

Listening to the child's objection*

by Trynie Boezaart**

1 Introduction

The ratification of the United Nations Convention on the Rights of the Child (hereafter referred to as CRC),¹ heralded a new dispensation for children in South Africa. This Convention had its footprints imbedded in the Constitution of the Republic of South Africa, 1996 and in the framework thus provided; the law pertaining to children was revised, consolidated and rewritten. In South Africa, child participation has been called the soul of the CRC.² The Hague Convention on the Civil Aspects of International Child Abduction (hereafter referred to as the Abduction Convention),³ has also been ratified by South Africa and incorporated into the Children's Act 38 of 2005. While the Abduction Convention has been and is still being hotly debated all over the world,⁴ South African legislation and case law have not acquired its rightful place in the international discourse.⁵

The first objective of this paper is to establish whether there is tension between the CRC and the Abduction Convention on the matter of hearing the child's voice.

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¹ UN Doc A/44/49 (1989), ratified by South Africa on 16 June 1995.

² Julia Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" (1995) 11 SAJHR 401 at 410-411; Julia Sloth-Nielsen and Belinda van Heerden "New child care protection legislation for South Africa? Lessons from Africa" (1997) 8 Stellenbosch LR 261 at 273, and gaining ground elsewhere: *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1 FLR 251 at [46]; *M v B* [2009] EWHC 3477 (Fam) [68].

³ 1343 UNTS 89, 19 ILM 1501-05 (1980), available at <http://www.hcch.net/upload/conventions/txt28en.pdf>. South Africa acceded to the Convention on 8 July 1997 with 2 reservations. The first reservation relates to art 24 and objects to documentation in French. The second reservation is directed at art 26 and stipulates that South Africa will not assume any costs resulting from the participation of legal counsel, advisers or court proceedings, except those costs which may be covered by legal aid (in terms of the Legal Aid Act 22 of 1969).

⁴ Rania Nanos "The views of a child: Emerging interpretation and significance of the child's objection defense under the Hague Child Abduction Convention" (1996-1997) 22(2) Brook J Int'l L 437 at 448-465 on judicial interpretations in the United States, England, Northern Ireland and Scotland; Nigel Lowe, Mark Everall and Michael Nicholls *International Movement of Children Law Practice and Procedure* (Jordan Publishing Ltd, 2004) for a full picture of the issues and available legal solutions concerning the international movement of children; also Nigel Lowe and Katarina Horosova "The operation of the 1980 Hague Abduction Convention – A global view" (2007-2008) 41 Fam LQ 59-103; Anastacia Greene "Seen and not heard?: Children's objections under the Hague Convention on International Child Abduction" (2005-2006) 13 U Miami Int'l & Comp L Rev 105 at 125 et seq on the United States' (narrow) interpretation of the children's objection clause; Linda Elrod "'Please let me stay': Hearing the voice of the child in Hague abduction cases" (2010-2011) 63 Okla L Rev 663-690.

⁵ C Nicholson "The Hague Convention on the Civil Aspects of International Child Abduction – pill or placebo?" (1999) 32 *CILCA* 228 at 239 n 49. Carina du Toit "The Hague Convention on the Civil Aspects of International Child Abduction" in Trynie Boezaart (ed) *Child Law in South Africa* (Juta, Claremont, 2009) 351 remarks at 352 that numerous aspects of the Abduction Convention remain unexamined in South African law.

The second objective is to put forward what has been achieved in South Africa in terms of research and judicial precedent on the child's objection exception. Finally, the question remains if and how the scales of justice should be balanced when child participation is at stake.

2 The voice of the child from an international perspective

Listening to children's voices is treated differently in the various jurisdictions and therefore one should turn to international law for guidance. Article 12 of the CRC states the following:⁶

- (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child,⁷ the views of the child being given due weight in accordance with the age and maturity of the child.⁸
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12(1) recognises that children are the bearers of fundamental human rights that deserve respect with views of their own that must be given serious consideration.⁹ For these purposes, the child could either participate and thus be heard directly, which is the best method to obtain information from children, or through a representative or an appropriate body.¹⁰ The law thus empowers children as rights bearers by offering them both participation and legal representation.¹¹

⁶ See Committee on the Rights of the Child "The Right of the Child to be Heard" *General Comment No 12* UN Doc CRC/C/GC/12 of 20 July 2009 at para 32 that art 12 covers matters of care and contact after separation or divorce.

