NOT REPORTABLE
IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 11/39798

(2012/1096)

DATE:20/03/2012

In the matter between:

THE CENTRAL AUTHORITY FOR THE

REPUBLIC OF SOUTH AFRICA FIRST APPLICANT
E, RC SECOND APPLICANT

and

M, A RESPONDENT

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This is an application brought in terms of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention").[1] The Central Authority of South Africa[2] and the father of the child seek the mandatory return of a minor child, A M E, ("A") currently 4 years old, to the jurisdiction of Australia.

2. The principles underlying and the objectives of the Convention have been set out

1 Which has been incorporated into the Children's Act 38 of 2005.
2 Pursuant to a request from the Central Authority in Australia.

and restated in numerous South African authorities and I do not need to repeat same.[3] Where a child has been wrongfully removed from his/her "*state of habitual residence*"[4] then this Court is required to order the return of the child. In terms of Article 3 of the Convention, the removal of a child is considered "*wrongful*" where such removal is firstly, "in *breach of rights of custody attributed to a person, ...under the law of the State in which the child was habitually resident immediately before the removal"* and secondly *"b) at the time of removal ...those rights were actually exercised…or would have been exercised but for the removal…"* The onus to establish both jurisdictional prerequisites of "*habitual residence*" and *"breach of the exercise of custodial rights actually exercised at the time of the removal"* rests upon the applicants, in this case the Central Authority and the father.[5]

3. The central issue in dispute is whether or not these jurisdictional facts of residence and custody have been proven. If that has been done, respondent seeks to demonstrate that *"the child is now settled in its new environment*"[6] and that the removal to Australia would expose the child to *"great harm or in an intolerable situation"*.[7] Finally, it seems to me that this Court is permitted to consider whether the father subsequently *"acquiesced in the removal*" of the child.[8] This Court must always, and throughout all these enquiries, have regard to the Constitutional imperative of the "best interests" of the child[9] as also the context of the Children's Act 38 of 2005.[10]

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3 Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC).
4 See the Preamble to the Convention.
5 Smith v Smith 2001 (3) SA 845 SCA; Pennello v Pennello (Chief Family Advocate as Amicus Curiae) 2004 (3) SA 117 SCA.
6 Article 12: "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."
7 Article 13: "...the judicial ... authority ...is not bound to order the return ...if the person....establishes that- b) there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."
8 Article 13: "... the judicial ... authority ...is not bound to order the return ...if the person....establishes that- a) the person...having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention...or subsequently acquiesced in the removal or retention..."
9 Sonderup *supra.*
10 Central Authority v MV 2011 (2) SA 428 (GNP).

A'S BIOGRAPHY

Parents' relationship before her birth

4. Second Applicant, the father of the child ("R") and the Respondent, the mother of the child ("A") met in June 2000 in Kosovo where they were both working as United Nations volunteers.[11] A continued in Kosovo whilst R moved first to England and then to Indonesia.[12] R and A holidayed in Thailand in 2006.[13] She then went to Indonesia to join him in May 2006,[14] spent a month at his home in Turkey in June[15] and then in July she joined R in Indonesia where he was working.[16]

5. By October 2006 A was pregnant and living in Indonesia with a visit to Australia for pre-natal testing in November. R was working in Indonesia and in a relationship with a girlfriend in Cambodia.[17]

6. Neither prospective parent appears at the time to have had a settled territorial attachment or residence (other than R's employment in Indonesia and his home in Turkey). It was therefore an open question where their child should be born:

> "Please make up your mind where you want to have the kid. Australia is fine with me however if it is not for you please tell me as soon as possible. If you have the kid in SA I will not buy a car...I am not happy you want to live on your own when you are new to the country and have no friends there... I intend to fly to Cambodia on the 4 February and return when you think it is best."[18]
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> R: 3 December 2006

11 Answering Affidavit at paragraph 8; Exhibit 'C' Chronology 1.
12 Page 27 of the bundle: BM1 R's application for the return of a child where Ross has indicated that he is employed in "emergency and conflict responses by the United Nations and NGOs"; Answering affidavit at paragraph 9; Exhibit 'C' Chronology 1.
13 Answering Affidavit at paragraph 12; Exhibit 'C' Chronology 1.
14 Answering Affidavit at paragraph 13; Exhibit 'C' Chronology 1.
15 Answering Affidavit at paragraph 15; Exhibit 'C' Chronology 1.
16 Founding Affidavit at paragraph 24; Answering Affidavit at paragraph 16; Exhibit 'C' Chronology 1.
17 Answering Affidavit at paragraph 17-18; Exhibit 'C' Chronology 1.
18 Page 134 of the bundle: Email from R to A of 3 December 2006.

A's Birth - 16 May 2007

7. A decided to remain in Australia – A was not born in Indonesia where R was living and working, nor in Turkey where he had a home, nor in South Africa where A's family lived. A was born in Australia on 16 May 2007.[19] Ross spent the month of December 2006 in Australia and returned for her birth in May where both parents remained until A could travel. They all left for Turkey on 6th July 2007.[20]

July 2007 – June 2010

8. R, A and A remained in Turkey until the end of 2007. A and A then came to South Africa in December 2007 while R remained in Turkey until February 2008 when he went to live in Cambodia.[21] A continued in South Africa until June 2008.[22]

9. In 6 June 2008, R returned from Cambodia to his home in Turkey[23] and A and A spent a month with him there from 11 June until he left to take up employment in Sudan.[24] A and A remained in Turkey for 8 months until early February 2009 with R returning home on two occasions.[25]

10. A and A returned to South Africa in early February 2009 and lived in Cape Town while A applied for a long term residence visa from Turkey ('Ikamet') which was granted in June 2009.[26] They returned to Turkey on 15 June 2009. During 2009 R was working in Sudan and returned to Turkey for a 5 day visit. [27]

19 Founding Affidavit at paragraph 25; Exhibit 'C' Chronology 1.
20 Answering Affidavit at paragraph 19 & 21-22; Exhibit 'C' Chronology1-2.
21 Founding Affidavit at 26-27; Answering Affidavit at 25-26; Exhibit 'C' Chronology 2.
22 Answering Affidavit at 26-27; Exhibit 'C' Chronology 2.
23 Answering Affidavit at paragraph 28.
24 Founding Affidavit at paragraph 30; Answering Affidavit at paragraph 28; Exhibit 'C' Chronology 2.
25 Founding Affidavit at paragraph 31; Answering Affidavit at paragraph 29; Exhibit 'C' Chronology 2.
26 Founding Affidavit at paragraph 31- 32; Answering Affidavit at paragraph 29; Exhibit 'C' Chronology 2.
27 Founding Affidavit at paragraph 31; Answering Affidavit at paragraphs 29-30; Exhibit 'C' Chronology 2.

