IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: AR 571/15

In the matter between:

[A…] [K…..] [N…….] Appellant

(Respondent in the Court *a quo*)

And

The Central Authority for the Republic of South Africa Respondent

(Applicant in the Court *a quo*)

Judgment

LOPES J:

[1] This is an appeal against an order granted in this Court on the 8th December 2014 by Mbatha J, which provided for the return of the minor child [S……] [S……] [R……], a girl born on the 30th March 2007, to the jurisdiction of the Central Authority

for Northern Ireland. Provision is made in the order for [S…..'s] mother to accompany her, should she wish to do so. The order also provides for Sarah's father to have reasonable and defined contact with her pending her return to Northern Ireland. Mbatha J provided the reasons for her order on the 7th January 2015.

[2] The original application was brought by the present respondent, the Central Authority for the Republic of South Africa, in terms of the provisions of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('the Convention'). Section 275 of the Children's Act, 2005 provides that the Convention is in force in the Republic of South Africa and that its provisions are law in the Republic, subject to the provisions of the Children's Act itself. The Chief Family Advocate in South Africa performs the functions assigned in the Convention to the respondent.

[3] The application was opposed by [S…..'s] mother, A…… K….. N……, the appellant in this appeal. She sought leave to appeal against the order granted by Mbatha J, which was dismissed with costs. Pursuant to an application to the Supreme Court of Appeal, leave to appeal to this Court was granted on the 14th July 2015.

[4] Article 12 of the Convention provides:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.'

[5] Article 3 of the Convention provides:

'The removal or 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.

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 that State.'

[6] The history of the matter is as follows:

(a) The appellant married Mr [R…….] in Northern Ireland on the 21st February 1997.

(b) Three minor children were born of their marriage:
(i) [H…….] [E……], a boy, born on the 12th September 1998;
(ii) [Y…….] [M…….], a girl, born on the 31st December 1999;
(iii) [S……] [S…….], a girl, born on the 30th March 2007.

(c) The appellant brought to the marriage a son from a previous marriage, Ryan McVeigh.

(d) The appellant and Mr [R……] were divorced on the 30th July 2008, and, by agreement, the children all continued to reside with the appellant. The appellant remained resident in the family home with Mr [R……] and the minor children until January 2010, when the appellant moved out with the three children of the marriage. They resided near the former matrimonial home in [F……] in Belfast. S…… thus lived with Mr [R……] and her siblings until she was almost three years old.

(e) In September 2010, and by consent of his parents, [H……] [E……] went to live with Mr [R…….].

(f) In March 2012, Y….. also went to live with her father.

(g) S…… continued to reside with the appellant, and Mr [R…….] continued to have regular contact with her.

(h) Sometime prior to the 22nd April 2012, the appellant removed Sarah from her school and moved their place of residence from [F…….] to [B…….] County (some one and a half hours' travel away) without informing Mr [R……], and without his consent. It is clear that from this point onwards, the appellant did her best to frustrate all attempts at contact between S….. and the rest of her family.

(i) On the 25th May 2012 Mr [R……] then brought an ex parte application before the Family Proceedings Court at Dungannon for an interim residency order directing that [S……] live with him, and her two siblings.

(j) Affidavits were filed, and following an oral evidence hearing at which both the appellant and Mr [R…..] testified, an interim residency order was granted on the 20th December 2012. The order provided that [S……] be transferred to live with her father and her siblings by the 29th December 2012. The application was to be reviewed on the 22nd January 2013, to determine whether appropriate contact arrangements had been put into place by Mr [R……]. The appellant noted an appeal against the order of the 20th December 2012. This had the effect of suspending the immediate transfer of [S……] to live with her father and her siblings.

(k) On the 22nd January 2013 Mr [R……] made an application to the Central Authority of Northern Ireland for the return of [S…..]. A search was conducted pursuant to that request, and the application of Mr [R……] was forwarded to the respondent in South Africa.

(l) On the 31st December, 2012, the appellant relocated to South Africa, taking [S…..] with her. The appellant admits that she did so without the consent of Mr [R……], and without his knowledge. In so doing, she effectively abandoned her appeal against the decision of the Dungannon Family Proceedings Court.