⁷ No lower age limit is set on children's right to express their views freely.

⁸ There is a positive obligation to listen to and take the views of children seriously. In deciding how much weight should be given to a child's view in any particular matter, the twin criteria of age and maturity must be considered and these are not synonyms: Gary Melton *Background for a General Comment on the right to participate: Article 12 and related provisions of the Convention on the Rights of the Child* (UNICEF 2006) 38. Again the Convention rejects specific age barriers.

⁹ Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (1998) 145 at 147-148; Melton, above n 8 at 16, 39, 58 and 62 et seq; Elrod 2010-2011 (63) Okla L Rev 672-674. It entails weighing-up child's autonomy interests against other considerations such as the child's long-term best interests.

¹⁰ Representation is used to indicate the rules that allow children to instruct attorneys, to seek legal advice or to have other kinds of adult representation in legal proceedings. Various other provisions in the CRC are also relevant in the context of child abduction, eg arts 9(1), 9(2), 9(3), 10(2), 11(1), 11(2) and 20(3). See also Estin "Where (in the world) do children belong?" (2011) 25 *BYU J Pub L* 217 at 229.

¹¹ Peter Margulies "The Lawyer as Caregiver: Child Client's Competence in Context" (1995-1996) 64(4) *Fordham L Rev* 1479. See *BS and Another v AVR and Others* unreported case 7180/2008 (SGC) discussed by Du Toit in Boezaart (ed) *Child Law in South Africa* 110 where the court was concerned about children's capacity to depose of affidavits and to be joined as parties. The court required an expert to file a report that the children were able to understand the litigation and the meaning of an oath.

On the African continent there is an important regional document, the African Charter on the Rights and Welfare of the Child¹² which entrenches the right of the child to be heard in article 4(2), in the following terms:

In all judicial and administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views *shall* be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws.¹³

Article 4(2) should be read with article 7, because in the latter provision every child capable of communicating his or her views has the right to express his or her opinions freely in all matters and to disseminate those opinions subject to the restrictions of domestic law. Although the right to be heard provided for in terms of the African Charter on the Rights and Welfare of the Child could seem more restricted than the scope of the right in the CRC, in some ways¹⁴ the African Charter is stronger than the CRC as it makes consideration of children's views obligatory and specifies how children will be heard.¹⁵

The Hague Convention on the Civil Aspects of International Child Abduction has two objectives:¹⁶ first and foremost to secure the prompt return of a child wrongfully¹⁷ removed from custody,¹⁸ and secondly, to ensure respect for children's custody and access rights internationally.¹⁹ Article 12 of the Abduction Convention obliges a court to order the return of the child²⁰ if all the requirements for the return are met and the application for the return has been brought within less than a year since the removal took place. Return of the child is mandatory.²¹ The Abduction Convention is based on the premise that the interests of the children who have been wrongfully removed are ordinarily better served by immediately returning them to their country of habitual residence, where the merits of care and contact issues should have been determined.²² The Abduction Convention assumes that it is in children's best interests not to be abducted and thus serves the best interests of children in a very

¹² OAU Doc CAB/LEG/24.9/49 (1990).

¹³ Emphasis added.

¹⁴ That the representative must be impartial, the child capable of communicating his or her views, etc. See DM Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10 Int J of Children's Rights 157 at 161; Trynie Davel "The child's right to legal representation in divorce proceedings" in Chris Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (Memorial Volume for JMT Labuschagne) (LexisNexis, Butterworths, 2006) 20-21.

¹⁵ The right of the child to be heard is also addressed in other regional instruments in a similar way, see art 24(1) of the Charter of Fundamental Rights of the European Union that entered into force on 1 December 2009.

¹⁶ Article 1.

¹⁷ See art 3 of the Abduction Convention for a definition of "wrongful".

¹⁸ *Penello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 3 SA 117 (SCA) 134B-D; *Central Authority v MR (LS Intervening)* 2011 2 SA 428 (GNP) 432.

¹⁹ Preamble of the Convention. See *Family Advocate, Cape Town, and Another v EM* 2009 5 SA 420 (CPD) 423I-J.

²⁰ The Convention ceases to apply when the child reaches the age of 16 years: art 4.

²¹ Article 12: "...the authority concerned *shall* order the return of the child forthwith", emphasis added.

