NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 21/06

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**LISA HANNA PANTON**	**APPELLANT/CLAIMANT**
AND	**DAVID PANTON**	**RESPONDENT/DEFENDANT**

Mrs. Pamela Benka-Coker, Q.C., Gordon Steer, Miss Debra Dowding instructed by Chambers, Bunny & Steer for the appellant

Ransford Braham and Mrs. Georgia Gibson- Henlin instructed by Suzanne Risden-Foster of Livingston, Alexander & Levy for the respondent

22nd, 24th, 25th, 26th May; 13th, 14th, 15th, 16th, 21st 22nd, 26th, 28th June; 4th 11th, 20th, 25th, July and 29th November 2006

HARRISON, P.

This is an appeal from the order of Miss Justice Gloria Smith on 20th March 2006 that the child "A" be returned to Georgia, United States of America ("USA") in the custody, care and control of the respondent ("the father").

The appellant ("the mother") and the father, both Jamaican nationals, were married in New York, USA and returned to Jamaica. "A" was born in Jamaica to the parties in March 2001.

The parties, along with "A", resided in Atlanta, Georgia, USA, from February 2004. They separated in May 2004 and divorced in June 2004.

On 10th June 2004, pursuant to an agreement signed by the parties on 9th June 2004, a final judgment and decree was pronounced in the Superior Court of Fulton County, Atlanta in the state of Georgia, USA. Primary physical custody of the child "A" was granted to the father with visiting parental rights to the mother.

On 25th August 2004, the said court denied a motion filed on 10th August 2004 by the mother to set aside the said final judgment, decree and settlement on the ground of duress. Judge Melvin K. Westmoreland found that the mother had consented to and acquiesced in the said agreement.

Having moved out of the matrimonial home, the mother lived next door interacting with the child. She returned to Jamaica in June 2005.

In December 2005, the father brought "A" to Jamaica to visit the mother, with the understanding that he would return for "A" in January 2006. On 11th January 2006, the father having come to Jamaica to take "A" to Atlanta, left without "A" who was retained by his mother.

On 17th January 2006 the mother obtained an interim injunction granting to her custody, care and control of "A" and an injunction restraining the removal of "A" from Jamaica. The father applied for an order discharging the injunction and seeking permission to take "A" out of the jurisdiction, a summary return to Atlanta, Georgia.

In Atlanta, "A" had been attending school and church, was training to be an acolyte and interacted well with his cousins.

The statutory provisions governing proceedings concerned with the custody of a child is contained in the Children (Guardianship and Custody) Act, section 18 of which stipulates that the welfare of the child is "... the first and paramount consideration". This principle pre-dominates all other considerations.

A court considering the summary return of a child to another jurisdiction must be guided at all stages by the principles of what would be in the best interests of the child. A balance must exist between the summary return and a hearing on its merits on the question of custody.

The Supreme Court has jurisdiction in respect of the custody of children (section 2) and accordingly such a court will not decline jurisdiction when the parties and the child are within its jurisdiction. In addition, the power of the Court of Chancery as parens patriae to all children, which is now exercisable by the Supreme Court, compels such a court to be slow to decline to exercise such power whenever the occasion arises, because of its all-encompassing interest in the welfare of the child. This power is exercisable by the Court, despite the wishes of the respective parents.

The true welfare of the child which is paramount, has been described as:

> "... the child's happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings,..."
> (***Forsythe v Jones*** SCCA No. 49/99 delivered 6th April 2001 at page 8)

The Act which governs these proceedings does not in any way assist in the procedure governing the request for the summary return order.

The cases which are based on the provisions of the ***Hague Convention on the Civil Aspects of International Child Abduction 1980***, which Convention is applicable to countries which are parties thereto, are not applicable to the instant case. The Convention, which discourages kidnapping or wrongful detention of children between states, mandates a court seized of such matters to make peremptory returns of such children without a prior hearing on its merits. Jamaica is not a party to the Convention. In ***Re P (A minor)(Child Abduction: Non Convention Country)*** [1997] Fam. LR 45 the Court of Appeal held that the Hague Convention concepts are not to be applied in a non-Convention case.

