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[04/12/2001; High Court of the Hong Kong Special Administrative Region - Court of Appeal; Appellate Court]
D v G [2001] 1179 HKCU 1

CACV003646/2001

IN THE High Court Of The Hong Kong Special Administrative Region Court Of Appeal

CIVIL APPEAL NO. 3646 OF 2001

(ON APPEAL FROM HCMP NO. 5520 OF 2001)

BETWEEN D, Plaintiff and G, Defendant

Coram: Hon Rogers VP, Le Pichon JA and Cheung JA in camera

Date of Hearing: 4 December 2001

Date of Judgment: 4 December 2001

Date of Handing Down Reasons for Judgment: 7 December 2001

REASONS FOR JUDGMENT

Hon Le Pichon JA:

1. This is an appeal by the defendant (the father) from the judgment of Hartmann J handed down on 17 November 2001 in an application by the plaintiff ("the mother") under the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") for the return of the child of her marriage to Switzerland. The judge ordered that the child be returned to Switzerland although the return was conditional upon the Swiss Central Authority ensuring that, immediately upon the child the arriving in Switzerland, an investigation takes place into the allegations of sexual abuse made by the father on behalf of the child. The order also dealt with the father's access to the child in December 2001 and February 2002. The mother was given leave to remove the child from Hong Kong for Switzerland on the night of Thursday, 15 November 2001, but that part of the order has been stayed pending the appeal to this court.

2. At the hearing, we ordered as follows:

"1. The Order of the Court below be set aside.

2. The matter be remitted to the Court of First Instance for further consideration and decision before Hartmann J. following the steps to be provided for below.

3. The matter be remitted to Deputy District Judge Remedios as a matter of urgency in order to determine whether the Order of 30 August 2000 was correctly drawn up to reflect the order intended to be made

a. as to the access arrangements and in particular whether the order was intended to be drawn up to incorporate all the proposals contained in the schedule of the proposed access arrangements referred to by the Judge at page 24 of her judgment of 30 August 2000 in particular the country where access is to take place save that the period of access at Easter be changed from 1 week to 10 days

b. as to whether it was intended to specify the school to be attended by the child having regard to what was stated in the judgment and if so to make the necessary amendments.

4. The child be examined for the purposes of ascertaining whether the child has been sexually abused as alleged. The said examination to be by Dr C.K. Wong or in default of his availability to conduct such examination by a child psychologist/psychiatrist conversant with child sexual abuse cases to be agreed between the parties. In default of the parties agreeing the identity of such psychologist/psychiatrist the Hong Kong Central Authority shall submit the name of one such psychologist/psychiatrist to the Court of First Instance for the Court's approval and appointment as soon as practicable.

5. There be no order as to costs here and below save for any legal aid taxation."

Government counsel for the Hong Kong Central Authority who was present in court undertook to abide by paragraph 4 of the order. The court indicated that written reasons for the order would be handed down later and this we now do.

Background facts

3. The father was born in England in 1958. The mother who is Swiss was born in Australia but returned to live in Switzerland when she was five. The parties met in Switzerland in 1982 and were married in 1984. They left Switzerland to take up teaching posts in China in 1987 and came in Hong Kong in January 1988. The child is the only child of the marriage and she was born on 26 May 1993.

4. The marriage did not work out and the parties separated in February 1999. In May 1999, the mother commenced divorce proceedings based on the father's conduct. The Family Court dealt with the issues of the child's custody, the mother's application for permanent removal to Switzerland, and the father's claim against the mother for ancillary relief in August 2000 in a hearing which lasted some nine days. On 30 August 2000, deputy District Judge D'Almada Remedios handed down a lengthy and fully-reasoned judgment ("the August judgment"). She granted sole custody, care and control of the child to the mother with access to the father as specified on page 25 of the August judgment.