²² *Penello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 3 SA 117 (SCA) 134; *KG v CB and Others* 2012 4 SA 136 (SCA) [19].

broad or general sense. The best interests standard is not connected to a specific child in a specific case linked to a particular country.²³ The Abduction Convention rather aims at a structural solution – the prevention of international child abduction.²⁴ However, is justice done by returning a child in line with the objectives of the Abduction Convention under the pretext that children’s interest are served in a broad or general way without hearing that particular child?²⁵

There are exceptions to the mandatory return of the child and one of these exceptions opens the door to hear the child’s voice. It also provides scope to consider the best interests of the child because the child’s individual interests are at stake.²⁶ Article 13 *inter alia* states that –

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its [his or her] views.²⁷

Unfortunately the Abduction Convention limits the child’s voice in abduction applications in various ways.²⁸ Firstly, the views of the child are only relevant in so far as the child *objects* to be returned to the country of habitual residence.²⁹ Secondly, the child’s age and degree of maturity are important to establish whether the child’s views will be taken into account, which implies a judicial discretion on these matters.³⁰ Thirdly, the court retains the discretion to return the child in spite of his or her objection.³¹ Fourthly, if the child’s voice is heard, it is weighed against the assumption that it is in the child’s interest to be returned.³²

²³ Article 19; Elisa Pérez-Vera *Explanatory Report* (1981) 430.

²⁴ Greene 2005-2006 (13) U Miami Int’l & Comp L Rev at 108 and 112; Thalia Kruger *International Child Abduction The Inadequacies of the Law* (Hart Publishing Ltd, 2011) 35.

²⁵ Seems not the case in New Zealand: *Secretary for Justice v HJ* [2006] NZSC 97 at [85].

²⁶ *De L v Director-General, NSW Department of Community Services* 187 CLR 640 (1996) at 683-684; *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC) 1185E-H; *Chief Family Advocate and Another v G* 2003 2 SA 599 (W) 611I-612C; *Secretary for Justice v HJ* [2006] NZSC 97 at [24] and [65]; *Coates v Bowden* [2007] NZHC 559 (30 May 2007) at [93]; *M v B* [2009] EWHC 3477 (Fam) [69]; *Central Authority of the Republic of South Africa v LG* 2011 2 SA 386 (GNP) 395A.

²⁷ This provision neither includes an age limit below which the views of the child should not be taken into account nor a higher age limit at which a child’s objection must be considered.

²⁸ Note the resemblance between these “limitations” and the “four step approach”: *White v Northumberland* [2006] NZFLR 793, approved on appeal [2006] NZFLR 1105 at [47].

²⁹ It is not a mere preference: *M v B* [2009] EWHC 3477 (Fam) [51]. See Lowe, Everall and Nicholls, above n 4 at 355; Vigers *Mediating International Child Abduction Cases The Hague Convention* (Hart Publishing Ltd, 2011) 80.

³⁰ Known as the “gateway” findings: *Re S (Minors) (Abduction: Acquiescence)* [1994] 2 FCR 945 at 954. Essentially a fact-based determination and judges’ own examination and observations play an important role: *Re S (Minors) (Abduction: Acquiescence)* [1994] 2 FCR 945 at 954; *Re T (Children)* 2000 EWCA Civ 33 (18 April 2000); Elrod 2010-2011 Okla L Rev 678. See also *Central Authority of the Republic of South Africa v JW and HW (C du Toit intervening)* unreported case 34008/2012 (NGP) at [23].

³¹ Article 13 read with art 18 of the Abduction Convention. Clearly articulated in *M, Petitioner* 2005 SLT 2 at [37]-[38] acknowledging the integrity of the Convention: *Secretary for Justice v HJ* [2006] NZSC 97 (16 November 2006) at [31].

³² *In re L (A Minor) (Abduction: Jurisdiction)* [2002] 1 WLR 3208 at [56]; *Vigreux v Michel* [2006] EWCA Civ 630 at [32]-[34]. This is one of the reasons why mediation could be a better route: Vigers, above n 29 at 91.

In Europe the Brussels II *bis* Regulation³³ has taken the child's objection exception further: it now places a positive duty on the courts to hear the child unless it is inappropriate to do so in view of the child's age.³⁴ The Regulation states that:

When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate³⁵ having regard to his or her age or degree of maturity.

