# SHOULD THE COURT LOOK AT THE BEST INTERESTS OF SPECIFIC CHILDREN IN ABDUCTION CASES? AN EXAMINATION OF *CENTRAL AUTHORITY OF THE REPUBLIC OF SOUTH AFRICA v JW AND HW WITH C DU TOIT INTERVENING*

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## INTRODUCTION

*Central Authority of the Republic of South Africa v JW and HW with C du Toit Intervening* (unreported case no 34008/2012, North Gauteng High Court, Pretoria, 6 May 2013) relates to the emotive field of international parental child abduction. This matter is regulated by the provisions of the Hague Convention on the Civil Aspects of International Child Abduction of 1980 ('the Convention'), which was incorporated into domestic South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 and was subsequently repealed and replaced by s 313 of the Children's Act 38 of 2005. The whole of the Convention is now incorporated into the Children's Act itself in chapter 17. The applicant, the Central Authority of the Republic of South Africa (the Chief Family Advocate or her or his designate: see s 277 of the Children's Act) launched an application on 15 June 2012 for the peremptory return of three minor children removed from Australia by the first respondent (their mother, 'M') in contravention of the provisions of the Convention. The process was initiated by the Australian Central Authority at the behest of the second respondent (the father of the children, 'F'). Ms C du Toit of the Centre for Child Law at the University of Pretoria was appointed to act for the children. (As will be seen below, the delay in making this appointment was a relevant factor in the ultimate decision of the court.) On 6 May 2013, Louw J handed down judgment. On 27 May 2013 an application was brought for leave to appeal the judgment. The application for leave to appeal was denied on 13 June 2013, but this decision was overturned by the Supreme Court of Appeal, which granted leave on 14 October 2013 (per Lewis and Wallis JJA). The purpose of this note is to argue why the court of first instance was correct in handing down the judgment it did, and why any future appeal should be dismissed.

## THE FACTS

M, who was married to F, and was a party to an abusive relationship, brought her three minor children, aged eleven-and-a-half, ten and three at the time of the proceedings (para 1), to South Africa on holiday on 12 December 2011. During her visit she consulted with family and friends, including her father-in-law, and made the decision not to return with the children to Perth, Western Australia, and her abusive marriage. She felt that her decision was supported fully by the two older children (para 2). M sought the input of a social worker, who attempted unsuccessfully to interview the two older

children on 14 December 2011, and did eventually interview them on 23 January 2012 (ibid). The social worker concluded that the children did indeed fear going back to Australia and that they had a clear preference to remain in South Africa (paras 3–4). On 24 January 2012 M advised F that neither she nor the children would be returning to Australia. F approached the Australian Central Authority on 24 February 2012 to assist him in securing the return of the children. This application for the children's return was sent to the applicant, who then unsuccessfully attempted to mediate a voluntary return of the children. This attempt to secure the voluntary return of the children was in accordance with the provisions of art 10 of the Convention. M refused to return herself and/or her children to a situation potentially fraught with domestic violence. She supported her position by furnishing the applicant with corroborative affidavits (para 6).

The applicant remained unconvinced of M's allegations, regarding much of her evidence as hearsay (para 8). On 20 March 2012 the applicant received an application for the return of the children from its Australian counterpart. The application was dated 7 February 2012 (para 9). The applicant arranged another meeting with M during April 2012, by which time M had initiated divorce proceedings and launched a Rule 43 application. The applicant asked M to stay her proceedings pending the outcome of the Convention application and proceeded to launch the Convention application on 15 June 2012 (para 7).

Clearly the applicant did not act expeditiously in this case (para 11). On 10 July 2012 M indicated that s 279 of the Children's Act requires that the children be represented separately in Convention matters, and on 21 August 2012 the applicant undertook to ensure the appointment of a suitable representative for the children. Steps to make this appointment were only taken in October 2012 and the application for leave to appoint Ms du Toit was only filed in December 2012 (see art 11 of the Convention; Carina du Toit 'The Hague Convention on the Civil Aspects of International Child Abduction' in Trynie Boezaart (ed) *Child Law in South Africa* (2009) 353).