5. In the afternoon of 30 August 2000, a court order was submitted by the mother's solicitors for approval without reference to the father's solicitors ("the August order"). The part pertaining to custody and removal of the child read:

"1. Custody of the child of the family ... be granted to the [mother], with access, as defined below, to the [father], namely:-

Autumn (October) 5 days;

Christmas (December) 10 days, either for the first half or the second half of [the child's] holidays. Each parent shall have [the child] on an alternative year basis for either Christmas Day or New Years Day holiday respectively. [The child] shall spend Christmas of 2000 with the [mother] and [the child] should spend New Year's Day 2001 with the [father];

Winter (February) 5 days;

Easter (April) 10 days;

Summer (July/August) 5 weeks;

Weekend access should the father be visiting Switzerland.

2. Leave be granted to the [mother] to remove the child from the jurisdiction permanently."

The recitals to the August order contained two undertakings by the mother. The first was an undertaking to pay one return airfare a year from Switzerland to Hong Kong or its equivalent for the purposes of the child's travel to see the father. The second was an undertaking to the court to return the child when called upon to do so by the court. It is to be noted that the provisions for access contained in the August order reflected what was set out on page 33 of the August judgment but which differed in some respects from what appeared on page 24 of that judgment.

6. After obtaining a sealed copy of the August order on the day the August judgment was handed down, the mother left for Switzerland with the child that same evening without informing the father and therefore without giving the father any opportunity to say goodbye to the child. As a consequence, he flew to Switzerland a few days later in order to do this. He was given access for the day and upon returning the child that evening, an argument broke out which led to a scene. Thereafter, access by the father became fraught with difficulties. According to the father, access during Easter of this year was curtailed and had to take place in Switzerland. Then came the question of the father's five-week summer access. The mother would not countenance access taking place outside Switzerland. The father thereupon obtained an order from Deputy Judge Levy on 7 July 2001 which implicitly confirmed that access could take place outside Switzerland. The mother chose not to appear at the hearing and continued to oppose access outside Switzerland. The father then attempted to enforce his right of access under the Convention, and a hearing to this end took place in Zurich in early August. Unfortunately, no ruling could be obtained from the Swiss court in time for that summer access to be enjoyed outside of Switzerland. The Swiss lawyers for the father explained that the problem was that "the decision" of 30 August 2000 was not sufficiently clear as to where access was to take place and in the eyes of the Swiss court, the July 2001 order was undermined by the absence of the mother. Understandably, the father found all this hugely frustrating.

7. To compound matters, on 14 August 2001, the father was informed by the mother that new arrangements were being made for the child's schooling. The evidence filed by the mother for the August 2000 hearing was to the effect that the child would be enrolled in the Inter-Community School in Zurich, a school attended by a cousin of the child who was the same age. The school offers GCSE and International Baccalaureate and tuition is in the English language. Indeed, the child did attend that school during the academic year 2000-2001. In August 2001, the father was informed that the child would be moved to a Swiss school where the medium of instruction is not the English language. The child does not speak either Swiss-German or French which are the two prevalent languages in Switzerland.

8. In early October of this year, the father flew to Switzerland to exercise his right of access. The following day he returned to Hong Kong with the child. Within a few days of his arrival, he made an application pursuant to Ord. 90 of the Rules of the High Court to have the child made a ward of court. Three days later, on 15 October, the mother commenced the present proceedings under the Convention. On 23 October 2001, Hartmann J directed that the proceedings under the Convention be

resolved first since the outcome would dictate whether or not the issues raised in the wardship proceedings be dealt with in Switzerland rather than Hong Kong.

The Convention

9. The Convention is part of the law of Hong Kong. The Child Abduction and Custody Ordinance, Cap. 512 was enacted in 1997 to give effect in Hong Kong to the Convention. The judge below outlined the effect of the Convention at [48] to [53] of his judgment. Once it is proved that the father had removed the child from Switzerland in breach of the mother's custodial rights or refused to return her in breach of those rights and the child was habitually resident in Switzerland immediately before the wrongful removal or retention, Hong Kong as a Contracting State must return the child subject only to the provisions of article 13 of the Convention. The judge concluded that the two matters referred to above (i.e. custodial rights and habitual residence) had been proved and no argument was raised at the hearing against those findings. He also correctly concluded that only in restricted circumstances is the court not obliged to order the return of the child. Those circumstances are contained in article 13 which, in pertinent part, reads:

"Notwithstanding the provisions of the preceding Article, 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-

(a) ...

