[2020] JMSC Civ 230

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2020 CV03807

BETWEEN	**DJ**	**CLAIMANT/APPLICANT**
AND	**MB**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Ms Nicole Chambers from the Family Services Agency, Executive Agency of Jamaica for the Claimant.

Mr Raymond Samuels instructed by Samuels and Samuels for the Defendant.

Heard: 15th and 19th of October, 5th 11th and 19th of November 2020.

The Hague Convention on the Civil Aspects of International Child Abduction 1980- Articles 3, 11, 12, &13 -The Children (Guardianship and Custody) Amendment Act- Habitual Residence- Grave risk- Discretion after one year- Abridgement of time- Civil Procedure Rules- Rule 27. 2(4).

L. SHELLY WILLIAMS, J

In Chamber

Background

[1] On the 8th of October, 2020 the claimant filed a fixed date claim form ('FDCF'), along with an affidavit for the return of the minor, X, to the United States of America. That affidavit had attached to it the application filed by the claimant with the United

States Department of State under **The Hague Convention on the Civil Aspects of International Child Abduction.**

[2] The FDCF requested the following orders :-

a. An Order for the return of **X**, born on July 6, 2017, in Maryland, United States of America, to his place of habitual residence at 5277 Cedar Lake Road, apartment No. 714, Boynton Beach, Florida, 33437, U.S.A.;

b. An Order that the defendant, within twenty – four (24) hours of being notified of the confirmed date of return to the United State of America, hands over **X** to the claimant or his personal representative;

c. An order directing that the defendant surrenders to the Central Authority all travel documents in her possession belonging to **X**;

d. An Order requiring the defendant to visit the Central Authority, located at 48 Duke Street in the parish of Kingston, with **X** every Monday and Friday on or before 3:00 p.m.; from the date this Order is given until the date of return to his country of habitual residence;

e. An Order for travel expenses to be borne by the claimant;

f. Such further and other relief as this Honourable Court deems fit.

[3] The matter came up for hearing on the 15th of October 2020. There was an affidavit of service filed by the claimant evincing that the defendant was served. The defendant did not attend court but it was indicated to the Court by the representative of the Central Authority that the defendant had attended their office

and stated that she would not be attending court. Further, the defendant had signed a type written letter which was left at the office of the Central Authority, which alleged abuse of her by the claimant. The Central Authority exhibited this letter to the affidavit of the claimant

[4] The matter was then adjourned to the 20th of October 2020 so that all efforts could be made to have the defendant attend Court so that both sides could be heard. An affidavit of service was filed in the court indicating that the defendant was served with the notice of the adjourned hearing. The defendant did not attend court on that date. The passport of the minor was, however, left at the office of the claimant. It was indicated to the court by the claimant that the defendant would not be attending court but that she would be willing to return the minor to the United States of America. The court at that time made the following orders :-

a. The minor, X, is to be handed over to his paternal aunt, BFW, on the 22nd of October 2020 by 3 p.m. at the office of the Jamaica Central Authority by the defendant.

b. The passport of X, that is presently in the custody of the Jamaica Central Authority, is to be handed over to BFW on the 22nd of October, 2020.

c. BFW is to travel with X on Spirit Airlines flight 702, which is to depart at 1:30 p.m. from the Norman Manley International Airport. On arrival in Fort Lauderdale, the minor is to be handed over to the claimant, D J, at the airport.

d. The custody determination of X is to be done in the United States, which is the place of habitual residence.

e. The claimant's attorney is to prepare, file and serve this order.

[5] On the 30th of October 2020 the defendant filed an application for court orders. That application sought :-

a. an injunction that would restrain the representative of the claimant from removing the minor from the island;

b. that she be granted custody of the child; and

c. that the status quo to remain as is until the matter is determined.