11. A and A remained in Turkey until they left for Australia on 13th June 2010.[28]

SOJOURN IN AUSTRALIA

Application for permanent residence visa

12. In August 2009 A applied for a permanent residence visa to and from Australia which was sponsored by R.[29] Of particular relevance are the details given by R as set out in the Sponsorship form for a partner to migrate as regard his and A's relationship, his financial commitment to her and his residential and employment details:

a. R states that he is the *"de facto spouse"* to A and that he intends to *"maintain a lasting relationship"* with her.

R records his residential address as "*13 Sokak 330 Uzumlu, Fethiye/Mugla Turkey"*[30] and that in the past ten years he has lived in *"Syria, Kosovo, Afghanistan, Yemen, Indonesia, Turkey".*[31]

R commits himself to support A financially by providing *"adequate accommodation and financial assistance as required to meet your partner's reasonable living needs ….. [which] assistance would cover the two years following the grant of her partner visa".*[32]

Response to granting of visa

13. In January 2010 the permanent residence visa was approved.

14. The response of both A and R to the grant of this visa appears from a series of emails exchanged between them over the period 13 January 2010 to 8 February 2010 from which extracts are reproduced below – A is writing from Turkey and

28 Answering Affidavit at paragraph 46; Exhibit 'C' Chronology 3.
29 Page 138 of bundle: Sponsorship form for a partner to migrate to Australia.
30 Page140 of the bundle.
31 Page143 of the bundle: Sponsorship form for a partner to migrate to Australia.
32 Page 145 of the bundle: Sponsorship form for a partner to migrate to Australia at paragraph 55 "Undertaking*" "I agree:... to ensure that adequate accommodation is available to them on arrival in Australia or, if necessary to provide accommodation for up to 2 years from arrival in Australia, or the two years following grant of your partner's visa if your partner is applying to Australia..."* and at page 148 "Sponsorship Undertaking": *"you agree to provide adequate accommodation and financial assistance as required to meet your partner's reasonable living needs. If your partner is applying outside of Australia, this assistance would cover the 2 years in Australia.*"

Ross from Malaysia, Turkey, Thailand, Cambodia and Afghanistan:

"5 year permanent residency –basically, for the 1st 5 years, you're entitled to come and go as you please"; "The following scenarios spring to mind: 1. Leave permanently when Ikamet expires in June. 2. Go to Australia in April – back in Turkey before end of May to pay bills...and renew Ikamet...3. Pay bills and renew Ikamet at end May – go to Australia June and July, return to Turkey early August. Leave permanently when new Ikamet expires or earlier during next year."; "[t]his is a huge move and I know once we have moved there, we will probably not travel, anywhere for a long time..."; "what will I do in Australia? I think I should start with the banks...."; "Having said all of that, the bigger issue of me generating an income while living in Turkey is unresolved- I am open to suggestions, and to be quite honest, I am even considering going into a partnership with my sister in a catering business."

A: 13 January 2010

"This visa will affect how we and the world see our relationship"; "it must be clear to all that we are not a couple..."; "...living in Turkey will most likely be cheaper than living in Australia. So if going to Australia you must find a job soon"; "This is my plan for the next 18 months- I will not coming to Australia with you and A though would like to meet in Turkey..."

R: 13 January 2010

"I think the idea would be for you and A to leave Turkey in May with the view of not returning; that means that you should take all things that you are emotionally attached to."; "I said previously that I was unwilling to cover all your costs in Australia. Part of the reason for my attitude is that I don't see you giving me access to A. As you have probably realised I don't intend to visit you and Ayla in Australia as I find our relationship extremely unhealthy."

Ross: 8 February 2010

Australian Experience

15. A and A eventually arrived in Australia on 13 June 2010 where they remained for a period of three and a half months. They left on 1st October 2011 when they came to South Africa. Again, a series of emails exchanged between R and A indicate their various experiences and states of mind over the duration of these months:

> "I am leaving for Cambodia tonight and will be back on the 24 April."
>
> R: 8 April 2010

> "I just sent you $ 20 000 in the past month"; "I will have little to do with you for the rest of my life. There is A which I intend to remain in contact with"; "Right now I do not know if will have a job next year. If I do I will provide money for A. If you are concerned that I am not pulling my weight than please see the gov authorities on child payments and just as important, access to A. I intend to do the right thing."
>
> R:
>
> 7 July 2010

> "I need to update you on what is happening over here – so far, I have only been able to find casual work"; "I have submitted many job applications... and am constantly searching and applying..."; "I have been delaying submitting any claims with Centrelink, as I will have to declare our 'separated' status and am concerned that this early into my residency, this will raise many questions about sponsorship, child support etc...and that they will see me as liability and revoke my permanent residency."; "it will certainly not be enough to cover A daycare."; "It is not my intention to register a claim with Centrelink...I will need to complete forms advising them that we are separated..."
>
> A: 5 August 2010

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"I have a few questions: What claims are you submitted to Centerlink? Why do you need to give them your status? Are you eligible for child support since you are working, and how will your marital status affect the claim?"; "It will probably take you 12 months to find a good job and get settled; you need to be prepared for a hard year in front of you. I am not prepared to support you but only because of your constant bad attitude. Money has little value for me; but with you bad attitude giving money to you will not be helpful."

