http://www.incadat.com/ ref.: HC/E/AU 294
[24/09/1999; Family Court of Australia (Brisbane); First Instance]
Director-General, Department of Families, Youth and Community Care and Hobbs,
[1999] FamCA 2059 (24 September 1999)

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA, Brisbane

BEFORE: Lindenmayer J.

24 September 1999

BR 6565 of 1999

BETWEEN:

Director-General Department of Families, Youth and Community Care

Applicant

-and-

Hobbs Julie

Respondent

REASONS FOR JUDGMENT

APPEARANCES:

Mr Parrott, of Counsel, appeared for the Director General, Dept of Families, Youth & Community Care

Instructed by the Crown Solicitor, Level 11, State Law Building, 50 Ann Street, Brisbane.

Mr Jones, Solicitor, of Jones Mitchell, 71 Davenport Street, Southport, Qld, 4215 appeared for the RESPONDENT MOTHER

JUDGMENT:

1. This is an application by the Director-General of the Department of Families, Youth and Community Care of the State of Queensland, in the capacity as State Central Authority, under the Family Law (Child Abduction Convention) Regulations. I shall hereafter refer to the Director-General in that capacity simply as "the Central Authority". The application

seeks orders for the return to South Africa of a child, K.H., also known as B., who was born in South Africa on 14 July 1993. The application is made on behalf of R.B., who is the father of the child and I shall refer to him hereafter simply as "the father". The respondent to the application is J.H., also known as B. and possibly also now known as M., who is the mother of the child. I shall refer to her hereafter simply as "the mother".

2. The factual and to some degree legal background to the application is as follows.

3. The father is a citizen of South Africa, having been born there on 16 August 1967. The mother is also a citizen of South Africa having been born in Wales on 5 August 1969. Perhaps I might be wrong in saying she is a citizen of South Africa, but she has certainly lived there for a number of years.

4. The parties were married in South Africa on 6 March 1993. As I have already said, the child, K., who is the only child of the relationship of the mother and father, was born in Johannesburg, in South Africa, on 14 July 1993. She is therefore now a little over six years of age.

5. The mother and father separated in October 1995 at which time the child remained in the care of her mother.

6. On 15 March 1996 the High Court of South Africa, the Wittwatersrand Local Division, pronounced a decree dissolving the marriage of the parties and declared binding an agreement entered into between them about various matters. That agreement is amongst the papers and, so far as it is relevant, appearing at page 59 of the father's founding affidavit in annexure PB2, it contains the following provision under the heading "custody":-

> ***"Custody and control of the minor child born of the marriage, K., be awarded to the defendant -***

that being the mother -

> ***"The award of custody aforesaid shall be subject to the plaintiff-***

that being the father -

> ***"- having reasonable rights of access to the said minor child at all reasonable times and shall be exercised in such a manner as not to cause unreasonable disruption to the child's scholastic, religious and social activities."***

7. Thereafter, as I say, the child continued to reside with the mother.

8. There is some dispute between the parties as to the extent of the father's contact with the child thereafter, but that is not a dispute which it is possible for this Court to resolve nor necessary for it to resolve on an application of this kind.

9. It is common ground that in December 1997 the mother brought the child to Australia for a holiday, returning to South Africa in January of 1998. Certainly at this time, and I think at that time also, the mother's parents resided and continue to reside in Australia, on the Gold Coast of Queensland.

10. Differences arose between the parties, certainly during 1997, in relation to the contact, or "access" as it is known in South Africa, by the father to the child, K., and on 26 February 1998 the father filed an application in the High Court of South Africa for an order to define his rights of access. The mother filed a counter-application in those proceedings for an

order that the father's parenting rights be terminated altogether, owing to his alleged violent and abusive nature. The allegations which she made about his violence and abuse were denied by him, I think, in those proceedings and certainly in the material which has been filed here. Again, that is not an issue which it is either possible or necessary for this Court to resolve on this application.

11. On 21 May 1998 the High Court of South Africa made an order in relation to the father's access rights. That order was, I think, arrived at by negotiation between the parties representatives at that time. It provided as follows:

> ***"Pending finalisation of the application, the applicant is entitled to the following access."***
>
> ***3.1: Such access as the respondent may allow the applicant over and above what is set out in this order."***
>
> **[The applicant being the father and the respondent the mother.]**
>
> ***"3.2: The right to exercise access every alternative (sic) Saturday commencing on 30 May 1998 from 900 hrs until 1200 hrs and the right to exercise access every Wednesday from 1700 hrs until 1800 hrs with effect from 27 May 1998 at the address and under the supervision of the said Lynette Rue."***

12. There were then further provisions of that order about the supervisor and there was also a provision wherein the mother might appoint a different supervisor which she ultimately did. The Court at that time also ordered that the Family Advocate institute an inquiry and prepare a report for the Court for the hearing of the application as to whether or not the applicant's rights of access should be defined or whether the applicant, that is the father, should not have any access to his daughter.

13. Procedures were then undertaken preparatory to the preparation of that report by the Family Advocate. Amongst those there was a report prepared, on or about 14 September 1998, by a Psychologist, Dr Venter, which at one point recommended un-supervised access by the father. There was also a report in relation to the father by Dr Peter Kitsoff, also a Psychologist, which, amongst other things, drew the conclusion that the father was not, by nature, an aggressor or a violent man.

14. The Family Advocate presented a report to the Court on or about 16 October 1998 wherein, having considered all the relevant material including the reports of Dr Venter and Dr Kitsoff, it was recommended that weekly un-supervised access of four hours by the father commence to operate for a period of four months. That report and recommendation also appear in the papers before me, at page 84 of the father's founding affidavit.