(m) On the 26th February 2013, and in the default of the appellant, Judge Devlin granted a residence order that [S…..] was to reside with her father until the age of sixteen years. In addition, the appellant's appeal was struck out.

(n) The respondent eventually established the whereabouts of [S….] and the appellant. In compliance with Article 10 of the Convention, the appellant was interviewed by a representative of the respondent on the 10th October 2013 with a view to facilitating the voluntary return of [S…..] to Northern Ireland. The appellant declined to do so, without citing reasons.

(o) The respondent then launched this application on the 25th March 2014.

[7] The grounds upon which the appellant appeals against the order of Mbatha J may be summarised as follows:

(a) That [S…..] is now 'settled' in the Republic of South Africa as envisaged in Article 12 of the Convention, and accordingly there is no compulsion on this court to return her to the Central Authority of Northern Ireland.

(b) In terms of Article 13(b) of the Convention, the appellant has established that returning S….. will expose her to the grave risk of physical or psychological harm, or otherwise place her in an intolerable situation.

(c) That returning [S…..] will involve a change in her lifestyle such that it cannot be in her best interests to do so.

[8] With regard to the question of onus, the appellant contends that a period of more than one year elapsed between the time when [S……] was wrongfully removed from Northern Ireland, and the commencement of these proceedings. It was submitted that in those circumstances, a court is not obliged to order the return of the minor.

[9] The appellant relies on the second part of Article 12 which requires the court hearing the application to order the return of the child where more than one year has elapsed, 'unless it is demonstrated that the child is now settled in its new environment.'

[10] The appellant submits that in leaving Northern Ireland with [S….] as she did, she did not behave '*wrongfully'* in the sense in which that word is used in the Convention. This was because, at the time she left Northern Ireland, there was no order in force, because she had lodged an appeal against the order of the Dungannon Family Proceedings Court. As the order was suspended, there was no order with operative effect barring her from acting as she did.

[11] This approach overlooks the following factors:

(a) Article 3 of the Convention provides that the removal or retention of a child is to be considered wrongful where it is in breach of the rights of custody attributed to a person under the law of the state in which the child habitually resided prior to removal. [S…….] clearly habitually resided in Northern Ireland prior to her removal or retention. The appellant was not the only person who had custodial rights in respect of [S……] prior to the decision of the Dungannon Family Proceedings Court. Although the rights which vested in Mr R…… were those described in Article 5 of the Convention as '*rights of access'* the '*wrongful'* removal of a child as set out in Article 3 appears ultimately to relate to the removal of a child in breach of any rights of access vesting in a person.

Commented [SB1]: Try a different numbering system here, as the first factor intended to be dealt with in '(a)' is actually spread out over three paragraphs, the second and third of which are unnumbered.

(b) It is clear from the judgment of Meehan J that an order granting Mr R…… access to [S……] was still operative when the matter was heard on the 20th December 2012. The suspension of the operation of the interim residency order meant that the previous court contact orders remained operative.

(c) In *KG v CB & others* 2012 (4) SA 136 (SCA); [2012] ZASCA 17 (22 March 2012) paragraphs 25 - 26, Van Heerden JA considered the meaning of Article 3, as follows:

'[25] A similar approach was adopted by the Constitutional Court in *Sonderup v Tondelli and another* [2001 (1) SA 1171 (CC) para11] where the court (per Goldstone J) stated that:

> "The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence". In applying the Convention "rights of custody" must be determined according to this definition [ie the definition in art 5] independent of the meaning given to the concept of "custody" by the domestic law of the child's habitual residence. As L'Heureux-Dubé correctly pointed out [in *W(V) v S(D)* (1996) 134 DLR (4th) 481 at 496]:
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> > "[H]owever, although the Convention adopts an original definition of "rights of custody", the question of who *holds* the . . . "right to determine the child's place of residence" within the meaning of the Convention is in principle determined in accordance with the law of the State of the child's habitual place of residence . . . . " (Emphasis added.)"

[26] 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 (or other person'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 the other parent (or the leave of

the court). 17 commits a breach of 'rights of custody' of the other parent within the meaning of the Convention and hence a 'wrongful removal'.'
(My insertion of the citation)

(d) The custodial rights vesting in the appellant were removed by the interim residency order of the 20th December 2012 and given to Mr [R……]. What then is the effect of the appellant having lodged an appeal against that order, and then failing to prosecute it, occasioning its striking out on the 26th February 2013? Can it be that by a simple expedient, the whole process of the law is frustrated to the extent that the provisions of the Article become inoperative?