Non-Convention cases which concern the determination whether a child who has been removed from one state in breach of a custody order, should be speedily returned thereto or the question of his custody heard on its merits in the state to which it has been taken, is governed by the welfare of the child principle. Because the parties generally, are of conflicting views on the choice of jurisdiction, the ultimate decision, inevitably, determines the appropriate forum. In that regard, the concept of forum non conveniens derived from ***Spiliada Maritime Corporation v. Cansulex Ltd*** [1987] A.C. 460, is applicable to custody cases in that a court may stay the proceedings before it in certain circumstances. However, that concept is not the means by which the determination is made. In particular cases it may be a factor in determining the appropriate forum, for example, in circumstances where the evidence in support of events relevant to

the custody application is available in the foreign jurisdiction. However, the welfare of the child is the prime test to be applied by a court in deciding whether or not it will consider anew the application for custody. (***Thompson v. Thompson*** 30 JLR 414)

The summary return order may only be made after considering several factors. The fact that one of the parents is in breach of a custody order by preventing a child from returning to his former residence, is undesirable, but it is not a disqualifying feature. In ***McKee v McKee*** [1951] 1 All ER 942, the father of an infant child took him from the United States of America into Ontario, Canada in breach of an order granting custody to its mother from whom the father was divorced. They were all American citizens. In habeas corpus proceedings in Canada custody was granted to the father, but ultimately reversed by the Supreme Court of Canada and granted to the mother. On further appeal to the Judicial Committee of the Privy Council, their Lordships held that despite the fact that the father had taken away the child to avoid obedience to the American court, he was entitled to have the question of custody re-tried in Canada. Their Lordships (per Lord Simonds) at page 946 said:

> "The fact that the father had broken an agreement solemnly entered into was, therefore, a circumstance which the learned judge had to take into account and weigh in determining what was for the welfare of the child. This he expressly did, and their Lordships see no ground for saying that he gave too little weight to what was only one of many elements in the case."

Although the conduct of the parents is a relevant factor in determining the grant of custody of a child in its best interests (Section 7 of the Act) it was held

that despite the prima facie unlawful behaviour of a parent who kidnapped its child, that will not disentitle such parent to custody. (See ***In the marriage of Schenck*** (1981) 7 Fam. LR 170).

In addition, the fact that a valid enforceable custody order exists in the state from which the child was taken is not a reason for a court in a different jurisdiction to decline to consider anew the matter of custody. The existence of a valid foreign order is one of the factors to which some weight must be given, but that will not preclude a court in another jurisdiction in some circumstances from adjudicating on the issue of what was best for the welfare of the child. Again, their Lordships in ***McKee v. McKee*** (supra) at page 947 said:

> "...the judgment of a foreign court as to the custody of an infant need not, as a matter of binding obligation, be followed in the courts of Ontario although great weight must be given to it."

There are other factors which a court, from which the summary return order is sought, is obliged to consider in determining the manner in which the interests of the child could best be served. For example, a sudden flight from a jurisdiction immediately after a custody order is made, in bold defiance of the foreign court's order may attract a summary return order. On the other hand, where parties have, for some time accepted and regarded themselves to be bound by the order, but new circumstances of disputes have arisen, and a child taken from one jurisdiction to another, that latter court if properly seized of it, may be inclined to hear the matter on its merits. Their Lordships in the ***McKee*** case said, at page 948:

> "Once it is conceded that the Court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. If that is so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant."

In ***Z P v P S*** [1994] 181 CLR 639, the majority of the High Court of Australia, ordered that the Family Court consider, on its merits, the statement of the mother of a child who had been brought by her to Australia in disobedience to an order of a Greek court, that she did not intend to return to Greece. Summary return was denied. The court re-affirmed that the welfare of the child is the first issue in making a summary order but held that when the child is within the jurisdiction, the doctrine of forum non conveniens is applicable. Their Lordships (Mason, C.J. Tootley and McHugh,JJ), with reference to the ***Family Law Act, 1975 (Australia),*** at page 647 said:

> "...when a child is within the jurisdiction of the Family Court, the doctrine of forum non conveniens has no application to a dispute concerning the custody of the child. Injustice to one or other of the parties, expense, inconvenience and legitimate advantage, which are always relevant issues in a forum non conveniens case are not relevant issues in a custody application. In some cases, those matters may bear on issues which touch the welfare of the child but they are not themselves relevant issues when the question arises whether the welfare of the child requires the

> making of an order that the issue of custody be determined in a foreign forum. When the Family Court is seized of jurisdiction in relation to the custody of a child, its duty is to exercise its jurisdiction."