15. As a result, no doubt, of that report, the parties, that is the mother and the father, entered into further negotiations and, on 19 October 1998, a deed of settlement was entered into between them in relation to various aspects of the proceedings which were then on foot before the Court. That deed of settlement appears at pages 103 to 107 of the father's founding affidavit. Not all of that is relevant. What is relevant, for present purposes, are paragraphs 2 and paragraphs 2.6.1 and 2.6.2.

16. Paragraph 2 contains the following relevant paragraphs:

> ***"2.1: The Court order issued under case number 96/2261 of 15 March 1996 is hereby amended to the extent that the applicant's,*** **[being the father's]** ***rights of access to his***

minor child, K., shall be all rights of reasonable access which rights are to be monitored and determined by Dr P. Kitsoff including any bonding therapy which may be required.

"2.2: Dr Kitsoff will consult with the applicant, the child and with the respondent, **[being the mother],** *on 20 October 1998 and will advise the parties in writing at the relevant time as to the nature and extent of the access which the applicant will have. The respondent undertakes to attend Dr Kitsoff's rooms at 1000 hrs on 20 October 1998 for this purpose.*

"2.3: After Dr Kitsoff has made his determination either party can approach the Court in order to make Dr Kitsoff's determination an order of the Court.

"2.4: Should any person be dissatisfied with Dr Kitsoff's determination then such party will be entitled to approach the Court for a variation of the order, but until the order is varied the access will be as is determined by Dr Kitsoff."

17. And then paragraphs 2.6.1 and 2.6.2 were in these terms:

"2.6.1: An interdict is issued against the applicant, **[that is the father],** *the respondent,* **[that is the mother],** *and the minor child K.H., born on the 14 July 1993, restraining the child to leave the Republic of South Africa without the written consent of the applicant and the respondent, which consent may not be withheld unreasonably."*

"2.6.2: The applicant and the respondent will sign all documentation required to enable the child to obtain a South African and/or a British passport."

18. Those particular paragraphs, 2.6.1 and 2.6.2 in fact became an order of the High Court of South Africa, Wittwatersrand Local Division, on 19 October 1998, and a sealed copy of that order appears at page 183 of the father's founding affidavit under annexure marking PB2.

19. On the 31 October 1998 the father exercised unsupervised access to K. pursuant to that agreement; that period of access being monitored by Dr Kitsoff in accordance with the parties' agreement: see paragraph 8 of Dr Kitsoff's affidavit at page 189, which is an annexure to the father's founding affidavit.

20. I think it is probably not inappropriate to refer to what Dr Kitsoff said there. He said this, in paragraph 8:

"The applicant exercised unsupervised rights of access to K. on 31 October 1998. After he had returned K. I conducted an informal interview with her, but could find no indication that she was traumatised. I therefore did not conduct any psychological testing as there was no need to do so. K. verbalised a desire to commence sleep-over access with the applicant. It was clear that K. was ready to commence unsupervised and sleep-over access, and I informed the respondent, **[that is the mother],** *and Mr M.,* **[with whom by then she was living as man and wife],** *during an interview afterwards that I had decided to allow the applicant to have unsupervised and sleep-over access over weekends to K. after two or three more day visits.*

"When I informed the respondent, and Mr M., of my decision they remained silent."

21. On 15 November 1998 the father again attended at the offices of Dr Kitsoff for the purpose, as he understood it, of availing himself once more of the access to which he was entitled under the parties' agreement of 19 October 1998. As it turns out he did not exercise access to the child on that day. There is some dispute between the parties as to why that did

not ultimately happen, and I need not resolve that dispute for the purpose of these proceedings. What is not the subject of dispute is that when he attended at Dr Kitsoff's office on that occasion he was in effect requested - to use a fairly neutral word - to give his consent to the child, K., being taken by the mother overseas to Australia during the then coming Christmas holidays. The father says, although the mother does not entirely agree with this, that he was given to understand that unless and until he signed the necessary form of consent he would not be seeing the child that day, but that if he did sign it he would be seeing her.

22. Now, again, I do not need to resolve that issue, but what is clear is that he was prevailed upon to sign and did sign, a form of consent to the child going overseas between November 1998 and January 1999. That form of consent is contained at page 184 of the father's founding affidavit, under annexure marking PB3. It is on the letterhead of Dr Kitsoff. It is dated 15 November 1998, and it says:

> ***"Consent is hereby given for K.B. to leave for holiday purposes during November 1998 until January 1999. Passport applications will be signed on Monday, 16 November 1998."***

23. On 16 November 1998 the father's solicitors forwarded to the mother a letter wherein they, on the father's behalf, withdrew his consent, which he had signed the previous day to her travelling - or taking the child K. to Australia during the period November 1998 to January 1999. That letter appears as annexure PB17 to the father's founding affidavit, and is at the page marked 117. It is in fact a letter addressed to the mother's solicitors, rather than to the mother herself, but the relevant paragraph, which appears at the bottom of the first page of the letter is in these terms:

> ***"Insofar as it may appear that our client consented to the overseas trip, such consent is withdrawn."***

24. Receipt of that letter was acknowledged by a letter from the mother's then solicitors dated 17 November 1998, a copy of which is annexure PB18 to the father's founding affidavit, and it appears at page 120 of that document. In the final paragraph of that letter those solicitors wrote this:

> ***"Kindly let us now have your client's written consent by no later than 1600 hours today, failing which we shall approach the High Court on an urgent basis requesting an order for consent to take K. overseas."***

25. Thus it appears to me that it was acknowledged by the mother's then representatives that the father had withdrawn and communicated the withdrawal of his written consent given in the circumstances which I have briefly touched on on 15 November.

