THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

FAMILY. APPEAL NO. 0010 OF 2018

FH 00138 OF 2018

BETWEEN

ARDEN WILLIAMS

APPELLANT

AND

RUTH WILLIAMS

RESPONDENT

PANEL: Mendonca, JA
Jones, JA
Des Vignes, J.A.

APPEARANCES: Mr. K. Scotland for the Appellant
Ms. George amicus for the Respondent
Ms. N. Thompson for the Central Authority

DATE OF DELIVERY: Monday 14th January, 2019

I have read the reasons of Jones J.A. and I agree.

Mendonca JA
Justice of Appeal

I too agree

Des Vignes JA
Justice of Appeal

REASONS

Delivered by J. Jones, JA.

1. The Appellant and the Respondent are the father and mother respectively of the child AW born on 25th May 2013. On 22nd January 2018 the Mother filed an application in the Family Court of Trinidad and Tobago seeking an order for the return of AW to the United States of America (the USA). This application (the Hague Application) was made pursuant to the **International Child Abduction Act No. 8 of 2008** and **the Hague Convention on the Civil Aspects of International Child Abduction 1980.** Both the USA and Trinidad and Tobago are Contracting States under the Convention.

2. On 19th April 2018 the Trial Judge granted the application and ordered that the Father obtain a Trinidad and Tobago passport in the name of AW within two weeks of the making of the order; that within 48 hours of obtaining the passport he apply to the USA Embassy for the necessary visa for AW and that he purchase an airline ticket to return AW to the United States, accompany her to the USA and deliver her to the Mother at her address in the USA within 72 hours of obtaining the visa.

3. On 17th July after giving brief oral reasons we dismissed the Father's appeal of the grant of the orders. On that date we indicated that we would provide written reasons for our decision. We now provide these written reasons.

4. The material facts are not in dispute. AW was born in Trinidad. The Mother and the Father are both Trinidadian citizens. The Father resides in Trinidad while the Mother is living in the USA. The Mother has made an application for a U non- immigrant visa which, if granted, would entitle her to remain in the USA. This application is pending. Both the Father and the Mother have two children each of previous relationships. The Mother's two other children are citizens of the USA.

5. In or around July 2015 the Father was sent to Maryland in the USA on a one year military appointment. In the same month the Mother and, it would seem, all of the 5 children joined the Father. The Father alleges the intention was that the family join him on vacation. The Mother denies this and claims that the intention was that they remain with the Father during his stay in the USA. The parties signed a lease for the apartment occupied by them in Maryland for the period 1 August 2015 to 30 June 2016.

6. In October 2015 the Mother made a report to the Maryland police of domestic abuse of her by the Father. The Father denies the allegation of abuse. Nothing turns on whether this was in fact true. As a result of the report the Father was taken into police custody, charged and, with his consent, a protective order was made against him. Subsequent to his arrest the Father was ordered to return to Trinidad by his employers, the Trinidad and Tobago Defence Force.

7. The Mother, her other two children and AW remained in the USA. According to the Mother she and the children continued to occupy the same apartment until August 2016. They subsequently moved to Maryland and then to

Miami, Florida. At the time AW was the holder of two visas to enter the USA: a B1/B2 visa that allowed her to enter as a visitor and an A2 visa that had been issued to her pursuant to the Father's military deployment to the USA. Prior to her being taken to Trinidad by the Father AW, and her sister, Suri, were enrolled and attended the same school in the USA. They and the Mother lived with the Mother's parents, who are legally resident in the USA, in the Mother's parents' apartment in Miami Florida. The Mother and Suri still reside there.

8. In December 2015 the Father applied for custody of AW in the USA. Pursuant to that application an order for the joint custody of AW was made with the Mother having primary physical and residential custody and the Father having specified access in the USA and, upon AW attaining the age of four, in Trinidad and Tobago. The order provided that if the parties were unable to reach agreement on major issues impacting AW after a good faith effort to do so the Mother was to have tie-breaking authority. The order also provided for the Father to make monthly maintenance payments to the Mother for AW's support. The Father admits that he is not up to date with these payments.