Their Lordships did embrace the welfare principle as it relates to jurisdiction, in the ***In re F (A Minor) (Abduction: Custody Rights)*** [1991] Fam. LR 25, in which, at page 31, Lord Donaldson in the Court of Appeal (England) said:

> "The welfare of the child is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child's best interests require. The second context, which only arises if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made." (Emphasis added)

Their Lordships, of the majority (Deane and Gaudron JJ) in ***Z.P. v P.S.*** (supra) placing the issues of forum non conveniens in context at page 699 said:

> "In cases such as the present, the issue is not forum non conveniens. Rather, as Mason CJ, Toohey and McHugh JJ point out, the issue is whether the welfare of the child requires speedy repatriation to the country from which he or she was taken, with the courts of that country determining custody and other matters relating to the child's upbringing. We would add, however, that in determining what is the interests of the welfare of the particular child, a court is entitled to take account of considerations of public policy reflecting and protecting the interests of all children. Among those considerations of public policy is the prima facie importance, in the interests of all children, of discouraging the taking of a child from his or her homeland and familial environment, in breach of the law of that homeland, for the purpose of obtaining standing or some forensic advantage in a dispute about custody, access or financial support in the

> courts of some other place. Such abduction of children across national boundaries, if encouraged by being treated as an accepted means of attracting the jurisdiction of, or obtaining some procedural advantage in, the desired forum, pose a threat to the security of any child subject to competing national claims or loyalties."

The doctrine of forum non conveniens was explained by the authors P.E. Nygh, ***Conflicts of Laws in Australia, 4th edtn., Butterworths, (1984)***

> "In the United States and Scotland the courts have evolved a general doctrine of forum non conveniens to allow them to decline jurisdiction where the forum chosen by the plaintiff is clearly inappropriate. As Lord Sumner explained the Scots rule in *Societe du Gaz de Paris v. Armateurs Francais* (1926) SC (HL) 13 at 22: 'the object ... is to find that forum which is more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends."

The authors Finlay and Bailey-Harris in ***Family Law in Australia, 4th edtn. Butterworths [1989],*** at paragraph 6118, said:

> "Choice of forum is ordinarily largely determined by a consideration of the convenience of the parties and their witnesses. However, custody proceedings are subject to an additional consideration not present in other litigation, namely the paramount welfare of the child." (Emphasis added)

A court considering an application for a summary judgment return order, should not do so in isolation from the knowledge of the nature and composition of the foreign forum to which the child, if returned, would be subject. The origin of the doctrine, also highlighted in the ***Spiliada*** case, (supra) being commercially based, was concerned principally with the parties and their witnesses in a competing jurisdiction.

In child custody cases, because the welfare of the child is paramount, all else is subordinate to that concept. The doctrine is applicable, in some cases. In the case of ***In the marriage of Schwarz*** [1985] 10 Fam. L.R. 235, the Full Court, at page 237 observed:

> "... considerations relating solely to the convenience of the parties and their witnesses ... have little relevance to a case, where the welfare of the child is the paramount consideration."

I agree with Mrs. Gibson-Henlin, counsel for the father that the doctrine of forum non conveniens applies, in the instant case.

Because the welfare of the child principle covers "its happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings", a court considering the summary return order ought to determine which of two fora is more appropriate to evaluate effectively those varied factors. Logically, the forum of the country in which the child is ordinarily resident or "... with which ... the child has the closer connection...", as Baroness Hale so described it in ***In re J (a child) (FC)*** [2005] UKHL 40, should be preferred.

A child's ordinary or normal residence must be viewed not as terms of art, nor equated with the technical statutory definition of "habitual residence" in the Hague Convention cases. Ordinary residence or its closer connection is viewed in a practical everyday meaning, in the circumstances of the particular case. The term ordinary residence was defined by Lord Denning, M.R. in ***Re P (G.E.) (an infant)*** [1964] 3 All ER 977. At page 982 he said:

> "... what is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of sixteen? So long as the father and mother are *living together* in the matrimonial home, the child's ordinary residence is the home and it is still his ordinary residence, even whilst he is away at boarding school. It is his base, from whence he goes out and to which he returns. When father and mother are at variance and living *separate and apart* and by arrangement the child makes his home with one of them then that home is his ordinary residence, even though the other parent has access and the child goes to see him from time to time. I do not see that a child's ordinary residence, so found, can be changed by kidnapping him and taking him from his home; even if one of his parents is the kidnapper. Quite generally, I do not think that a child's ordinary residence can be changed by one parent without the consent of the other. It will not be changed until the parent who is left at home, childless, acquiesces in the change, or delays so long in bringing proceedings that he or she must be taken to acquiesce."