26. Notwithstanding that fact, the mother says that, on 18 November 1998, she in fact left South Africa with the child and came to Australia. She did so, clearly, without telling the father further of her intention to do so although it is not inappropriate to note that annexed to the letter from her then solicitors of 17 November to which I referred a moment ago, was what was described as an "itinerary" of her proposed travel to and from Australia, which indicated that she was proposing to depart on 18 November and return on 8 January 1999.

27. On 24 November 1998, no doubt upon the motion of the father, the High Court of South Africa made an order, which appears at page 126 of the father's founding affidavit under annexure marking PB23.

28. That order is in these terms:

> ***It is ordered:***
>
> ***(1) That the applicant's*** **[being the father's]** ***rights of reasonable access to his minor daughter, K., shall be the right to have the child with him every second week-end from 900 hours to 1600 hours, alternating on Saturday and on Sunday;***
>
> ***(2) That in order to enable the applicant to exercise his rights of access the respondent is ordered to deliver the child at the rooms of Dr Peter Kitsoff at ***, Alberton, and to collect the child at the said address after the applicant had exercised his rights of access.***

29. Clearly, that order was made in the absence of the mother, because she had departed for Australia with the child prior to that date.

30. On 15 January 1999, the mother's current de facto husband, Mr M., returned to South Africa, he apparently having been in Australia also, and entered into some correspondence and communication with the father and his solicitors. It is unnecessary to refer to all of that, except that he informed the father that the mother was unable to return to South Africa at that time due to illness.

31. On or about 13 February 1999, the father's solicitors sent a letter to the mother addressed to her mother - that is K.'s maternal grandmother - at her address on the Gold Coast of Australia. That letter, omitting formal parts, said this:

> ***According to an itinerary provided to our client, you and the child were to return to South Africa during the course of January 1999. Whilst you have been in Australia, our client has had no access or contact with his daughter, and you have frustrated telephonic contact by refusing our client to speak to his daughter over the telephone. Our client regards the breach of your undertaking to return to South Africa during January 1999 and your failure to allow our client telephonic contact with his daughter in a very serious light.***
>
> ***Our client is very perturbed about the frustration of his rights of access, and you are hereby requested to allow our client telephonic contact with his daughter without delay.***

And then later:

> ***Unless we hear from you, we shall assume that you do not intend to return to South Africa, and we will immediately proceed with the necessary legal action to safeguard our client's rights and his child's right to have access to her father.***

32. The solicitors received back, apparently from the mother's mother - that is, the maternal grandmother - a copy of that document, whereupon she had handwritten a note in these terms:

> ***I do not know nothing. This is my address, and I know nothing at all where J. is or K.. We have no ties at all. We have not seen J. since October 1998. Last I heard, she went to England via the far east.***
>
> ***(Signed) Mrs M.H.***

And then further down:

> ***Please do not send any more mail for her here. I do not wish to know about it.***

33. It is, from all of the material, abundantly clear that what Mrs H., if it was she, wrote and sent back to the father's solicitors was plainly false. She knew indeed where her daughter was, and her daughter was with her - or at least in close vicinity to her - on the Gold Coast of Queensland all the time.

34. On or about 8 March 1999, Mr M., I think for the first time, advised the father that the mother and he would not be returning to South Africa to reside, and the father then instructed his solicitors to institute proceedings under the Hague Convention for the return of the child.

35. The application was filed by the Central Authority here on 17 June 1999, acting, no doubt, upon the instructions of the South African Central Authority. In the meantime, in about April of 1999, the father received a letter from the mother, purporting to come from and perhaps in fact coming from Great Britain, wherein she informed him that she was in fact living in England with distant relations, where she would be for plus or minus three months "due to medical reasons".

36. She further informed him thus:

> ***My husband, Mr S.M., has had a very good job offer in the Middle East and will be taking this job. It is a two-year contract, and we will then be living there. Once we are settled, we will forward you our address and telephone number, and Mr B. will then be able to come and see our daughter K. at any time, if he wishes to do so. At present, I have no fixed address, so it is pointless to give you one at this time.***

She continued:

> ***K. is happy and healthy, if your client is interested.***

37. Again, it is abundantly clear, from all that has happened since, that that piece of correspondence was nothing but a tissue of lies. She was not in England, had never been in England, and remained, at that time, as she had always been up to that point, in Australia.

38. The proceedings, having been instituted in this Court, the mother was eventually, if I can use the expression, flushed out by some subpoenas which were issued to her parents to attend the Court to give evidence about her whereabouts.

39. She now appears by her legal representative Mr Jones and opposes the application. The application of the Central Authority is for final orders:

> ***(1) That the child, K.H., also known as B. and also known as M., born 14 July 1993 at Johannesburg in the country of South Africa, be returned to the country of South Africa;***
>
> ***(2) That the necessary expenses incurred by or on behalf of the applicant and the father, Reto Heinz, also known as P.B. including travel expenses in respect of the return of the child, K.H., also known as B., also known as M., be paid for by the mother, J.H., also known as B., also known as M.***

And then there was certain interim orders also sought, some of which have been made.

40. The proceedings are brought pursuant to the regulations to which I have earlier referred, and I shall refer to the relevant parts of those regulations in due course. The regulations, however, are the embodiment in Australia, or the adoption in Australia, of the

principles of the Hague Convention, being the Convention on the Civil Aspects of International Child Abduction, which is contained in schedule 1 to those regulations.

41. Unlike the United Kingdom and some other countries, Australia has not adopted the Convention as part of its substantive law, but rather has introduced regulations which, in large measure, although not necessarily entirely, reflect the provisions of the Convention. It is the regulations which govern this Court's dealing with the application which is before it.