9. By an order for temporary timesharing, made in the USA on 5 July 2017 on the application of the Father, the Father was given access to AW during the period 5 July to 15 July 2017 and permitted to travel with AW to Trinidad and Tobago during that period. The order further provided for the Father to have additional access during the period 20 August 2017 to 27 August 2017 but this time in the USA. The order specifically provided that the Court in the USA was to retain jurisdiction in the matter.

10. Pursuant to that order on 6th July 2017 the Father exercised his right to access taking AW to Trinidad for the period of access. AW was not returned to the Mother in compliance with the order. According to the Father AW was refused entry onto the flight to the USA because her A2 visa was no longer

valid. There is some conflict of fact with regard to what exactly occurred on that date but it is not in dispute that at the time AW had a valid B1/B2 visa. On 18 July 2017 the Mother filed contempt proceedings in the USA and on 21 July the Father filed an emergency custody application in this jurisdiction seeking custody of AW. Nothing turns on the outcome of either of these proceedings. On 28 November 2017 the Mother filed this application.

11. At the time of the failure to return her to the Mother AW was just over 4 years old and had lived in the USA for 2 years and 4 months. On 23 January 2018 the Father reported to the Trinidad police that his car had been broken into and AW's passport stolen.

12. The Judge was of the view that there were three issues for her determination:

    1) Whether AW had been wrongfully removed or retained in Trinidad and Tobago away from her place of habitual residence;
    2) Whether the immigrant status of the Mother and AW was a factor barring the return of AW to the USA; and
    3) Whether there existed a grave risk that the return of AW would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

13. The Judge found that the Mother was at the time of the application exercising her custody rights to AW. She found that AW was habitually resident in the USA and that her removal on 5 July 2017 was wrongful. The Judge was of the opinion that the child's immigration status in the USA was not a bar to her being returned to the USA. Further she determined that the Father had presented no evidence that there was a grave risk that the return of AW to the USA would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

14. Before us the Father submits that: (i) there was no basis for the Judge to find that the removal of or failure to return AW was wrongful. According to the Father this was simply an immigration issue and a matter outside of his control; (ii) the Judge erred in finding that AW was habitually resident in the USA; (iii) the Judge, by her order, placed AW at risk of being in a situation where her welfare was at significant risk and /or placed her in an intolerable situation; and (iv) in any event the application ought to be dismissed as the principle of res judicata applied.

The Hague Convention

15. In accordance with Trinidad and Tobago's international responsibilities the Hague Convention of the Civil Aspects of International Child Abduction was adopted into our domestic law by the International Child Abduction Act 2008. The stated purpose of the Convention is "to protect children internationally from the harmful effects of their wrongful retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."

16. "Hague Convention cases are a special type of proceedings in which this country adheres to an international Convention which we are duty-bound to observe and to implement. The procedure is summary, and intended expeditiously to deal with the mischief of wrongfully removing children from the jurisdiction of their habitual residence. By Art 11 of the Convention, speed is of the essence. It is an entirely different procedure from internal proceedings concerned with making orders based upon the principle of paramountcy of the welfare of the child. Article 13, if invoked, deals with specific instances where the welfare of the child may inhibit an order for return under Art 12. Article 13 has to be raised as a defence to the Convention application, and a court has to be satisfied that the matters raised are so important as to displace the prima facie requirement to return the child under Art 12 upon proof of wrongful removal or wrongful retention

under Art 3." per Butler-Scloss LJ in **Re M (Abduction Undertakings) [1995 1 FLR 1021 at page 1024.**

17. Of relevance to this appeal are Articles 3, 4, 12 and 13 of the Convention. The Convention mandates the court, where it is found that the child has been wrongly removed or retained from that child's place of habitual residence, to return the child unless, if the application is made after the expiration of one year from the wrongful removal or retention, it is demonstrated that the child is now settled in its new environment (**Article 12**)[1] or unless one of the statutory defences established by Article 13 has been established.