Consequently, the country in which the greater influences can be seen to have brought about the varied factors that constitute the best welfare of the child, for some period of time, will be the country of the child's ordinary residence or with which the child has the closer connection. Commenting on this issue, Baroness Hale in ***In re J,*** (supra) at paragraph 32 and 33 said:

> "The most one can say, in my view, is that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed, in this or any other case, that allowing a child to remain here while his future is decided here inevitably means that he will remain here for ever.

> One important variable, as indicated in ***Re L***, is the degree of connection of the child with each country. This is not to apply what has become the technical concept of habitual residence, but to ask in a common sense way with which country the child has the closer connection. What is his 'home' country? Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this." (Emphasis added)

Furthermore, along with the other factors, a court considering the summary return order, must, in its balancing exercise, be satisfied that the court of the country to which it is sought to return the child, recognizes and employs and will apply principles similar to the accepted welfare of the child principles. In that regard, the court considering the application will be assured that the welfare of the child will be preserved, in the event that the child is summarily returned. This cautionary condition was stated by Ward, L.J. in ***In Re JA (Child Abduction: Non-Convention Country)*** [1998] 1 FLR 231, at page 241. He said:

> "... the court cannot be satisfied that it is in the best interests of the child to return it to the court of habitual residence in order that that court may resolve the disputed question unless this court is satisfied that the welfare test will apply in that foreign court."

This approach was approved of in ***In re J*** (supra), where Baroness Hale said, at paragraph 15:

> "In practice, however, as foreign law is presumed to be the same as English law, it will be for the party resisting return to show that there is a difference which may be detrimental to the child's welfare." (Emphasis added)

It is the duty of a judge, therefore, who is asked to exercise his discretion in respect of the summary return of a child to another jurisdiction, to examine the various competing factors relevant to the well-being of the child involved. He has to keep constantly in his mind, in that balancing exercise the paramouncy of the welfare of the child. The fact that the custody order exists in a foreign court will not by itself bind the trial court, but comity compels that consideration be given to such foreign order and to the weight to be attached to it, in the circumstances. The approach of the exercise of the discretion of a judge hearing the application was approved by their Lordships' Board in ***McKee v McKee,*** (supra.)

> "It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. It is, however, the negation of the proposition, from which every judgment in the present case has proceeded, *viz.*, that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper

weight will depend on the circumstances of each case."

As long as a judge applies the correct principles in the conduct of the determination of the appropriate forum, the ultimate decision in the exercise of his discretion will not be disturbed by an appellate court unless the trial judge is plainly wrong (see ***G v G (Minors: Custody Appeal)*** [1985] 1 WLR 647). If, for example, a trial judge had considered other factors to be of greater importance than the welfare of the child test, an appellate court would be obliged to interfere. However, an appellate court will not substitute its own views for that of the trial judge who has considered the application for a summary return.

The following grounds were, as summarized, argued by learned Queen's Counsel for the appellant mother:

1. The learned judge failed to examine the affidavit evidence in its entirety, and failed to examine any of the affidavit evidence put forward by the mother in support of her claim to custody of the child. This contention is supported by the fact that when she sought to enumerate the child's substantial connection with Atlanta, Georgia, U.S.A., she failed to mention or balance the nineteen or more criteria which establish the child's real, substantial, and continued connection with Jamaica, the land of his birth.

2. This erroneous conclusion that the child's real and substantial connections are now with Atlanta Georgia, led to the erroneous exercise of her discretion in ordering the return of the child to Georgia.

3. The learned judge confined her decision to the case presented by the father, in seeking to determine what decision would best promote

the child's interests, wrongly relied on an e-mail from the mother which praised the father's paternal attributes, without taking into account the fact that that e-mail was written in when the parties were residing together as man and wife and prior to her complaints as to how the father was parenting the child.

4. There is no mention in her judgment of any evidence which could adversely impact the child's best interest. Nowhere, does she demonstrate in her judgment that she has indeed taken these issues into consideration, and evaluated them nor explain on competing and often contradictory affidavit evidence, the process by which she arrived at her conclusions.