42. Before proceeding further, I record the fact that, at the outset of the hearing before me today, Mr Parrott, who appears for the Central Authority, handed up to me a detailed and comprehensive outline of his submissions, covering some 37 pages. For convenience, and because of the very comprehensive nature of those submissions, I propose to annex a copy of those submissions to this judgment, and, from time to time, as occasion seems to me appropriate, refer to, and adopt or otherwise, various paragraphs of that outline of submissions.

43. The general principles of law applicable to these applications, and the powers of the Court in dealing with applications which are referred to as "Hague Convention applications", but are strictly applications under the regulations, are set out in paragraphs 1 to 16 of Mr Parrott's written outline. None of that was in issue in these proceedings, and I adopt what appears in those paragraphs, without reservation, except to note that, in paragraph 9, there is a small error, because there is a reference to the case of Hanbury Brown (1996) FLC 92-671 at 82,976 and a suggestion that there is a typographical error there in relation to the numbering of the particular regulation. However, that was not an error because the regulation at that time was in a different form to from its present form. However, as I say, I adopt the substance of all of those submissions.

44. In paragraph 18 of the submissions, Mr Parrott outlined what he contended the applicant needed to establish in order to succeed in these proceedings, and again I agree with and adopt what is set out in that paragraph.

45. Mr Jones for the wife, in the course of his helpful submissions, indicated that many of those matters referred to there are not in issue in the case before me, and it is appropriate that I briefly go through them.

46. The first matter referred to in paragraph 18(a) of Mr Parrott's outline that the applicant must establish is:

> ***"That the habitual residence of the child, K.H., also known as B., also known as M., born on 14 July 1993, was, at the time she was removed from South Africa and retained in Australia, the Republic of South Africa."***

47. Mr Jones did not contest that assertion. Accordingly, and in any event, in accordance with the evidence, I find that, at that time, K. was habitually resident in South Africa.

48. In paragraph 18(b), it is submitted that it is necessary for the applicant to establish that South Africa is a country to which the Hague Convention applies, and that, too, was not in issue in these proceedings. South Africa clearly is now a convention country between which and Australia the Convention is in operation.

49. In paragraph 18(c), Mr Parrott correctly submits that it is necessary for the applicant to establish that the requesting applicant - that is, the father - possesses rights of custody in respect of the child. That was a matter which was in issue in these proceedings, and Mr

Jones submitted that, effectively, I would not find that such rights of custody existed in the father at the relevant times. I will come back to that in due course.

50. In paragraph 18(d), it was submitted that the applicant would need to establish that, by the child being taken from South Africa to Australia, on or about 18 November 1998, there was a breach of the requesting applicant's rights of custody, which were at that time being exercised or would have, but for the removal, been exercised. That was not admitted by Mr Jones on behalf of the mother, and I shall deal with that also in due course.

51. However, the next paragraph, 18(e), was effectively conceded by Mr Jones, and it was in these terms: that the applicant would need to establish in the alternative that, by the child being retained in Australia on or from 8 January 1999, there was a breach of the requesting applicant's rights of custody, which were at that time being exercised or would have, but for the retention, been exercised.

52. As I say, Mr Jones contested the issue about whether the father had rights of custody at that time, and that he was exercising or would have exercised them but for the retention. However, he did not contest that, if that were the case, then there was a retention within the meaning of the relevant regulations.

53. In paragraphs 18 to 33 of his outline, Mr Parrott makes submissions, both on matters of law and matters of fact, relating to the issue of habitual residence. That was not in issue or not put in issue by the mother's representative, Mr Jones, in these proceedings, and it is therefore unnecessary for me to go into all of that material. It will suffice to say that I adopt those paragraphs of that submission, and I am satisfied that, at all relevant times, at least up until mid-January of 1999, K. was habitually resident in South Africa.

54. In paragraphs 34 and 35, there is reference to South Africa being a convention country, but, as I have said, that was not in issue.

55. The most significant issue - perhaps one of law - for the purposes of these proceedings, was in relation to whether or not the father had "rights of custody" to K. at the relevant times.

56. First of all, it is necessary to refer to the relevant regulations. Because of the nature of this case, I do not propose to set out in detail the provisions of the Convention or the regulations because only certain aspects of them became relevant specifically for the determination of the issues before me.

57. Regulation 3(1) defines "removal of a child" in these terms:

> ***"A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of removal, those rights:***
>
> ***(a) were actually exercised, either jointly or alone; or***
>
> ***(b) would have been so exercised, but for the removal of the child."***

And then, sub-regulation (2) defines "retention of a child" as follows:

> ***A reference in these Regulations to the retention of a child is a reference to the retention of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of the retention those rights:***

(a) were actually being exercised, either jointly or alone; or

(b) would have been so exercised, but for the retention of the child.

58. Regulation 4 then defines "rights of custody" for the purposes of the regulations in these terms:

For the purposes of these Regulations, a person, an institution or another body has rights of custody in relation to a child if:

(a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and,

(b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in the convention country in which the child habitually resided immediately before his or her removal or retention.

59. That was sub-regulation (1). Sub-regulation (2) then provides:

"For the purposes of sub-regulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child."

Sub-regulation (3) then provides:

For the purposes of this regulation, rights of custody may arise:

(a) by operation of law;

(b) by reason of a judicial or administrative decision; or

(c) by reason of an agreement having legal effect under a law in force in Australia or a convention country.

60. So, in broad terms, what is required to be established is that the father had rights of custody in relation to K. at the time of the removal or retention of her by the mother from South Africa, and that her removal or retention was in breach of those rights of custody.