(e) To suggest that the appellant was not in breach of the order in these circumstances would be to surrender to a legal fiction. She knew at all times that, despite having lodged her appeal, she was at risk of having the order granted in favour of Mr [R…..], confirmed. Indeed, having elected not to prosecute the appeal, and instead to flee the jurisdiction of Northern Ireland, and remain out of it for more than one month, she would be in breach of the order. The interim residency order was not set aside by the noting of an appeal, it was merely suspended until set aside on appeal. To suggest that she could ignore the impact of the order until her appeal was struck out, and at the same time permanently frustrate the rights of Mr [R……] by nullifying any possibility of the interim residency order being confirmed, cannot be an acceptable legal or moral application of the suspension of the operation of an interim order.

(f) The appellant was acutely aware of the legal implications of leaving the jurisdiction of Northern Ireland in the face of such an interim residency order, albeit that order was suspended. This is clear from her own conduct in seeking to obtain an order to prevent Mr [R……] doing exactly the same thing by taking [S……] to Algeria without her consent. Indeed, the interim residency order contains a warning against her behaving in such a manner. I do not believe that she did or would have received legal advice that she could do so.

Such advice would be tantamount to sanctioning what may be referred to as an anticipatory contempt of the order.

(g) The inescapable inference is that the appellant lodged an appeal in order to suspend the interim residency order so that she could flee from Northern Ireland together with her new partner and [S…..]. She did not form a genuine intention to appeal. It was a legal stratagem employed by her to facilitate her ability to flee Northern Ireland. Any doubt in this regard is removed by the appellant's decision not to prosecute her appeal. She believed that there was no need to do so because she and Sarah would be beyond the reach of the authorities in Northern Ireland. In these circumstances I do not believe that there can be any basis upon which the interim residency order was genuinely suspended. The appellant certainly did not believe that it was.

(h) The appellant was no stranger to the frustration of orders of court because she had been trenchantly criticised by Judge Meehan for analogous conduct in frustrating the rights of Mr [R……] to have access to [S…..].

(i) In any event, Articles 3 and 12 refer to a wrongful removal or '*retention'*. The retention of Sarah by the appellant in contravention of the residency order began immediately upon the striking out of her appeal and the confirmation of the order on the 26th February 2013. From that date the retention of [S……] by the appellant in South Africa was in contravention of the order, and accordingly '*wrongful'* as defined in Articles 3 and 5 of the Convention.

[12] In the circumstances the conclusion of the learned judge in the court *a quo* cannot be faulted insofar as it related to the application of Articles 3 and 5 of the Convention.

[13] The appellant submits that the learned judge in the court *a quo* made her findings on the basis that the proviso to the second part of Article 12 was applicable. It is common cause that:

(a) The appellant left Northern Ireland on the 31st December 2012.

(b) Mr R…. reported her departure with S……. to the Central Authority in Northern Ireland on the 22nd January 2013.

(c) The respondent received an application from the Northern Ireland Central Authority on the 19th June 2013.

(d) An interview was conducted by the respondent with the appellant on the 10th October 2013. That was done pursuant to the provisions of Article 10, which reads:

'The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child'.

[14] It would seem that whatever facts are used for calculating the one year period, the position is that the legal proceedings were started more than one year after S…. was wrongfully removed or retained. The learned judge in the court *a quo* gave careful consideration to the matter of whether S…….. had 'settled in [her] new environment' in South Africa. She paid particular attention to the likely long term effects of S…… being alienated from her siblings, both by the physical distance which would endure between them, as well as by the religious differences which would arise as a result of the appellant's alienation of her from the faith of her birth and upbringing, despite her previous assertions to the contrary that she would not do so.

[15] In my view it is important to keep in mind that:

(a) This application is not a custody issue in the normal sense, but rather this court is seeking to determine which forum is best placed to hear those issues. Considerations of 'the best interests of the child' are not viewed in the normal context of custody battles. The question here is somewhat wider.