[6] The defendant filed an affidavit of urgency in support of application for court orders. In her affidavit she indicated that she was never served with the FDCF and the affidavit in support. Additionally, the defendant stated that that she was served with the adjourned hearing notice but she did not know how to access the Zoom platform. She detailed that she had been abused by the claimant and that she prayed that the Court grant the orders requested in her application

[7] On the 4th of November 2020 the claimant filed an affidavit in response to the application for injunction. In his affidavit he also claimed abuse at the hands of the defendant. He asked that the minor be returned to the United States of America, where he is habitually resident, so that the custody case can be heard there.

[8] On the 5th of November 2020 the application for injunction came up for hearing. counsel from the Central Authority indicated that a bundle was served on the 29th of October 2020 on counsel for the defendant. Included in those documents were the FDCF along with the supporting affidavit. Although the evidence from the affidavits of service pointed to the fact that the defendant was properly served, I decided that due to the nature of this claim, and that it concerned a minor, the defendant should be given a chance to be heard.

[9] Case management was undertaken in this matter on the 5th of November 2020, with the defendant being allowed to file an affidavit in response to the FDCF. The claimant was given an opportunity to respond. The matter was then heard on the 11th of November 2020.

[10] The order that was granted on the 20th of October 2020 is set aside. The order for an injunction would not be granted as the order on which it was predicated has

been set aside. The application for the defendant to be granted custody would not be heard at this time as the application for the return of the minor ought to be heard first before such an application can be entertained by the court. Therefore, the issues left to be decided in this matter are those raised in the FDCF.

Facts not in dispute

[11] The parties were married on the 6th of July 2018 in Florida, Unites States of America.

[12] The parties had a child, X (the minor), who was born on the 6th of July 2017 In Maryland, United States of America.

[13] The parties resided in Boynton Beach, Florida.

[14] On the 23rd of June 2019 the defendant and the minor travelled to Jamaica and since then have not returned to the United States of America.

[15] On the 21st of October 2019 the defendant filed an application under **the Hague Convention on the Civil Aspects of International Child Abduction** for the return of the minor.

[16] On the 8th of October 2020 a FDCF along with the accompanying documents were filed for the return of the minor.

Preliminary issues

[17] There were a number of issues that arose either prior to and during the course of the hearing. These included :-

a. Whether or not the defendant had been served with the FDCF?

b. Whether the Claim was properly served given that service was executed on the defendant on a Sunday.

c. Whether time could be abridged in relation to the **Civil Procedure Rules 2000** ('CPR') for the hearing of this matter.

d. Whether the jurats of two of the claimant's affidavit were in the prescribed format? And if they were not, could the defect be cured?

Service of the FDCF

[18] The first issue related to the service of the FDCF on the defendant. The submission from counsel for the Central Authority, is that on the receipt of the request under the Convention from the United States of America there were attempts to locate the defendant, which proved futile. Exhibited to the first affidavit of the claimant is a home assessment report. That report indicated that a children's officer Ms Nelissia Pryce, attached the Central Authority, visited the community of Kintyre, in the parish of St Andrew, in an effort to locate the defendant and the minor. The defendant was not located and she was unable to garner any information as to her whereabouts.

[19] The Central Authority later received information that the defendant was residing in Cane River, St Thomas. The bailiff for the parish was contacted. He located her and served the documents on the defendant on a Sunday. The claimant submitted that the bailiff had difficulty locating the defendant and after receiving information that she attended a particular church, went there and effected service.

[20] The defendant denied that she was ever served with the documents and maintained throughout that she only received a notice of the adjourned hearing.

[21] Counsel for the defendant submitted that due to the fact that his client was never served with the documents, she would not have been aware of the date fixed for the hearing of the matter. He further submitted that the documents were served on a Sunday and as such violated the CPR.

[22] Counsel for the defendant had filed an application for an injunction in these proceedings. The claimant filed an affidavit in response on the 30th of October 2020. counsel for the defendant was served with all the documents in relation to the case including the FDCF on the 29th of October 2020.

