Due to the urgency of these matters they are often decided on affidavits. In ***Pennello v Pennello and Another*** (283/2003) [2003] ZASCA 147; [2004] 1 All SA 32 (SCA)⁴ I December 2003 the court held that the primary purpose of the Convention is 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

³ ***Smith v Smith*** 2001(3) SA 845

⁴ ***Pennello v Pennello and Another*** (283/2003) [2003] ZAZCA 147; [2004] 1 All SA 32 (SCA)

retention as expeditiously as possible so that custody and similar issues in respect of the child can be adjudicated upon by the courts, of the state of the child's habitual residence.

9.

9.1 I therefore find in favour of the Applicant and find that the Respondent has failed to discharge the onus in terms of Article 13(b) and Article 12 of the Convention. I therefore confirm the order given on 8 December 2012.

9.2 1) That the minor children , namely S[...] S[...] R[...], a girl born on the [...] 2007 be returned to the jurisdiction of the Central Authority for Northern Ireland after the delivery of the reasons for judgment and the respondent is given 5 days to consider the reasons, thereafter the order comes into effect.

2) In the event that the respondent (the mother) intended to accompany the minor child S[...] S[...] R[...], a girl born on her return to Northern Ireland, she must notify Antonio Rodriques Correia of the Office of the Family Advocate, Durban (Family Advocate) within five days of the granting of this order, that she so intends to accompany the minor child S[...] S[...] R[...] on her return to Northern Ireland.

3) In the event of the Respondent failing to notify the Family Advocate of her willingness to accompany the minor child S[...] S[...]

R[...] on her return to Northern Ireland, it is to be accepted that the Respondent is not prepared to accompany the minor child S[...] S[...] R[...] to Northern Ireland, in which event the Family Advocate is authorised to:

- 3.1) remove the minor child S[...] S[...] R[...] from the care of the respondent;
 - 3.2) make such arrangements as may be necessary to ensure that the minor child S[...] S[...] R[...] is safely returned to the care of the Central Authority for Northern Ireland and to take such steps as are necessary to ensure that such arrangements are complied with.
- 4) In the event that the Respondent fails and or refuses to hand over the minor child S[...] S[...] R[...] to the Family Advocate as envisaged in paragraph 3.1 above, then the Sheriff of this Honourable Court is directed to remove the minor child S[...] S[...] R[...] from the care of the Respondent or wherever and from whomever she may be found to be with and hand her over to the Family Advocate.
- 5) Pending the return of the minor child to Northern Ireland as provided for in paragraph 3.1 above, the Respondent shall not remove the minor child S[...] S[...] R[...] from the province of Kwazulu-Natal and until then she shall keep the Family Advocate informed of her (the

Respondent) and the minor child's physical address and contact telephone numbers.

6) Pending the return of the minor child S[...] S[...] R[...] to Northern Ireland, F[...] R[...] (the father) is to have reasonable contact (access) with the minor child S[...] S[...] R[...], which shall among other include the following:

- 6.1 Daily telephonic contact during reasonable times;
- 6.2 Skype contact at least once a week;
- 6.3 Physical contact with the child at all reasonable times that the child is not attending classes or extra-mural activities at school, in the event that the father should visit the minor child in South Africa, pending the finalisation of the Respondents' approval or legal process that may be undertaken by the Respondent;
- 6.4 Any further contact which the parties may agree upon.

No order as to costs.

Mbatha J