R: 7 August 2010

"you have two options; continue the masquerade with us as partners or go it alone. Since I receive $ 15 000 a month consultancy fee it is unlikely you will receive any benefits – in the case we continue the masquerade. It would be better if you went it alone however do not jeopardise your visa."; "Please take responsibility for your life; I am not going to do it for you especially as dealing with you makes me feel like a loser."; "I will not support you; that you need to take steps now to get your life in order...we must keep our relationship distant"; "I will support A however there is no money in the foreseeable future."

R: 11 August 2010

"Currently we are linked on Centrelink as partners..."

A: 11 August 2010

"Please consider letting me take A for 6 months while you find your feet."

R: 12 August 2010

"Thinking about next year; A cold come to live with me in Turkey for a while until you are more settled. It means I have a chance to spend time with A and A will learn Turkish."

R: 12 August 2010

"It would be nice to resolve this issue as soon as possible though in

reality it could wait till I finish work at the end of the year. It is likely this issue will have to go to the family court next year. The family court will give me access to A especially as I have the money, house etc and therefore I don't see why we should not come up with an agreement which suits all. I don't intend to take A away from you for the long term but I do not to be part of her life. Without her staying with me how do you think I will have access to her? When and how do you think I will meet up with her?"

R: 13 August 2010

"I am on the move so best way of contacting me is by email."

R: 9 October 2010

Departure from Australia

16. A and A arrived in South Africa at the beginning of October 2010. Again, extracts from their emails indicate the reasoning of A for her move and the response of R thereto:

"adjusting to life in Australia has not been very easy for A and myself. It has been extremely difficult for me to cope with the financial dilemma I have found myself in."; "I have been trying to find a permanent job in Australia which would be financially viable, but have so far been unsuccessful."; "I came to the conclusion that the best positive solution to resolve all the issues, was for me to be on familiar ground, where I am known and would more easily be able to source the help for permanent job, and whereby I would then be able to provide myself and A with a decent life. Hence, the decision was made to leave for SA."

A: 6 November 2010

"To make a decision to return to SA after only 5 months in Australia and in a place where we both agreed that there was little opportunity for work only shows a lack of thought and will. This is not a good decision for A, but at least she has an Australian passport and will be able to escape SA when she is older."

R: 6 November 2010

"I have been told that I have two options, they are: 1. We come to a formal agreement ourselves where I am given access to A for three months of the year and daily contact through Skype. Included in that would be maintenance for you and A. 2. Issue a missing persons report for A under the Hague convention for children. In that application I will ask for full custody of A. In addition I will cancel my sponsorship of your residence visa and inform the relevant authorities that I have issued an abduction order against you."; "If you take the first option I will pay for you to travel with A to Australia and again to bring her back to SA, until A is old enough to travel on her own. I will also cover your costs if you preferred to stay in Australia when A is with me."

R: 7 November 2010

"[a]s her father I have unalienable rights then please consider the following for option 1. I don't ask for my rights under the Hague convention. And I do not impede your return to Australia by notifying the authorities that you have abducted A. 2. I pay maintenance for A based on SA laws...3. You give me access rights to A for three months of the year. You would accompany her on the flights from and to SA until she reaches the age where she can travel on her own…6. When A is with me in Australia you can register an airport watch to stop me taking her out of the country without your permission."; "I would like A to accompany me to Australia from Dubai in December. I will pay for your airfare to Dubai and return. In two months time you will come to Australia to return Ayla to SA. This two months will give you time to find a proper job and home in SA."

R: 8 November 2010

"I still like option 1 but know that it will never happen. For that reason, I will preserve with option 2. I will ask for full custody, not because I want to replace you as A's mum but to put myself into a position that I can make compromises. After gaining custody, my intention would be to give up the right to look after A full-time though give myself some time with her."

R: 10 November 2010

HABITUAL RESIDENCE

Legal Approach

17. The first requirement for the finding that the removal of A from Australia was "*wrongful*" is determination of the jurisdiction where A was "*habitually resident"* immediately prior to 1 October 2010.

18. It has not gone unremarked that this jurisdictional fact is undefined in the Convention.[33] The Court must therefore interpret this expression according the "*the ordinary and natural meaning of the two words as a question of fact to be decided by reference to all the circumstances of any particular case*."[34]

19. The approach to determination of "*habitual residence*" appears to be based either upon the life experiences of the child herself or the customary associations and intentions of the parents of the dependant child.

20. With regard to the child's removal from an habitual residence, the Courts have accepted the *"implication that it is being removed from the family and social environment in which its life has developed*".[35] Enquiries into this environment have been concerned whether the child has established "*a stable territorial link [which] may be achieved through length of stay or through evidence of a particularly close tie between the person and the place*"[36] and which has also been expressed as a determination "*whether the child has a factual connection to the state, and knows something of it, culturally, socially and linguistically.*"[37]

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33 See Senior family Advocate, Cape Town, and Another v Houtman 2004 (6) SA 274 (C); Central Authority (South Africa) v A 2007(5) SA 501 W and Neulinger & Shuruk v Switzerland [2010] ECHR Grand Chamber.

34 S v S (Minor: Abduction: Illegitimate Child) [1990] 2 All ER 1968 HL at 965 quoted with approval in Houtman *supra*.

35 Houtman *supra* at paragraph [9].

36 Houtman *supra* at paragraph [9].

37 In Re F (A Minor) (Child Abduction) [1992] 1 FLR 548 at 551.

21. Of course, with small children such as A it is usually impossible to distinguish between the habitual residence of such a dependant child and her custodian(s) or parent(s).[38] The parents' habitual residence is usually that of the young child and vice versa. Accordingly, the desires and intentions and actions of the parents must be evaluated. When adults establish an habitual residence, either as individuals or as a parental couple, one would expect both the existence of a "*stable territorial link"* coupled with "*some degree of settled purpose or intention"*[39]. Courts with common law jurisdiction, both in South Africa[40] and the United Kingdom[41] have equated *"habitual residence*" with *"ordinary residence*"[42]. In Central Authority (South Africa) v A *supra*, Jajbhay J concluded that the "*the essential elements are that the residence is voluntary and for a settled purpose*".