The focus of this note is the Convention and the peremptory return requirement. This note will not examine the trend towards shared parental responsibility and the reasons for the trend; the complex nature of the factors to be considered when establishing the best interests of the child; or the very real problem of post-divorce relocation, the driving force behind many parental child abduction cases. (See on such issues, amongst others, W Domingo '"For the sake of the children". South African family relocation disputes' (2011) 14(2) *PER/PELJ* 148; P Strous 'Post-divorce relocation: In the best interests of the child?' (2007) 37 *SA Journal of Psychology* 223.) How courts should deal with the best interests of the child in custody (parental responsibility) and post-divorce relocation disputes are related matters that also fall outside the scope of this note.

## THE CONVENTION

Article 3 of the Convention clearly provides that a child is wrongfully removed or retained in terms of the Convention when he or she is removed

or retained in breach of the rights of custody lawfully attributed to a person or persons in accordance with the law of the state of habitual residence of the child immediately before the removal or retention ('the sending state'), in circumstance in which such rights were being exercised or would have been exercised save for the removal or retention (para 13). In such cases, art 12 of the Convention provides that the administrative authority of the contracting state in which the child now finds itself ('the receiving state') must order the immediate return of the child if the child has been located within its jurisdiction for a period of less than a year. If a year or more has elapsed since the child's arrival in the jurisdiction, the administrative authority has a discretion to refuse to order the child's return if it finds the child to have become settled in his or her new environment (art 12(2)).

In addition to the above, the administrative authority of the receiving state may refuse to order the peremptory return of a child wrongfully removed or retained if, in terms of art 13, the person whose custody rights were breached subsequently acquiesced to the removal or retention (art 13*(a)*); there was grave risk of physical or psychological harm to the child or he or she would be placed in an intolerable situation if he or she were to be returned (art 13*(b)*); or the child voices an objection to being returned and he or she is sufficiently old and mature that, in the circumstances, it is appropriate to take his or her views into account (art 13*(c)*).

Finally, art 20 of the Convention also creates a discretion for the receiving state to refuse return of the child when the return would be contrary to the fundamental principles of the state regarding the protection of human rights and fundamental freedoms. (For a discussion of the Convention, see Caroline Nicholson 'Introduction to the Hague Convention on the Civil Aspects of International Child Abduction' in C J Davel (ed) *Introduction to Child Law in South Africa* (2000) ch 13; Du Toit in Boezaart op cit ch 15; E Perez-Vera 'Explanatory Report by E Perez-Vera, Hague Conference on Private International Law', Actes et Documents de la Quatorzieme session, vol III, 1980, p 426 Report 50/462 available at *http://haguejudicialresources.org/Hague_Judicial_Resources/Perez-Vera_Report.html*, accessed on 24 February 2014).

There can be no doubt that the primary purpose of the Convention is to ensure the peremptory return of children wrongfully removed from their place of habitual residence in order that the courts there may make a determination regarding custody rights. (Note that the term 'custody' is used throughout this article rather than the term 'parental responsibility', which is used in more recent legislation in the various jurisdictions mentioned. The reason for this is that the Convention uses the older terminology: *Pennello v Pennello (Chief Family Advocate as* Amicus Curiae*)* 2004 (3) SA 117 (SCA); Du Toit in Boezaart op cit at 351, 353). Bearing in mind that primary purpose, it is not surprising that the overwhelming majority of the case law available in contracting states supports peremptory return, irrespective of the circumstances prevailing in the place of habitual residence (see in this regard the overview of relevant case law in contracting states to be found in the

International Child Abduction Database ('INCADAT') available at *www.incadat.com*, accessed 24 February 2014). Sadly, however, this means that the welfare of the child is not always at the heart of the court's determination and parties may experience trauma and a sense of helplessness.

Courts of contracting states are also encouraged to apply a uniform approach to the treatment of Convention applications and to this end are permitted, if not encouraged, to draw upon the wealth of case law from the jurisdictions of member states in determining cases (Du Toit in Boezaart op cit at 352). Thus, a comparative approach to the issues raised in the above case will be of value.