18. The jurisdiction of the court under an application made pursuant to the Convention does not include the determination of any underlying custody dispute: See **Friedrich v Friedrich [number 2] 78 F. 3d 1060 (6th Cir. 1996).** Issues of the best interests and the welfare of the child that are present in custody applications have no place in applications under the Hague Convention. These are issues to be dealt with in the State of habitual residence. Indeed, by **Article 19**, the Convention provides that a decision under the Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.

19. By **Article 3** of the Convention:

> "The removal or retention of a child is to be considered wrongful where –

[1] 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 the judicial or administrative authority of the Contracting State where the child is, 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. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State."

20. By **Article 4** the Convention applies to any child who was habitually resident in a Contracting State immediately before the breach of custody or access rights until that child attains the age of 16 years.

21. **Article 13** establishes the defences to an application under the Convention and states:

"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 established that –

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(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.

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

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

22. The issues for determination on this appeal were: (i) was AW habitually resident in the USA; (ii) if so was the failure by the Father to return her to that jurisdiction in breach of the Hague Convention; (iii) does there exist a grave risk that AW will be exposed to physical or psychological harm or otherwise placed in an intolerable situation if returned to the USA; and (iv) does res judicata apply.

Was AW habitually resident in the USA

23. "The expression 'habitually resident' in art 3 of the convention is not to be treated as a term of art with some special meaning, but is to be understood according to the ordinary and natural meaning of the two words it contains. The question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. There is a significant difference between a person ceasing to be habitually resident in a country, and his subsequently becoming habitually resident in another country, since a person may cease to be habitually resident in country A in a single day whereas an appreciable period of time and a settled intention are necessary for him to become habitually resident in country B. Furthermore, where a very young child is in the sole lawful custody of the mother, his situation with

regard to habitual residence will necessarily be the same as hers": **C v S (minor-abduction –illegitimate child) [1990] 2 All ER 961 at page 962.**

24. A determination of habitual residence is essentially an issue of fact. Case precedents are relevant only insofar as they establish the legal meaning to be placed on the term 'habitual residence' and give guidance, albeit limited, on how other courts have dealt with particular facts. Each case must be determined on its specific facts.

25. In arriving at the conclusion that AW was habitually resident in the US the Judge relied on statements made in the cases of **Freiderich v Freiderich 983 F. 2d 1396 (6th Cir.1993)** and **Francis v Maharaj**[2]. Both of these cases dealt with a determination of habitual residence under the Hague Convention. Insofar as the Judge relied on the statement of **Boggs J** in **Frederich** that:

> "A person can have only one habitual residence. On its face habitual residence pertains to customary residence prior to removal."

it may be more accurate to say that a person can have only one habitual residence at a time and that on the face of it, habitual residence pertains to the customary residence immediately prior to removal.

26. In **Francis v Maharaj,** the other case relied on by the Judge on this point, it was stated that:

> "Habitual residence is the place where the person resides for an appreciable period of time with a settled intention to remain there, whether temporarily or permanently for a particular purpose." **per Katarnych J at page 7.**

Insofar as she relied on these cases the Judge cannot be faulted. The cases properly identified the law as it pertains to the habitual residence of a child for the purposes of the Convention.

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[2] [2014] ONCJ 285

27. In dealing with settled intention or settled purpose the case of **H-K (Children) [2011] EWCA Civ. 1100** is of assistance. There in delivering the decision of the court Lord Justice Ward approved the statement of Lord Scarman in the case of **Reg v Barnet LBC., Ex p Shah [[1983] 2 AC 309, 344B-D** as follows:

> "There are two, and no more than two, respects in which the mind of the propositus is important in determining ordinary residence. The residence must be voluntarily adopted. ... And there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the propositus intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

28. The facts in the case of **H-K (Children)** are worth repeating. The issue in the case was where was the habitual residence of the children of the parties. The mother was a British citizen with Australian rights of residence and the father an Australian citizen. The parties met and lived in Australia. They had two children a boy aged 8 and a girl aged 2. The mother became homesick and parties agreed to live in England for a year. They left behind most of their personal belongings in Australia and made arrangements for a place to be available for the son at his school on their return in February 2011. While in England they lived in premises inherited by the mother. They worked as and when they could but mostly relied on social security support. In October 2011 the mother booked their return flights to Australia in February 2011.

