The Court of Appeal for Bermuda

CIVIL APPEAL No. 7 of 2019

B E T W E E N:

KAB

Appellant

v

THE ATTORNEY GENERAL FOR BERMUDA (CENTRAL AUTHORITY)

Respondent

-and-

KT

Affected Party

(In re T and K (Children) (Abduction: Children's Objections)

Before: **Clarke, President**
Kay, JA
Smellie, JA

Appearances: Adam Richards, Marshall Diel & Myers Ltd., for the Appellant; Brian Moodie, Attorney-General's Chambers, for the Respondent

Date of Hearing: **Thursday, 6 June 2019**
Date of Reasons: **Friday, 12 July 2019**

REASONS

Children – custody rights – breach by wrongful retention – children raised in Bermuda by father – mother's application for return to New York, USA under Hague Convention – children objecting to return – father relying on children's objections under Article 13 to Prevent return – children of age and maturity to require that their objections be taken into account – discretion of court to refuse return – finding that discretion exercised improperly – obligation of Court of Appeal to determine matter promptly in keeping with Article 11 of the Convention

SMELLIE JA:

Introduction

1. This is an appeal from an order made by Stoneham J. on 20 may 2019 in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention") [1] . The order directed the return of two girls from Bermuda to New York, USA, pursuant to the Convention. On the 6 June 2019 we allowed the appeal and set aside the order. These are the reasons for our decision.

2. The appeal concerns T aged 12 and K aged 10, the daughters of the Appellant and his estranged wife K. T. The Appellant and K.T. were married in Bermuda in February 2008 but separated in September 2011. Subsequently in April 2013, T and K were taken by their mother from Bermuda to live in New York where both girls have since resided under her custody and control. This situation came about despite an order of the Supreme Court made upon the application of the Appellant, which prohibited the removal of K from Bermuda without the permission of the Court. However, the Appellant did not apply for the enforcement of that order by way of seeking the return of K to Bermuda and now acknowledges an arrangement with K.T., by which both K and T have become habitually resident with her in New York. It is by acknowledgement of this arrangement that he has continually exercised his rights of access to the girls since their relocation in April 2013.

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[1] The Convention has legal effect in Bermuda having been signed by the United Kingdom on 19 November 1984, incorporated into Bermudian law by section 4 of the International Child Abduction Act 1998 ("the Act") and brought into effect in Bermuda on 1 March 1999 by section 2 (3) of the International Child Abduction (Parties to Convention) Order 1999 made pursuant to section 3 of the Act.
As regards the present matter, Article 8 of the Convention provides, inter alia, that: "*Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the central Authority of the child's habitual residence or to the Central Authority of any Contracting State for assistance in securing the return of the child." Article* 10 provides that "*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."*
And, Article 11, as it applies generally, provides inter alia that" *The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.*"

3. These proceedings arise from a request issued on behalf of K.T. by the United States of America Department of State to the Attorney-General of Bermuda (in their respective capacities as Central Authority under the Convention) for the return of the girls to her custody in New York as the place of their habitual residence. The request for the return of the girls became necessary because the Appellant failed to return the girls to New York at the end of their summer holiday with him here in Bermuda, in September last year. The Appellant acknowledges this failure, which he explains on the basis of his determination that it is in the best interests of their welfare that the girls remain with him in Bermuda.

4. While he has filed proceedings to seek the court's approval, this unilateral action by the Appellant would ordinarily be regarded as a wrongful retention of the girls under Article 3[2] of the Convention, as being in contravention of the objects of the Convention[3], and so requiring that the girls be returned as mandated by Article 12. In this regard Article 12 states as follows:

> *"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed*

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[2] Which 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." (The words in emphasis being the provision most directly relied upon by mother in this case on the basis of the father's decision not to press for the return of the girls to Bermuda by way of legal proceedings as he was entitled to do).

[3] As set out in Article 1 in these terms: "*The objects of the present Convention are-*

a) to secure the prompt return of Children wrongfully removed or retained in any Contracting State;
and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States".

> *from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.*
> *The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.*
> *…"*

5. Given that the girls' time away from their habitual residence has been less than one year and that the object of Article 3 is to secure their prompt return for the resolution of any custody issue in the State of habitual residence; Article 12 would ordinarily mandate that they be returned to their mother in New York, at least pending the outcome of proceedings there as to the final merits of any custody issue[4].

6. However, the requested State is not bound to return a child if circumstances contemplated by Article 13 as set out following, arise:

> *"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child* ***if the person, institution or other body which opposes its return establishes that-***
>
> *The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*
>
> ***There was grave risk that his or her return would expose the child to physical or psychological harm***

[4] And as contemplated by Article 19 which 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*." In this regard we note that the girls' mother filed proceedings in New York and served notice of them upon the Appellant who has not responded.

> ***or otherwise place the child in an intolerable situation.***
>
> ***The judicial or administrative authority may also refuse to order the return if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views****.*
> *In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence"* [**emphases added**].

7. In keeping with Article 13, in this case it is the Appellant father, as the person opposing the return of the girls, who assumed the burden of establishing the existence of circumstances of the kind described in emphasis above.

8. In the Court below as before us in this Court, the question therefore became whether such circumstances had been established to overcome what would otherwise be the mandatory requirement for the return of the girls.

The relevant background

9. As already mentioned, the Appellant and the girls' mother K.T., were married in Bermuda, in February 2008. The Appellant is Bermudian and K.T. is American.

10. K is the biological child of the Appellant and K.T. She was born in Bermuda in September 2008. T was born to K.T. in New York in April 2007 but the Appellant is not her biological father. She was a very young baby when K.T. and the Appellant began to co-habit and was only 12 months old when they were married. T has always considered the Appellant to be her father, as he considers himself to be.