As was stated by Goldstone J in *Sonderup v Tondelli and another* 2001 (1) SA 1171 (CC); [2000] ZACC 26 paragraphs 28 to 32:

'[28] The Convention itself envisages two different processes — the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters. It is so recorded in the preamble which affirms that the State parties who are signatories to it, and by implication those who subsequently ratify it, are "[f]firmly convinced that the interests of children are of paramount importance in matters relating to their custody." As was stated by Donaldson MR in Re F (Minor: Abduction: Jurisdiction):

> "I agree with Balcombe LJ's view expressed in Giraudo v Giraudo . . . that in enacting the 1985 Act [giving effect to the Convention], Parliament was not departing from the fundamental principle that the welfare of the child is paramount. Rather it was giving effect to a belief-
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> > "that in normal circumstances it is in the interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been habitually resident." "

[29] What, then, of the short-term best interests of children in jurisdictional proceedings under the Convention? One can envisage cases where, notwithstanding that a child's long-term interests will be protected by the custody procedures in the country of that child's habitual residence, the child's short-term interests may not be met by immediate return. In such cases, the Convention might require those short-term best interests to be overridden. I shall assume, without deciding, that this argument is valid…

[30] … The purpose of the Convention is important. It is to ensure, save in the exceptional cases provided for in art 13 (and possibly in art 20) that the best interests of a child whose custody is in dispute should be considered by the appropriate court. It would be quite contrary to the intention and terms of the Convention were a

court hearing an application under the Convention to allow the proceedings to be converted into a custody application. Indeed, art 19 provides that:

"A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

Rather, the Convention seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That Court will have access to the facts relevant to the determination of custody.

[31] Given the appropriateness of a specific forum, the Convention also aims to prevent the wrongful circumvention of that forum by the unilateral action of one parent. In addition, the Convention is intended to encourage comity between States parties to facilitate co-operation in cases of child abduction across international borders. These purposes are important, and are consistent with the values endorsed by any open and democratic society.

[32] There is also a close relationship between the purpose of the Convention and the means sought to achieve that purpose. The Convention is carefully tailored, and the extent of the assumed limitation is substantially mitigated by the exemptions provided by arts 13 and 20. They cater for those cases where the specific circumstances might dictate that a child should not be returned to the State of the child's habitual residence. They are intended to provide exceptions, in extreme circumstances, to protect the welfare of children. Any person or body with an interest may oppose the return of the child on the specified grounds…'

(Footnotes omitted)

(b) The submissions made in the appellants affidavits, and the facts put up to support those submissions fail to deal in any way with the continued intended contact between S…. and Mr R…., and between S… and her siblings. I agree with the conclusion of the judge *a quo* that a clear impression is conveyed that the appellant does not wish S…… to have any contact with the remainder of her family. This is reinforced by the continuing vilification of Mr R…… and his religious beliefs throughout the appellant's affidavits. After describing him as 'devout' she then goes on to categorise him as 'fanatical'. She describes Mr R….. as having 'indoctrinated' the two eldest children – this

despite the appellant's previous statements under oath that she was the parent who actively supported and encouraged the children in their religious observance, and that Mr R…… 'did not have any involvement in the children's religion'.

(c) The contradictions between the averments contained in the affidavits deposed to in opposition by the appellant in the court *a quo,* and the averments in the affidavits and her evidence in the Dungannon Family Proceedings Court, do the appellant no credit. They inevitably result in her being characterised as a mendacious person who will say whatever she thinks will advance her belief that she is entitled to have sole control over the life of S……, without any proper consideration of S…..'s needs and her relationship with the other members of her family. The appellant's entire approach seems to be at odds with the assurances which she apparently gave to Dr Helen Keen, the registered social worker who compiled a psycho-social report on S……. Significantly, S……. told Dr Keen that she misses her siblings in Ireland and would like to see them. Her reluctance to discuss Mr R…… and his new wife was, unfortunately, not explored or explained by Dr Keen (perhaps because she did not want to upset S…….). Dr Keen nevertheless recorded at the end of her report that S…… should have contact with her father and siblings to maintain her bond with them. Unfortunately, given the attitude of the appellant, there is scant chance of that happening if left up to her.