## THE FIRST RESPONDENT'S ARGUMENT/DEFENCES TO THE APPLICATION

M argued that the application for the return of the children should fail on the following grounds:

- The two older children strenuously objected to being returned and they had reached an age and level of maturity that required the court to take account of their views (art 13).
- Return of the children would place them at grave risk of physical or psychological harm, or would otherwise place them in an intolerable situation (art 13*(b)*).
- F had acquiesced in the retention (art 13*(a)*). The last ground was not strenuously pursued by M and thus was not fully considered by the court (para 16). This is unfortunate as the South African jurisprudence on this point is extremely limited and could have benefited from the court's attention (see in this regard *Smith v Smith* 2001 (3) SA 845 (SCA); *Chief Family Advocate, Cape Town v Houtman* 2004 (6) SA 274 (C); *Family Advocate, Cape Town & another v EM* 2009 (5) SA 420 (C); Du Toit in Boezaart op cit at 362–3; F Bates 'Child abduction: The Hague Convention and Australian law — A specific overview' (1999) 32 *CILSA* 72).

The court a quo decided that it would first examine the constitutionality of the Convention's provision for peremptory return (para 17). This examination was essential to establishing the context within which the Convention applies in South Africa. To this end, the court considered *Sonderup v Tondelli & another* 2001 (2) SA 1171 (CC), in which it was held that the Convention was consistent with s 275 of the Children's Act and s 28(2) of the Constitution of the Republic of South Africa, 1996, which make the child's best interests the paramount consideration in all matters affecting children. The court arrived at this decision on the basis that the exceptions in arts 13 and 20 allow courts to protect the child's welfare in extreme cases. The court in *Sonderup* provided that the paramount consideration of the best interests of the child should 'inform our understanding of the exemption without undermining the integrity of the Convention' (para 33). It thus indicated that it must balance, 'in the interests of the child, the desirability . . . of the

appropriate court retaining its jurisdiction . . . and the likelihood of undermining the best interest of the child by ordering his or her return to the jurisdiction of that court . . .' (para 35).

Further, the court a quo considered *Central Authority v MR (LS Intervening)* 2011 (2) SA 428 (GNP), in which Fabricius J set out the legal framework within which the court must make a determination in an abduction case (at 438B–439B). Fabricius J referred to s 2*(b)*(iv) of the Children's Act, in which s 28(2) of the Constitution is restated, and to ss 6, 7 and 10 of the Children's Act dealing with general principles, the best interests of the child, and children's participation in matters affecting them, respectively. He arrived at the conclusion that, having regard to the relevant legal framework, the Convention must be applied in a subservient way to the constitutional provisions and the provisions of the Children's Act (at 439B). In *Central Authority of the Republic of South Africa v JW and HW with C du Toit Intervening* Louw J indicated that, on his interpretation of Fabricius J's judgment in *Central Authority v MR (LS Intervening)* (supra), Fabricius J did not regard the Convention as irrelevant, but emphasised the court's obligation in terms of both the Constitution and the Children's Act to consider the best interests of the child (para 19). Louw J stressed that the *Sonderup* judgment (supra) confirmed that the incorporation of the Convention by the Children's Act was consistent with the Constitution and that its provisions therefore had to be considered. However, it was not a simple matter of making a Convention order; a balancing of the child's interests had to take place (ibid).

As regards M's defences to the application, Louw J in *Central Authority of the Republic of South Africa v JW and HW with C du Toit Intervening* made the following determination: the Convention provision (art 13) and the provision in the Children's Act (s 10) are similar in their content regarding when a child's views should be taken into account (para 20). The court confined itself to the views expressed by the older children as the youngest child was a baby and thus patently too young to have his views assessed or taken into account (ibid). The two older children expressed their views to a social worker on two separate occasions (paras 21–22) and, despite objections by both the applicant and F to their views being considered (para 23), the court found their views to have been articulately expressed and expressed with a proper understanding of the purpose for which the views were being sought (paras 23, 25). The court rejected allegations that the views of the children had been unduly influenced by M, indicating that the social worker had stated in her report that there was no evidence to support these allegations (para 24).