61. In relation to this issue I adopt, with respect, paragraphs 36 to 50 of Mr Parrott's outline, which appear to me to be valid submissions. In particular, in the circumstances of this case, I rely upon the decision of the Court of Appeal in the case of C v C (minor: abduction; rights of custody abroad) [1989] 2 AllER 465, especially at 468, per Butler-Sloss LJ, and at 472, per Neil LJ.

62. That was a case in which the mother, who was English, married an Australian father in England, and they then went to live in Australia. A child was born there in 1982. After the marriage had broken down there were divorce proceedings instituted in Australia. Agreement was reached about various matters, and in November 1996 a consent order was made in this court providing for the mother to have the custody of the child; for the father and mother to remain joint guardians; and for neither parent to be entitled to remove the child from Australia without the other's consent. In August 1998 the mother removed the child from Australia to England without the father's consent, and the father applied to the High Court, in England, under the Child Abduction and Custody Act (1985), for the return of the child to Australia, contending that his removal out of the jurisdiction of the Australian

Court was a "wrongful removal or retention" within article 3 of the Convention. his contention being that it had been done in breach of the father's rights of custody.

63. So the question arose in that case whether the father had rights of custody under the orders of the Australian Court. It was held, on appeal, by the Court of Appeal that the father had rights of custody in relation to the child because of his right to prevent the mother removing the child from Australia without his consent. At 468 Butler-Sloss LJ said this:

> ***By clause 2 -***
>
> **[that is of the orders which had been made in Australia] -**
>
> ***...the father had, in my judgment, the right to determine that the child should reside in Australia or outside the jurisdiction at the request of the mother.***

And further down the same page her Lordship said:

> ***The words of art 5 must, in my view, be read into art 3 and may in certain circumstances extend the concept of custody beyond the ordinarily understood domestic approach. Therefore in the present case there would be the general right of the mother to determine the place of residence within the Commonwealth of Australia, but a more limited right, subject to the father's consent, outside the jurisdiction of the Australian Family Court. The father does not have the right to determine the child's place of residence within Australia but has the right to ensure that the child remains in Australia or lives anywhere outside Australia only with his approval. Such limited rights and joint rights are by no means unknown to English family law and no doubt to Australian family law. Indeed, in art 3, rights of custody are specifically recognised as held jointly or alone. The Convention must be interpreted so that within its scope it is to be effective. For my part, I consider that the child was wrongfully removed from the jurisdiction in breach of clause 2 of the order of the 4 November 1986.***

64. Neil LJ put the position even more clearly, I think, at 472 where he said this:

> ***The right to determine the child's place of residence is, therefore, included among the rights of custody to which art 3 applies.***
>
> **[And for this purpose article 3 is relevantly in the same terms as our regulation 4].**
>
> ***Moreover, it appears from art 3 itself that the right may be attributed to a person either jointly or alone, and it may arise by reason, of inter alia, a judicial decision or by reason of an agreement having legal effect under the law of the state in which the child was habitually resident immediately before the removal. With this introduction, I turn to the order dated 4 November 1986, made in Sydney, in the Family Court of Australia. It was a consent order. By para 1 of that order it was provided that the mother should have custody of the child, and that the father and the mother should remain as joint guardians. Paragraph 2 was in these terms:***
>
> > ***"Neither the Husband nor the Wife shall remove the child from Australia without the consent of the other."***
>
> ***The question for decision is whether para 2 gives to the father the right to determine the child's place of residence. Plainly it is not an exclusive right. The mother has custody of the child and can decide where in Australia they are to live. But the father's consent is***

required before the child is removed by the mother from Australia. It seems clear that this consent could be limited both as to the period of absence and as to the place to which the child could be taken. Thus, to take an example, the father could consent to the child residing with the mother for a period of a year or so in England or some other agreed country or even at some particular address.

I am satisfied that this right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right of custody within the meaning of arts 3 and 5 of the convention. I am further satisfied that this conclusion is in accordance with the objects of the Convention and of the 1985 Act. Until last August this child was habitually resident in Australia. In 1986 the Family Court of Australia made orders relating to his custody, which included an agreed provision that he should not be removed from Australia without the father's consent. In my judgment the enforcement of that provision falls plainly within the objects which the Convention and the 1985 Act are seeking to achieve.

65. It seems to me that that case, for relevant purposes, is almost on all fours with the current case where there was an order for custody in favour of the mother, but there was also an order that neither party could remove the child from South Africa without the consent of the other.

66. There is also evidence before me, in the form of the affidavit of Mr Hendrick Groebler, which is annexure BP3 to the father's founding affidavit, as to the law of South Africa in relation to rights of custody. That evidence is contained particularly in paragraphs 5 and following of that affidavit. I think it is worth recording what Mr Groebler there says, and in doing so I observe that the question of foreign law is essentially a question of fact on which the Court receives expert evidence, and that is what Mr Groebler's affidavit amounts to. He says this:

In the South African law there is not a unified code on the rights of the respective parents of minor children. The legal principles are either to be found in the common law as interpreted in the various decisions of the High Court of South Africa, and ad hoc statutory enactments. As a general rule the South African law relating to family and persons draws distinction between the custody of a minor child and guardianship. None of the two concepts, however, are crisply defined and judicial attempts at giving a clear definition of these two concepts have not always been successful.

7. As a general rule, however, the concept of guardianship denotes the sum total of the bundle of rights a parent has in relation to a legitimate child. This includes the right to control the estate of the minor child, determining the country of the minor child's residence, the giving of consent to the minor child to contract a marriage, or to enter into any agreement. The concept also includes the duties of the parent vis a vis the minor child, such as the duty to contribute to the minor child's maintenance, and to properly account for the administration of the estate of the minor ward. The Guardianship Act number 192 of 1993 confers equal rights of guardianship upon both parents of a legitimate child. A copy of the Act is hereto annexed, marked HG1.