[16] The next matter for consideration is the allegation of the sexual assaults on Ryan McVeigh by Mr R……, and the application of Article 13 in this regard. The judge *a quo* was of the view that is a matter to be decided by the Family Court in Northern Ireland. She also sought to alleviate any possible harm to S…. by providing in the order that the appellant be permitted to accompany S….. when she is returned to Northern Ireland.

[17] Mr *Skinner* SC, who appeared for the appellant as *amicus curiae* submitted that the learned judge *a quo* incorrectly found that there was no dispute of fact regarding the allegations of sexual assault, and failed correctly to apply the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). He submitted that this was also applicable to the question of whether Mr R…… would 'foist' his religious beliefs upon S…… and cause a cessation of the relationships between S….. and the appellant and S…… and the appellant's family.

[18] In dealing with the approach to be adopted by a court in assessing the applicability of Article 13, Goldstone J stated in *Sonderup v Tondelli* at para 43ff:

'[43] A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a Court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in art 13 for exceptional cases where this will not be the case.

[44] An art 13 enquiry is directed to the risk that the child may be harmed by a Court-ordered return. The risk must be a grave one. It must expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation." The words "otherwise place the child in an intolerable situation" indicate that the harm that is contemplated by the section is harm of a serious nature.'

[19] The allegations of sexual assault on Mr McVeigh are indeed of a very serious and disturbing nature. But is a South African court best placed to deal with those allegations?

[20] The custody dispute in the Dungannon Family Proceedings Court was hotly contested, yet at no stage was any reference made to this issue. The only possible reference (viewed with the benefit of later revelations by the respondent) is in the email by the appellant to her daughter Y…….. Where she states 'first ask your dad the truth about R…..' In addition:

(a) This assault allegedly occurred when Mr McVeigh was eight years old.

(b) The account of the alleged assault given by Mr McVeigh differs from that given by the appellant under oath. Either version is horrific, but the differences are significant.

(c) It is inexplicable that the appellant would have continued to reside with Mr R….., allow him to live with her other children, and bear more children by him, if she believed the allegations to be true.

(d) As the matter was dealt with by both the police in Northern Ireland and the UK Social Services, resulting in R…. being removed from the R……. home (including the appellant), to reside with his grand-parents, all the records of any proceedings which were held will be available in Northern Ireland, as would the witness statements, etc.

(e) These events took place sometime around 1998 (i.e. 18 years ago). How they would be received by a court in Northern Ireland now, particularly given the proceedings in the Dungannon Family Proceedings Court, the lodging of an appeal, abandoning the appeal

and the appellant subsequently fleeing to South Africa with S……, is not something about which this court could, or should, speculate.

(f) Mr *Skinner* submits that the appellant only became aware of the true nature and extent of the conduct of Mr R….. in 2013. I do not believe that this can be true. The appellant was clearly a party to the initial complaints by Mr McVeigh to the police and social welfare investigations, etc. She obviously simply did not believe the allegations, and holds no honest belief now that they are true.

[21] None of the above should be understood to reflect a belief by this court that the events alleged, or some part of them, did not take place. What is placed squarely in doubt is the appellant's expressed belief that there is a grave risk that S…… would be exposed to physical or psychological harm or that S…… would otherwise be placed in an intolerable situation, if she is returned to Northern Ireland. The appellant bears the onus in this regard, and she has not begun to discharge it.

[22] With regard to the approach of Mr R….. to the continuation of S….'s Christian beliefs, as opposed to persuading her to follow the tenets of Islam, I agree with the approach of Meehan J where he stated:

'It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or tenets, doctrines or rules of any particular section of society. All are entitled to equal respect, so long as they are "legally and socially acceptable".'

One should perhaps add, in a South African context, provided they accord with the provisions of The Constitution. Whatever dispute may emerge from the competing religious beliefs of the appellant and Mr R……., they should inevitably be decided by the decision of the Family Court in Northern Ireland. In this regard I agree with the

learned judge in the court *a quo* that this issue should be decided by the courts in Northern Ireland.

[23] The conclusion that S…… has 'settled', at least in the short-term, is difficult to resist. There is no doubt that she appears to be doing very well in her school environment, and appears to have made friends both at school and in the church which she attends.