The Preamble of the Convention states that the member states regard the interests of the child as the paramount consideration in custody matters, and that peremptory return will best serve those interests. This means that the Convention assumes that the wrongful removal or retention is, in most instances, inherently prejudicial to those interests (Du Toit in Boezaart op cit at 354). Its point of departure is that the best interests of the child will, in the vast majority of cases, be best served by the swift return of the child to the

place from which he or she was abducted, and that this jurisdiction will be best placed to examine the merits of the custody dispute and to make a determination in that regard (ibid). This assumption is informed by the fact that the courts of the jurisdiction of the child's habitual residence immediately before the abduction will have access to vital information regarding the child's background and circumstances (*Pennello v Pennello* (supra) at 134B–D).

The literature is emphatic that the Convention provides for the return of the child from one jurisdiction to another and that it is not a removal of the child from one parent and its return to the other that is envisaged (*Pennello v Pennello* ibid at 145B–D; Du Toit in Boezaart op cit at 354). In light of this, the Convention prohibits the hearing of evidence on the merits of the custody matter or the best interests of the specific child involved during the Convention application. This, it may be argued, is unconstitutional. South African courts are required to treat the child's best interests as being of paramount importance in all matters concerning him or her (s 28(2) of the Constitution). This applies to the specific child involved, not children in general. It thus appears that the international regulatory framework and the domestic one are somewhat at odds.

Section 278(1) of the Children's Act allows the court hearing the return application to require that the Family Advocate provides a report pertaining to the pre-abduction circumstances of the child. This report can then be used, inter alia, as evidence to establish whether or not a Convention exception should be exercised and peremptory return be denied. Convention provisions that allow for exceptions to the peremptory return requirement create scope for a court faced with a request for the return of an abducted child to make a superficial inquiry into the best interests of the child and, on finding that there are grounds to uphold such an exception, to exercise a discretion as to whether or not the child should be returned. (*Smith v Smith* (supra) at 850I–J, 851B–C; *Chief Family Advocate & another v G* 2003 (2) SA 599 (W) at 618D–E; *Secretary for Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* [2006] NZSC 97 para 34; Du Toit in Boezaart op cit at 360). This inquiry is of course not comprehensive and the further inquiry into the best interests of the child is left to the court vested with the jurisdiction to make the final custody determination.

The upholding of an exception, and the consequent refusal to return the child, is simply a safeguard to ensure the child's safety during the custody hearing proper. Hence, as this inquiry does not constitute a full-blown custody hearing, it may safely be assumed that the evidence presented need not meet the standards required for such a hearing, which will still take place.

The art 12(2) exception that the application was not launched timeously and that the child has become settled in his or her new environment was not relied upon in this case (para 13). (This exception is discussed by Du Toit in Boezaart op cit at 361–2). The question whether or not the child is settled takes cognisance of physical, emotional and social factors *(Re N (Minors) (Abduction)* [1991] FLR 413; *Soucie v Soucie* 1995 SLT 4148; *Secretary of Justice (As the New Zealand Central Authority on behalf of TJ) v HJ* (supra) para 55;

Du Toit in Boezaart op cit at 361). The one-year period runs from the date of the child's removal (*Central Authority v B* 2009 (1) SA 624 (W) at 632A–C). The question as to what is in the best interests of the child who has settled in the new environment is fundamental in this enquiry. In such cases, therefore, Du Toit (in Boezaart op cit at 362) has posited that the s 28(2) paramountcy principle in the Constitution that requires the best interests of the child to be the paramount consideration may well override policy considerations and the Convention when considering whether or not to effect a peremptory return.