11. This Court was informed and has proceeded upon the basis, as accepted and agreed by the parties, that T is to be regarded and treated as a child of the family of the Appellant and K.T.

12. T and her sister K had continued to visit regularly with the Appellant ever since the separation of K.T. and the Appellant in 2011. This access continued regularly both in Bermuda and in New York, since the girls were taken by their mother to live there in April 2013.

13. In keeping with the established arrangements, the girls were allowed to come to Bermuda in the summer of 2018 to visit with the Appellant. It was agreed that they would be returned in time for the opening of school in September 2018 but, as already mentioned, the Appellant did not allow that to happen.

14. According to the Appellant, he refused because both girls clearly and firmly expressed to him that they did not wish to be returned to live with their mother. Most serious among the concerns raised by the girls, was that T had been sexually molested by a mere acquaintance in whose charge both girls had been placed by their mother. The Appellant's account is best taken from his affidavit filed in these proceedings starting at paragraph 17:

> "*17. .. The children arrived in Bermuda on 7 August 2018 with plans to remain until September when they were due to return to school in New York. I had absolutely no intention of keeping the children with me after the summer ended and was simply looking forward to spending time with my daughters.*
> *…*
>
> *19. Both T and K have separately told me that they do not want to return to live with (their mother) in New York. They were adamant and emotional when questioned by the Social Worker that they would not return to their mother's care. Furthermore, in light of their comments (discussed further below), I have grave concerns about*

their welfare if I were to return then to New York. I strongly believe that it is in the best interests of both children to remain living with me in Bermuda. The children have settled in well. They are doing great in school and making new friends. They remain adamant that (they) do not wish to return to New York. …

24. As stated above, the welfare of (T) and (K) are of paramount consideration and importance to me. I set forth below my serious concerns regarding the children's welfare if they were to return to live in New York.

Sexual Abuse
25. On Friday 24 August 2018, my cousin, C. S., sent me a text message while I was at dinner and told me to come home and talk to the children. She did not specify why. When I arrived at home, my cousin told me that K had told her about abuse that had occurred when they were in New York.

26. I was extremely concerned and worried for the children.

27. That day I spoke with both children who told me what occurred in New York. K told me that she and T had gone to the movies with a child from K's after-school program and the father of that child. K stated that the man rubbed her hand throughout the movie. K told me that after the movie was over, the man brought all three back to his house to play.

28. T told me that when all three children returned to the man's house, the other child and K were playing outside of the kitchen and T was alone with the man. T stated that the man began to rub her leg and told her that he wanted her to kiss him on the lips… K told me [(somewhat later as becomes apparent below)] that the man touched her in her private area…

29. The children told me that (their mother) made a police report and that the man was arrested and spent two or three weeks in jail.…

…

> *32. (Their mother) did not tell me anything at all about this incident and I was shocked to be hearing it for the first time from the children. I am extremely concerned to think about what happened and what might have happened and I am concerned that the children have not received any professional services [(ie: psychological or other counseling)] following this incident. I am forced to wonder what else (K. T.) has not told me if she has kept this terrifying incident from me. It makes me also question the level of supervision being provided by (K.T.). What checks did she undertake before allowing the girls to go with this man? Although (K.T.) is not directly responsible for the actions of this man, the events seem to form part of a general malaise towards the care of the children where they are being left unsupervised to fend for themselves."*

15. The Appellant's account of the girls' complaints to him about being molested, were confirmed by K.T. in her affidavit filed in these proceedings. She confirms that the girls had indeed complained to her, that she had reported the matter to the police and that the man was arrested and incarcerated for two to three weeks until bailed. It appears from the evidence in these proceedings, that the matter is pending a Grand Jury investigation in New York.

16. Serious though the incidents described above are, there are further matters of concern as related by the girls and which the Appellant cites as having also affected his decision not to return them to their mother. While he sets these concerns out in some detail in his affidavit under the heading "*Home Environment in New York*", for present purposes they are better seen as related to the Social Workers ("the Workers") by the girls themselves and as set out in the Workers' report to the Supreme Court.

17. This report was first commissioned by the Attorney General's Chambers who requested that a welfare check be undertaken, shortly after the Hague Convention Request was received in October 2018. An updated report was later required by Stoneham J, the learned judge having decided to rely upon the

Workers' investigations and report to inform her own decision in the case. This Court was informed that the judge expressed her preference for reliance upon a welfare report, especially upon such matters as the girls might wish to bring to the Court's attention, rather than meet with the girls in person.

18. This the learned judge was entitled to do and neither the Appellant, the Attorney General nor the girls' mother, K T, challenges the reliability of the Workers' report. K T has however, registered in her affidavit, her disagreement with concerns reported in the report, as expressed by the girls in relation to the home environment in New York and about her physical abuse of T and neglect of both girls. It must be noted that K T firmly denies the girls' accounts about her lack of care for them and about her physical chastisement of T. This Court's decision in these proceedings is not to be regarded as a factual determination of these issues. These are issues which are amenable to being determined at any subsequent custody proceedings which, as a result of our determination in these proceedings, will be taken in Bermuda.