This provision of the Regulation embodies a principle of "universal application" which is "consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child".³⁶ It creates a presumption that the child will be heard unless it appears inappropriate.³⁷ In European states children will thus routinely be heard and the debate has shifted towards the way(s) in which they should be heard and the weight that should be afforded to their expressed views.³⁸

From the above it is evident that there are international and regional instruments that oblige courts to hear children's voices. But the Abduction Convention does not do so and the laws and procedures in member states vary considerably on this issue. Do children's rights under international law favour a liberal interpretation of the child's objection clause or uphold the child's objection blindfolded to refuse return?³⁹ Does the child's objection clause create or intensify tension between the CRC and the Abduction Convention?⁴⁰

In attempting to answer these questions it has been argued that the Abduction Convention deals primarily with forum and not with substance. The merits are left to

³³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. The Regulation takes precedence over the Abduction Convention where its rules alter the Convention: art 60. See also *Vigreux v Michel* [2006] EWCA Civ 630 (18 May 2006) [24].

³⁴ Article 11(2) of the Brussels II *bis* Regulation, which is in line with art 24(1) of the Charter of Fundamental Rights of the European Union 2000/C 364/01. See also arts 41(2)(c), 42(2)(a) and 23(b) of the Brussels II *bis* Regulation.

³⁵ The fact that there is no obligation to hear a child when it is inappropriate due to age, makes the Brussels II *bis* Regulation narrower than art 12 of the CRC. Also see *Vigers*, above n 29 at 83.

³⁶ *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 per Baroness Hale of Richmond at [58].

³⁷ *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 at [58]; *In re F (Children) (Abduction: Rights of Custody)* [2008] EWHC 272 (Fam) at [65].

³⁸ Ruth Lamont "The EU: Protecting children's rights in child abduction" 2008 *IJFL* 110 at 112; *Vigers*, above n 29 at 86. Aoife Daly "Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland" [2009] 1 *Irish Jour of Fam L* 16 at 17-20 expresses concern regarding the weight that the courts attach to the children's views. It is argued that effective consideration of their views implies accountability on the part of the decision-maker. Judges should thus explain and give reasons why the views of the child are not determinative.

³⁹ The position in Germany while courts in the United States routinely deny the child's objection: Greene (2005-2006) 13 *U Miami Int'l & Comp L Rev* 120. Greene (*ibid*) suggests that justice lies between these extremes.

⁴⁰ *S v S* [1999] NZFLR 625 at 634; *Hollins v Crozier* [2000] NZFLR 775 at 797; John Caldwell "Child welfare defences in child abduction cases – some recent developments" (2001) 13 *Child & Fam LQ* 121 at 130-133; Greene Rev (2005-2006) 13 *U Miami Int'l & Comp L* 109; Daly (2009) 1 *IJFL* 19; Elrod 2010-2011 63 *Okla L Rev* 675.

be dealt with elsewhere.⁴¹ The Abduction Convention is considered compatible with the CRC because returning a child in terms of the Hague Convention is exactly what the CRC expects of member states in article 11.⁴² Prompt return is considered to be in a child's best interests⁴³ and contact between a child and the non-resident parent, can be facilitated.⁴⁴ Henceforth returning the child becomes more important than hearing the child's view.⁴⁵ I submit that it is possible to apply the Abduction Convention while listening to children's voices.⁴⁶ However, it is also important *how* we listen to and hear the child's voice.

3 The legal framework in South Africa regarding the child's objection

The whole Abduction Convention is incorporated in Chapter 17⁴⁷ of the Children's Act 38 of 2005 rendering the case law on the Convention still applicable.⁴⁸ Section 275 of the Children's Act stipulates that the Abduction Convention is in force in South Africa and that its provisions are law, subject to the provisions of the Children's Act. The Convention is thus subservient to the Children's Act.⁴⁹ Seeing that the Constitution of the Republic of South Africa, 1996, is the supreme law, the Convention should also be read and interpreted subject to the Constitution and s 28(2) thereof is of particular importance.⁵⁰ Section 28(2) provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.⁵¹

More than a century ago Nicholson observed that the child's objections "have seldom been recognised by the courts".⁵² This has changed drastically. The Children's Act has now given effect to the child's objection exception and has taken it even further. Section 278(3) of the Children's Act emphasises that the court *must* afford the child the opportunity to raise an objection to being returned and in doing so

⁴¹ Greene (2005-2006) 13 U Miami Int'l & Comp L Rev 141 opines that this is one of the reasons behind the "narrow" or "strict" policy not to return a child.