(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."

10. The father raised an issue under article 13. He filed evidence to the effect that his daughter had complained to him of being sexually abused in Switzerland by a male companion of the mother's. The father contended that to remove the child to Switzerland would expose her to grave risk of physical and psychological harm. The judge ordered that the child be returned to Switzerland although the return was "subject to the condition that the Swiss Authorities undertake an immediate investigation into the allegations of sexual abuse." The correctness of that ruling is the substance of this appeal.

The order dated 30 August 2000 ("the August order")

11. Before turning to article 13, it is necessary to consider the August order which, as drawn up, has been the source of much of the troubles and disputes that have erupted over access and education.

Access

12. Given the circumstances in which the judge arrived at the access arrangements, it is highly probable that the order as drawn up did not accurately reflect what the deputy district judge had intended to order. In her judgment, the deputy district judge referred to "a very helpful schedule of [the child's] school holidays and proposed access" which had been submitted by the mother. In fact, that schedule was produced to the court on the last day of the hearing in August by the mother's counsel in his final submissions. It included the mother's proposals for access. The schedule is reproduced in full below:

School holiday: *Autumn (October)

Proposal: 1 week, Open to visit her for 5 days

Where: Switzerland or elsewhere in Europe

School holiday: **Christmas (December)

Proposal: 16 Dec - 7 Jan 3 weeks, 10 days

Where: Wherever the [father] chooses

School holiday: *Winter (February)

Proposal: 17 Feb - 25 Feb 1 week, Open to visit for 5 days

Where: Switzerland or elsewhere in Europe

School holiday: Easter (April)

Proposal: 7 Apr - 22 Apr 2 weeks, 1 week

Where: Wherever the [father] chooses, but preferably in Europe

School holiday: Summer (July/August)

Proposal: 8 weeks, 5 weeks

Where: Wherever the [father] chooses

School holiday: Weekend access

Proposal: Should the [father] visit Switzerland, he may then see [the child] for weekend access visits

Where

*** Alternate between [the mother] and [the father]**

**** Christmas holidays will be shared. Each parent has [the child] on alternate year basis for the Christmas Day half of the holiday, i.e. Christmas 2000 will be with the [mother] and the [father] will have the second half of the Christmas holiday to include New Years Day, Christmas 2001, the [father] will have Christmas Day and the [mother] will have the second half of the holiday, and so on.**

2 Flights by [the child] to Hong Kong per year, one of which paid by [the mother].

If the [father] is to move to Switzerland:

(i) then the Christmas, Easter and summer holiday arrangements are as above.

(ii) the [father] to have access to [the child] on an alternative weekend basis from after school, Friday until 7 pm Sunday. The [father] to collect and return [the child]."

At pages 24-25 of the August judgment, the deputy district judge said this:

"Access

A very helpful schedule of [the child's] school holidays and proposed access has been submitted to me by the mother. [The child] will have 15 weeks of holiday per school year of which the proposed access for the father is 7 weeks 5 days. If my understanding is correct he agrees to the proposed access but requests for 10 days instead of that offered over Easter. I agree to his request.

On that basis I order that the father be granted access to [the child] as follows:-

(1) Autumn (October) 5 days;

(2) Christmas (December) 10 days;

(3) Winter (February) 5 days;

(4) Easter (April) 10 days;

(5) Summer (July/August) 5 weeks;

(6) Weekend access should the father be visiting Switzerland.

The mother has agreed to pay for one return airfare for [the child] from Switzerland to Hong Kong per year."