[23] Rule 5 of the CPR dictates how Claim Forms may be served. That rule does not indicate any date or time as to when Claim Forms may be served, and as such there was nothing precluding service of documents on a Sunday. In any event, the defendant's attorney was served with the FDCF along with the supporting documents on the 29th of October 2020. There was no doubt that the defendant would then be in possession of all the documents relating to the application. In light of that I had turned the hearing for the application for an injunction into a case management conference in relation to the FDCF. The defendant was allowed to file an affidavit in response to the FDCF and the claimant allowed to file an affidavit in response. The matter was then set down for inter parties hearing. This was done, as in the Court's view, given the nature of the matter it is important that all parties be heard.

Abridgment of Time for FDCF

[24] Rule 27.2 of the CPR lays down the procedure to be adopted in relation to FDCF. It states that:-

> (1) When a fixed date claim is issued the registry must fix a date, time and place for the first hearing of the claim.
>
> (2) That date shall be not less than four weeks nor more than eight weeks from the date on which the fixed date claim form is issued unless the court otherwise directs.
>
> (3) The general rule is that the claimant must serve the fixed date claim form not less than 14 days before the first hearing.

(4) However the general rule is subject to any rule or statutory provision which specifies a different period.

[25] **The Children (Guardianship and Custody) Act** (the Act) was amended on the 8th of February 2017. Section 7 (H) of the Act urges the court to act expeditiously in relation to these cases. It states that :-

> *The Court shall have regard to the need to act expeditiously in proceedings for the return of a child wrongfully removed or retained.*

Section 7 (I) (1) seeks to set a timeframe by which these matters should be heard. It states that :-

> *Having the need to act expeditiously with regards to proceedings referred to in section 7(H), The Court shall make every effort to make a decision within six weeks from the date of commencement of Proceedings referred to in Section 7 (H).*

Utilizing section 27.2 (4) of the Rules I have abridged time in relation to the FDCF due to the need for urgency in these matters and in keeping with Section 7(I) of the Act.

The jurat

[26] The CPR gives guidance as the format to be followed in filing affidavits. In particular rule 30 speaks to how a jurat is to be endorsed on an affidavit. The jurat in relation to two affidavits of the claimant did not conform with rule 30 which states that :-

> (*1) An affidavit must –*
>
> *(a) be signed by each deponent;*
>
> *(b) be sworn or affirmed by each deponent;*
>
> *(c) be completed and signed by the person before whom the affidavit is sworn or affirmed; and*
>
> *(d) contain the full name of the person before whom it was sworn or affirmed.*

(2) The statement authenticating the affidavit ("the jurat") must follow immediately from the text and not be on a separate page.

(3) No affidavit may be admitted into evidence if sworn or affirmed before the attorney-at-law of the party on whose behalf it is to be used or before any agent, partner, employee or associate of such attorney-at-law.

[27] The jurat for those two affidavits were signed by counsel of the Central Authority on behalf of the claimant and as such breached rule 30. The claimant gave an undertaking to correct the jurat and resubmit those same affidavits to the court by the 17th of November 2020. The defendant agreed that once this is done they would not take issue with the affidavits and therefore the Court will rely on their contents.

[28] Once the jurat is corrected the court will rely on the contents of the affidavits. If they are not corrected, then the contents of the affidavits will be disregarded. The affidavits with the corrected jurats were filed with the court, and therefore, I will rely on the affidavit.

Issues

[29] In deciding this case there are a number of issues that have arisen. These include :-

1. Where is the minor's habitually place of residence?

2. Did the claimant, by agreeing to allow the minor to visit Jamaica, waive his parental rights.

3. Whether the minor would be placed at grave risk if he is to return to the United States of America?

4. Whether any steps can be instituted to ameliorate any risk to the minor

5. Does the Court have a discretionary power in relation to the return of the minor?

Claimant's submission

[30] The claimant proved that he had filed an application for the return of the minor within the one year. They acknowledge that a FDCF for the return of the minor was filed outside of the one-year period. The failure to institute proceedings in the Courts in Jamaica was due, they submitted, to two main factors. These were the inability to locate the defendant, and on locating her, the attempts made to settle the matter in an amicable manner.