⁴² Article 11 of the CRC states: "(1) States Parties shall take measures to combat the illicit transfer and non-return of children abroad. (2) To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements."

⁴³ Article 3. Even if the Convention's assumptions may be flawed: John Caldwell "Child Abduction Cases: Evaluating Risks to the Child and the Convention" (2008) 23 NZULR 161 at 163-164.

⁴⁴ Article 9.

⁴⁵ For the same conclusion, see Vigers, above n 29 at 82.

⁴⁶ Exactly what the court did in upholding the 11 year-old's objection in *Re T (Children)* 2000 EWCA Civ 33 (18 April 2000); *Re W (Minors)* [2010] EWCA Civ 520 at [17].

⁴⁷ Sections 274-280 (and Ch 4 of the Regulations Relating to Children's Courts and International Child Abduction, 2010), which became operative on 1 April 2010. Section 274 states the purposes of the Chapter being – "(a) to give effect to the Hague Convention on International Child Abduction; and (b) to combat parental child abduction".

⁴⁸ *Central Authority of the Republic of South Africa and Another v B* 2012 2 SA 296 (GSJ) 302E-F.

⁴⁹ *Central Authority v MR (LS Intervening)* 2011 2 SA 428 (GNP) 433; *Central Authority of the Republic of South Africa and Another v B* 2012 2 SA 296 (SGJ) 298G.

⁵⁰ *Central Authority v MR (LS Intervening)* 2011 2 SA 428 (GNP) 433 and 439. Therefore, when applying dicta of foreign courts, special care should be taken: per Goldstone J in *Sonderup v Tondelli* 2001 1 SA 1171 (CC) [33]. See Christopher Woodrow and Carina du Toit "Child abduction" in CJ Davel and AM Skelton (eds) *Commentary on the Children's Act* (Juta, Claremont, loose-leaf, Revision Service 5, 2012) 17-1 at 17-31 to 17-34.

⁵¹ Emphasis added, which takes care of the "welfare principle" and all the concerns in that regard.

⁵² 1999 *CILCA* 236.

must give due weight to that objection, taking the child's age and maturity into account.⁵³ In line herewith, s 10 of the Children's Act, which embodies one of the general principles of the Act, requires that a child that is of such an age, maturity and stage of development as to be able to participate, has the right to express his or her views and the right that those views must be given due consideration.⁵⁴ The following section pursues the child's participation even further: Section 279 instructs that the child *must* have legal representation in all Abduction Convention applications.⁵⁵

South African case law has made it clear that the Abduction Convention has to be applied in the context of the Children's Act: In *Central Authority v MR*⁵⁶ the court found that s 278(3) of the Children's Act resonates art 13 of the Convention regarding the child's objection. The court considered the following provisions of the Children's Act to be relevant in this regard:⁵⁷

- (1) The paramount importance of the child's best interests (s 2(b)(iv), also a constitutional imperative: s 28(2) of the Constitution).
- (2) The general principles of the Act stating that the fundamental rights of the child have to be respected (s 6(2)(a) of the Act) and the best interests standard adhered to (s 7). It is also one of the general principles that a child, having regard for his or her age, maturity and stage of development, must be informed of any action or decision taken in a matter that affects him or her significantly (s 6(5)).
- (3) The factors that have to be considered in terms of the Act when the best interests standard is applied,⁵⁸ while appreciating that it is not a custody matter.
- (4) That not only art 13, but also s 10 of the Children's Act requires the court to give due consideration to the views of the child and allow the child to participate in the matter.

The court then found that the advent of the Constitution and the Children's Act do not merely entail applying the Convention and making an order in terms of its provisions. It is rather a matter of "applying the Convention subservient to the relevant provisions

⁵³ Emphasis added. See *Central Authority v MR (LS Intervening)* 2011 2 SA 428 (GNP) 433.

⁵⁴ See also s 31 of the Children's Act that the person holding parental responsibilities and rights must give due consideration to the child's views and wishes in all major decisions involving the child.

⁵⁵ Emphasis added. See *Central Authority of the Republic of South Africa v JW and HW (C du Toit intervening)* unreported case 34008/2012 (NGP) at [12].

⁵⁶ 2011 2 SA 428 (GNP) 438B-C.

⁵⁷ 438C-439A.