22. It is certainly possible that the parents of even a young child may have formed an intention that she will acquire an habitual residence different to that of one or both of the parents. If that is the case, then the Court should consider the parents' *"shared intentions regarding the child's residence".*[43] Where the parents do not appear to have been of the same mind as regards the habitual residence of their child then the Court returns to the habitual residence of the parent with whom the child has a home as also the factual connections established by the child to the State demanding her return.[44]

The Child – A

23. A was born in Australia on 16 May 2007.[45] The alleged removal took place on 1

38 In Re F *supra* at 551 Butler-Sloss stated *'a young child cannot acquire habitual residence in isolation from those who care for him.'*

39 Houtman at paragraph [9].

40 Central authority (South Africa) v A 2007 (5) SA 501:

41 R v Barnett London Borough Council [1982] Q.B. 688; Ex parte Shah [1983] 2 AC 309 (HL) at 340, 342 and 349.

42 'A man's abode in particular place or country which he had adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of long or short duration.'

43 Re F (A Minor) *supra*.

44 See A *supra*- "*Where the parents do not have a common habitual residence, the habitual residence of the child follows that of the parent with whom he has a home at the time. This approach would be consistent with the dependency approach because the child's habitual residence is held to be the same as the common habitual residence of the parent."*

45 Founding Affidavit at paragraph 6 & 25; Answering Affidavit at paragraph at 19; Exhibit 'C'

October 2010.[46] At that time, she had been physically present (one hesitates to say 'resident') during her three and a half years of life (some 40 months) on several continents and in several countries:

a. Australia for two periods of 7 weeks (after birth) [47] and 3 ½ months (13 June - 1 October 2010);[48]

Turkey for three periods of 5 ½ months (6 July - 18 December 2007),[49] 8 ½ months (11 June 2008 - February 2009) [50] and one year (15 June 2009 - 12 June 2010);[51]

South Africa for two periods of 6 months (18 December 2007 - 11 June 2008),[52] and 4 ½ months February 2009 - 15 June 2009.[53]

24. It certainly cannot be said that, between the age of three years and one month and three years and four months, A formed any intention or views regarding her home or residence.

25. The greatest duration of residence in A's life has been in Turkey – the longest period she ever resided in one building, town or country. It is the only place she has ever really spent time with both parents together.

26. There is nothing on the papers to suggest that she has acquired any *"factual connection*" to Australia or *"knows something of it culturally, socially and linguistically*".

27. Even her father, who has initiated these proceedings does not seem to have considered A *'habitually resident*" in Australia. On 11th August 2010 he emailed the suggestion that three year and two month old A should come and live with him in

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Chronology 1.
46 Founding Affidavit at paragraph 34; Answering Affidavit at paragraphs 99.2 and 66; Exhibit 'C' Chronology 3.
47 Exhibit 'C' Chronology 1; Answering Affidavit at paragraphs 22-23.
48Founding Affidavit at paragraph 33-34; Answering Affidavit at paragraph at 46; Exhibit 'C' Chronology 1.
49 Founding affidavit at paragraph 27; Answering Affidavit at paragraph 22; Exhibit 'C' Chronology 1-2.
50 Founding affidavit at paragraph 29; Answering Affidavit at paragraph 28; Exhibit 'C' Chronology 1.
51 Answering Affidavit at paragraphs at 30 & 46.
Exhibit 'C' Chronology 2-3.
52 Answering Affidavit at paragraph at 25;
53 Founding Affidavit at paragraph 33-34; Answering Affidavit at paragraph 46; Exhibit 'C' Chronology 3.

Turkey *"for a while*" where she will *"learn Turkish*" and the next day suggests that she comes to Turkey for a period of "*6 months*"! A month after A has moved to South Africa, his email of 6th November 2010 envisages that she will continue living in South Africa saying that, because she has an Australian passport, she "*will be able to escape SA when she is older"*. Throughout November 2010, he gives no indication that either he or A or A have any settled intentions as regards Australia and continues to suggest that A comes to spent time with him (presumably in Turkey) for a three month period and makes various suggestions whereby A should travel the world escorting A on her visits to R.

28. What is abundantly clear is that, throughout A's short life, there has been only one constant in her caring. This is her mother – A. As A has travelled the world, her most enduring, settled, stable and known connection - i.e. her *"family and social environment"* – has been her mother – A.

Father – R

29. A's father has lived and continues to live a peripatetic existence dictated by work opportunities and his relationships. From the documentation furnished to this Court, he appears to have had no settled residence in any continent (save his house in Turkey where he has not lived but instead returned to on vacation or in between contracts of employment), no settled country of employment, no settled home with family (with relationships in a number of countries and irregular return to A and A in Turkey).

30. R's approach to the Central Authority of Australia has not been based on accurate information and it has been opportunistically based upon the adherence of both Australia and South Africa to the provisions of the Hague Convention.

31. R is not himself habitually or otherwise resident in Australia.

a. In his completed Application for the Return of A he claims that he resides in Australia and provides an address in Queensland.[54]

54 Page 23 of Bundle: BM1.

This is not his address and he does not live there. In fact, he has not lived in Australia since long before A was born. The photocopies of his passport handed up to this Court and from which a chronology of his travels has been extracted make it very clear that Ross has not even been in Australia since A was born in 2007. He arrived in Australia for that purpose only and has not since returned.

When R completed the Sponsorship Application in August 2009 he stated that his place of residence was in Turkey and amongst the list of countries in which he stated he had lived in the past ten years he did not include Australia.