8. Custody on the other hand relates to the physical control and care of the minor child and connotes the power to decide how and where the minor child will spend its time. The custodian parent, however, does not have the right to unilaterally decide on whether the minor child should be entitled to emigrate, or whether the child should be entitled to leave the Republic of South Africa.

67. He then refers to the interdict, or injunction, as I would call it, contained in the orders of the 19 October 1998. Annexed to his affidavit is the relevant parts of the Guardianship Act, and it is clear from section 1, subsection (2) of that Act that :

> ***Where both mother and father of a child have guardianship of a minor child each of them is competent, subject to any order of a competent Court to the contrary, to exercise independently, and without the consent of the other, any right or power or carry out any duty arising from such guardianship, provided that, unless a competent Court otherwise orders, the consent of both parents shall be necessary in respect of -***

and then follow a number of matters, one of which contained in paragraph (c) is:

> ***The removal of the child from the Republic by one of the parents or by a person other than a parent of the child.***

68. When regard is had to that evidence, and to the orders to which I have referred, it seems to me, on all of the material, that at the relevant time the father had a right to determine the place of residence of the child, within regulation 4(2) of our regulations, in that he had a right to determine that the place of residence of the child should be either, within South Africa or, outside South Africa, only with his consent. And in that respect I think the position is, as I have said, on all fours with the position dealt with by the Court of Appeal in C v C, to which I have already referred.

69. Accordingly, I hold that as at 18 November 1998, and at all relevant times thereafter, the father had "rights of custody" in relation to K. within the meaning of regulation 4 of the regulations which bind this Court in these proceedings.

70. The next issue dealt with in Mr Parrott's written outline is the issue of removal or retention. And again, with respect, I adopt paragraphs 51 to 62 of that outline for the purposes of this judgment.

71. I am satisfied that at the time the mother left South Africa with K. on 18 November 1998, the father was not consenting to her doing so, and she knew that he did not so consent. That to me is clear from the correspondence to which I referred earlier. Such removal, therefore, in my view, was in breach of the father's rights of custody in relation to K., which the father, in my judgment, was exercising at that time, and/or would have exercised but for the removal.

72. Accordingly, the removal was "wrongful" within the meaning of the regulations.

73. Further, I am satisfied that even if the father's original consent to the child's removal for the purposes of a holiday, given on 15 November 1998, had not been effectively revoked prior to 18 November 1998, the mother knew that he did not consent to her retaining the child outside South Africa beyond about 8 January 1999, and that her continued retention of the child in Australia after 8 January, or at least after the middle of January, constituted a wrongful retention of her, being a retention in breach of the father's rights of custody.

74. The next issue addressed in Mr Parrott's outline is whether sub-regulation 16(1)(a) or (b) applies to this case. Although an issue was raised about that by the mother, it was not pursued by Mr Jones. However, it is appropriate that I refer to what the regulation says. Regulation 16, sub-regulation (1) is in these terms:

> ***Subject to subregulations (2) and (3), on application under regulation 14, -***

which this is -

> ***…a court must make an order for the return of the child:***
>
> > ***(a) if the day on which the application was filed is less than one year after the day on which the child was removed to, or first retained in Australia; or***
> >
> > ***(b) if the day on which the application was filed is at least one year after the day on which the child was removed to, or first retained in Australia, unless the court is satisfied that the child is settled in his or her new environment.***

75. As I have said, in her affidavit in response the mother did seek to argue that the child had been in Australia for more than 12 months on the basis of the earlier holiday trip which she took with the child in Australia during late 1997/early 1998. Clearly, that submission has absolutely no merit, and, as I have said, it was very sensibly not pursued by Mr Jones in his submissions before me. I reject the mother's contention, and adopt paragraphs 63 to 65 of Mr Parrott's outline.

76. Sub-regulation 16(2) then provides as follows:

> ***A court must refuse to make an order under subregulation (1) if it is satisfied that:***
>
> > ***(a) the removal or retention of the child was not a removal or retention of the child within the meaning of these Regulations;***

Well, I have already found that it was, so that does not apply.

> ***or***
>
> ***(b) the child was not an habitual resident of a convention country immediately before his or her removal or retention;***

And, again, I found that the child was habitually resident in South Africa immediately before her removal or retention.

> ***or***
>
> ***(c) the child has attained the age of 16;***

And clearly she has not.

> ***or***
>
> > ***(d) the child was removed to, or retained in, Australia from a country that, when the child was removed to, or first retained in Australia, was not a convention country;***

That clearly does not apply.

> ***or***
>
> ***(e) the child is not in Australia.***

Again, that clearly does not apply because the child is here, and that is not an issue.

77. That brings us then to regulation 16(3) which really contains the substance of the basis for the mother's opposition to the current application. That sub-regulation provides as follows:

> ***A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:***
>
> > ***(a) the person, institution, or other body, making application for return of a child under regulation 13:***
> >
> > ***(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or***
> >
> > ***(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia.***

78. Pausing there, I am clearly satisfied that that paragraph does not apply to the circumstances of this case, because I have found that the father was actually exercising his rights of custody at the time of the removal or retention, or at least would have certainly done so but for the removal or retention, and I have found that he has not consented to or subsequently acquiesced in the child being removed to or retained in Australia.