⁵⁸ The factors in subsections 7(1)(a), 7(1)(c), 7(1)(d), 7(1)(f), 7(1)(g), 7(1)(h) and 7(1)(k) were regarded as particularly apposite in this case. Section 10 could be the reason why the wishes of the child are not mentioned as one of the factors in s 7. See also *Central Authority v MR* 2011 2 SA 428 (GNP) 438C-439A. Yet, when it comes to adoption, the child's consent is an explicit requirement if the child is 10 years of age or older, or under 10 but of such an age, maturity and stage of development to understand the implications of such consent: s 233(1)(c).

of the Children's Act and the Constitution".⁵⁹ The application for the child's return to the United States was refused.⁶⁰

Abiding by the provisions of the Children's Act and the Constitution does not mean that there is nothing to be learnt from other jurisdictions. In *Central Authority for the Republic of South Africa and Another v B*⁶¹ the court referred to various foreign judgements on the interpretation of the child's objection clause. In this case a 13 year-old boy (K), objected to being returned to his mother in Australia after a lengthy summer holiday with his father in Johannesburg.⁶² K took the initiative and sent a text message to his mother informing her that he wished to stay in South Africa.⁶³ This prompted the application.

When considering the factors to be taken into account in exercising the discretion under art 13, the court relied on English and Scottish judgments mentioning the following:⁶⁴ the fact that the child objects; the actual age and maturity of the child; the reason behind the child's objection; the strength of such objection; whether the objection constitutes an independent viewpoint; the policy of the Convention; whether the child appreciates that the reason behind return or behind the Convention's policy would be to enable the court of habitual residence to decide on his or her immediate future and the child's best interests either broadly or in detail, depending on the facts of each case.⁶⁵

The approach to an art 13 application is to balance the desirability of the appropriate court retaining jurisdiction against the likelihood of undermining the child's best interests by ordering his or her return.⁶⁶

When the court considered the child's objection, it had the report of the social worker in the office of the Family Advocate stating that the child's view should be considered. The judge had the opportunity to observe the child during the court proceedings and also saw him in chambers. The child was represented by experienced counsel.⁶⁷ On the strength of these facts the court concluded that it is appropriate to take the child's views into account and that considerable weight should

⁵⁹ 439C.

⁶⁰ 440F-G.

⁶¹ 2012 2 SA 296 (GSJ).

⁶² 298F. The parents divorced in Australia. The Family Court in Sydney granted custody to the mother and reasonable access to the father. The father returned to South Africa after a few years but managed to maintain regular contact with K: 299B.

⁶³ 299C.

⁶⁴ 301E-302G, quoting from two Scottish cases, namely *Singh v Singh* 1998 SLT 1084 and *M* 2005 SLT 2 at [38] and applying the dictum of the latter case. See *The Ontario Court v M and M (Abduction: Children's Objection)* where a 9 year-old and *Re T (Children)* 2000 EWCA Civ 33 (18 April 2000) where an 11 year-old declined return. See also *R v M* [2007] UKHL 55, [2008] All ER 1157 at [46].

⁶⁵ The child's own perspective of what is in his or her best short, medium and long-term interests is also important, see *Singh v Singh* 1998 SLT 1084 at 1095.

⁶⁶ 302H, applying *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC) [35]. See also *Central Authority for the Republic of South Africa v De Wet and Another (Centre for Child Law as Amicus Curiae)* unreported case 2006/2028 (WLD) [43] that the wishes of the child and the child's best interests do not always coincide. However, the court found that that was not the case in this instance and dismissed the application for the boy's return.

⁶⁷ Judge Meyer appointed a legal representative for the child in accordance with s 279 of the Children's Act: 298I.

be given to it.⁶⁸ The court rejected allegations that the child was influenced or manipulated by the respondent.⁶⁹ The child's objection prevailed, the application was dismissed and the parties were ordered to pay their own costs.