5. The learned judge erred in law and in fact when she placed great store on the consent agreement signed between the parties and dated the 9th June 2004, but failed to refer to or take into account the contents of document intituled 'mandatory addendum' attached to the final decree of divorce in which the parties were to share physical custody of the child 50/50, and to determine its effect.

6. She erred when she failed to examine the contents of that addendum referred to the 'Kidnapping cases' relied on the findings of contempt against the mother by the courts in Atlanta, for breach of the consent order which gives primary care and control of the child to the father, and yet the 'mandatory addendum says that each parent should share equally, the physical custody of the child.

7. She erred by her unwarranted reference to the 'kidnapping cases,' wrongly relied on the concept of 'habitual residence' and she also wrongly concluded, that the U.S.A. is the child's habitual residence.

8. The learned judge found without explanation that the principle of 'forum conveniens' known to Private International Law, did not apply 'per se' to custody cases, and yet she proceeded to utilize the principles stated therein in arriving at her decision.

9. The learned judge attached insufficient, or no weight at all to the fact that the parties including the child, are Jamaican Nationals. She misinterpreted, and failed to apply the binding ratio decidendi of the Court of Appeal case of **Thompson and Thompson.**

10. The learned judge sought to reinforce her relegation of nationality to a position of unimportance by quoting from the judgment of Mr. Justice Sykes in **Grant v Robinson** in preference to the decision of our own Court of Appeal and the Privy Council in favour of that of a judge of concurrent jurisdiction.

11. The court in Jamaica has no jurisdiction to decline to hear a case for custody, properly presented by a Jamaican National, in relation to a Jamaican child, unless there are 'exceptional circumstances' which would warrant such a refusal. In this case, there are none and the Jamaican Courts should not defer to the courts in a foreign country. More importantly, there has never been a hearing on the merits in relation to the custody of the child in the United States of America, and there is at present no application for custody in those courts.

12. Contrary to the principles stated in the authorities by which the learned judge is bound, she wrongly attached too much importance to the existence of the consent order for custody in those courts, and consequently failed to exercise her discretion in keeping with the principles adumbrated in those cases.

13. The judge failed to take into account, and apply the principles which are applicable in determining how a court, properly seised of a custody application, should treat with a pre-existing custody order in a foreign court.

14. The learned judge also erred in law when she reversed the priorities and stated that where there are two competing jurisdictions, the court should first determine in which court the case should be heard. With respect, the first thing to be considered is what would be in the child's best interests and having determined that, in which court would these interests best be served.

15. The learned judge failed to indicate beforehand the procedure she was adopting in this case, and so, the child's welfare was severely prejudiced, in that the process that was followed did not facilitate a proper determination of what is in the best interests of the child.

16. A proper and full determination of what was in the child's best interests was sacrificed for expedition and haste, and effectively prevented the kind of careful review necessary, to determine the child's best interests and what would best promote his welfare and happiness. She thereby wrongly exercised her discretion in returning the child to Atlanta.

17. The appellant therefore asks that the Appeal be allowed, that the orders of the Honourable Ms. Justice Smith made on the 20th March 2006, be discharged, and the orders of the Honourable Mrs. Justice Sinclair-Haynes be restored.

18. That this Honourable Court, do order that the hearing of the substantive application for custody of Alexander proceeds in the Supreme Court of Judicature of Jamaica.

The principal issues which arise in the instant case of an application for a summary return order are:

(1) Does the Court have the power to decline jurisdiction and return a child to a foreign jurisdiction?

(2) To which of the two competing jurisdictions should the question of custody of the child be subject in order to promote its best welfare;

(3) By what procedure is this decision best achieved?

(4) What factors should a court consider in order to arrive at a proper conclusion?

(5) Did the learned trial judge adopt the correct approach?

(6) What are the powers of an appellate court in such circumstances?

Learned Queen's Counsel for the mother argued that the Jamaican courts had the jurisdiction to hear a custody application by the mother in respect of "A", who as a Jamaican child has the right to have these courts determine his welfare. Accepting the court's obligation to the child as parens patriae, learned Queen's Counsel, argued that the trial court should not have made findings of fact on contested affidavit evidence and should have allowed cross-examination of the witnesses who gave affidavit evidence, before an order for the summary return was made. This is particularly so, in this case allegations of abuse of "A" have been alleged and not yet resolved.