19. It is however, in relation to the girls' perception of these issues- that which has become relevant to the present proceedings in relation to their return - that the Workers' report reads disturbingly, as follows:

> "*T was interviewed at Clearwater Middle School on October 10, 2018….T said that she believed that the workers were speaking with her because she did not want to return to her mother's home in New York in September [it appears that T had been informed by K.T, with whom the girls have remained in touch throughout, to expect the visit from the workers]. When asked why she didn't (want to) return, T stated that she did not want to return to her mother's home and her father (whom she identified as the Appellant) decided that he would keep her and her sister K here in Bermuda. T went on to explain her reasons for not wanting to return to her mother as the following:*

> *(K T) will go out until late at night with her boyfriend leaving T (and sometimes her older siblings) to care for her younger siblings (of whom there are two). She also stated that sometimes when her mother is out late, they ask her to bring home food as there is no food in the home and she will not return with food.*
>
> *T stated that her mother also physically abuses her and has left marks on her after hitting her with a wire hanger. T also stated that her mother had hit her with a bottle leaving a large lump on her head. She confirmed that a social worker in New York had spoken to her about the mark on her head after that incident. T also recalled another incident in which her mother "busted her lip".*
>
> *T also stated that she does not want to return to her mother because she does not act like a parent (take care of her). She stated that her father and his girlfriend (B C) take very good care of her and her sister.*
> *T also reported that she was living with her mother and siblings in a hotel room for a significant period of time.* [This is a matter confirmed by K T herself but who explains in her affidavit that this was a temporary situation, while she was transitioning to her current home].
>
> *T intimated that there was another reason that she did not want to return to her mother, but she did not want to discuss it with the workers. She did indicate that she had discussed this with her father and it was one of the reasons that he had decided to keep her and her sister in Bermuda."*

20. This last item reflects T's reticence about discussing the alleged sexual molestation. The allegation had become known to the Workers when they spoke to her father. T's natural reticence here may therefore be regarded as a sign of discernment, rather than as lack of forthrightness. It is a fair indication that she is "*quite capable of being a moral actor in (her) own right*[5]". She was eventually seen again by the Workers on 15 October 2018. When reminded that there was

[5] As Baroness Hale explained on behalf of the Supreme Court when emphasizing the importance of listening to the views of children who are of sufficient age and maturity: ***In Re D [2007]*** 1 A.C 619 at [57], to be further discussed below.

a concern which she had mentioned but did not wish to talk about and asked if she felt able to discuss it then, she proceeded to describe in detail the incident which the Appellant described as set out above, as she had reported it to him.

21. The welfare report in relation to T ends by the Workers recording that T was pleasant and co-operative throughout the interview. However, the Workers also noted that "*She did become tearful when discussing her mother hitting her and the thought that she may have to return to her mother's care. She also stated that she will not be returning to her mother and if she had to speak to the Courts to stay with (her father) then she would do so. T also shared that she speaks to her mother on a daily basis via her ipad.*"

22. In relation to K, the Workers report that she was interviewed at Eastend Primary School on October 10, 2018. That she appeared well-kept, in good health, and was dressed appropriately for the weather in her correct school uniform. That K was unaware why the Workers wished to speak to her. According to the report:

> "*She stated that she had just started at Eastend Primary as she usually is in school in the United States and visits Bermuda for the summer. K was unable to say why she did not return to her mother at the end of summer. K became tearful at this point and said that she does not want to return to her mother's home because it is "boring." The workers noticed K's tears and asked if there were any other reasons that she did not want to return to her mother's home. K then started to cry and said she did not want to talk about it. SW Smith redirected the conversation and asked K how things were going at her father's residence. K said that she likes living with her father and she does not have any concerns in his home."*

23. The Workers also interviewed K on a second occasion. It then became apparent that she too had been withholding her concerns on the first occasion and that she had also been a victim of molestation:

> "*K began to get tearful when she started to describe the sequence of events that transpired once they arrived at M's father's house (after the movies). K reported that she was wearing jeans and that they had become uncomfortable so she decided to change into a pair of her friend M's leggings. K reported that following this, M's father would "pick her up". When SW Smith asked K to describe what she meant by this, she explained that he would hug her tight while lifting her off of the ground. K reported that M's father touched her "private parts" by putting his hand inside her pants but not inside her underwear. K revealed that she told him she had to use the bathroom in order to escape from him. (K reported that) (f)ollowing the incident she felt okay because M's father was ordered to stay 50ft away from her. When SW Smith asked K what she would like to happen next she requested that she be allowed to stay in Bermuda with her father and that M's father goes to jail. When asked if she had spoken to anyone about the incident, such as a counselor, she reported that she had not and that she did not wish to".*

24. The report concludes with the Workers' observations as follows:

> "*It should be noted that K was crying for a significant period of this interview and while she has stated that she does not want to see a counselor it does appear that K is still visibly disturbed by this incident. After this interview the workers met with (her father) and shared with him that K had disclosed that M's father had put his hand in her pant as (he, her father) did not share this detail in his disclosure. (He stated) that this was new information to him and reiterated his wish to get some sort of counseling for K and T".*

25. For his part, the Appellant has expressed his concerns about the impact of the alleged molestations in his affidavit at paragraphs 30-31, in these terms:

> "30. *The children confirmed these very concerning events with the Social Worker who interviewed them. It is clear that K in particular is traumatized by these events and*

> *finds them deeply upsetting. She also reported for the first time to the Social Worker that this man touched her "private parts", a fact she has not mentioned to me previously.*
> *31. To the best of my knowledge, the children have received no other counseling or psychological support following this incident. It is clear from the social work report that it is imperative that they do."*

26. In addition to their concerns as reported by their father and the Workers, both girls provided hand written letters seeking to explain why they did not want to be returned to live with their mother but wished to remain with their father in Bermuda. These letters express their concerns regarding the care they were receiving and about the incidents of sexual and physical abuse described to their father and the Workers. Included in the exhibits attached to the Appellant's affidavit at pages 10-20 of the exhibits; at page 11, the letter from K states "*I wish my mom would change to be better"* and at page 12: *"I don't want to go back to New York".* At page 17, T in her letter describes an incident of being hit by her mother and then states: "*That goes to show exactly why I want to stay with my daddy in Bermuda*".