Preparations were made in Australia for their return. It was accepted by the court that at that time she did have the intention to return to Australia. By December 2010 the mother had begun to change her mind. The parties eventually agreed that the father would return in February 2011 and that the mother and the children would return to Australia in June 2011. The father returned to Australia under the impression that the mother and the children would be returning to Australia in June. In May the mother informed him that she would not be returning. In those circumstances he made an application for the return of the children under the Hague convention.

29. On the basis of these facts the Court found that there was sufficient evidence to establish habitual residence in England even if it was to be temporary and for a period of 12 months. The application by the father for the return of the children to Australia was therefore dismissed.

30. In support of his submission that AW was not habitually resident in the USA the Father relies on the case of **Re Morris**[3]. This was a decision of the US District Court for the District of Colorado. Here the father was a naturalized American citizen and the mother a German citizen. The child held citizenship in Ireland, having been born there, the US and Germany. The parties lived together in Colorado from 1990 to 1998 during which period the child was born. In December 1997 the father, a university professor, arranged to go to Switzerland on sabbatical leave and for a short teaching appointment. He signed an agreement to return to his teaching position in Colorado at the end of the appointment. The parties sold their home with the intention of purchasing a larger one on their return to Colorado. The mother resigned from her job but asked that she be given the opportunity to resume her position on her return.

[3] 55 F.Supp.2d 1156(1999)

31. The judge found that at the time that the parties left Colorado there had been a shared and settled intention to return to Colorado. While the father was working in Switzerland the family travelled between Germany and Switzerland. The marriage began to have difficulties and when his position in Switzerland had ended the father, without the mother's knowledge, returned to Colorado with the child. The mother obtained an ex parte custody order in her favor in Switzerland and the father subsequently petitioned for divorce and sought a custody order for the child in Colorado. The mother brought an application in Colorado for the return of the child pursuant to the Hague Convention. The question for the Colorado court's determination was whether the child's habitually residence had shifted from Colorado to Switzerland.

32. In arriving at the decision that the habitual residence of the child had not changed to Switzerland the judge accepted that the determination of a child's habitual residence was a factual determination made on a case by case basis. He also accepted that in determining the habitual residence the duration of the residence of the child in the contracting state was a factor for consideration. In examining the domestic arrangements of the parties while out of the United States, the judge found that out of a period of 205 days away from Colorado the child had only lived in Switzerland for 104 days. Further he found the mother's testimony that she intended to stay in Switzerland not credible. The judge alluded to the fact that the mother was a German citizen, had no family in Switzerland, during the period had travelled frequently to Germany and had told the day care provider that she intended to move to Germany.

33. Against that factual background the judge applied decisions arrived at in other sabbatical cases in the USA and determined that the unilateral intent of a parent cannot change the habitual residence of the child. He concluded that a change in the child's habitual residence from the USA would have significant negative policy implications by discouraging extended

international travel and temporary international employment for scholastic and professional enrichment. He therefore determined that the child's habitual residence had not changed from the USA.

34. The Father relies on the statement made by the judge that: "In a sabbatical situation such as this one, in which a family intends to be in a foreign country for a defined period of time for less than a year and for a defined, specific purpose, a parent's unilaterally changed intent is not enough to shift the habitual residence of a minor child".