Article 13 exceptions are more commonly raised and more problematic, especially those in terms of art 13*(b)*, where it is alleged that returning the child will place him or her at grave risk of physical or psychological harm or will otherwise place the child in an intolerable situation (Du Toit in Boezaart op cit at 363–4). This exception turned out to be extremely difficult to prove (Du Toit in Boezaart op cit at 363). The Constitutional Court dealt with this exception in *Sonderup v Tondelli* (supra), where it stated (at 1189D–1190A) that the return must expose the child to a grave risk either of physical or psychological harm or place him or her in an intolerable situation. Thus the risk of the harm must be serious, and the harm or situation contemplated must also be of a serious nature and must extend beyond the harm or prejudice ordinarily associated with the removal of a child, his or her forced return, and a subsequent contested custody dispute. There must be objective evidence of the risk. (In arriving at this conclusion the court relied on *WS v LS* 2000 (4) SA 104 (C) at 115E–F.) This exception allows the courts to make an enquiry into the child's best interests. This enquiry is, however, circumscribed (*Sonderup v Tondelli* (supra) at 1185E–H; *Chief Family Advocate & another v G* (supra) at 611J–612C; *Family Advocate v B* [2007] 1 All SA 602 (SE) paras 11, 13; Du Toit in Boezaart op cit at 364).

At the heart of M's defence to the Convention proceedings lay her allegation that an art 13*(b)* exception should be upheld given the fact that returning the children with or without her would place all three of them in grave risk of harm of a psychological nature, and possibly also of a physical nature, and would place them in an intolerable situation (para 28). This risk of harm, she alleged, was exacerbated by the unnecessary and lengthy delays by the applicant and F in bringing the matter before the court (paras 30, 31). She supported this allegation with reference to *Central Authority of the Republic of South Africa v B* 2012 (2) SA 296 (GSJ) para 17 and s 6(4)*(b)* of the Children's Act. She alleged that, although the application was launched timeously, the delays in bringing the matter before the court allowed the children to become settled in the new environment (para 31) — an argument that, combined with the two older children's objection to being returned, convinced Louw J sufficiently to deny the application for the return of the children to Australia.

## A BRIEF COMPARATIVE OVERVIEW

Currently, in Australia, the matter of child abduction is dealt with by the International Family Law and Children Section of the Attorney-General's

Department, which concentrates on legal and practical issues associated with facilitation of the child's return. (Information relating to abduction matters in Australia is available at *http://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/Questionsaboutinternationalchildabduction.aspx*, accessed 24 February 2014.)

In considering the current matter, I examined the prevailing law relating to child custody (parental responsibility) in the requesting state and then at the case law relating to the abductor's (mother's) possible arguments against the return of the children to their place of habitual residence. A brief survey of the custody law applicable in Western Australia (the requesting state) disclosed that current legislation in the form of the Family Law Amendment (Shared Responsibility) Act of 2006 (which came into effect on 1 July 2006), promotes joint custody (s 61C(1)) and creates a presumption that this is in the best interests of the child. This presumption can be rebutted where evidence of child abuse or domestic violence can be presented to the court (s 61DA(1) and (2)).

If the children in the case under discussion were to be returned to Australia, M might well be able to argue a case for sole custody in Australia based on the domestic violence she alleges to have taken place. Thus F's assertions to his wife (disclosed in an informal interview with M) that the Australian court would automatically award him equally shared custody, whilst founded upon the current legislative provisions, may well have been incorrect if M were able, on the evidence, to rebut the presumption that such an order would be in the best interests of the children.

There is a wealth of case law, both in Australia and elsewhere, which discloses how difficult it is to raise a successful defence to Convention proceedings. (There is a reasonably comprehensive summary of relevant case law in INCADAT, available at *http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1*, accessed 24 February 2014. The bulk of the authority supports peremptory return.)

The comparative law on each of the defences raised by M will be dealt with in more detail below.

