



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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KG v CB
(748/11) [2012] ZASCA 17 (22 March 2012)

Media Statement

Today the Supreme Court of Appeal (SCA) delivered judgment dismissing an appeal against a judgment of the South Gauteng High Court, Johannesburg (Satchwell J) which ordered the immediate return of T, the minor child of KG (the mother) and CB (the father), to the United Kingdom (UK). The SCA however replaced the order of the court below by amending it to include specific requirements and arrangements to be made in order to facilitate the safe return of T to the UK.

The facts and history of this matter can be summarised as follows:

T was born to KG and CB on 12 May 2006 in England. Her parents had never been married to each other and soon after her birth they separated. Following a number of disputes between the parents, KB refused contact between T and CB. This led to an application by CB to the English court in November 2007, in which CB claimed residence and defined contact orders in respect of T, as well as an order prohibiting KG from removing T from the jurisdiction of the court. On 12 December 2007, KG filed a counter-application for a residence order in respect of T. Under the UK Children Act 1989, a 'residence order' means an order settling the arrangements to be made as to the person with whom the child is to live and a 'contact order' means 'an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other'. A 'defined contact order' contains directions and/or conditions about how it is to be carried into effect (eg, that the contact between the parent and the child must be supervised). A defined contact order was granted in favour of CB and an interim residence order in favour of KG. In October 2008, the English court ordered a consolidation of CB's application for residence and contact and KG's application (brought in October 2008) for an order permitting her to remove T from the jurisdiction of the court to reside permanently in South Africa.

On 14 February 2009, T was removed by her mother from the UK, and taken to South Africa. This was done without the knowledge or consent of CB. Six months later, in August 2009, an application was brought to the South Gauteng High Court for the return of T to the UK under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the

Convention). The order granted by Satchwell J ordering the return of T to the UK is the order appealed against.

The primary purpose of the Convention is to secure the prompt return (usually to the country of their habitual residence) of children wrongfully removed to or retained in any Contracting State, viz to restore the *status quo ante* the wrongful removal or retention as expeditiously as possible, so that custody and similar issues in respect of the child can be adjudicated upon by the courts of the state of the child's habitual residence. T was habitually resident in England at the time of her removal to South Africa. The appellant contended, however, that CB did not have 'rights of custody' in respect of T within the meaning of the Convention and that the respondents thus had no *locus standi* to bring the return application.

The SCA held that despite some initial uncertainty, there is now much authority from a number of Contracting State jurisdictions which establishes that, for the purposes of the Convention, a parent's right to prevent the removal of a child from the relevant jurisdiction, or at least to withhold consent to such removal, is a right to determine where the child is to live and hence falls within the ambit of the concept of 'rights of custody' in arts 3 and 5 of the Convention. Thus, a custodian parent who removes the child from the state of the child's habitual residence or allows a third party to do so without the consent of such other parent (or the leave of the court) commits a breach of 'rights of custody' of the other parent within the meaning of the Convention and hence a 'wrongful removal'. CB has parental responsibility for T as he had been registered as the father of T and was indicated as such on T's birth certificate. KG therefore required his written consent to remove T from the UK. In addition, by removing T from the UK without CB's consent, KG committed a criminal offence. In view hereof, CB had 'rights of custody' within the meaning of arts 3 and 5 of the Convention. KG's removal of T from the UK constituted a breach of such rights of custody and was therefore wrongful under the Convention.

In terms of the Convention, a court is not bound to order the return of the abducted child if the person opposing the return establishes that 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.'

KG contended that there was indeed a grave risk that T's return to the UK would expose her to physical or psychological harm or otherwise place her in an intolerable situation. In support of this contention, the appellant alleged that T is 'fully settled' in South Africa; that she 'has no recollection, independent or otherwise' of living in the UK; that she is now a 'fully-fledged' South African child, enrolled in school and able to speak English and Afrikaans; that she is surrounded by family and friends in South Africa; that 'her entire life is in the Republic of South Africa and she has a quality of life that she could never have in the UK'. KG pointed to the fact that she has secure accommodation and a permanent job in South Africa, as opposed to the UK where she has no home and no employment and where she and T would be dependent on state welfare. She contended that there was a chance that, should she return to the UK, she would be arrested and prosecuted for child abduction. CB denied that there was any risk of T or KG suffering abuse of any kind upon their return to the UK, let alone 'a grave risk' of physical or psychological harm. Moreover, CB contended that T would not be placed in 'an intolerable situation' upon such return. According to CB, KG would not be arrested for child abduction; and that the English court would be very loath to separate T from her mother. He alleged that there was no doubt that accommodation would be found for T and KG and stated that he would not seek to disrupt their relationship in any way.

It must be remembered that a return order under the convention is an order for the return of the child to the Contracting State from which he or she was abducted, and *not* to the 'left-behind' parent. The child is not, *by virtue of a return order*, removed from the care of one parent, or remanded to the care of the other parent. The situation which the child will face on return depends crucially on the protective measures which the court can put into place to ensure that the child will not have to face a harmful situation when he or she returns to the country of habitual residence.

The SCA held that KG had not succeeded in showing that return to the UK would expose T to a grave risk of physical or psychological harm or otherwise place her in an intolerable situation. It was clear from the report of the curator ad litem that KG is a loving and competent mother and that T is more attached to her than she is to any place or other person. The court held that there could be no doubt that KG would return to the UK with T should the court order T's return. This, coupled with the protective measures which the SCA put in place to govern T's return, would serve to insulate T against harm. The SCA finally held that to refuse the return application under these circumstances would undermine the objects of the Convention and create an unfortunate precedent.

The appeal was dismissed. The order of the court below was amended to include arrangements and requirements to facilitate T's safe return to the UK. The court held that both parties had contested the matter in what they believed to be the best interests of their child as concerned parents and as a result no costs order was made.

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