4 South Africa's contribution to the debate

In various jurisdictions different ways and means of establishing the child's view have been applied with varying degrees of success. Generally three possible ways are explored: an interview with the judge,⁷⁰ a report compiled by a welfare officer or other suitably qualified professional after interviewing the child,⁷¹ and/or legal representation.⁷² The latter is obligatory in Hague abduction applications in South Africa. The Children's Act thus provides a mechanism to ensure that children's views are placed before the court. A legal representative *must* represent the child in *all* applications in terms of the Abduction Convention.⁷³ This independent client-directed lawyer⁷⁴ has to determine whether the child is of such an age and maturity that his or her views must be considered and bears the duty to establish these views and convey them to court. The legal representative may apply for the child to be joined as a party.⁷⁵

Neither the CRC nor the Abduction Convention sets a minimum age for children to be afforded an opportunity to air their views. The children that are most frequently abducted are the young ones.⁷⁶ South African courts do not shy away from establishing their views and upholding their objections by interpreting the provisions of the Children's Act. In *KG v CB*⁷⁷ a curator *ad litem* was appointed to report on the five years and ten months-old child's views. In *Family Advocate v B*⁷⁸ the court held that a seven year-old child was mature enough to make an informed decision and the court subsequently took the child's view into account.⁷⁹ In *Central Authority v MR (LS*

⁶⁸ 303A-E.

⁶⁹ 304A-I. See also *Chief Family Advocate and Another v G* 2003 2 SA 599 (W) 618G-I on the child's preference for his school and friends.

⁷⁰ See *W v W* 2004 SC 63 at [29]-[32] for the considerations and precautions when a judge interviews the child.

⁷¹ *Urness v Minto* 1994 SC 249. Note the child's fear that the welfare officer could not properly explain the objection to the judge in *J (Children)* [2004] EWCA Civ 428 at [73].

⁷² *De L v Director-General, NSW Department of Community Services* 187 CLR 640 (1996) at 688; *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 at [60].

⁷³ Section 279 of the Children's Act, emphasis added. See *KG v CB and Others* 2012 4 SA 136 (SCA) [13].

⁷⁴ Thus taking care of some of the concerns experienced in inter alia, the United States: Elrod 63 Okla L Rev 2010-2011 670.

⁷⁵ *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL14218 (T) at [8]; Woodrow and Du Toit *Commentary on the Children's Act* 17-28.

⁷⁶ In *Central Authority v B* 2009 1 SA 624 (W) 626, the little girl was less than 2 years old when her mother left the place of habitual residence and in *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC) at [1] the child was four years of age.

⁷⁷ 2012 4 SA 136 (SCA) at [52].

⁷⁸ *Family Advocate v B* [2007] 1 All SA 602 (SE) at [14].

⁷⁹ The thrust of the decision was not based on the child's objection, but on the other art 13 defences: [12].

Intervening)⁸⁰ an application for the return to the United States of an eight year-old girl was refused, among other considerations, taking into account the views of the child. In this case the unmarried father took responsibility for his daughter after her mother's death when she was five years old. She resided with her father and his new wife in both Belgium and the United States, but visited her maternal grandmother in South Africa. It was after one such visit when she refused to return to her father that this application was brought.⁸¹ The maternal grandmother in the meantime applied in an *ex parte* application to be appointed as the child's primary caregiver and be awarded primary residence.

Woodrow and Du Toit⁸² submitted that if the children are very young, the role of the legal representative would be more akin to that of a curator *ad litem*, while with older children the legal representative will take instructions from the child and act in accordance with those instructions to represent the views of the child. This viewpoint has been given a stamp of approval when the court in *B and Others v G*⁸³ appointed a Legal Aid attorney in his role "akin to that of a curator *ad litem*" for a boy between four and five years of age. The legal representative prepared a written report in which he recommended that the child should not be returned until such time as a pending appeal was finalised, which recommendation was followed by the court.⁸⁴ In *Central Authority for the Republic of South Africa and Another v B*,⁸⁵ where the court once more accepted the above viewpoint, a legal representative was appointed by the court *amicus curiae* for a 13 year-old boy.⁸⁶

It is obvious that the court will have to ascertain whether the view of the child is influenced to establish whether it is in fact the child's own view.⁸⁷ If the views of the child are carefully considered, it is likely to shed light on this pertinent issue. In *Central Authority for the Republic of South Africa and Another v B*⁸⁸ the fact that the boy contemplated to stay in South Africa even before leaving Australia, the fact that he planned to live with his father once he became old enough, because this is where he ultimately wanted to stay and the veracity of the child's version in this regard, convinced the court that the decision was the child's own. The court warned that parental involvement and participation in a child's life form part of parenthood.⁸⁹ Although it might contribute to the child objecting to be returned, it should be distinguished from manipulation or undue influence.

The child's best interests will play a role because the strength and validity of the child's views will include an examination of the child's perspective of his or her

⁸⁰ 2011 2 SA 428 (GNP).

⁸¹ 429F-J.