*The mother's (abductor's) refusal/inability to return to Australia, exposing her children to grave emotional and psychological harm*

Case law reveals that it is only in very exceptional cases that the abductor's insistence that she will not return to the place of habitual residence will sway the court in making its decision. In *Director-General Department of Families, Youth and Community Care and Hobbs* [1999] FamCa 2059, the court disregarded the fact that the child's mother was neither willing nor able to return to the requesting state (in this case, South Africa) in determining grave risk of harm. The court was of the opinion that the mother's situation (in this case, that she had recently given birth to her new partner's child) was largely a consequence of her own actions. The court's decision to return the children was, however, conditional upon certain undertakings in respect of which mirror orders were to be created.

There is, however, a Canadian case (*NP v ABP* [1999] RDF 38 Que CA) in which the abductor's (mother's) refusal to return was regarded as a basis to establish grave risk of harm if a return order were to be granted. In this case, the abductor was found to have been subjected to a genuine threat that she was correct to fear. The facts were extraordinary in that the woman had herself been abducted, sold into slavery, and beaten and abused by the applicant.

In the United Kingdom, in *Re S (A Child) (Abduction: Grave Risk of Harm)* [2002] EWCA XCiv 908, [2002] 3 FCR 43, the mother's refusal to return for health reasons was taken into account. Despite this, the court still ordered return of the children.

In the 2012 case of *Re S (A Child)* [2012] UKSC 10, the court a quo refused to issue a return order in a case where the applicant (father), a recovering drug addict who had been guilty of serious violence, sought return of his children to Australia. His successful appeal of the ruling of the court a quo was overturned on further appeal to the United Kingdom Supreme Court. The court, relying on *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 para 55, found that in instances where a grave risk had been established, the court should not exercise its discretion to return the child. The mother had presented medical evidence that her return to Australia would result in her suffering crippling anxiety as well as ill-health. On her return to the United Kingdom, she had suffered from Battered Woman Syndrome and acute stress associated with the breakdown of her relationship with the applicant. Her return to Australia was found by the court to be likely to cause her (then) stable condition to deteriorate significantly. The court noted that in *Re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 the fact that a mother's anxiety might affect her ability to parent to the point that the situation might become intolerable for the child, could satisfy the threshold requirement for an art 13*(b)* exception. This, together with the court a quo's correct assumption of the truth of the applicant's allegations of abuse, was sufficient basis for the court to hold that protective measures would be insufficient to ensure that the child would not be placed in an intolerable situation if returned. The court was correct in finding that the mother had set out a convincing case that she had suffered significant abuse at the hands of the applicant. The Supreme Court thus determined that the grave risk was not simply a matter of the mother's subjective perception.

*The grave risk of physical abuse that the minor children may face in the event of their return*

It seems that courts are extremely hesitant to reject applications on the basis of grave risk in general. Many defences based on grave risk involve potential exposure of returned children to sexual abuse (see *www.incadat.com/index.cfm?act=analysis.show&s1=3&1ing=1*, accessed 24 February 2014). Others relate to the return of children to areas of strife and the like (ibid). Neither of these was applicable in the case under discussion.

Despite some strong arguments that grave risk of harm may exist, the courts have tended not to reject the application, choosing instead to deal with the risk through the imposition of conditions and the giving of undertakings. The courts have largely taken the view that allegations of risk, such as exposure to sexual and other abuse, are a matter for the court to investigate in the course of the custody proceedings. In the United States of America, in *Danipour v McLarey* 286 F3d 1 (1st Cir 2002) the Court of Appeals for the First Circuit cautioned against reliance on undertakings for the protection of the child, as such undertakings are often unenforceable.

That protective measures put in place in the requesting state should satisfy the concerns of the sending state's courts are not a sufficient guarantee that the children will be safe. Once the child has left the jurisdiction of the court it has no further opportunity to safeguard the best interests of the child, and no authority by which to follow up on the implementation of undertakings made. In a 2008 USA case, an order was issued for the return of a child abducted from Australia to the USA, despite the fact that the mother (abductor) had been raped by the applicant (father). (The case report could not be located; however, the case is reported upon by Tom Morton 'Grave risk of harm and The Hague: Judge orders girl back to Australia' available at *www.international-divorce.com/grave-risk-australia.htm*, accessed 24 February 2014.) The applicant had been convicted and imprisoned for a number of crimes, including rape. Despite the clear evidence of risk to the child, the child's return was ordered on the basis that the court was not determining that the child was to be returned to the father, but that the court of Australia was the forum in which such a determination was to be made. The court beseeched the Australian authorities to ensure the safety of the mother and child, and indicated that should they be harmed, the fact that the court had complied with the law would be cold comfort. According to Morton (op cit), the judge, Chief US District Judge William Downes, expressed his disgust at having to order the child's return, but felt compelled to do so. Morley, the mother's legal representative, indicated that too rigid an enforcement of the Convention could lead to injustice. The matter was to be taken on appeal to the 10th US Circuit Court of Appeals in Denver, but no report of the appeal could be found.