27. Of importance to the outcome of these proceedings are the wishes of the girls. In this regard it is important to record that the Workers' report states that both girls are at least of average maturity for their age. And, according to school counselors in Bermuda whom they have seen, that T is above average and K at least of average (if not above average) maturity, for their respective ages[6].

28. It is very significant that while both girls object to being returned to live with their mother they both are also willing to maintain their relationship with her.

[6] As reported by the Workers in their updated report for the Supreme Court.

29. It is also important to note that the Workers in their report find that there does not appear to have been any undue influence exercised by their father (or by anyone else for that matter) on either of the girls. Indeed, it appears that it was her mother who made T aware, in the first place, that there are these proceedings before the Court in Bermuda. The report states that both girls appeared genuine in the information they provided and that there was no indication that the information provided was intentionally inaccurate.

30. The report concludes that both girls demonstrated strong emotional reactions, becoming tearful when discussing previous experiences in their mother's care; that those extreme reactions would indicate that their experiences living with their mother were at least at times difficult and traumatic for them. The report recommends that the girls undergo counseling prior to any transition back to their mother's home.

The ruling of the Supreme Court.

31. The learned judge by her ruling delivered on 20 May 2019, found that no circumstances were presented to overcome the general or presumptive requirement of the Convention for their return and so ordered that the girls be returned to the custody of their mother in New York ("the Return Order"). As stated at paragraphs 37 , 38 and 43[7] of her ruling, the reasons given by the learned judge for her decision are the following:

> "*37.* ***In Re: E (Children) (Abduction: Custody Appeal)*** *[2011] UKSC 27 Baroness Hale and Lord Wilson said this about Convention applications:-*
>
> > *" (They) are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the child should be when the issue is decided."*

[7] The numbering of the paragraphs seem to have gone awry, as paragraph 43 follows immediately on paragraph 38 and should therefore be paragraph 39.

38. In the exercise of my discretionary power conferred under Article 13, I make the following findings on the balance of probabilities:-

a. *The children were habitually resident in the US prior to arriving in Bermuda in the summer of 2018.*
b. *The purpose of their visit to Bermuda was to spend a defined period in the Respondent's care.*

c. *The children have not attained the age of 16 years [(the age at which the Convention ceases to apply)]*[8]*.*

d. *On or about September 2018, the Respondent wrongfully retained the children in Bermuda contrary to Article 3.*

e. *Less than a year has lapsed since the Respondent wrongfully retained the children in Bermuda.*

f. *There is absolutely no evidence that the children will face grave risk or otherwise place them in an intolerable situation if returned to their habitual residence in the USA. It is well established that Article 13(b) of the Convention looks to the future that is the situation which the children will face on return. (**the judge's emphasis**).*

g. ***The matters set out throughout the Respondent's affidavit** including those at paragraphs 24 through 42, **if true, are upsetting accounts of historic events**. Thus, the Respondent has failed to establish there is grave risk of harm to the children being exposed to physical and psychological harm in the context of an exception to the general rule of prompt return of children under the Convention. **(emphases added)***

h. *The evidence of the children*[9] *is that they are not opposed to visiting their mother in the future. Such evidence is inconsistent with the Respondent's*

[8] As provided by Article 4: "*The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years*."

[9] As the children did not give evidence and were not interviewed by the learned judge, this is understood to mean the evidence in the Workers' report, as related by the girls and their father and as presented in the girls' hand written notes.

contentions that the children will be placed in an intolerable situation if returned to their mother. In the circumstances, I prefer the evidence of the children. The Respondent has failed to establish (that) these children will face an intolerable situation if returned to the USA.

i. *There is no evidence to support the Respondent's contentions that, if the allegations are true, there are no protective measures available in the USA to protect these children. I am satisfied that the US Department of State, judicial and social services authorities will be able and willing to take measures to safeguard these children whether in the interim or final basis.*

j. ***T and K have been given a voice in these proceedings, as should all children who have reached an age and level of maturity in proceedings concerning their abduction**. In accordance with established Convention practice, the appropriate method by which any child may be heard during proceedings concerning their wrongful removal or wrongful retention is a report from a welfare officer. The children have shown much courage in expressing their vulnerabilities to the Social Worker. I do not attach any weight to the content of the handwritten letters of the children.*

k. ***The Welfare Reports confirm that the children object to residing with their mother. The children do not object to returning to the USA. Their objections are directly related to allegations regarding their historic experiences and upbringing in their mother's care**. [**emphases added**].*

l. *T is open to visiting her mother in the USA. This, in my view, is an expression of her preferred care arrangement. Such an arrangement is appropriate to be dealt with in the court of habitual residence. Moreover, **a mere preference to live with the Respondent** is (in) and of itself not a valid objection under the Convention. **(emphasis added**).*

> ***Conclusion***
> *43.* ***I have weighed in the balance the general policy considerations underlying the Convention against the interest of the children****. These include not only the swift return of wrongfully retained children, but also comity between contracting states and respect for one another's judicial processes. For the reasons stated herein,* ***I am obliged*** *to order the children's expedited return to the USA."* ***(emphasis added****)"*

The Grounds of Appeal.

32. The Appellant's primary ground of appeal is that "*the learned Judge erred in (not) properly applying and considering the child objection defence provided for in Article 13(b)(ii) (sic) of (the Convention)".*

33. We were satisfied, after a careful consideration of the learned judge's reasons for decision, that this ground of appeal is justified.