[24] Is this, however, the whole picture of her well-being, and is it conclusive in determining her best interests? In arriving at the final conclusion, the following appear from the record:

(a) We know from the report of Dr Keen that S….. misses her siblings, and wishes that she could see them.

(b) We also know that S…… did not wish to discuss her father and step-mother with Dr Keen. This was not explored by Dr Keen, and one should not have to speculate as to why that would be. There is no indication in the record of any animosity to her father, and no allegations are made against him by the appellant regarding his mis-treatment of [S……], or of any fears harboured against Mr [R……] by Sarah. Whatever reasons Dr Keen may have had for not exploring these problems (and we are not told of any), it leaves the court in the dark.

(c) Given the past conduct of the appellant, the court can have no doubt whatsoever that she will do everything in her power to prevent S… from having contact with her father and her siblings. That is the inevitable conclusion drawn from the appellant's past conduct. Had she harboured any honest intention to foster those relationships we would, no doubt, have been timeously furnished with an affidavit of the appellant, setting out the steps she has taken since the decision of the court *a quo*, (some sixteen months' ago), to comply with the requirements of Mbatha J in ensuring that Mr R….. and his children were given access to S…… by way of Skype,etc.

(d) Mr *Skinner* submits that this court must accept that S……'s state of well-being in her present environment has remained unchanged since the decision of the court *a quo.* As we have no information to gainsay that submission, I accept it. However, for the reasons set out above, we must also accept that the appellant has failed to take any steps to promote the relationship between S…. and the rest of her family. That conclusion, as unfortunate as it is, is inescapable.

(e) Mr *Skinner* also submits that, if an order to return S…… to Northern Ireland is refused, the matter can referred back to the court *a quo* for contact arrangements to be finalised, and for a mechanism to be put in place to ensure compliance by the appellant. He submits that the Family Advocate could be directed to adopt a supervisory role, reporting to the court where there is non-compliance. I am by no means confident that this could be achieved. If the appellant appeared genuinely of the belief that continued contact between S….. and her family is a good idea, it might. But that is not what we are faced with here.

(f) I am extremely concerned about the impact upon S…... which may only emerge later in her life, of having no contact with her family. This should have been dealt with in some detail by Dr Keen, but was inexplicably ignored. This is an intricate part of the equation in determining whether she has indeed 'settled', and in this regard I refer to the judgment of Goldstone J in *Sonderup v Tondelli*.

[25] This matter is a prime example of a court being held to ransom by the delaying tactics of the appellant and the incompetence of the respondent in not ensuring that the matter was expeditiously dealt with in accordance with the Child Abduction Regulations. Had the legal process begun timeously, and there seems no acceptable reason why it should not have done so, the matter would have been resolved and S…… returned to the jurisdiction of the Northern Ireland Central Authority.

[26] Now we are faced with a situation where S….. has resided in South Africa for three years and four months. I do not believe that this court can simply ignore the extra one year and four months' since the decision of the court *a quo*. Sarah has adapted tolerably well to living here, and appears, on the face of it at least, to be happy. Returning to Northern Ireland will, no doubt, be an enormous shock to her system. She will have to leave behind her way of life and friends of the last few years, adapt to a new mother, a new language, a new religion, and entirely new rules of living. Will the joy of reuniting with her siblings and father overcome the undoubted shock of relocating? What makes the decision so much more difficult is her age. S…… is now nine years of age. She was five years old when she arrived in South Africa. These years are part of a critical development period in a child's life. S….. has not seen, nor yet as I understand the positon, had any contact with her father and siblings during that period. There is, in any event, a significant age gap between herself and her siblings – eight years and seven years respectively. One would not expect their bond to be an extremely close one in those circumstances, even were they to be residing together.

[27] In all the circumstances, and very reluctantly for my part, I am of the view that it would be in S……'s best interests (even as viewed by Goldstone J) for her to remain in South Africa. This conclusion is no criticism of the reasoning or decision of the court *a quo*. The present circumstances simply compel that decision. I agree that the Family Advocate should be directed to conduct an enquiry into the most appropriate methods of ensuring that S…… maintains contact with her father and siblings, and that the contact arrangements are monitored at regular intervals to ensure compliance by the appellant. The enquiry should include consulting with Mr Riache by Skype, email, etc as to the times when such contact should be exercised.