In the various emails written by R to A he makes it very clear that he has not been living in nor does he intend to even visit, let alone reside, in Australia "*I will not be coming to Australia with you and A though would like to meet in Turkey*". To his friend Greg he writes at the beginning of 2010 *"I have little connection with Australia having been away for nearly 20 years..."*[55]

32. Though R may speak English (perhaps with Australian accent), he may have grown up in that country, his parents may still live there and he may hold an Australian passport, there is no basis on which this Court can find he is or was habitually or otherwise resident in Australia.

Mother - A

33. A's mother also has also lived a peripatetic life occasioned by employment opportunities and relationships. Since A was born in 2007 she has lived on and off in Turkey and South Africa and Australia. Employment has been difficult to find in both Turkey and Australia. She has been reliant upon the provision of a home in Turkey by R, funding from R and undertakings of funding by R.

34. She lived in Turkey in the latter half of 2007, in 2008 (when not in South Africa) and in 2009 (when not in South Africa). Whilst in South Africa she finally obtained permanent residence in Turkey in July 2009. While in Turkey she obtained permanent residence in Australia in January 2010. She has had the option to live and work in both Turkey and Australia and has exercised both options.

35. From the documentation available to this Court, it would appear that A's intentions

55 See annexure Z6: R's email to his friend Greg of 14 January 2010.

were to utilise opportunities for work and residence in both Turkey and Australia. On receipt of the Australian visa in January 2010 she wrote that a number of "*scenarios spring to mind*" which included time in both Turkey and Australia – she would travel between the two countries, renew her 'Ikamet" in Turkey, perhaps set up a catering business with her sister in Turkey to earn an income, look for work with banks in Australia. It seems that she was trying to maintain a foot in both worlds. In part there was impetus to leave Turkey where she had been unable to find work and incentive from Australia where she thought that she could find employment.

36. The possibilities of life in Australia were certainly unknown. She voiced a number of concerns about living there. Clearly her stay in Australia was predicated upon obtaining employment and ensuring the financial stability which would ensure her capacity to support both A and herself.

37. Part of the difficulty in this Australian escapade is that A and R were both operating in a different paradigm from that contemplated by the Australian authorities. On the one hand, the authorities had been assured that A was the '*de facto*" spouse of R and that they were "*committed to a lasting relationship*" to each other. As sponsor, R had undertaken to *"provide adequate accommodation and financial assistance to meet [his] partner's reasonable living needs… for a period of two years following the grant of the partner visa"*. On the other hand, they both knew that they were not in a long term or committed relationship and their only remaining bond was the parenting of A. R's email to A when she was granted the visa is clear – *"this visa will affect how we and the world see our relationship. It must be clear to all that we are not a couple"* - and A did not remonstrate with him or dispute this understanding. In February 2010, long before A decided to go to Australia, R was clear *"I said previously that I was unwilling to cover all your costs in Australia"* – again A did not remonstrate or dispute this understanding. The upshot is that A was in reality a single mother with no regular or reliable form of support other than her own earnings whilst the Australian authorities considered her to be in a partnership where her partner was responsible for her and A's support.

38. From A's emails over the time she was in Australia it is clear that neither appropriate employment nor financial stability came to fruition – she was reduced to domestic service and had to remove A from daycare. She felt obliged to enquire about childcare benefits.

39. R's attitude to the financial position of both A and A also changed over the time they were in Australia. In February he committed to covering some, but *"not all your costs*". This eased into a more uncertain and conditional indication in July that *"If I have a job I will provide money for A*" and in August that "*I will support A but have no money*". This hardened in August to *"I am not prepared to support you*". By August 2010, he was proposing that A should "*see the government authorities about child payments*" and concluded in August with *"it is unlikely you will receive any benefits"* and *"must go it alone*".

40. The uncertainties of Turkey with the ability to live in R's home but the inability to earn her own living had now disintegrated into the certainties of no support at all in Australia and the inability to earn her own living.

41. A had the legal right to live and work in Turkey and Australia and South Africa. She attempted to do so in both Turkey and Australia. Her departure for Australia was clearly predicated upon a number of conditions – paramount was that of employment, financial security, proper care for A during the working day, provision of a home for A and a settled future. None of these conditions eventuated.

42. Of course there is *"no objective temporal baseline*"[56] required for the establishment or otherwise of an habitual residence. Such residence may be established and lost in only a day.[57] What is required of residence, whether of short or long duration, is that there is "some degree of settled purpose or intention". In the present case, A had, from the very first email in January 2010, kept her options open. She

56 Houtman *supra* at paragraph [9].
57 In Re B (Minors) (Abduction) (No.2) (1993) 1 FLR 993 at 995 quoted with approval in De Lewinski and Legal Aid Commission of New South Wales v Director-General New South Wales Department of Community Services 1997 FLC.

had not cut loose all legal ties with Turkey – hence the reference to validity of the Ikamet. Her intentions as regards Australia may have been hopeful but they were cautious. Residence in and relocation to Australia was conditional - upon success not failure, upon financial security and a degree of domestic comfort not anxiety and deprivation.

43. There is no evidence that, in three and a half months, A established *"a stable territorial link"* with any part of Australia nor that, whilst there she developed "*a particularly close tie*" to the country or its people.

44. I cannot find that A had established an habitual residence in Australia prior to her return to South Africa.

EXERCISE OF RIGHTS OF CUSTODY

The law

45. For this Court to find that the removal of A from Australia was wrongful, it is further required that such removal was firstly, *"in breach of rights of custody attributed to [R] under the law of the State in which the child was habitually resident immediately before the removal" and* secondly, that at the time of removal, i.e. 1 October 2010, these rights of custody *"were actually exercised*" by R. The onus remains on the applicants to establish this jurisdictional fact.[58]

1.

46. Rights of custody enjoy their own autonomous definition in terms of the Convention apart of domestic law interpretations.[59] What is encapsulated in this phrase *"rights of custody*" is set out in Article 5 of the Convention as including "*rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".*

47. The affidavit setting out the applicable law[60] refers this Court to the Family Law Act 1975 and the relevant provisions thereof. In summary, R has all parental responsibilities

58 Pennello *supra.*
59 See Neulinger *supra.*
60 Pages 56 – 58 of the pleadings.

and rights of custody in respect of A since none of these rights and responsibilities have been removed by a Court order.