It would thus appear that the father agreed to the proposed access made by the mother save that he requested access of ten days instead of seven for Easter. The deputy district judge agreed to the father's request. Her order was thus made on that common basis. That remains the present position. At the hearing, counsel for the mother stated that access had been agreed between the parties as per the schedule with the single change of 1 week to 10 days. He proposed (and counsel for the father was prepared to agree) that the parties enter into a consent order based on the schedule with the variation as to Easter made by the deputy district judge in order to avoid future difficulties.

13. On perusing the periods of access set out at (1) - (5) above (taken from page 25 of the August judgment), it would appear that the father was being given access of a total of 9 weeks 2 days which cannot have been intended and is difficult to reconcile with the statement in the passage cited to the mother's proposal giving the father access for 7 weeks 3 days out of 15 weeks of school holidays. It would appear from the asterisk annotation in the schedule that October and February holidays are meant to alternate between the father and the mother. That does not have appear to have been taken into account in the August order. Even allowing for this, the arithmetic does not quite add up unless the August judgment contained a typographical error. In its present form, the August order bristles with problems.

14. In situations of this kind where the parties have themselves agreed the terms of access including the country of access, (the only variation being the father's request for ten days rather than one week at Easter a request to which the deputy district judge had apparently acceded,) it is a recipe for disaster if the order does not faithfully and fully reflect the detail of what had been agreed. There is no evidence that the deputy district judge rejected any of the proposals set out in the Schedule. All she did was to vary access at Easter from one week to ten days. In these circumstances, I see no reason why the entire schedule should not form part of the order subject to the single variation mentioned. Much of the heartache and aggravation in this unhappy case could have been avoided had this been done. It is therefore imperative that the August order which is plainly deficient and problematic be put right. The deputy district judge must clarify what it was that she had intended to order.

Education

15. The other matter arising which calls for clarification is whether the deputy district judge intended to specify the school to be attended by the child having regard to the matters stated in the judgment. It was contended by the father that the order allowing the mother to remove the child to Switzerland was premised on the child attending a particular school i.e. the Inter-Community School and that there should have been an undertaking to that effect. There are various references in the August judgment to the child's education (see pp. 12, 14-15, 17, 18 and 23) from which one can glean that the fact that tuition is in the English language at the Inter-Community School and that the child has a cousin of the same age attending the same school were important considerations although whether the deputy district judge had intended to specify the school is not entirely clear from those passages. It would be in the interest of all concerned to have the doubt resolved. In remitting this aspect to the deputy district judge, I wish to make it clear that there is no question of the issue of education being revisited: it is simply a question of clarification. If the deputy district judge never intended to specify the school, that would be the end of the matter.

Article 13

16. I now turn to the sexual abuse issue. This issue was raised only shortly before the hearing commenced below. On behalf of the mother, it was submitted that the matter ought to be ignored entirely. It was never raised by the father in his wardship proceedings and the suggestion was that it was an invention on the father's part in an attempt to bring himself within article 13 after the framework of the Convention had been explained by the judge below at the directions hearing. The mother was gravely suspicious of the allegations and effectively dismissed them. Nevertheless, the mother was prepared to give an undertaking to have the matter investigated if the child was returned to Switzerland. Those submissions did not find favour with the judge for otherwise he would have dismissed the father's allegations out of hand and found that the father had failed to establish para. (b) of Article 13. He made no such finding. Further, the judge did not feel able to dismiss the allegations inasmuch as he did not regard the mother's undertaking to call for an investigation as sufficient. He said this (at [82]):

"I was concerned, however, that any delay in carrying out an investigation might be harmful to the child. There was also the concern that the mother, upon her return, may dismiss the allegations as absurd, fail to call for an investigation and continue allowing Mr [X] to spend time in the company of [the child]."

His initial reaction and proposal appear at [83]:

"In the first instance, I therefore determined that arrangements should be made for [the child] to see a child psychiatrist, a person with experience of these matters. While I was not looking for an exhaustive enquiry, the psychiatrist would at least be able to conduct what is sometimes called a 'gross screening' and be able either to dismiss the allegations entirely or to say whether there may, upon further investigation, be some substance in them."

In fact, one such expert had been identified, namely, Dr C K Law.