⁸² *Commentary on the Children's Act* 17-27.

⁸³ 2012 2 SA 329 (SGJ) 332H-I.

⁸⁴ [15].

⁸⁵ 2012 2 SA 296 (SGJ) 298H. But note the fact that Woodrow and Du Toit (*Commentary on the Children's Act* 17-28) correctly point out that the court made a mistake confusing the roles of the representative and an *amicus curiae*.

⁸⁶ In *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 at [22] called "litigation friend".

⁸⁷ Brenda Shirman even advocated the complete elimination of the child's objection clause to remove the possibility of undue influence by the abducting parent: "International treatment of child abduction and the 1980 Hague Convention" (1991-1992) 15 *Suffolk Transnat'l LJ* 188 at 219.

⁸⁸ 303J-304B.

⁸⁹ 304I.

interests.⁹⁰ While interpreting the nature and extent of the exceptions in the Abduction Convention, the courts have to abide by the paramountcy principle in s 28(2) of the Constitution and the values of the Bill of Rights.⁹¹ If returning a child is not in the child's (short term) best interests, the inconsistency will have to be "justifiable under s 36 of the Constitution, which requires a proportionality analysis and weighing up of the relevant factors".⁹² This makes application of the "exceptional circumstances" standard in South Africa highly unlikely.⁹³

In *Central Authority of the Republic of South Africa v LG*⁹⁴ the court made two very important points: Firstly, that South African courts are compelled to place particular importance on the best interests of the child, not only as upper guardian, but because of the constitutional imperative that the child's best interests are of paramount importance in every matter concerning the child.⁹⁵ Secondly, that the drafters of the Abduction Convention have made provision for referring to the law of independent states with the insertion of article 20 which allows the refusal to return the child if such is not permitted by the principles relating to the protection of human rights and fundamental freedoms in the requested state.⁹⁶

5 Conclusion

Listening to the child's voice is both a fundamental and a universal principle. The child's objection clause embodies the participation and respect afforded to children in the Abduction Convention. It must therefore be possible to apply the Abduction Convention while acknowledging that children's voices should be heard. The importance of *how* the child's voice is heard should not be underestimated. In South Africa legal representation for the child in abduction applications is the starting point. Thus when child participation in a case of parental child abduction is at stake, the scales of justice should balance perfectly when an independent client-directed and suitably trained lawyer stands squarely in the corner of that particular child and provides adult insight and legal knowledge to the voice of the child.⁹⁷

⁹⁰ Short-term, medium-term and long-term interests. See *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC) 1185E-H; *Chief Family Advocate and Another v G* 2003 2 SA 599 (W) 611E-F; *Central Authority v MR (LS Intervening)* 2011 2 SA 428 (GNP) 433 and 439. Similar approach in *Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 at 827; *M (A Child)* [2007] EWCA Civ 260 at [62] et seq; *De L v H* [2009] EWHC 3074 (Fam), [2010] 1 FLR 1229 at [67].

⁹¹ *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC) 1185G-H; *Chief Family Advocate and Another v G* 2003 2 SA 599 (W) 611E-F; *Central Authority for the Republic of South Africa and Another v B* 2012 2 SA 296 (SGJ) 300D-E; *Central Authority of the Republic of South Africa v JW and HW (C du Toit intervening)* unreported case 34008/2012 (NGP) at [19] and [32]. Woodrow and Du Toit *Commentary on the Children's Act* 17-31.

⁹² *Sonderup v Tondelli* 2001 1 SA 1171 (CC) at [29]. Section 36 is the limitation clause in the Constitution.

⁹³ See Woodrow and Du Toit *Commentary on the Children's Act* 17-26. To the contrary, see *Central Authority for the Republic of South Africa v De Wet and Another (Centre for Child Law as Amicus Curiae)* unreported case 2028/2006 (WLD) at [23] and [25].

⁹⁴ 2011 2 SA 386 (GNP) 392D-F, quoting from *Senior Family Advocate, Cape Town v Houtman* 2004 6 SA 274 (C) 286F-H.

⁹⁵ See also *Central Authority v MR (LS Intervening)* 2011 2 SA 428 (GNP) 433D.

⁹⁶ *Central Authority of the Republic of South Africa v LG* 2011 2 SA 386 (GNP) 394J-395A.

⁹⁷ *Soller v G* 2003 5 SA 430 (WLD) 438D-F.