34. As an important starting point to the expression of our reasons, it is to be remembered that Article 13 of the Convention permits the requested state exceptionally to refuse to return a child in different sets of circumstances where:

> *(a) [not applicable here]*
> *(b) There is a grave risk that his or her return would expose the child to physical or psychological harm or where the child would be subject to an intolerable situation; or*
>
> *The court finds that the children object to being returned and that they have obtained an age and degree of maturity at which it is appropriate to take account of their views.*

35. The first limb of the Article 13(b) exception "*grave risk of harm*", was found by the learned judge not to have been established. It appears from her reasoning, especially at paragraphs 38 f), g) and i) above, that this was having regard to her conclusion that the risk, which she described as related to the "*historic incidents*"

(implicitly referring to the allegations of molestation), were being properly dealt with by due process of law in New York and so that adequate safeguards were or could be put in place to prevent further abuse and even further contact with the alleged molester.

36. While the Appellant accepts and it may be correct that there is no longer a grave risk of *physical* harm from that quarter, this we find, was too narrow a view of the circumstances and may well have overlooked the latter aspect of this exception, viz: whether the girls "*would be subject to an intolerable situation"*. While the legal process in New York may well provide assurance that the immediate risk of contact with the man is removed, this does not address any proper ongoing concern for the emotional impact which their experiences will continue to have upon the girls, and which may be expected to become exacerbated by their return to the immediate environment of the events. Indeed, a careful consideration of the reasons given by the girls for their objections to being returned to live in New York reveals that these circumstances, for them, are in no sense "*historic incidents*", they remain very much part of their concerns.

37. Of more immediate importance to the outcome however, is the apparent overall failure by the learned judge to have regard to the child objection exception under Article 13, and so her failure to take into account, and give due weight to, the objections and concerns expressed by the girls themselves.

38. While at paragraph 38 j) of her judgment (above), the learned judge correctly acknowledges that T and K "*have been given a voice in these proceedings*" having regard to their "*age and level of maturity*"; nowhere does she express, with any degree of particularity, an understanding or consideration of the girls' objections or reasons for not wanting to be returned.

39. Given the acknowledged maturity of each girl it was, as Article 13 recognizes, of crucial importance that due consideration be given to their firmly and cogently expressed objections. This was required even though, in the exercise of the judge's discretion, the objections of the girls were not bound to have been conclusive.

40. In this case, the learned judge decided not to meet with the girls herself for the purposes of the required assessment, opting instead to rely upon a Social Workers' Assessment and Report for those purposes. This was of course, also a matter for the judge's discretion and no criticism is made in this regard. It must be noted if only in passing in this regard however, that there is no "*established Convention practice*", as the learned judge appears to have found at paragraph 38. j) of her ruling. The practice is rather more flexible, as it is left to the discretion of the Court, on the case by case basis, to decide whether or not a face- to- face meeting with the child would be appropriate[10].

41. At all events, having commissioned the report which related in clear terms the objections of the girls themselves as expressed to the Workers, and which confirmed the Workers' independent views as to the maturity of the girls and the authenticity of their concerns and objections, it then became incumbent upon the learned judge to explain her reasons for rejecting them. This the learned judge simply did not do to the extent that this Court might be satisfied that she exercised her important discretion properly, giving adequate consideration to the concerns and objections of each of the girls.

42. On the contrary, what appears, for instance from the ruling, is a basic misunderstanding of the concerns of the girls, with their willingness to visit their mother being confused with a willingness to return to reside with her: at paragraph 38.h) :"*The evidence of the children is that they are not opposed to*

[10] . See below from the discussion of Baroness Hale's judgment in **In Re D [2007]**.

visiting their mother in future. Such evidence is inconsistent with the Respondent's contentions that the children will be placed in an intolerable situation if returned to their mother. In the circumstance, I prefer the evidence of the children." And at paragraph 38.l): "*T is open to visiting her mother in the USA. This, in my view, is an expression of her preferred care arrangement. Such an arrangement is appropriate to be dealt with in the court of her habitual residence. Moreover, a mere preference to live with the Respondent is (in) and of itself not a valid objection under the Convention.*"

43. A further misdirection appears from paragraph 38 (k) of the judgment (above), as it is there revealed that the learned judge was of the impression that the child objection exception under Article 13 is triggered, not by a child's reasonable objections to being returned to a parent but instead by what must be an objection to being returned to the State of habitual residence itself.

44. While we were advised that this misunderstanding might have arisen from a submission made on behalf of the Attorney General which was later recanted, this reference in the judgment suggests that this was not appreciated by the learned Judge. Indeed, this misunderstanding appears to have crept its way into the ultimate conclusions as set out above at paragraph 43 of the judgment, to misinform the judge's finding, contrary to the wide discretion she was called upon to exercise, that she was "***obliged*** *to order the return of the (girls) to the USA".*

45. Also contra-indicative of a proper consideration of the objections of the girls (as required by the child objection exception in Article 13), are the directions from the learned judge as set out at paragraphs 45 and 46 of the judgment.

46. At paragraph 45 she invited Counsel to agree "*to participate in a direct judicial Hague Network liaison*[11]*, to expedite identifying what protective measures are available to ensure the smooth and safe return of the children, including the scheduling of proceedings in the USA."* And at paragraph 46: "*Additionally, the mother must immediately provide written assurance simultaneously to this court and the US authorities that she has appropriate accommodation, ability and means to feed the children in the interim period pending the US Courts, Social Services and other relevant agencies being seized of proceedings regarding these children*".

47. These directions, which implicitly reveal the learned judge's concerns about the situation into which the girls would be returned, are only consistent with her acceptance nonetheless, of an *obligation* to return the girls, and to do so in deference to the protocols of the Convention.

