

Pennello v Pennello and another [2004] 1 All SA 32 (SCA)

Headnote : Kopnota

The Appellant, an American citizen and the Respondent were married in America and had a minor daughter, “the minor”. The Respondent removed the minor from the USA without the knowledge or consent of the Appellant. The Appellant made an application in the Durban and Coast Local Division (court of first instance) asking for return of the minor to the USA pending the final adjudication and determination, by the New Jersey Courts, on the issues of custody, care of and access to her.

This order was granted in accordance with the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (1980) (“the Convention”), as incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act [72 of 1996](#) (“the Act”). The Respondent then appealed against this order to the full court of the Natal Provincial Division (“court *a quo*”). The appeal was upheld, setting aside the order made by the court of first instance and dismissing the Appellant’s application for the return of his daughter to the USA. The present appeal is against the judgment and order of the court *a quo*.

Held – It is common cause that, at the time of the minor’s removal, she was habitually resident in the USA and that both parents were exercising equal custody rights in respect of their child. Thus, in terms of the Convention, the minor’s removal from the USA was wrongful.

The main issue to be adjudicated on was whether article 13(b), which gave the Court the authority to prevent the return of the child to its state of habitual residence, was applicable. In terms of article the Respondent had to prove that the return of the minor to the USA would have exposed her to a grave risk of physical or psychological harm or otherwise place her in an intolerable situation.

The Court conducted an investigation into the purpose of the Convention and the proper approach to the article 13(b) “defence”. The Court identified that the most important element in article 13(b) was that of “risk” to the child and sought to define the phrase whilst comparing stances taken in England, Canada, Australia and the USA on the same issue.

The Court disagreed with the court *a quo*’s decision and asserted that the Respondent did indeed bear the usual civil onus of proof, viz that she was required to prove the various elements of the particular article 13(b) defence on a preponderance of probabilities. The Court held that the reasons given by the court *a quo* for finding that there was a grave risk that the minor would be exposed to harm were she to be returned to the USA were inadequate and unconvincing. Further the Court was of the view that the Respondent had not discharged the onus resting on her.

The Court imposed its own protective conditions, to secure the best possible interim protection of the minor’s needs, whilst preventing the Appellant from

experiencing unreasonable and excessive financial demands. The Court was of the view that the conditions suggested by the Respondent would have resulted in the objectives of the Convention being thwarted and would have allowed the Respondent “to effectively blackmail this Court into shirking its obligations under the Convention”. Accordingly, the appeal was upheld and the order of the court *a quo* was set aside.