[28] It would be remiss were I to fail to mention this Court's gratitude to both Mr *Skinner*, and his attorney Ms *De Wet*, in agreeing, at a fairly late stage, to act as *amicus curiae* on behalf of the appellant, after her attorneys had withdrawn.

[29] It is also necessary to comment upon the dilatory manner in which this litigation was pursued by the respondent:

(a) S……. was brought to South Africa on the 1st January 2013.

(b) On the 22 January 2013 Mr R……. made a request to The Central Authority for Northern Ireland for assistance. They, in turn, requested the respondent to assist, and after a search which located S….. and the appellant, a request was made by the Central Authority of Northern Ireland on the 19th June 2013.

(c) An interview was conducted by the respondent with the appellant on the 10th October 2013.

(d) Despite the appellant then refusing voluntarily to return S….. to Northern Ireland, an application in the KwaZulu-Natal Division in Durban was only served on the 26th April 2014. The application was then heard before Mbatha J on the 8th December 2014, when the order appealed against was made. Reasons were given on the 7th January 2015. Leave to appeal was first adjourned to the 28th April 2015 to enable the appellant to obtain legal representation.

(e) Leave to appeal was refused by the court *a quo* on the 28th April 2015. An application to the Supreme Court of Appeal was then made on the 28th May 2015, which was granted on the 14th July 2015 to this court. Somewhat inexplicably, this matter only came before us on the 22nd April 2016.

(f) It was suggested by Ms *Bhagwandeen* for the respondent that after the interview with the appellant on the 10th October 2013, she again moved

residential premises without advising anyone. This required the respondent to again establish her whereabouts. Regrettably none of this was dealt with in the court *a quo* as it should have been, and this court can make no findings or draw any conclusions in this regard.

[30] It is well documented in the many cases dealing with the provisions of the Convention, that the process should be completed as expeditiously as possible. Not to do so inevitably causes psychological prejudice to the families involved. It may also contribute to a situation where courts feel held to ransom when the parent responsible for the wrongful behaviour drags matters out in order to secure the perceived advantages of an entrenched status quo. That is not the way the process should work. It is to be hoped that in the future the respondent will pay swifter attention to the finalisation of these matters. Had the Judge President of this division been approached at an early stage of the proceedings, he would have encouraged and set out a programme of earlier hearing dates to ensure the expeditious finalisation of this matter.

[31] It remains to decide the issue of costs. This is a difficult question because it would seem that neither the appellant nor Mr R….. is financially well-off. The respondent is a State-funded institution, but the conduct of the appellant disinclines me from being sympathetic towards her on this issue. In my view she should be ordered to pay the respondent's costs of the appeal. She has displayed a contemptuous attitude to the decisions of the Dungannon Family Court, refused a reasonable approach in terms of the Convention to return Sarah to Northern Ireland, and persisted in extending the legal proceedings. That, of course, is her right, but when her cause is found to be so palpably wanting, she cannot complain at being mulcted in costs. That S…… is not to be returned to the Central Authority of Northern Ireland is in no part due to any action of the appellant, save her unconscionable behaviour in failing to take into account the best interests of Sarah, and pursuing instead her own selfish and misguided beliefs. She has put the respondent, and the High Court to considerable effort and expense in doing so.

[32] I accordingly make the following order:

(a) The appeal succeeds, and the order of the court *a quo* is set aside.

(b) The Family Advocate is directed to conduct an enquiry into, and report to the High Court in Durban, within one month of the date of this order, on the most suitable arrangements for S…… to have ongoing contact with her family in Northern Ireland, such contact arrangements to be made in consultation with Mr R…...

(c) The report of the Family Advocate is to suggest a system of regular supervision by the Family Advocate, and the Family Advocate is to apply to have the arrangements made an order of court.

(a) The appellant is to pay the respondent's costs of appeal.

_____

Lopes J

I agree,

_____

P Bezuidenhout

I agree, and it is so ordered.

_____

Gyanda J

Date of hearing: 22nd April 2016

Date of judgment: 10th May 2016

Counsel for the Applicant: B Skinner SC (instructed by Ms de Wet of Shepstone and Wylie (both *amicus curiae))*

Counsel for the Respondent: N Bhagwandeen (instructed by the State Attorney)