[31] Their submission is that the claimant had agreed for the minor to visit Jamaica but that was for a short duration. That agreement for the travel of the minor cannot then be interpreted as an agreement to relinquish the claimant's custodial rights.

[32] They further submit that the claimant, who is the father of the minor had been exercising his parental rights and by retaining the minor in Jamaica the defendant has deprived him of his rights.

[33] They argued that the issue of custody should be decided in the country where the minor is habitually resident, which is, the United States of America.

[34] They submitted that the state of Maryland, where the minor was born, automatically grants joint custody to both parents.

[35] They submitted that the defendant had been abusive to the claimant during the course of the marriage and repeatedly made false police reports against him. They submitted that there was no grave risk to the minor and that the Court should grant the orders prayed.

Defendant's submission

[36] The defendant submits that the claimant, by allowing the minor to travel to Jamaica, had acquiesced to his relocation to this country.

[37] Secondly that the defendant at the time when the minor was born was not married to the claimant and according to Florida laws the defendant was the natural

guardian of the minor. They relied on a purported excerpt for the Florida statute on natural guardians which stated :-

> *The mother is the natural guardian of a child born out of wedlock and is entitled to primary residential care and custody of the child unless the court enters an order stating otherwise.*

[38] Thirdly that the minor has been in Jamaica for over one year and as such had become settled in his new environment and it would be disruptive to send him back to the United States of America.

[39] Fourthly, that the claimant had been abusive to her and his older children during the course of the marriage and she was fearful that harm that may befall the minor if he is returned to him. The defendant has therefore raised the defence of grave risk.

The Law

[40] This application can be entertained as Jamaica became signatory to **the Hague Convention on the Civil Aspects of International Child Abduction 1980** in 2017. Subsequently, the Children (Guardianship and Custody) Act ('the Act') was amended on the 8th of February 2017 and it now gives effect to the Convention.

Article One

[41] **The Hague Convention** presents a road map as to how contracting states are to approach cases where children are abducted. The object of **the Hague Convention** is to provide the left behind parent the means to petition the court to have the child returned to country where he is habitually resident, so that the issue of custody may be decided. Article one of the Convention states that :-

> *The objects of the present Convention are -*
>
> *a) to secure the prompt return of children wrongfully removed to 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.*

Article Three

[42] The Convention then seeks to give assistance as to how the objective can be realised. Article 3 of the Convention details who may approach the court to make these applications. It states that :-

> *The removal or the retention of a child is to be considered wrongful where -*
>
> *a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*
>
> *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.*
>
> *Counties who are signatories to the Convention are required to set up Central Authourities to send and receive these applications to be processed.*

[43] There are two concepts that the Court is required to settle arising out of Article 3: What is the definition of habitual residence and what amounts to wrongful removal or retention?

Habitual Residence

[44] Although Article 3 alludes to the concept of 'habitual residence' there is no definition of the term in either the Convention or in the Act. Various courts have sort to coin definitions for this concept.

[45] In the case of **A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)** *[2013] UKSC 60,* Lady Hale at paragraphs 54 and 55 of the Judgment sought to draw together the different definitions of habitual residence. She stated that :-

> 54. *Drawing the threads together, therefore:*

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

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

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

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

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

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

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

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

55. *So which approach accords most closely with the factual situation of the child – an approach which holds that presence is a necessary pre-cursor to residence and thus to habitual residence or an approach which focusses on the relationship between the child and his primary carer? In my view, it is the former. It is one thing to say that a child's integration in the place where he is at present depends upon the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a*

habitual residence without ever setting foot in a country. It is one thing to say that child is integrated in the family environment of his primary carer and siblings. It is another thing to say that he is also integrated into the social environment of a country where he has never been.