A brief review of case law regarding this defence thus suggests that it will succeed only in exceptional cases. That said, the caution of the USA court in *Danipour v McLarey* (supra) that undertakings may be inadequate to ensure the child's protection, should not be ignored. In the United Kingdom, in the 2012 case of *Re S (A Child)* (supra), the court a quo refused to issue a return order, inter alia because it found protective measures inadequate as a means to ensure that the child would not be placed in an intolerable situation if returned.

Rigid enforcement of the Convention provisions can lead to injustice in individual cases. The court, although not responsible for the custody determination, should assume some responsibility for ensuring that the child will be protected. As the upper guardian of minor children, the high court in

South Africa should not excuse itself from its obligation to protect the best interests of each individual child on the basis that international undertakings allow it to defer this responsibility and to shift it to another forum. (On this point, see the remarks of Baroness Hale in *Re D (A Child) (Abduction: Foreign Custody Rights)* (supra) referred to in the conclusion below.)

*The children's objections to being returned*

A comparative overview of case law reveals that it is not clear from what age a child's objection to the return will be taken into consideration. In Australia, the views of an eight-year-old girl were not taken into account in *HZ v State Central Authority* [2006] FamCA 466, yet in *Director-General, Department of Families, Youth and Community Care v Thorpe* (1997) FLC 92-785 the objection of a nine-year-old child was upheld.

In the United Kingdom, the views of children of eight and six years of age have been upheld by the courts (*Re W (Minors)* [2010] EWCA 520 Civ). In Australia, this exception is regulated by s 111B(1B) of the Family Law Act of 1975, as amended. This section requires that the child's objection must amount to more than a simple preference not to return (*Richards & Director-General, Department of Child Safety* [2007] FamCa 65). This approach accords with the approach taken in South Africa in the case under discussion. Furthermore, the point was made in the English case of *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 that the child's objection to being returned to the applicant parent must be distinguished from an objection to life in the place of habitual residence.

*In Re T (Abduction: Child's Objections to Return)* [2000] 2 FCR 159 the court identified questions to be posed to the child in determining whether or not to take the child's objection into account. These questions were endorsed in 2007 by the Court of Appeal in *Re M (Children) (Abduction: Rights of Custody)* [2008] AC 1288. The questions are discussed in the case analysis that appears in INCADAT (*http://www.incadat.com/index.cfm?act=analysis.show&s1=3&1ing=1*, accessed on 24 February 2014).

Baroness Hale, in *Re D (A Child) (Abduction: Foreign Custody Rights)* (supra) para 57ff, indicated that the wishes of the child should be ascertained at the start of the proceedings. She also indicated, in *Re M (Children) (Abduction: Rights of Custody)* (supra) that, despite the fact that they may have separate legal representation, children should be aware that their objection is merely one of many factors that the court will consider and that it will not carry undue weight.

Furthermore, it is important that the court determine whether or not the child's objection is a result of undue influence exerted by the abducting parent. The child's views must be independent, taking into account that any caring parent will influence the child's preference to some extent (*Robinson v Robinson* 983 F Supp 1339 D Colo 1997; see also *Re M (A Minor) (Child Abduction)* (supra)). In the case under discussion, Louw J rejected the allegations that the children's opinions had been unduly influenced by M (para 24).

