



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Heidi Nicole Koch N O and Another v The Ad hoc Central Authority for the Republic of South Africa and Another (188/2021) [2022] ZASCA 60 (26 April 2022)

Today the Supreme Court of Appeal (SCA) upheld the appellant's appeal with costs including those of two counsel. It granted the application to adduce further evidence and set aside the order of the Western Cape Division of the High Court (the high court). It replaced the order as follows: 'The application for the return of the child in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 is dismissed with costs including costs of two counsel.'

This appeal concerned the return of a four-and-a-half-year-old girl (the child) from South Africa, Cape Town to the United Kingdom (UK) in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Convention). The child's mother, (the mother), who had been diagnosed with colorectal cancer whilst still living in the UK decided to come to South Africa primarily for the purpose of enabling her to pursue available treatment options. The understanding was that the child's mother would return to the UK with the child after her successful medical treatment in South Africa, alternatively, if nothing further could be done to treat her cancer, the child and the mother would return to the UK. Accompanied by the father and the child she left the UK for South Africa in September 2019. Some few weeks later the child's father left South Africa for the UK. The child remained in South Africa with the mother and was being cared for by the second appellant, the maternal aunt (the aunt) and the maternal grandmother.

When the child's mother realised that her chances from recovery were non-existent, she expressed the wish that should she become too ill to take care of the child, and in the event of her death, she would like the child to remain in South Africa and be raised by the aunt. The child's father did not agree to the child remaining permanently in South Africa under any circumstances. He approached the Central Authority for England and Wales and submitted a request for the return of the child under the Convention on the grounds that the child's retention in South Africa by her mother without his consent was wrongful.

The mother opposed the return of the child to the UK on the grounds that the father had consented to the child remaining with her in South Africa for as long as she was undergoing treatment for cancer. In the alternative, she opposed the Convention application on the ground that there was a grave risk that the child's return to the UK would expose the child to both physical and psychological harm and also place the child in an intolerable situation. The matter was heard by the high court and the high court dismissed the mother's defences under the Convention. It ordered the child to be returned to the UK subject to certain conditions and granted the child's aunt leave to appeal to this Court.

Two issues arose in this appeal. The first was whether the high court's rejection of the mother's defences under article 13 of the Convention and ordering the child's return to the UK, was correct. The second issue was whether further evidence should have been admitted on appeal. This evidence related to the events which occurred subsequent to the death of her mother and was relevant to the enquiry whether there was a grave risk that the court order for the return of the child to the UK would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The high court rejected the defences advanced by the mother under articles 13(a) and (b) of the Convention and ordered the return of the child to the UK. The SCA first dealt with the new evidence (expert opinion of an educational psychologist, specialising in the field of child forensic psychology) which the appellant sought to adduce. It granted the appellant leave to introduce the new evidence on the basis that in terms of s 19 of the Superior Courts Act 10 of 2013, a court was afforded powers, on hearing an appeal, to receive further evidence. The new evidence sought to be adduced dealt with the functioning of the child subsequent to the death of her mother and the likely impact of her death on the child psychologically and emotionally. The SCA observed that this assessment could not have been conducted while the mother was still alive.

In relation to the question whether the high court was correct in ordering the return of the child to the UK, the SCA held that any further retention by the mother or the appellant, through the mother's stated intention, constituted a wrongful retention of the child within the meaning of the Convention. It held that the high court was, therefore, bound to order the return of the child to the UK unless circumstances under article 13(b) existed.

In terms of article 13(b) of the Convention (article 13(b) the court is not obliged to order the return of the child if a person opposing the child's return application establishes that 'there is a grave risk that the [child's] return would expose [him or her] to physical or psychological harm or otherwise place the child in an intolerable situation'. The high court rejected the mother's defence on the ground that there was no evidence that should the child be ordered to return to the country of the child's habitual residence, the child would be faced with the risk of grave psychological and physical harm or that the child may otherwise be placed in an intolerable situation.

The SCA held that the high court erred in rejecting the mother's evidence which showed that the removal of the child from her primary attachment figure in the form of her aunt and safe and secure environment will expose her to the risk of grave psychological and physical harm or otherwise place her in an intolerable situation and that the mechanisms in place in the UK are not sufficient to ameliorate such harm to which the child will be exposed on her return to the UK.

In the result, the SCA made an order in the following terms: The application to adduce further evidence was granted. The appeal succeeded with costs including costs of two counsel. The order of the high court was set aside and replaced by the following: 'The application for the return of the child in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 is dismissed with costs including costs of two counsel'.

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