48. In light of the settled case law which acknowledges that in Convention cases, as in all cases dealing with the custody and care of children, the welfare of the child is the primary consideration[12], such an approach is erroneous.

49. It leaves the impression that the learned judge failed to give the girls' objections the weighty consideration they deserved, that her emphasis was rather upon adherence to what is described below[13] as the "*general policy requirements of the Convention*". This is also evident from the judge's focus in paragraph 38 k) of the judgment, as discussed above, upon what is described as a requirement for objection to return to the state of habitual residence, rather than to return to the left- behind parent. As the case law shows, where a child's objections to being

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[11] There is a well-established albeit informal " International Network of Hague Convention Judges" which exists for the kind of liaison contemplated by the learned judge here but as the title implies, between Network Judges, not between counsel and judges: https://www.hcch.net

[12] As the preamble to the Convention itself makes clear.

[13] **In Re M (A Minor) [1994]** per Butler-Sloss LJ

returned are based upon concerns about the treatment from the left-behind parent, an objection to return to the state of habitual residence becomes inseparable from an objection to return to the left-behind parent.

50. As was said by Lady Butler-Sloss LJ in **Re M (A Minor) (Child Abduction: Acquiescence) [1994]** 1 FLR 390 at 395 (later reaffirmed by the Court of Appeal in ***In Re M (Children) (Abduction: Children's Objections)***[14]***:***

> "*It is true that article 12 requires the return of the child wrongfully removed to the state of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child's future.* ***The problem arises when the [abducting parent] decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and refuse to listen to the child on so technical a ground****. I disagree with the contrary interpretation given by Johnson J in B v K (Child Abduction) [1993] Fam Law 17.* ***Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him... the Court has .. to be vigilant to ascertain and assess the reasons for the child not wishing to return to the parent living in the State of the habitual residence****. If the only exception is his preference to be with the abducting parent who is willing to return [to that State], this will be a highly relevant factor in the exercise of discretion. Otherwise an abducting parent would be*

[14] Discussed extensively below. This dicta from Butler-Sloss LJ was applied in ***In re R (Child Abduction: Acquiescence)*** [1995] 1 FLR 716 per Balcombe LJ: "*The second principle to be deduced from the words of the Convention itself, and particularly the Preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases … where the two factors are so inevitably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in re M (A Minor) (Child Abduction) [1994] 1 FLR 390, 395.*" Ward LJ's approach in ***In re T (Children) (Abduction: Child's Objections to Return)*** [2000] 2 FLR 192 was similar. Listing the matters that had to be established in a child's objection case, he began with the following, at p 203:

"(*1) Whether the child objects to being returned to the country of habitual residence, bearing in mind that there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated*".

> *likely to encourage the older child to remain and frustrate the purpose of the Act [(and the Convention)]. The Court has to assess the ability of the child to understand the situation and whether he has valid reasons for not returning. The Courts have accepted reasons from children in several cases and exercised their discretion not to return them [(citing a number of cases)]. [**emphases added**].*

51. There was no question in this case of the Appellant being willing to return to New York with the girls to resolve the question of their custody there. But that did not trigger an automatic default in favour of their return to New York. The Court was nonetheless obliged to consider and give appropriate weight to their objections. We agreed that this was the correct thing to do in the circumstances.

Intervention by this Court

52. In this case we found that the discretion allowed by Article 13 had been exercised wrongly, both in terms of the wrong application of principle and by the failure of the learned judge to give sufficient consideration and weight to the views of the girls which were very relevant to the question of their return.

53. In 1985 in the case of ***Gregory v Gregory*** [1985] FLR 894, the House of Lords settled the principles upon which an appellate court should proceed when reviewing the decision of a judge reached in the exercise of discretion in relation to the welfare of children. It was stated, not unlike as in the case of reviewing any other exercise of discretion (per Lord Fraser of Tullybelton at [ ]) that:

> "*All these various expressions were used in order to emphasize the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. The principle was stated in this House by my noble and learned friend Lord Scarman in **B v W (Wardship: Appeal)** [1979] 1 WLR 1041, where after mentioning the course open to the*

Court of Appeal if it was minded to reverse or vary a custody order he said, at p. 1055:

> *"But at the end of the day the court may not intervene unless it is satisfied either that the judge exercised his discretion upon a wrong principle to that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly."*

Lord Bridge of Harwich in his speech added the following , quoting from Viscount Simon L.C. in the case of ***Charles Osenton & Co v Jston*** *[1942] A.C. 130:*

> *"The law as to the reversal by the court of appeal of an order made by the judge below in the exercise of his discretion is well- established, and any difficulty that arises is due only to the application of the well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge… But if the appellate tribunal reaches the clear conclusion that there was a wrongful exercise of discretion in that no weight, or insufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."*

54. The appeal in the present case having been allowed and given the imperative for speedy resolution of Convention requests[15], it was accepted by the parties that further delay in the disposition should be avoided and that, rather than refer the matter back to the Supreme Court, this Court should consider the objections of the girls in all the circumstances of the case and come to our own decision on whether they should be returned.

55. The recent authoritative case law explains the principles applicable to cases in which children object to their return pursuant to the Article 13 exception under

[15] Imposed by Article 11.

the Convention. It will, we think, suffice in this regard, to further examine the principles as distilled in four leading cases - two decisions of the House of Lords- , ***In Re D [2007]*** 1 AC 619***; Re M and Another [2008]*** AC 1288, [2007] UKHL 55; and two decisions of the Court of Appeal of England and Wales – **In re S (Minors) (Abduction: Acquiescence) [1994]** 1 FLR 819 and ***Re M [2015]*****(above)** which itself considered and applied those three earlier decisions.