79. Paragraph (b) of that sub-regulation then continues - and just to put it back in context, it says:

> ***A court may refuse to make an order under sub-regulation (1) if the person opposing return establishes that:***
>
> > ***(b) there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation."***

80. It is that paragraph (b) which is heavily relied upon by the mother in this case. Just to complete the reading of that subregulation, it continues:

> ***"... or***
>
> > ***(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or***
> >
> > ***(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.***

It is not at all suggested that paragraph (c) has any application to the circumstances of this case. There is a suggestion in the mother's material that paragraph (d) may have some application. I shall deal with that in due course.

81. As I have said, paragraph (b) of that sub-regulation 16(3) is the fundamental basis for the wife's opposing the order sought in this case. The evidence of the mother essentially is this: that she came to Australia with the child and Mr M. on 18 November 1998 initially for the purpose of a holiday, intending to return to South Africa in January 1999. She was at the time pregnant to Mr M. She says that after she came to Australia, having regard to and because of her pregnancy and aspects of her health in relation to it, it was not then possible,

medically, for her to return to South Africa prior to the birth of the child and for some little time after it. Her child, Amber, was born in Australia on a date which escapes me at the moment, but she is about seven months of age at this time. I think she was born in February.

82. The mother's case, essentially, is that there is a grave risk that to order the return of K. to South Africa would expose her to physical or psychological harm, or otherwise place her in an intolerable situation, particularly having regard to the fact that the mother herself and Mr M. do not wish to return to live in South Africa and Mr M. has filed in these proceedings an affidavit in which he says he does not consent to his child Amber being taken out of Australia to South Africa. The mother says, essentially, that she is placed thus on the horns of a very uncomfortable dilemma, because she has a seven month old infant, whom I think she may have said that she is breastfeeding, and she does not wish to leave her behind, so therefore she is unable to go to South Africa to accompany K. in the event that this Court ordered her return. Her alternative is to go to South Africa with K. and leave her seven month infant behind with Mr M.

83. Now, as I have said, that is undoubtedly a very uncomfortable dilemma which she faces, but I have to say it is one largely of her own making, and merely because she faces that dilemma does not necessarily, although it may, lead to a conclusion that to order the return of K. to South Africa would expose her to the grave risk of which regulation 16(3)(b) speaks.

84. Before proceeding further it is appropriate that I note that the father has tendered certain undertakings to the Court which are annexed to his affidavit which was filed today by leave. The annexure number is PB35, and I think it was intended to be annexed to his original affidavit but was not. The undertakings which the father there offers are these:

> ***(1) the applicant undertakes not to institute fresh or to voluntarily support any criminal or civil charges against the respondent arising from: 1.1 the manner in which the respondent obtained an endorsement on her passport allowing K. to travel on such passport; 1.2 the removal of K. from the Republic of South Africa during or about December 1997; 1.3 the removal of K. from the Republic of South Africa on or about 18 November 1998 and her subsequent retention in the Commonwealth of Australia.***

85. That particular undertaking was offered to meet a concern, expressed by the mother in her affidavit material, that upon her return to South Africa she might be arrested and dealt with by the authorities there in respect of criminal charges, the precise nature of which she did not spell out in her material except to describe them as "kidnapping charges", presumably instituted at one point by the father in respect of either or both of her departures from South Africa first in 1997 and the second in 1998.

86. Secondly, he undertakes "to withdraw any of the charges referred to in paragraph 1 above that may presently be pending against the respondent", that is the mother. Thirdly he undertakes "to pay the costs of K.'s air fare to the Republic of South Africa" and I might add, or interpolate, at this point, that I have been informed that he is present today in Court along with some legal representatives from South Africa.

87. Fourthly, he undertakes "that K. will remain in the care of the respondent, [that is to say, the mother], should she accompany the child back to the Republic of South Africa until the High Court of South Africa directs otherwise."

88. Fifthly he undertakes "that should the respondent not accompany K. to the Republic of South Africa the applicant [that is he] undertakes to personally accompany K. to the

Republic of South Africa and to retain her in his care until the High Court of South Africa directs otherwise.

89. Sixthly he undertakes "to institute proceedings in the High Court of South Africa within 48 hours of K.'s arrival in the Republic of South Africa, relating to her custody, rights of access and maintenance.

90. Pending a decision in such proceedings the parties respective rights will be governed by the terms of the agreement of settlement they concluded in Johannesburg, on 18 October 1998, which, I should interpolate, effectively would allow the mother, if she is there, to retain the custody of the child subject to the father's access.

91. Seventhly he undertakes "that should K. be returned to the Republic of South Africa and as a result thereof be unable to complete her current year of schooling in Australia [which is an issue raised by the mother in her material] to obtain private tuition for K. on a similar or higher standard to that she presently enjoys at the Merrimac State School and to bear the costs of such private tuition."

92. Eighthly, and finally, he indicates his consent to these undertakings being incorporated into mirror orders to be granted by this Court and the High Court of South Africa.

93. In the course of Mr Parrott's oral submissions I raised the question of what was meant by paragraph 8. As I understand it, what the father is there saying is that he would consent to give similar undertakings to the High Court of South Africa, so that he might effectively be bound by such undertakings there, in the same way as he would be bound by undertakings in that form given to this Court, and it is possible to make an order for the return of the child conditional upon his giving the appropriate undertakings to that Court as a pre-condition.

94. In making his submissions in support of the mother's defence, based on regulation 16(3)(b), Mr Jones referred to and relied upon the decision of Joske J of this Court in the unreported case of State Central Authority of Victoria v Ardito (unreported FCA 29 October 1997). In my view that case is clearly distinguishable from the present case.