Applicant's Averments

48. In the Founding Affidavit to this application, the Central Authority goes no further than to state that *"...A left her habitual residence in Australia where Second applicant was evidently exercising rights of custody*".[61] No details of such rights of custody or the manner in which or where or when they were exercised is given. There is no indication that anyone in the Central Authority of Australia or South Africa ever interrogated any of the facts alleged by R to determine whether or not this jurisdictional requirement could ever be met.

49. When R initiated these proceedings by completing his Application for the Return of a Child he stated that he, the "*requesting individual*" was the person *"who actually exercised custody before the removal".* He stated the following factors upon which he relied to suggest the exercise of rights of custody in respect of A:

> "1. *I have been the sole financial provider for A and A before the pregnancy in July 2006...*
>
> 4. A and A lived in my house in Turkey for the first three years of A's life...
>
> *I am sponsoring A's Australian residence visa to ensure I have access to A...."*[62]

50. The expression by R of his intentions in respect of his daughter, his recordals of his commitment to her, the documentation prepared by him and the chronology extracted from the photocopies of his passports provide more than sufficient indication of the failure by R to meet his own claims to have exercised rights of custody to A or that there has been any breach in regard to the one instance of access which he has exercised – Skype contact over the computer.

51. It may well be correct that A dwelt in his home in Turkey for major portion of the first years of her life - R states this to have been *"the first three years"* of her life. It is not in

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61 At paragraph 37.
62 Page 27 of bundle: BM1.

dispute that A was living in Turkey over the periods 6th July to 18 December 2007, 11th June 2008 to February 2009 and 15th June 2009 to 12th June 2010. However, R was not living there with her. He was working everywhere else in the world but Turkey. A's calculations are that he was with A for 7 weeks in 2009 (spread over 3 trips) and 2 weeks in 2010 (spread over 2 trips) which calculations are not in dispute. Article 3(b) of the Convention requires that rights of custody be exercised *"at the time of removal"* which was 1 October 2010. It is common cause that R did not provide a home for A from the time of her arrival in Australia in June 2010 until 1 October 2010 and she was certainly not living in his home in Turkey at that time.

52. R claims to have been *"the sole financial provider for A"*. Yet his own emails record that he had ceased to make any financial contribution towards the living expenses of A with effect from June 2010. His email of 7th July 2010 records that he had sent $20 000 during June and A has explained that this was expended on the purchase of air tickets, shipment of personal effects, the purchase of a laptop, internet connection fees and monthly fees, the purchase of a car, car registration and car insurance, fuel costs, rental of property, payment of utilities, household expenses and weekly groceries, the purchase and fitment of a car seat for A and the purchase of clothing and shoes.[63] His ability to contribute toward the maintenance of A in the future was doubtful. On 7th July he stated that if he had a job *"next year*" "*I will provide money for A"*. By 7th August he was asking about eligibility for child support but then expressed resignation to the unlikelihood that such benefits could or would be available. Again in August he stated "*I will support A however there is no money in the foreseeable future"*. Ross was certainly not even one financial provider, let alone the sole financial provider, for A as at 1 October 2010.

53. R claims that he sponsored the application of A for residency in Australia in order that this would ensure his access to A. However, the very day that he was informed by A of her success in obtaining the residence visa he stated that he would not be coming to Australia *"although he would like to meet in Turkey"* and within the month confirmed that "*I don't intend to visit you and A in Australia"*. Certainly physical access between father and daughter was not within R's contemplation in the early portion of 2010. Thereafter there

63 Answering Affidavit at paragraph 52.

was communication between father and daughter over Skype which most certainly must be accepted as a form of access. There has been no suggestion that R has been denied continuing Skype access to A. Indeed, the one benefit of this form of access is that it has been implemented whether R was in Indonesia, Cambodia, Sudan, Thailand, Afghanistan or anywhere else in the world. Notwithstanding the singular definition of "rights of custody" in the Convention, I doubt such rights are as broad as to encompass Skype communication between father and daughter. In any event this access has never been denied to R.

54. In his Application for the Return of A, R stated that it was his intention *"when I return to Australia at the end of 2010 to seek access to A through the family court...."*[64] R has not pursued such rights of access. There has never been any litigation initiated on his behalf. No access arrangements between R and A have been recorded by way of agreement or made the subject of any order of Court. No Court has ever been approached to make arrangements with regard to access and the permission of no Court is needed for A to travel throughout the world with A.

Determination of habitual residence

55. One aspect of "rights of custody" to a child is the right to determine the habitual residence of a child. In this application, R has averred that Australia is A's place of habitual residence.

56. It is notable that R himself disclaimed any right which he may have had to determine A's place of residence in Australia or anywhere else.

57. In December 2006 when she was three and half months pregnant, that it was more or less immaterial to him where A would be born: *"Please make up your mind where you want to have the kid. Australia is fine with me however if it not for you please tell me as soon as possible. If you have the kid in SA I will not buy a car."*

64 It is notable that R was not in Australia at the time of A's departure from Australia or subsequent thereto – according to the photocopies of his passport certified at the Australian Embassy in Bangkok, Thailand.

58. Similarly he made it clear it was more or less immaterial to him whether A remained living in Turkey or went with her mother to Australia: in January 2010 (after A had acquired permanent residence visas for both Turkey and Australia) he wrote *"living in Turkey will most likely be cheaper than living in Australia. So if going to Australia you must find a job soon"*.

CONCLUSION - HABITUAL RESIDENCE AND RIGHTS OF CUSTODY

59. In the result I am of the view that the Applicants have not discharged the onus of showing that the "habitual residence" of A immediately prior to 1 October 2010 was Australia or that there has been any breach of any rights of custody exercised by R to A and by A to R which rights were actually exercised prior to 1 October 2010 or would have been exercised if it were not for her departure *from* Australia on 1st October 2010.