35. We do not think that this statement has any relevance to the instant appeal. Each case is fact specific. In the appeal before us the Judge determined that there was a settled intention for the parties to reside in Maryland for the duration of the Father's stay while pursuing his military training. We agree. Insofar as it can be stated that there was a shared settled intention between the parties it was to live, albeit temporarily, in the USA during the period of the Father's deployment there. As it transpired the Father was returned to Trinidad abruptly leaving AW and the Mother in the USA.

36. The Judge found that AW had resided with the Mother in the USA for 2 years from 11 July 2015 to 7 July 2017 until taken by the Father to Trinidad for his period of access. She was satisfied that the Mother had demonstrated a settled intention to remain in the USA as evidenced by her application to have her immigrant status regularized. She accepted the evidence of the Mother that AW had been attending pre-school; that she and the Mother now resided in Florida with the Mother's parents and other relatives and that AW was attending the same school as her sister.

37. The fact that the parties intended to return to Trinidad after their stay in the USA, although relevant, is not determinative in this case. It is clear that this shared intention had been overtaken by the passage of time and the actions of both parties. Two years is a long time in the life of child particularly a four

year old. On the evidence it is clear that insofar as the Mother is concerned her intention is to reside in the USA. She and AW and two of her siblings have in that period settled in the USA. AW attended pre-school there. According to the Mother she had made friends with other children in her class. Her sister also attends that school. Further, as the Judge found, AW has other family ties in the USA namely her grandparents and other relatives.

38. The Father also submits that AW's lack of a settled immigration status ought also to be a factor to be considered in determining her habitual residence. In order to remain in the USA AW's immigration status is dependent on the Mother's. The unchallenged evidence from the Mother's Attorney in the USA is that the U non-immigrant visa is a form of lawful immigration status for victims of certain crimes, including domestic violence, who cooperate in the investigation and prosecution of that crime. It requires certification of cooperation from a law enforcement authority. The Mother received such certification and in January 2017 filed her application for the visa which application is pending. According to the Attorney the complete processing of the application should take about 7 years.

39. The Mother contends that the immigration status of AW is not a bar to a determination that she is habitually resident in the USA and relies on the case of **In re: B Del CSB Mendoza v Miranda No 08-55067 DC CV -07-00290-CJC**. This was an opinion of the United States Court of Appeals for the Ninth Circuit. Here the court had to decide whether a child of Mexican origin whose mother wrongfully retained her in the USA should be allowed to stay in the USA while custody proceedings were being conducted in the USA or should be returned to Mexico while proceedings were conducted there. Both parents were Mexican citizens and neither parent had legal status in the USA. The question for the court's determination was stated by it to be "whether a court may find that a child is not "settled" for the purposes of Article 12 of the Hague Convention for the reason that she does not have lawful immigration status."

40. In delivering its opinion the court identified the factors to be considered:

> "In determining whether a child is settled within the meaning of Article 12, we consider a number of factors that bear on whether the child has "significant connections to the new country." 51. Fed Reg. at 10509. These factors include: (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability. In some circumstances, we will also consider the immigration status of the child and the respondent. In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation. Although all of these factors, when applicable, may be considered in the "settled" analysis, ordinarily the most important is the length and stability of the child's residence in the new environment."

41. This opinion was echoed by Lady Hale in the UK Supreme Court in course of giving judgment in the case of **RE A (children) [2013] UKSC 60.** The issue there was whether the UK court had jurisdiction to order the return to the UK of a young child, who had never lived or been in the jurisdiction, on the basis that the child was habitually resident in the UK or had British nationality. At the time of this decision the Hague Convention had not as yet been incorporated into the UK law but the relevant regulations under the Family Law Act 1986 took account of the Hague Convention.

42. In the course of delivering her judgment Lady Hale after reviewing the relevant authorities on habitual residence concluded;

"Drawing the threads together, therefore:

i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.

ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulations must also be interpreted consistently with those Conventions.

iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, ex parte Shah* should be abandoned when deciding the habitual residence of a child.

vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

viii) As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of *Proceedings brought by A*, it is possible that a child may have no country of habitual residence at a particular point in time."[4]

43. Insofar as Lady Hale recommended the abandonment of the test in Ex parte Shah her criticism was directed to the words "voluntarily and for settled purposes" used by the Court in that case. According to Lady Hale:
"……..the reference to adopting an abode "voluntarily and for settled purposes" is not readily applicable to a child, who usually has little choice about where he lives and no settled purpose, other than survival, in living there. If this test is adopted, the focus inevitably shifts from the actual situation of the child to the intentions of his parents"[5]

44. The following principles can be distilled from the cases. Each case must be dealt with on its own facts. The emphasis here is on the situation of the child in the country concerned and an assessment of "the place which reflects some degree of integration by the child in a social and family environment". Of necessity however where the child is an infant or young it will be necessary to assess the integration into the social and family environment of the country concerned of the person on whom the child is dependent. This is the test recommended by Lady Hale in Re A. We agree that this is the appropriate test to be applied in applications pursuant to the Hague Convention.

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[4] paragraph 54
[5] Paragraph 38

45. Of particular importance in a determination of habitual residence of a child is the length of time that the child has lived within the particular jurisdiction and the integration of the child into that society. Of special interest here is whether the child has any special ties, family or otherwise, within the jurisdiction and the character of the child's life within the jurisdiction, for example, is it stable; does the child attend school.

46. While the Trial Judge did not specifically apply this test to the facts before her we are satisfied that had she done so the result would have been the same. In the case before us, given the young age of AW, the fact of a custody order that favoured the Mother and gave her primary custody, of key relevance was the integration of the Mother in a social and family environment in the USA. The undisputed evidence revealed an application by the Mother for immigrant status in the USA and the existence of strong family ties in that country. These ties included the fact that the Mother's other two children were citizens of the USA.

47. There is nothing to suggest that the Mother will be unable to reside in the USA during while awaiting the results of her visa application. In fact the evidence is that she still resides there. In particular there is no evidence of "an immediate, concrete threat of deportation". In the absence of such evidence the lack of AW's immigration status was not a factor to be considered.

48. On the particular facts of this case therefore the Judge cannot be said to have been wrong in concluding that AW's habitual residence was the USA and that her immigration status was not a bar to such a determination.

Was the failure by the Father to return her to the USA in breach of the Hague Convention

49. Insofar as the Judge determined that AW's removal on 5th July 2017 was wrongful she was wrong. The removal of AW on that date was pursuant to the Father's entitlement under the custody order and the temporary timesharing order. There was however evidence before the court upon which the Judge could properly have determined that the retention of AW in this jurisdiction by the Father after 15 July 2017 was wrongful.

50. At the time of AW being brought to Trinidad there was a valid order from the Court in the USA for the parties to have the joint custody with parental care and control vested in the Mother subject to the Father's right of access. This was the order acted upon by the Father to procure his access to AW in Trinidad and Tobago. It cannot be disputed therefore that at the time of application the Mother was actually exercising her rights of custody as she had done immediately prior to the Father's access and would have been so exercising those rights had the Father not failed to return AW to her custody. These rights were acquired by reason of a judicial decision under the law of the USA.

51. The Father submits that there was no wrongful retention of AW by him because the failure to return AW was through no fault of his own but simply because the airline refused to allow her to board the flight to the USA given the expiration of her A2 visa. Insofar as he suggests that this was an immigration issue he is incorrect. On the evidence AW was not refused entry by the relevant immigration authority of the USA but rather refused to be boarded by the Airline because a valid visa had not been produced. At the time however AW was in possession of a valid visitor's visa (B1/B2) that would have allowed her to be boarded. Thereafter her position on landing would have been the same as any other person seeking entry into the USA, on any type of visa, subject to the discretion of the relevant immigration authority.