*The acquiescence of the applicant to the removal*

This defence was not relied upon in the case under discussion. However, it should be noted that the bulk of authority appears to support the view that the determination on acquiescence must be based upon the subjective intention of the applicant in the particular case (see *http://www.incadat.com/index.cfm?act=analysis.show&s1=3&1ing=1*, accessed on 24 February 2014).

## CONCLUSION

It should be noted that Baroness Hale, in *Re M (Children) (Abduction: Rights of Custody)* (supra) para 40, indicated that there is no test of exceptionality in terms of the discretion exercised under the Convention. The circumstances under which return might be refused are themselves exceptional, and the Convention should not be further glossed. She stressed that other considerations must be weighed 'against the interests of the child in the individual case' (ibid para 42).

In South Africa, constitutional imperatives make the best interests of the child the paramount consideration in any matter affecting them. In light of Baroness Hale's remark above, it could be strongly argued that the courts must weigh the best interests of the individual children in each abduction case and should not simply view peremptory return to be in the best interests of children in general and leave their investigation at that. Clearly the court in *Central Authority of the Republic of South Africa v JW and HW with C du Toit Intervening* shared this view and, in my opinion, arrived at the correct decision, namely not to return the children to Australia.

From the pleadings in support of the application for leave to appeal (the applicant's founding affidavit) it is clear that F is of the opinion that, inter alia:

- The court should not have taken the objections of the children into account (para 12 of the founding affidavit);
- The approach taken by Louw J is incorrect and that his application of what F terms a 'welfare approach' undermines the purpose of the Convention (para 14, esp para 14.7–14.8 of the founding affidavit);
- The court erred in finding that there was an unreasonable delay in bringing the matter before the court and that such delay was sufficient to ground a view that the children should not be returned to Australia;
- The court erred in concluding that there were grounds to support an art 13*(b)* defence; and
- The court admitted hearsay evidence of alleged domestic abuse in circumstances where it should not have done so.

Likewise, the Central Authority took the position that the court a quo erred in finding that the objection of the children should be upheld, that there were grounds to support an art 13*(b)* defence and, most importantly, that the court a quo erred in its understanding of its role in Convention cases, thus undertaking an investigation into the merits of the case instead of confining itself to the purely jurisdictional question. It indicated further that in its opinion, the potentially abusive situation to which the children would be returned was not sufficiently extreme to ground an art 13*(b)* exception.

The approach taken by the Central Authority and F in their appeal documents, discloses a shot-gun approach to the matter, simply alleging that the court a quo erred in almost every conceivable way in arriving at the conclusion it did. Comity between nations, upon which the Convention is founded, does not exclude M and her children from protection under South African law, especially as provided by the Constitution. The Convention is applied in South African law as an integral part of the Children's Act, and this Act is subject to the Constitution as the supreme law of South Africa. Thus, the best interests of the child, as entrenched in s 28 of the Constitution, must be the paramount consideration in any matter involving a child, including a Convention matter. This requires at least some consideration of the facts of a particular case and not simply the provisions of the Convention that regard peremptory return to be in the best interests of children in general.

Thus it is submitted that the court a quo gave a detailed, well-considered and legally sound determination in this matter. The judge was sufficiently clear in his reasoning and analysis to be confident that any future determination in the matter would uphold the original findings. Therefore his refusal of the first application for leave to appeal was justified. However, leave to appeal has been granted by the Supreme Court of Appeal. I argue that the matter should not be determined differently on appeal. The decision of the court a quo to balance constitutional imperatives in the interests of individual children with the Convention's imperatives reflects a healthy approach worthy of emulation. To do otherwise would be to compromise constitutional supremacy and perhaps open the door to an art 20 exception.

Proponents of peremptory return are quick to assure the abducting parent that the abduction hearing is purely jurisdictional and that custody will still be determined on the merits in a suitable hearing. So too, in this case, F can take comfort from the fact that the final decision of custody still falls to be determined by a court in a future hearing during which all the evidence will be evaluated and considered. Thus, even after the abduction matter has been finally disposed of, whether in F's favour or not, the custody hearing must still proceed.