17. During the intervening weekend, the judge had second thoughts on the matter and directed the Hong Kong Central Authority to contact the Swiss Central Authority to ascertain what procedures were in place in Switzerland for 'investigation' of child abuse cases. The reply from the Swiss Central Authority was to the effect that:

"Switzerland has a very well elaborated and functioning system of child protection measures ... The guardianship authorities are to interfere ex-officio when they have doubts about the wellbeing of the child, when they hear from some concerned private person or official national or international authority that there might be a child in danger.

When the child returns to Switzerland, our Central Authority can immediately inform the local guardianship authority and ask for an official investigation to be established ..."

18. On the basis of that information and the mother's formal consent to such an investigation being carried out in Switzerland (which in any case was unnecessary), the judge ruled as follows:

"(1) That the child be returned to Switzerland.

(2) That the return is conditional upon the Swiss Central Authority ensuring that, immediately upon the child arriving in Switzerland, an investigation takes place into the allegations of sexual abuse made by the father on behalf of the child."

It is to be noted that the Swiss Central Authority was not before the court in Hong Kong. In effect, the order was made conditional on the acts of a third party over whom the Hong Kong court has neither jurisdiction nor control. To say the least, that was a highly unusual course to take.

19. It appears to me that if there was no substance in the allegations made, in the sense that they could safely be ignored or discounted, the threshold test required for article 13 would not have been met and the child must be returned to Switzerland unconditionally. On the other hand, if those allegations were true, there must be a grave risk that the return of the child would expose her to physical or psychological harm within paragraph (b) of article 13. If there were doubts as to whether or not there was some basis to the allegations, then, unless and until such doubts are resolved, the judge would not be in a position to properly exercise the discretion contained in article 13. So, unless and until those allegations could be discounted altogether or after investigation is found to have no substance, it is almost inconceivable that the discretion could reasonably and responsibly be exercised to return the child to the environment in which the alleged abuse took place. It may be that highly unusual or exceptional circumstances might justify the exercise of the discretion to return the child notwithstanding the grave risk shown to exist although it is difficult to conceive of such situations. Even so, this could not and should not be

done without the judge being fully satisfied that adequate and sufficient practical measures are in place to ensure that the child would not be exposed to any risk of harm.

20. Even if (contrary to my view) the stage for the exercise of the discretion had been reached, in deciding to return the child, the judge appeared to have overlooked the fact that protection for the child looks to the future rather than the past. It is not a question of ascertaining or investigating whether sexual abuse did take place in the past. The fact that an investigation would be initiated prima facie relates to past events. What practical measures existed to ensure the child's protection was not apparent. There was no evidence of that nature before the judge. The judge himself appeared to recognise that a risk existed in returning the child. [89] Yet, the condition contained in paragraph 2 of his order and such information as had been provided by the Swiss Central Authority at the request of the Hong Kong Central Authority referred to above dealt with a single aspect only, namely, an "investigation" into the allegations of sexual abuse.

21. Moreover, it is to be noted that paragraph 2 of the order did not appear to fully reflect what was said to be the judge's ruling at [85] of the judgment in that it omitted the following:

"and, pending the outcome of that investigation, [the Swiss authorities] take appropriate measures to ensure the child's protection".

Assuming the omission was an oversight, the difficulty with that statement or order (as the case may be) is that there was no evidence of any such "measures", much less what they were in practical terms. For example, would the child be taken into care forthwith upon her return? That is equally true of the statement at [88] i.e.

"when this Court can be assured by the authorities of the Requesting State that it is possible to put measures in place to avoid the child being exposed to any risk of such harm then that may be sufficient" (emphasis added)

The basis for that conclusion appears nowhere. What form did the "assurance" take? What were the measures contemplated? The same applies to the assertion of "taking firm administrative steps" to remove the risk. [89] In my judgment, based on the papers before the court, those statements are unsustainable.

