

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

### 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 International Child Abduction Act 72 of 1996 for the handing over of the children by their mother for the purpose of their return 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 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 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 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 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 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 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.)

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

*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.)

*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.)

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