56. ***In Re D [2007]*** (above), the main issue was whether the father had rights of custody so as to make the mother's removal of the child from Romania wrongful. The House of Lords decided that he did not and that that was sufficient to conclude the Hague Convention proceedings against him. However, ***In re D[2007]*** in which a child's objections argument was advanced for the first time in the House of Lords, had wider importance because of what was said about hearing the views of children involved in these proceedings.

57. During the proceedings there had been very significant delay such that, by the time the matter reached the House of Lords, the child was eight years old and it was clear that he was adamantly opposed to being returned to Romania.

58. In her lead judgment, Baroness Hale of Richmond spoke at [57] of the "*growing understanding of the importance of listening to the children involved in children cases*" and referred to Article 11(2) of Brussels 11a[16] which she considered required the judges to look afresh at the question of hearing children's views: [58]and [61]. As she explained, the principle that emerged from Brussel 11a was

[16] ***European Council Regulation No 2201/2003 of 27 November 2003*** concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which recognizes that in cases under the Convention, speed is of the essence and that the primary object of the Convention is to return abducted children as soon as possible to their home country, restoring the status quo and enabling the courts there to determine whatever disputes there are about their future upbringing. The longer the time that elapses following a wrongful removal or retention, the more difficult it becomes to return the child. In recognition of this Brussels 11a requires that judgment is expected to be given no later than six weeks after the commencement of the proceedings. These requirements are no less applicable in the Bermudian context in light of the provisions of Article 11 of the Convention.

applicable in every Hague Convention case and erected "*a presumption that the child will be heard unless this appears inappropriate*". She spoke of the need for children to be heard far more frequently in Hague Convention cases [59] and at [60] examined the ways in which this might be done, including where appropriate, on the case by case basis especially where requested by the child, by face- to- face meeting between the judge and the child. She recognized however, that the modern English practice proceeds by way of a report to the Court from an independent and experience Welfare Officer.

59. Baroness Hale also emphasized at [57] and [59], that hearing the child is not however, to be confused with giving effect to his or her views. The question of what weight should be attached to them was very much a matter of judicial discretion.

60. Finally, for present purposes, she discussed the meaning of "*intolerable situation*" as the phrase appears in Article 13(b) as a basis for refusing to return a child and as such a situation which might affect the presumption in favour of return to the requesting state. She stated that:

> "*Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually suffice to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, article 11.4 of(Brussels 11a) , expressly provides that a court cannot refuse to return a child on the basis of Article 13(b) "if it*

> *is established that adequate arrangements have been made to secure the protection of the child after his or her return". Thus it has to be shown that those arrangements will be effective to secure protection of the child. With the best will in the world, this will not always be the case.*
>
> *No-one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm."*

61. These principles apply, with at least equal force, to the present case. Here it was ordered that the girls be returned from Bermuda to New York on the basis of adequate arrangements to be put in place for their protection and care but without any assurance that this would, in fact, be effected before their return.

62. Indeed, the order for their return was not made conditional upon the learned judge's satisfaction in this regard. Adequate compliance was unlikely, given the judge's own obvious concerns about mother's means and ability to comply. The requirement for adequate arrangements may be seen therefore, as having been little more than a formality.

63. ***In re M [2008]*** the trial judge had found that the children, two girls aged 13 and 10, were settled in England and, although the girls had been abducted to England in breach of their father's custody rights, that the children's objection exception was established. But the judge erroneously approached the case from the point of view that their return could be refused only if the case was exceptional and, considering that it was not, ordered the return of the girls to Zimbabwe. The House of Lords allowed the appeal and dismissed the father's application for their return.

64. Two particular related aspects of ***In Re M [2008]*** are important for present purposes. First, it was established that after an Article 13(b) gateway ground for opposition to return had been made out, there was no additional test in the form

of a requirement that the case be "exceptional". As Baroness Hale stated on behalf of the Court at [40]:

> "*I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention.*"

65. Secondly, ***In re M [2008]*** established that the discretion that arose once the gateway exception was established is at large, ending the debate which had arisen from earlier cases as to whether it might be confined to a consideration of only two factors, namely the child's objections and Hague Convention policy. In this regard Baroness Hale said at [43]:

> "*My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare.*"

66. This is very far reaching dicta because it disabused the notion that issues involving the child's rights and welfare were invariably to be left for consideration upon return in the requesting state. Baroness Hale's statement in this regard at [46] should be quoted in full:

> *"In child objection cases, the range of considerations may be even wider than those in the other exceptions[17]. The*

[17] As found in Article 12 (where the child has become settled in its new environment), Article 13 (a) (where it is established that the person requesting return of the child was not actually exercising the custody rights at time of removal),Article 13 (b) (grave risk of harm or otherwise placing the child in an intolerable situation), Article 20 (where return of the child would not be permitted by the fundamental principles of the requested state related to the protection of human rights and fundamental freedoms)

> *exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so.* ***Once the discretion comes into play****, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances*". [**Emphasis added**]

67. ***In re S (Minors) [1994]1 FLR 819*** , as to the difficult problem of deciding whether a child is mature enough, Waite LJ helpfully explained (at 827):

> "*When article 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the inquiry which it envisages is not restricted to a generalized appraisal of the child's capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question "Do you object to a return to your home country?" he or she can be relied on to give an answer which does not depend on instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and short term.*"

68. The final in the series of recent authoritative cases is ***In re M [2015***] in which the English Court of Appeal conducted a thorough review of the earlier cases,

distilling from them the main principles applicable to the children's objection exception under the Convention.