22. I would add that another reason that the judge regarded as relevant was that there would not be any "need for undue haste in Switzerland". That may be true so far as the investigation into past events is concerned but the same cannot be said of measures that should be in place for the child's protection in the event of her being returned in the exercise of the judge's discretion under article 13 notwithstanding the "grave risk" of harm.

23. In my judgment, what requires immediate and urgent investigation is whether or not there is any substance to the allegations made by the father. That investigation must be undertaken here forthwith before any question as to the exercise of the discretion under article 13 of the Convention can arise. Paragraph 4 of the order made at the hearing is designed to achieve that objective as swiftly as possible.

Other matters

24. One of the practical matters considered by the judge was whether the father might have to face criminal proceedings for child abduction in Switzerland should he go there in the future as he is bound to in order to exercise his right of access if the child is returned to Switzerland. At [94] of the judgment the judge referred to having spoken to the Swiss Central Authority by telephone. This was apparently in the absence of the parties. He records in the judgment that he was given the information that it would be very unusual for a prosecution in respect of the wrongful abduction of a child to proceed when the child has been returned and when the essential dispute was between parents each of whom thought that they were acting in the child's best interests. This court was also informed, in the course of argument, that the judge had told the parties that he had made enquires with his brother-in-law who was a psychiatrist practising in Switzerland. On the basis of that and apparently other enquiries decided that the matter could be left until the child's return.

25. It is highly unusual, to say the very least, for a judge to make factual enquiries himself. Whatever maybe the practice in overseas countries, the making of enquiries by the court itself is something which is alien to the procedure of Hong Kong courts. Other countries which are signatories to the Convention are civil law countries. The procedure there may be different. The role and function of a judge in those countries may be different to Hong Kong. As far as Hong Kong is concerned, it is most undesirable that a judge should take an active role in the investigation of facts, whatever they be. This would apply as much to circumstances prevailing in other jurisdictions relating to the welfare of a child as they do to events that have happened in the past.

26. It would also seem highly unusual and undesirable that a judge should communicate with an executive authority for the purposes of obtaining information in order to enable him to reach a decision, even if the authority be in Hong Kong. It would be still more undesirable if that executive authority be overseas. There could be little, if any, assurance that the person with whom the communication were made were speaking with the proper authority or knowledge or had given the appropriate attention to the matters in hand.

27. Even if most unusual circumstances prevailed and the judge found it necessary to communicate with another court or agency, that should only be done in the presence, and with the consent, of all parties and their representatives. To do otherwise would be to give the appearance of receiving evidence without the knowledge of the parties and reaching a decision without communicating the same to the parties. This would be an abrogation of quasi-judicial procedures, not to say judicial procedures: see for example, Moxon v Minister of Pensions [1945] KB 490 at 501 per Tucker J (as he then was), cited with approval Dato Tan Leong Min v Insider Dealing Tribunal [1999] 2 HKC 83 at 96 C-E per Mortimer VP.

28. It is difficult, in my view, to imagine circumstances which would justify the communication with outside agencies, whether they be authorities or courts or other persons, without giving prior warning to the parties and without having the minimum safeguard of a recording and transcript of what took place. I have no doubt that the judge in contacting the various people he did was acting in what he considered was the interests of the parties. He was no doubt also concerned to deal with the matter in the speediest way, bearing in mind the underlying intent of the Convention. Indeed it may be mentioned that article 11 provides that if a decision has not been reached within 6 weeks from the commencement of the proceedings, the applicant or the Central Authority of either the requesting or requested state may ask for a statement of reasons for the delay. Nevertheless, the need for a prompt and speedy resolution cannot be grounds for permitting the court to alter the fundamental approach to the rules of evidence.

Hon Cheung JA:

29. I agree with the reasons given by Le Pichon JA. I would like to add the following observations.

Habitual Residence

30. First, by the order of Deputy District Judge Remedios dated 30 August 2000 the mother was granted the custody, care and control of the child. She was given the permission to bring the child permanently out of Hong Kong. The child has been living and studying in Switzerland since August 2000 before the father took her back to Hong Kong in October this year where she has remained. The child was clearly in habitual residence in Switzerland prior to her removal. Habitual residence is basically a question of fact decided by reference to the circumstances of each case : see Dicey and Morris : The Conflict of Laws (13th Ed.) at pg 149 and Re F Minors [1992] 2 FCR 595.