[46] In the case of **Re B (a minor) (habitual residence)** 2016 (EWHC) 2174 Hayden J at paragraph 18 of his judgment sought to place down markers that the court could rely on the establish a minor's habitual residence. Paragraph 18 states:-

If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the Court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties. Thus:

i. *The solicitors charged with preparation of the statements must familiarize themselves with the recent case law which emphasizes the scope and ambit of the enquiry when assessing habitual residence, (para 17 above maybe a convenient summary);*
ii. *If the statements do not address the salient issues, counsel, if instructed, should bring the failure to do so his instructing solicitors attention;*

iii. *An application should be made expeditiously to the Court for leave to file an amended statement, even though that will inevitably result in a further statement in response;*

iv. *Lawyers specializing in these international children cases, where the guiding principle is international comity and where the jurisdiction is therefore summary, have become unfamiliar, in my judgement, with the forensic discipline involved in identifying and evaluating the practical realities of children's lives. They must relearn these skills if they are going to be in a position to apply the law as it is now clarified.*

The simple message must get through to those who prepared the statements that habitual residence of a child is all about his or her life and not about parental dispute. It is a factual exploration.

[47] I will adopt the test laid down in these authorities which is the integration of the child in the country.

Wrongful removal/retention - Agreement to travel

[48] Article 3 of the Hague Convention speaks to the wrongful removal or retention of a child. A question that has arisen in this case is, whether the claimant has relinquished his custodial rights? The claimant has given evidence that he had agreed for the minor to travel to Jamaica, but it was only for a six- week vacation.

[49] In the case of **Re C (Children) 2018 3All ER 1,** Lord Hughes opined that in consenting to the child's travel a parent is exercising, not abandoning his right to custody. He stated at paragraph 43 that :-

> *when left behind parent agrees to the child travelling abroad, he is exercising not abandoning his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movement abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left behind parent's right of custody. But once he repudiates the agreement, and keeps the chid without the intention to return, and denying the temporary nature of the stay, his retention is on longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live…*

I find favour with this approach and will adopt it.

Article 11

[50] Article 11 of the Convention emphasises the need for prompt action in relation these applications. It speaks to the fact that the cases should be dealt with within a six -week period. Article 11 states that :-

> *The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.*
>
> *If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by*

> *the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.*

[51] The FDCF was filed on the 8th of October 2020 and the judgment delivered on the 19th of November 2020. That would be within the six -week period stipulated by both the Convention and the Act.

Article 12

[52] Article 12 addresses the approach Courts should adopt in proceedings commenced before a one-year period as opposed to those commenced after the one year period. It states that :-

> *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 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.*
>
> *Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.*

[53] The rationale behind this Article is that if the child remains in a new country for a significant period of time, he may be viewed as having become settled. If the cases are dealt with within a one-year period then the court has no discretion as to whether or not the child is to be returned. If the child remains in the new country for more than one year then the court has a discretion as to whether or not, he is to be returned.

'Settled'

[54] The concept of being settled is not defined in either the Convention or the Act. There have been a number of cases that have sought to define the meaning of the

terminology. In the case of **Cunningham v Cunningham** 237 F. Supp. 3d 1246 (M.D. Fla. 2017) in deciding whether or not the child had been settled the court opined at 1281 that :-

> "*Generally, courts consider . . . '*
>
> *(1) the child's age;*
>
> *(2) the stability and duration of the child's residence in the new ` environment;*
>
> *(3) whether the child attends school or day care consistently;*
>
> *(4) whether the child has friends and relatives in the new area;*
>
> *5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and*
>
> *(6) the respondent's employment and financial stability.*

[55] The minor in this case has resided in Jamaica for over one year and as such the issue as to whether or not he has become settled is a live one.

Article13

[56] There are defences that may be preferred by the abducting parent as to justify the retention the child. This is detailed in Article 13 of the Convention which states that :-

> *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 -*
>
> *a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*
>
> *b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has 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.