52. Indeed the Father took a very different position at the hearing that produced the temporary timesharing order. At the request of the judge, the Father and his Attorneys produced a copy of the said visa, that is the B1/B2 visa, and by way of a letter to the judge indicated that the visa, which was stamped in AW's passport, would allow for her re-entry into the USA.

53. In any event Article 3 of the Convention is strict in its liability. It provides that the removal or the retention of a child is to be considered wrongful where:

> "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

54. Once the facts disclose that the child has either been removed or retained in the circumstances identified at (a) and (b) of the Article it is deemed to be a wrongful retention or removal. Such a finding mandates the court to make an order for the removal of the child unless the evidence discloses that either Article 12 or Article 13 applies. On the evidence therefore by failing to return AW on 15 July in accordance with the custody and timesharing orders, the Father wrongfully retained AW thereby entitling the Mother to an order for her return pursuant to the Hague Convention.

55. In these circumstances there was no need for the Judge to have found that the Father had formed the intention to retain the child in Trinidad when he made an urgent application for her custody in this jurisdiction. We find however that that was an inference that the Judge was entitled to make on the evidence.

Does there exist a grave risk that AW will be exposed to physical or psychological harm or otherwise placed in an intolerable situation if returned to the USA.

56. The issue here is not what is in the best interests of AW but whether in returning her to the country of her habitual residence there is a grave risk that she will be exposed to physical or psychological harm or otherwise be placed in an intolerable situation. Insofar as the judge found that the burden of proof was on the Father to provide evidence that if AW was returned to the USA she would be exposed to grave risk of physical or psychological harm or be placed in an intolerable situation and that the Father had provided no evidence of such a risk she was correct.

57. In assessing the nature of the risk the Judge accepted the statement of Boggs CJ in **Frederich v Frederich 78 F.3d 1060 (6th Cir.1996) at paragraph 34**:

> "…. we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute – e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason may be incapable or unwilling to give the child adequate protection."

We think that the Judge was correct to rely on this statement. It represents a correct view of the applicable law.

58. The application of Article 13 of the Hague Convention was considered in the case of **In re E (Children)(Abduction-Custody) [2012] 1 AC 144.** In the joint judgment of **Baroness Hale of Richmond**, as she then was, and **Lord Wilson JJSC** the Court stated:

"**31** Both Professor Pérez-Vera and the House of Lords referred to the application, rather than the interpretation, of article 13. We share the view expressed in the High Court of Australia in *DP v Commonwealth Central Authority* (2001) 206 CLR 401, paras 9, 44, that there is no need for the article to be "narrowly construed". By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or "gloss".

32 First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

33 Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

34 Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or

otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

35 Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr. Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist".

See also the statements of **Gleeson CJ in DP v Central Authority 206 CLR 401 at page 407 paragraph 9.**

59. Before us the Father submits that the fact that the Mother is unemployed, has no status, no means to provide for AW and no prospect of having her status regularized in under 7 years places AW in an intolerable situation. In support of this submission he refers to an application made by the Mother in July 2017 to proceed in the United States District Court without paying fees or costs in which she states that she has no income.

60. The evidence presented by the Father does not even approach that required to satisfy a finding that should AW be returned to the USA there is a grave risk that she would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation. In the first place there is no evidence that the Mother is unemployed or impecunious at the present time. While she may have been unemployed and in need of legal aid in July 2017 that does not necessarily speak to her present situation. Indeed in her affidavit deposed in March 2018 she describes herself as a babysitter, hairdresser and online administrator. There is no evidence before us of the ability or non-ability of the Mother to work while awaiting the approval of her U visa. However we note that there is an enforceable order for the payment of maintenance to her for AW by the Father. In any event the onus is on the Father to convince us of the gravity of the situation in accordance with the statements made in **In re E** referred to earlier.

61. In the case of **B v B (1993) 2 All ER 144** the UK Court of Appeal determined that evidence of the impecuniosity of the mother if she was forced to return with the child to Canada did not approach "the high degree of intolerability" required when the provisions of Article 13 were considered.[6] The evidence does not reveal a "situation which this particular child in these particular

[6] page 152 of the judgment of Sir Stephen Browne P.

circumstances should not be expected to tolerate." As the cases demonstrate the evidence must show more than mere discomfort or distress.