60. If I am in error in finding that A did not have an habitual residence in Australia at the relevant time and that R was not exercising rights of custody at the relevant time and that, anyway, there has been no breach of any rights of custody – then there are three further issues with which I should very briefly deal. The first is the discretion granted to this Court, in terms of Article 12, to consider whether or not A is now *"settled in [her] new environment"*. The second is the Article 13 defence that A would be exposed to "*harm*" or *"an intolerable situation*" should she be returned to Australia. The third is the question whether or not R has acquiesced to A's return to South Africa which possibility is provided for in Article 13 of the Convention.

IS A SETTLED IN HER NEW ENVIRONMENT?

61. Where a Court determines that the necessary jurisdictional requirements have been met and proceedings in this Court have been commenced within a period of one year from the date of removal from Australia, then this Court is obliged to order the return of A forthwith. However, Article 12 of the Convention continues to provide that: "*the judicial... authority even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its*

new environment.."

62. A and her mother left Australia for South Africa on 1st October 2010. These proceedings were launched by the Central Authority of South Africa on 14th October 2011. The consequence of this elapse of the one year period is that this Court has a discretion to refuse the application for the mandatory return of A.

63. Ross filed his Application for the Return of A on 14th March 2011. At that time he stated that *"A and her mother went missing around the end of October beginning of November 2-10*" but went on to refer to the email from A of 5 November which gave a telephone number which he phoned and a conversation with her which was *"cordial but tense"*. He gave no address for A and A and set down only the address of A's father in Cape Town. There is no averment that he ever asked for A's address and was refused same. He does speculate that *"It is very likely that once A is aware of the request for A's return to Australia that she and A will go into hiding"*.[65]

64. No reason is given to explain the lapse of four and a half months from R's first email communication with A in South Africa until the time he made the Application for the Return of A. No reason is given for the further lapse of time to 8th June 2011 when the Affidavit of Applicable Law for the Return of the Child was deposed.[66]

65. Advocate Mansingh, appearing for the applicants submitted at paragraph 84 of her heads of argument that *"She and the child were in hiding from 2 October 2010 until 12 August 2011 when tracing agents hired by the first applicant located them in Johannesburg"*. This submission is not based upon any averment in any affidavit nor any of the documents attached thereto. Since I have found no reference thereto in any of the material before this Court, I am most surprised at this submission by applicants counsel. I enquired of her at the hearing of the basis of this submission and she shrugged it off. It must, of course, be rejected.

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65 It is noted that R had emailed A advising that he would be on holiday and could not be contacted until the end of the month of October 2010. He does not suggest that he made any attempt to contact either A or A while he was on holiday or that A would have had any means of contacting him.

66 Pages 56 and 57 attached to Founding Affidavit.

66. In the result there is no reasonable explanation for the (admittedly miniscule) lapse from one year after removal in the launch of these proceedings. I see no reason why this Court cannot exercise its discretion in terms of Article 12 to consider whether or not A is *"settled in her present environment."*

67. A's answering affidavit is replete with details of the stability afforded to A in her home, educational and social environment. I am most indebted to the very full investigation conducted by Advocate G Kinghorn who was appointed by this Court as the legal representative of A.

68. Advocate Kinghorn first met with A at her home and found a cheerful, confident and talkative little girl who had a lot to say about her school activities, her social activities and her maternal relations. The details given by Advocate Kinghorn are obviously selective but are telling. Understandably she expressed a particularly close relationship to her mother - "I *never want to leave Mommy*"; she is obviously the recipient of warmth and love - *"I am special";* her very obvious attempts to avoid hearing anything about her father and Australia. Advocate Kinghorn visited A's day care centre where she toured the facility and met the staff before attending class with A. She commented most positively on A's happiness and contentment in her school environment and her interaction with her classmates.

69. It should be noted that Advocate Kinghorn has received no undertaking of payment of any fees in this matter. Nevertheless, she devoted a great deal of time and trouble in this investigation – for which the Court is most grateful.

70. In addition, Advocate Kinghorn procured the services of a psychologist, Ms Felicity van Vuuren who had three interviews with A and/or her mother. The report indicates that A has an understanding of the family unit comprising two parents and a child but accepts that her family currently comprises just herself and her mother. A is closely attached to her mother which attachment is complicated by anxiety and insecurity.

I also understand that Ms Van Vuuren was given no undertaking of any payment for her time and must thank her very much for her endeavours.

71. A seems, on the papers before me, to be a child who is secure in her mother's love, outgoing and responsive to family and friends and schoolmates; articulate and communicative. It is to be expected that she is possibly overprotected by A who has been a single parent for so long and in the context of this litigation. It is also to be expected that, at her young age, she has no real comprehension of the role which her father, R, could play in her life. I have had regard to his later set of emails to A and concur that they indicate a complete lack of insight into A's interests or level of communication but quite understand how R has found himself completely cut off from A's life - he has really only been with her on his own visits from Afghanistan, the Sudan and elsewhere and maintained email and Skype contact with a baby and then a toddler.

72. This rich, warm, stimulating environment must be contrasted with the completely unknown and unexplained environment which could await A in Australia. R does not live in Australia. He does not work in Australia. His Application for her Return gives an address in Queensland where he does not live and apparently has not lived for over 20 years. There is no indication in his Application or his Replying Affidavit who would meet A at an airport in Australia, where she would be housed, fed and clothed. Apart from those bare essentials, there is no mention of who would cuddle her, laugh with her, comfort her, nurture her or love her.

73. The only mention of any environment within which R has ever tendered to care for A is in Turkey. When he suggested that A live with him for a while or for three months in 2010 – when she was just over three years old – he suggested Turkey. This is the country where he says he is not permitted to work? He thought that A would learn to speak Turkish when she was barely learning to speak English. In his Replying Affidavit he repeats his attachment to Turkey and his ownership of a boat (to which reference has been in made in the emails). In short, R is not really asking for A to be taken to Australia. He is asking for A to go and live in Turkey – whilst he continues to work in Afghanistan and elsewhere.