Defences

[57] In relation to Article 13 of the Convention, there have been a number of cases decided on these issues. The central point that has arisen from these decisions is that return of the minor depends on the particular circumstance. In the case of **Re E (Children) (Abduction: Custody Appeal)** [2011] UKSC 27 the issue of grave risks was opined upon. This case lays out the framework that the court should adopt in their approach to these matters. It stated, starting at paragraph 31 that :-

[31] Both Professor Pérez-Vera and the House of Lords referred to the application, rather than the interpretation, of art 13. We share the view expressed in the High Court of Australia in DP v Commonwealth Central Authority [2001] HCA 39, (2001) 206 CLR 401, paras 9, 44, that there is no need for the article to be "narrowly construed". By its very terms, it is of restricted application. The words of art 13 are quite plain and need no further elaboration or "gloss".

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

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

[34] Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in Re D, at para 52 "'Intolerable' is a strong word,

but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'." Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

[35] Fourth, art 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home.

[58] Paragraph 36 of the said judgment sets out how the court should deal with contested allegations within the confines of Article 13(b):

36 There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.

[59] This position was reinforced by the case of **Rubio v. Castro,** No. 19-3740, 2020 U.S. App. LEXIS 14905 (2d Cir. May 11, 2020) it was held that even if a grave risk exists, there are measures in place in the habitual residence country to treat with any psychological or grave risks. The Second Circuit stated that ;-

> *…in cases of serious abuse, before a court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b) [of the Hague Convention], it must examine the full range of options that might make possible the safe return of a child to the home country." Such ameliorative conditions "balance our commitment to ensuring that children are not exposed to a grave risk of harm with our general obligation under the Hague Convention to allow courts in the country of habitual residence to address the merits of custody disputes." Thus, where repatriation would return a child to the sole physical custody of their abuser, a district court does not properly weigh the safety of the child if it fails to examine the full range of ameliorative measures, including those that are enforceable when the respondent parent has chosen not to return.*

[60] In this case there are allegations of domestic violence being alleged by both the claimant and the defendant, however there has not been any alleged case of violence against the minor. The Court will have to decide whether measures can be put in place to ameliorate any potential risk.

Age of the Child

[61] The age of the minor is to considered in relation to two aspects of the case. In the first place the age of the minor affects the ability of the child to acclimatize to his new environment. It is also relevant in relation to Article 13 of the Convention that speaks to whether the minor has attained an age and degree of maturity at which it is appropriate to take account of its views.

[62] Courts have often discussed the difficulty regarding young children as having been acclimatized. This view was expounded in the case **Ahmed v Ahmed** 867, F. 3d 682 (6th Cir. 2017 where the court found that :-

> *The circuit court found that the acclimatization standard was difficult, if not impossible, to apply to cases involving especially young children. Acclimatization requires consideration of facts concerning the child's connections to the country, including such areas as academics, sports, social contacts, and other meaningful connections. As a result, the court found that "virtually all children who lack cognizance of their surroundings are unable to acclimate, making the standard generally unworkable." The court held that looking to shared parental intent was consistent with all past Sixth Circuit rulings, which held that habitual residence involves consideration of both acclimatization and shared parental intent.*

[63] In the case of **re M (FC) and another (FC) (Children) (FC),** [2007] UKHL 55, Baroness Hale in paragraph 46 of her judgment stated "-

> *In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The 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.*

[64] In this case the minor is three plus years old and he has not reached the age of maturity where his views would be taken into consideration. The fact that he has resided in Jamaica for over a year and may have become acclimatized will be examined.

Article 16

[65] Once an application has been made under the Convention Article 16 indicates that the custody issue is not to be decided until the issue as to whether a child is to be returned is adjudicated on. It states that :-

> *After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.*

[66] The approach detailed under Article 16 will be adopted by this Court.

Analysis

[67] Jamaica having become a signatory to the Convention, and the United States of America having accepted Jamaica as a signatory to the Convention, gives the

court jurisdiction to hear the matter. The first issue to be dealt with is the timeframe in which the FDCF was filed.