62. There is no evidence that AW would be in discomfort or distress. Nor is there any evidence that AW's life would be adversely affected by her immigration status or her Mother's impecuniosity. Neither is there any suggestion of any physical or psychological harm to AW or of the risk of same. In the circumstances the Judge was right to conclude that the evidence presented by the Father did not discharge the burden of proof on him to establish a grave risk that AW's return would expose her to harm or an intolerable situation as required by the Convention.

Does res judicata apply

63. Finally the Father seeks to rely on the principle of res judicata. He submits that the principle arises as a result of statements made by the Court of Appeal on a procedural appeal brought by him from an order of another judge in his custody application. While the Trial Judge does not treat with this submission in her judgment by treating with the substantive issues it is clear that she found no merit in the submission. We too find no merit in the submission.

64. Simply put res judicata applies where there is a final decision made by a court of competent jurisdiction on the same subject matter. In the case of **Virgin Atlantic Airways Ltd. v Zodiac Seats UK Ltd. [2013] UKSC 46** treating with the principles of res judicata Lord Sumption stated:

> "[17] Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a

cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336, 97 LJKB 452, [1928] All ER Rep 120. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 2 Dow & L 382, 1 New Pract Cas 72, (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, s 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr. 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198, [1964] 1 All ER 341, [1964] 2 WLR 371. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare

100, 115, 67 ER 313, [1843-60] All ER Rep 378, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

65. The issue for determination in the appeal before us was not the same as the issue for determination in the earlier matter. Here the issue arose on the Mother's Hague application and was whether AW had been wrongfully removed or retained in Trinidad by the Father and whether she ought to be returned to the USA in accordance with the provisions of the Convention. The earlier matter was the Father's custody application. The comments made by the Court of Appeal were made in a procedural appeal from that judge's decision to refer the application to the Central Authority established under the International Child Abduction Act to secure the prompt return of children and to achieve the other objects of the Convention in the absence of an application under the Hague Convention. The Mother, although she had been served with the custody application, had not filed any evidence in opposition nor had she appeared.

66. Jamadar JA in delivering the oral decision of Court of Appeal setting aside the judge's decision and remitting the matter for hearing before another judge made the following statement: "the trial judge without the benefit of any submissions or evidence from the Central Authority in relation to the pending Hague treaty applications had no prima facie evidence of either an abduction or an illegal retention and therefore fell into error in making an assumption that such an application was viable at that point in time. I will just repeat that at that point in time." It is these and similar statements made during the course of the hearing that the Father relies on as the basis for his plea of res judicata.

67. Res judicata does not lie on the basis of statements made by a court during the course of a hearing. The basis of res judicata is the decision of the court in an earlier determination. The decision of the Court was simply that the judge was wrong to treat the pending Hague applications as viable at that point in time in the absence of evidence or submissions by the Central Authority as to an abduction or illegal detention. The decision of the Court was therefore based on the peculiar set of circumstances that applied at the time. In any event the cause of action, or any issue, in those proceedings were not the same as in the Hague application the subject of this appeal. Indeed issues of custody are not appropriate in an application under the Hague Convention. In the circumstances res judicata does not apply.

68. For these reasons we determined that the finding of the Judge that the USA was the State of AW's habitual residence was correct. The failure of the Father to return AW to the Mother in the USA in accordance with his obligation under the temporary timesharing order was a wrongful retention of AW by the Father in accordance with Article 3 of the Hague Convention. And that the return of AW would not place her in any grave risk that she would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation if she is returned to the USA. In the circumstances we found that the Judge was correct to order the return of AW to the USA and to make the orders from which the Father has appealed. Accordingly we dismissed the appeal.

Judith Jones
Justice of Appeal