31. The only real challenge by the father was that the mother had misled the judge in granting the order. The mother had stated that the child would be studying in an international school in Switzerland in which the students would be taking international examinations qualifying them to study in universities not confined to Switzerland. The mother now has enrolled the child in a local school where German is the teaching medium. The decision to enroll the child in a new school was taken by the mother after the child has studied in her previous school for a year. In terms of education for the child, what is best clearly depends on the child's needs and circumstances do require changes to be made. By no means of imagination can one say that the mother had deliberately set out to deceive the judge who ordered the custody, care and control of the child to her. In a usual case, if a child is in Hong Kong, one would expect a parent who is given the care and control to apply to the court for an approval of the change of the schooling. This has not been done in the present case. However, in my view, this does not affect in any way the validity of the order itself.

Role of the Hong Kong court

32. Second, the rationale of the Convention is that it is repugnant for one parent, unilaterally and secretly with the full knowledge that it would be against the wishes of the other parent who possessed rights of custody over a child, to remove that child from the jurisdiction of his habitual residence : In re F (Abduction : Custody Rights Abroad) [1995] Fam 224. Generally speaking, if the Hong Kong court is satisfied that the conditions for the return of child have been fulfilled, it should make the order and let the court of the child's habitual residence resolve the contested issues affecting the implementation of the access order. However, unlike most of the Convention cases, the custody and access order in this case was made by the Hong Kong court. As clearly recognised by the Convention, the welfare of the child is the paramount consideration. If the Hong Kong court is aware that the parents are contesting where access should take place, then it obviously could and should step in and clarify the place of access. This is more so when the dispute on access adversely affects the welfare of the child whose father took the drastic step of removing the child from Switzerland and taking her back to Hong Kong. The mother had in the hearing before Deputy District Judge Remedios proposed how and where access could take place. There was no dispute by the father on the proposal apart from the length of one of the access. Although the actual places of access were not mentioned by the judge in her judgment, since her decision was based on the mother's proposal, in my view, clearly she had intended the places of access to follow those contained in the proposal.

Article 13(b)

33. Third, applying the principle that the welfare of the child is the paramount consideration, when faced with a serious allegation by the father of sexual abuse of the child by the mother's boyfriend, the court has to resolve this matter first before it could order the return of the child. After all, it has to be satisfied that when returned, there is no risk that the child would be exposed to physical or psychological harm or the child being placed in a intolerable position as required by Article 13(b) of the Convention. Whether the Swiss authority will conduct the investigation of sexual abuse remains to be seen, but the Hong Kong court which considers the request to return the child to Switzerland is duty bound to consider this matter first. Unless the court can reject the allegation contained in the affidavit, because it is so inherently incredible or unreliable, it should consider whether there is independent extraneous evidence in support of the allegation. The view of an independent psychologist or psychiatrist who specializes in sexual abuse of children cases provides the appropriate independent evidence. While admission of oral evidence in Convention cases should be allowed sparingly : In re F (Abduction : Custody Rights Abroad), this is one of those cases, where evidence in the form of an expert report should be introduced to assist the court in its determination.

Hon Rogers VP:

34. I agree with the reasons that have been given.

35. We have been informed that this is the first appeal concerning the Convention. In view of the importance of the matters raised, these reasons are handed down in open court.

Anthony Rogers, Vice-President

Doreen Le Pichon, Justice of Appeal

Peter Cheung, Justice of Appeal

Representation:

Mr Kevin B Egan, instructed by Messrs Massie & Clement, for the Plaintiff/ Respondent

Mr Neal Clough, instructed by Messrs Oldham Li & Nie, for the Defendant/Appellant

Mr Enzo Chow, Government Counsel of the Department of Justice, for the Hong Kong Central Authority (As an observer)

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