[68] The minor travelled to Jamaica in June 2019 and the FDCF was filed on the 8th of October 2020. This timeline places the case outside the one-year period where compulsory return would be required. The Court would then be given, under Section 7K(b) of the Act, a discretion as whether or not the minor should be returned to the United States of America.

[69] I note that efforts were made to have this case dealt with expediously. The efforts included :-

a. The claimant filing an application under the Hague Convention within a six-week period.

b. The claimant forwarding the application to the Central Authority.

c. The Central Authority then visited the address given in relation to the defendant but she was not located.

[70] The evidence of the claimant is that to locate the defendant, he had to lie to her that he was in Jamaica, and was at the office of the Central Authority. The defendant then attended the office of the Central Authority.

[71] Nevertheless, it still stands that by the time the defendant was located the one-year period had already elapsed and so Section 7 K (b) applies.

[72] The second issue to be dealt with is whether or not the minor was habitually resident in the United States.

[73] The claimant in his affidavit gave evidence that the minor resided with him, the defendant and his older children prior to the minor travelling to Jamaica. He has produced pictures showing him and the minor at various location in the United States of America which show that he had strong ties to the minor. The evidence of both the claimant and the defendant is that the minor was part of a nuclear family prior to his trip to Jamaica with his older siblings.

[74] The defendant does not deny the evidence of the claimant but contends that the child is now settled in Jamaica and should not be returned. I find that the habitual place of residence for the minor is the United States of America. I make the finding on the basis that :-

a. The length of time the minor resided in the United States of America.

b. The family unit that he part of that includes his father and his siblings.

c. The interactions and social interactions the minor seemed to have had with the claimant and his family prior to travelling to Jamaica.

[75] Despite the finding that the United States of America is the place of habitual residence, the defendant has raised the defence that the minor should not be returned as he has become settled in Jamaica. In support of this assertion she gave evidence that the minor has resided in Cane River since he travelled to Jamaica and now attends church.

[76] The claimant's submission is that the minor is not settled in Jamaica. In support of this assertion he points to two pieces of evidence. The claimant indicated in his affidavit that subsequent to her return to Jamaica, the defendant resided with the minor, for a period of time in the Cayman Islands. In support of this assertion he indicated that the defendant had posted pictures of herself standing beside vehicles with Cayman Islands license plate. This evidence is buttressed by the passport of the minor which shows arrival and departure stamps that points him residing in the Cayman Islands for about a month. Based on this evidence I find that the defendant and the minor could not have resided in Cane River for the period purported by the defendant.

[77] In addressing the issue of settlement, I rely on the case of **Ahmed v Ahmed** that lays down some pointers that can assist the court to decide if the minor has become settled. Having perused the evidence provided by the defendant there is very little evidence to point towards the minor being settled. There no evidence for instance that :

a. he was interacting with family members;

b. that he is attending school;

c. that he has found friends that he has become attached to; or

d. that he part of any social group.

[78] The defendant indicated that the minor now attends church. There is no evidence of which church he attends, if he is part of a church group or if he has formed any deep attachments at the church.

[79] In deciding whether the minor is settled I also took into consideration his age. Following the decision in the case of **Cunningham v Cunningham**, I find that he has not have become acclimatized to his new country.

[80] I find that the minor has not become settled in the Jamaica and that this cannot be used as a defence in relation to his return.

[81] The next issue is whether or not the claimant has acquiesced or consented to the removal of the minor to Jamaica. The evidence of the claimant is that he had only agreed for the minor to take a holiday in Jamaica but with the clear intention that he was to return. In support of this evidence he produced two sets of return airline tickets. One set of tickets had the name of the minor and the aunt of the minor, whilst the others had the name of the minor and his grandfather. The claimant maintained that he purchased the tickets in furtherance of the agreement of the parties.

[82] The defendant agrees that the claimant consented to the minor travelling to Jamaica but she denies there was any agreement for him to return. She indicated that she had no intentions of returning to the United States of America as she had been abused by the claimant.