95. That was a case in which the mother of two children, who was an Australian citizen, but had been married and lived in America with her American husband, returned to Australia with one of those two children. Proceedings having been brought by the father pursuant to the regulations in Australia for the return of that child, initially the mother consented to such an order. But eventually, because of difficulties she had in obtaining a visa to return to the United States, she instituted an appeal and fresh evidence was placed before the Court about the difficulties she was having in obtaining a visa, and the appeal was allowed and the matter was remitted for a re-hearing. It was that re-hearing which came before Joske J.

96. In the course of his judgment in that case his Honour referred to a concession which was made by counsel for the State Central Authority, which appears at page 28 of his judgment as it is provided to me. He there records this:

> ***It is conceded by counsel for the State Central Authority that there is no way in which the respondent can gain entry into the United States so as to be heard and participate in custody proceedings in that country.***

97. It is clear from reading his Honour's judgment that the mother had made a number of unsuccessful applications to the relevant authorities of the United States for a visa to re-enter the United States for the purpose of contesting proceedings which it was envisaged

would take place there in relation to the custody of the children, and she had been quite unable to obtain a visa. So, effectively, she was precluded, as a matter of law, from entering the United States and contesting the proceedings. His Honour, on that basis, ultimately concluded that it would place the child in an intolerable position if, having been ordered to be returned to the United States, the child's mother would be precluded, as a matter of law, from appearing there and contesting the issue of her custody.

98. As I say, in my view the circumstances of that case are quite clearly distinguishable from those of the present case. In this case there is no legal impediment to the mother's return to South Africa. There is of course - and as I have said - a practical impediment, but it is one essentially of her own making; namely that since coming to Australia she has given birth to another child now aged seven months, the father of whom swears he does not consent to that child being taken back to South Africa. That is a matter for him, of course, and it remains a matter of choice for the mother whether she returns to South Africa with K. or stays in Australia with Amber, if indeed Mr M. maintains his attitude in relation to Amber in the face of an order of this Court, if one were made for K.'s return.

99. Neither he nor the mother, in my view, can be permitted to effectively blackmail this Court into shirking its obligations under the Convention, imposed through the regulations. To allow them to do so would indeed be to allow them to drive a coach and four through the Convention, as Butler-Sloss LJ suggested in the case of C v C to which I have already referred in another context. In that case in a passage which is indeed quoted by Joske J in Ardito's case, Butler-Sloss LJ said this, at 471:

> ***The convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of refusing the application under the convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is the parent to create the psychological situation, and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.***

100. I adopt, with respect, her Lordship's comments in this case. Indeed Joske J in Ardito's case made the point that the case before him was very much different from that case and he noted, at page 36, the basis of the difference as follows:

> ***The wife has not deliberately refused to return to the United States and thereby endeavoured to create a defence of grave risk,(sic) psychological harm or an intolerable situation. On the contrary, on the day following the issue of the State Central Authority's application she consented to an order to escort the child back to the United States.***

101. And he then goes on to talk about the difficulties she had in obtaining and ultimately being unable to obtain a visa.

102. So, as his Honour in that case distinguished the case of C v C, I in this case distinguish Ardito's case and conclude that this case is more on all fours with that of C v C and the decision of the Court of Appeal in it.

103. I have indicated that the father has offered what appear to me to be appropriate undertakings to safeguard the welfare of K. upon her return to South Africa to ensure the mother's capacity to retain her care and control in South Africa pending determination of the relevant proceedings by the High Court of South Africa, which is clearly the appropriate forum for the resolution of all of the issues between these parties.

104. I accept and adopt paragraphs 130 to 151 of Mr Parrott's outline, and I am not satisfied that there exists any grave risk that the return of K. to South Africa would expose her to physical or psychological harm or otherwise place her in an intolerable situation. Accordingly this aspect of the mother's defence to the proceedings is also rejected.

105. Regulation 16(3)(d), which I have already recited, was raised by the mother in her material, and she sought to argue a proposition that, to order the return of K. would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms. Very sensibly, again, that was not pressed on her behalf by Mr Jones. In my view that claim clearly has no merit for the reasons set out in paragraphs 152 to 158 of Mr Parrot's outline, which again I adopt.

106. Having concluded that none of the defences prescribed by regulation 16(3) have been made out, there is no residual discretion in the Court to refuse to make the return order sought, because of regulation 16(1). I therefore propose to make the orders sought. However, I shall order that the operation of the order be conditional upon the father's first filing in the High Court of South Africa an affidavit or other appropriate document wherein he gives to that Court the undertakings specified in annexure PB35 to his affidavit, which was filed herein by leave this day and the filing in this Court of an affidavit verifying compliance with that condition.

107. I do not need to hear you further, Mr Parrott, because I do not see any necessity to expand the undertaking beyond the matters which are set out in it. They seem to me to be the relevant matters. There is no evidence before me to suggest there are any other criminal or other proceedings of any kind pending in South Africa and I do not think it is necessary, in the circumstances, to require the father to give such a sweeping undertaking as that which has been suggested on the mother's behalf. So I am content with the undertakings in the form proffered, with the amendment of number 6 to read:

> ***Pending any decision in such proceedings.***

108. I would have thought it was clear, in any event, that a decision would include an interim decision but for abundance of caution, so be it.

109. What I have written in on your draft before the words, "it is ordered that", is the following:

> ***Conditional upon R.B., the father, filing in the High Court of South Africa Wittwatersrand Local Division, within seven days of this date an appropriate document wherein he gives to that Court the undertakings specified in annexure PB35 to his affidavit filed herein by leave this day, and the filing in this Court of an affidavit verifying compliance with that condition, it is ordered that.***

and then I have just inserted the date 8 October 1999 in paragraph 2.

110. I make orders in the form of the draft initialled by me and lodged with the papers.

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