74. It is inconceivable that this Court should even contemplate ordering the removal of A from the Republic of South Africa to Australia where she would, presumably, immediately have to be placed in foster care by some welfare agency.

HARM

75. Closely aligned to the consideration of A's settledness or otherwise in her new environment, as per Article 12, is the enquiry in terms of Article 13 whether or not A has established that *"[t]here is a grave risk that her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"*. The onus rests upon A to establish this defence.

76. A's counsel has submitted that there are a number of concerns.

77. Firstly, R has threatened that A would be in jeopardy should she return to Australia: "*it would not be wise to return to Australia.*" This Court must immediately question: With whom then would A live and who would care for her? How is it possible that a four year old child could be separated from the mother who has been the only stable influence or factor in A's entire life.

78. Secondly, there is no indication that A would be any more likely to obtain suitable and sufficient remunerative employment in Australia than she was in 2010. There is nothing to suggest that she would not confront the same financial difficulties with the resulting hardship and emotional trauma. In none of the documents is there any indication from R that he would make an undertaking to support or maintain either A or her mother.[67]

79. The situation is even more complicated by the basis upon which R and A procured the residence visa for A. She and R have been shown not to have been in a committed or lasting relationship at the time of her application for a visa and his sponsorship of same. If the sponsorship falls away then so does the visa. If the relationship is still extant then A may still find herself unable to access childcare benefits.

ACQUIESCENCE

80. It was not argued that R has acquiesced in A's living in South Africa. Yet the emails from R immediately upon his learning that she and her mother were in South Africa clearly

67 See the approach of the courts in WS v LS 2000 (4) SA104 (C); and in De Lewinski *supra.*

indicate that that is the situation: on 6th November 2010, the day after he learns that she is in South Africa, R writes of A *"she will be able to escape SA when she is older", the* next day he demands access for "*three months of the year"*. R made a number of proposals for A's travel – all of which involved him paying for airfares for both A and her mother. But at no stage did he offer to come to South Africa.

81. It would seem that it was only when it was clear that A was not prepared to allow three and a half year old A to go and live somewhere with R for three months at a time, that R threatened, on 10th November 2010 to *"ask for full custody*" so that *"he could make compromises"* and pursuant to this decision he took until March 2011 to initiate the proceedings for the return of A to Australia.

82. Until that time, R seemed satisfied that A live in South Africa and visit him elsewhere in the world.

CONCLUSION

83. I have found that the applicants have not shown that A had an habitual residence in Australia nor that R was actually exercising any rights of custody at the time of her removal from Australia. Accordingly, the necessary jurisdictional facts for implementation by this Court of the return of A to Australia have not been proven.

84. In addition, I am satisfied that A is settled in her new environment. I am also satisfied that she would be placed under intolerable strain amounting to harm should she be returned to Australia. Further, I am of the view that R acquiesced in A's removal to South Africa.

I should comment that I have had regard to the precepts of the Constitution of South Africa and the overriding nature of the Children's Act to the Hague Convention. It has not been necessary for me to perform a balancing act between the *"best interests of the child"* as against the requirements of the Convention since I have found that the necessary jurisdictional requirements have not been proven and that the defences available to the mother of the child are satisfactorily established.

COSTS

85. Costs usually follow the result but the Court obviously has a discretion to make an order that is appropriate and having regard to all the relevant facts. In matters which concern children and disagreement between parents there is usually much distress and anguish occasioned to all family members. This can often occasion unfortunate decisions clouded by emotion.

86. I believe this is one such case. R's own emails (to many of which I have not even made reference) clearly indicate that he does not really want A to return to Australia to live with him. What he wants is for A to have to capitulate to him and for A to be brought to Australia after which he will procure lengthy "access" for which purpose A would have to travel the world to facilitate.

87. I appreciate that R wants to enjoy access to his daughter and she is certainly entitled to enjoy access to him. It will be for the appropriate Court to determine what would be the appropriate arrangements for access – taking into account A's age, the country in which R would be able to see her, the arrangements R would be able to make for her care. The frequency and duration of such access would depend on these and many factors. It is not on spurious averments of habitual residence and exercise of rights of custody demanding the return of A to Australia that access should be arranged. R was able to travel to Dubai at the end of 2010 – he could have visited his daughter in South Africa on the way.

88. R has stated facts which he knew were not true (eg his residence and address), he has made allegations that were without any foundation (eg that he feared A would go into hiding of which there was no indication), he has pursued litigation in bad faith (eg claiming the return of A to a country where he was not resident and did not intend to be and has not been resident).

89. It would appear that neither the authorities in Australia nor the authorities in South Africa saw fit at any time to carefully examine the basis upon which this application was brought. All that had to be done was to ask R for photocopies of his passport entry and exit stamps, prepare the appropriate chronology and then ask him a few questions.

90. I raised the issue of fees for both Advocate Kinghorn and Ms van Vuuren. Advocate Mansingh's response ranged from pointing out that all advocates do pro bono work through to stating that the Legal Aid Board could be approached.

91. I note that the Central Authority and R E have had the benefit of the services of the State Attorney and Advocate Mansingh at the expense of the taxpayer. This was not done on a pro bono basis nor at Legal Aid rates. The Central Authority of South Africa is obliged to respond promptly and positively to a request from the Central Authority of Australia and it is unfortunate that the South African taxpayer has had to fund R Everson's misguided initiation of these proceedings.

92. I can see no reason why the respondent in this matter, A, should be without redress in her costs. I can see no reason why Advocate Kinghorn should work for free or Ms Van Vuuren give of her time and expertise for free.

ORDER

1. The following orders are made:

a. The application by the Central Authority for the return of A is refused.

The applicants are to pay the respondents taxed or agreed party-party costs, jointly and severally the one paying the other to be absolved.

The applicants are to pay the taxed or agreed fees of Advocate G Kinghorn and of Ms Van Vuuren, jointly and severally the one paying the other to be absolved.

Dated at Johannesburg this 20th day of March 2012.

Satchwell J