[83] I find it remarkable that the claimant would have purchased two sets of airline ticket to enable the return of the minor if there was no agreement to do so, and I do not

believe the defendant. I find, in keeping with the case of **Re C (Children)** that when the claimant agreed for the minor to travel to Jamaica, he was merely exercising and not abandoning his rights of custody. The defence that the claimant acquiesced or consented to the removal of the minor fails.

[84] The defendant then raised the defence of grave risk. Her evidence is that the claimant had physically abused her and she was forced to call the police on more than one occasion. In support of her allegations she produced pictures showing bruises on her body. The defendant also alleged that the claimant would abuse his daughter.

[85] The defendant also produced pictures of a firearm that she alleged belonged to the Claimant. She asserted that the firearm was left unattended and as such the minor might be exposed to harm as a result of it.

[86] The claimant does not deny inflicting the bruises on the defendant but he claimed that he was defending himself. He then produced videos showing confrontations in which the defendant was the aggressor. The claimant also gave evidence that he does own a licensed firearm. He states that he is unaware as to how the defendant was able to take the pictures of the firearm.

[87] It is clear from the evidence of both parties that they have a toxic relationship. I must emphasize that the Court takes all allegations of abuse seriously. I note that with all the allegations of abuse made by the parties, neither party suggested that there had been any abuse meted out to the minor. The defendant contended that the claimant abused his older child, but this has been denied by the claimant. The burden is on the defendant to not only raise this defence but to prove to the court that no measures can be put in place to ensure the safety of the minor.

[88] During the course of the hearing the defendant was asked as to what measures could be put in place to alleviate her fears concerning the return of the minor. I am aware that the position of the defendant is that the minor should not be returned to the United States of America. She, however indicated that if she was allowed to

communicate with the minor every day at a prescribed time, in addition to visits from social workers, then these measures would alleviate some of her fears.

[89] I find that the minor can be returned to the United States of America with some safeguards. These safeguards would include :-

a. That there be regular visits by a social worker to ensure that whatever complaints that may be lodged by the defendant are promptly investigated.

b. The defendant is granted daily contact with the minor so she can be satisfied as his wellbeing.

c. The defendant can arrange for visits by either friend or family member or both to ensure the safety of the minor.

d. The complaint about the firearm being left unsecured by the claimant be investigated by the relevant authorities.

[90] The final issue raised by the defendant is that she was unmarried at the time that the minor was born, and as such the Florida statute automatically makes her natural guardian of the minor and she is then entitled to primary residential care and custody of the minor.

[91] This is denied by the claimant who submitted that the statute that would apply in this case would be the one in Maryland that grants him joint custody of the minor.

[92] The fact that there is an issue as which statute should be in operation as it relates to the minor reinforces the point that this clearly is a matter that should be adjudicated in a court where the child is habitually resident, which is the United States of America.

[93] I am aware that I do have a residuary discretion in relation to these matters as was detailed in the case of **Re M**, however, on the circumstances of this case I would not be minded to exercise that discretion.

Order

1. The United States of America is the place of habitual residence for the minor.

2. Custody proceedings are to be pursued in the country where the minor is habitually resident.

3. The minor child X is to be returned to the United States of America on or before the 5th of December 2020.

4. The claimant is to indicate to the court who is accompany the minor to the United States of America by the 21st of November 2020.

5. The claimant is to purchase the tickets for the return of the minor child.

6. The minor is to collected at the airport by the claimant and he is to reside with him until the issue of custody is settled.

7. That should the defendant make complaints regarding the minor to the relevant authorities in the state of Florida in the United States of America, that those authorities conduct prompt and adequate investigations.

8. The defendant can arrange for visits by either friends or family members or both to ensure the safety of the minor.

9. The complaint about the firearm of the claimant being left unsecured is to be investigated by the relevant authorities.

10. The defendant is to have daily telephone contact with the minor at 7 pm daily for at least fifteen minutes.

11. The claimant's attorney to prepare file and serve the order.