69. The case involved four children who had lived with their British mother and Irish father in Ireland. The mother wrongfully removed the children, without notice to the father, in 2014 to England. The children were then aged respectively 16, 12, 10, and 5. The father applied under the Convention for the return of the three younger children, the eldest over 16, not being a subject of the Convention. The mother accepted that she had wrongfully removed the children but alleged a history of domestic abuse by the father. She relied on Article 13 of the Convention claiming that the children objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of their views, and further that Article 13 (b) applied because there was a grave risk that the children's return would expose them to harm. The evidence of the children was that they did not want to return and were in fear of their father. The judge at first instance granted the application and ordered the children's return, holding that there was no risk since the children would not be returning to a household which included the father, that the safeguards which could be put in place through the Irish courts and by virtue of the undertakings of the father would be sufficient, and that the children's concerns did not therefore amount to objections within the meaning of Article 13 of the Convention. The older two of the four children and the mother were granted leave to appeal.[18]

70. It was held, allowing the appeal, that (as taken from the headnote) the determination of whether the court had a discretion, under Article 13 of the Hague Convention, to decline to return a child, required only a straightforward and fairly robust examination of whether the simple terms of the Convention

[18] At the directions hearing procedural issues arose in relation to the joinder of the children as parties to the proceedings for the first time at the appeal stage, and the question,(not relevant to this case), of what procedure should be followed in those circumstances was referred to the full court for consideration.

were satisfied, namely whether the child objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his views, and sub-tests and technicality of all sorts were to be avoided. That in exercising the discretion once its existence had been established, the child's views were not determinative but one of the factors to be considered alongside other welfare considerations and various aspects of Convention policy, bearing in mind that the Convention only worked if, generally, children who were wrongly retained out of, or removed from, their country of habitual residence were returned promptly. That the judge had been wrong to conclude that the children were not objecting to being returned, that therefore, the judge's exercise of discretion could not be sustained and since it was inappropriate to remit the case to another High Court judge, the Court of Appeal would determine how the discretion ought to be exercised.

71. The judgment of the Court was delivered by Lady Justice Black. At [18] she explained what she described as "*The traditional approach to the child's objections exception"*, in the following terms which we consider to be applicable here:

> "*In England and Wales, the normal approach to the child's objections exception is to break the matter down into stages. There is what is sometimes called the "gateway stage" and the discretion stage. The gateway stage has two parts in that it has to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views. If the gateway elements are not established, the court is bound to return the child in accordance with article 12. If the gateway elements are established, the court may return him or her but is not obliged to do so. This approach has not been challenged before us."*

72. From the settled case law reviewed above, we regarded the following factors as being of particular application to the exercise of our discretion in this case when considering T's and K's objections to being returned:

(i) First, an appreciation that the discretion to be exercised is at large. This is a very important factor to be recognized because it is by the proper exercise of the discretion that the presumption in favour of return may be set aside.

(ii) Secondly, the nature and strength of the girls' objections. As we have already noted, these were both soundly based and firmly expressed.

(iii) Next, the extent to which they are authentically the girls' own objections or the product of the influence of the Appellant (or any other person).Given the independent findings of the Workers in this regard, we consider that there was no proper basis on which it could be said that the objections of the girls are the manifestation of the influence of their father or anyone else).

(iv) Next, the extent to which the girls' objections coincide or are at odds with other considerations which are relevant to their welfare. It is in this regard especially that account must be taken of the circumstances in New York to which the girls would be returned, both those which in our view the learned judge inaccurately characterized as "*historic*", as well as those which point to the reasonable concerns of the girls themselves about their mother's ability to protect and care for them.

(v) Next, the general policy requirements of the Convention, such as the important need to deter and discourage abduction and matters of comity such as respect for the legal and judicial processes of the requesting State. For the reasons mentioned above, while these requirements are very important, they were, in our view, disproportionately applied in the circumstances of this case by the learned judge.

(vi) And finally, but by no means least, the principle that the older the child, the greater the weight that her objections are likely to carry. This principle appears to have been overlooked in this case which involved girls 10.5 and 12 years old respectively and of above or at least average maturity, for their respective ages.

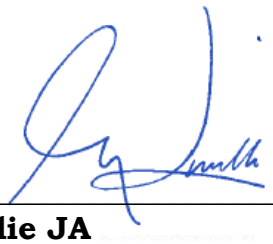
73. We were satisfied that the girls' objections are clearly reported in the Social Welfare report and are set out in handwritten letters of the girls themselves, expressed quite clearly especially in that of T, the elder sister. We will not set them out here but it is important to note that their objections arise from complaints of neglect and in the case of T, of physical abuse by her mother.

74. Having considered their objections and concerns, we were satisfied that it is in the best interest of the girls – those interests which the Convention ultimately considers to be most paramount - that they should continue to reside in Bermuda in the custody of their father at least until a final determination of the arrangements for their custody and care can be made by the Courts of this jurisdiction.

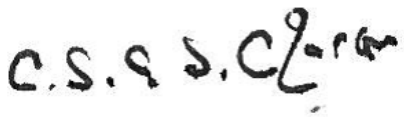
75. We note that there are already, in this regard, such proceedings instituted both in New York (by mother) and in this jurisdiction (by father). A result of our decision is that these custody issues will be determined in the proceedings in Bermuda.

76. It will be in the best interests of the girls that their mother be allowed to participate fully in the proceedings and so, to extent that she may not have the means to fund her own legal representation, we would regard it as imperative

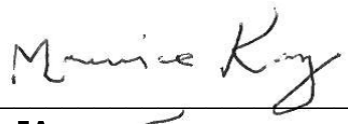
that she be allowed legal aid for those purposes. Article 25 of the Convention clearly so requires.[19]



Smellie JA



Clarke P



Kay JA

[19] Article 25 reads: "Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.