The true welfare of a child, such as "A" in the instant case, embraces a comprehensive view of all aspects that determine its proper well being, namely,

its happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings- (***Forsythe v Jones***, supra). A court requested to grant a summary return order as opposed to the consideration of a custody order, is obliged to consider, at which location may these varied factors which combine to achieve the best welfare of the child may be best found. With such an aim in view, such a court is obliged to balance the contentions of the competing interests on the uncontested evidence. Undoubtedly, if the answers point in one direction, a court, in its discretion is obliged to follow such dictates, both according to the statutory provisions and its role inherited from the Court of Chancery as parens patriae to a child who may at that time be in its jurisdiction. Both sections 7 and 18 of the Act confer on the Supreme Court the power and consequently the obligation, to make orders in respect of the custody of a child "... having regard to the welfare of the child.." and mindful of the fact of "... the welfare of the child as the first and paramount consideration ...", respectively. In some circumstances, however, an order for summary return of a child to a jurisdiction from which it was removed may be the proper one. Such a power undoubtedly exists in this Court (see ***Thompson v. Thompson,*** supra). The House of Lords conclusively stated the power of the Court, at common law, to make summary return orders. Baroness Hale, ***In re J (a child)*** supra, at paragraph 26 said:

> "... the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits."

Her Ladyship also observed the manner, in which the power is exercised. She said at paragraph 25:

> "... in all non-Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other consideration."

The court must however first decide which court should decide the child's best interests. See ***In re F (a minor) Abduction: Custody Rights)*** (supra).

Although the latter case, in which the Hague Convention did not apply, was concerned with an abducted child, the general principles which guide a court, in the context of the welfare of the child, in the consideration of a summary return order are therein re-inforced.

The court in Jamaica has the power, in certain circumstances to decline jurisdiction and return a child summarily to a foreign jurisdiction, without a hearing on its merits. In such circumstances a judge is not obliged to allow cross-examination of the witnesses who have given evidence on affidavit, seeing that, the judge is not at that time required to make primary findings of fact, nor pronounce on the credibility of the witnesses. The court may therefore in those circumstances properly base its decision on the undisputed evidence tendered, as Miss Justice Smith did.

The learned judge at page 14 of her judgment said:

> "I concluded that the Court has a discretionary power as to whether or not to hear the merits of the case in an application of this nature. ...

> I further concluded that the lack of hearing on the merits incorporated the element of speed to facilitate the prompt resolution of these applications which is what is required as there is always an element of urgency in these applications."

She cannot be faulted in this regard.

The doctrine of forum non conveniens does apply in the circumstances of the instant case, contrary to the argument of learned Queen's Counsel for the mother.

A court which is asked to consider whether it will make an order for the summary return of a child, ever mindful of the welfare of the child must consider which of two jurisdictions is better suited to determine that issue. Inevitably, the doctrine of forum non conveniens arises and closely aligned thereto is the question of the ordinary residence of the child. This is equally described as the country to which the child enjoys a closer connection, which may be a factor in the determination of the issue of summary return.

In ***Thompson v Thompson,*** (supra), this Court regarded "the child's habitual residence [as] a factor in all cases persuasive, in many determinative, but in none conclusive."

The term "ordinary residence" or "closer connection" not being terms of art, as they relate to the child will assist a court in deciding which environment is likely to possess and provide the factors recognized as most likely to promote the concept of the best interests of the child.

In the instant case, it is therefore proper to examine the events of the child's more recent history of development, prior to his stay in Jamaica in

January 2006, in order to conclude the issue of the country of "closer connection" or of "ordinary residence".

Born in March 2001, the child "A" was taken from Jamaica by his father and mother to reside in Atlanta in February 2004, at the age of two years and eleven months. Up to that age a child would not be expected to have yet acquired any functional perception of his environment or surroundings. "A" lived in Atlanta up to December 2005, a period of almost two years, during which period several events occurred which would have created significant effects on him, then in his formative years, promoting his well-being. These events are indications of some of the known factors which do contribute to the welfare of the child. The undisputed affidavit evidence is, that the child "A" was happy and attending school and church in Atlanta, Georgia, benefitting initially from the close co-operation of both mother and father. He was also being trained to be an acolyte. His moral, religious and educational upbringings were thereby assured. The father is employed in a good job by an investment firm, Mellon Ventures and bought a home, in which the family lived. The child "A" enjoyed a good relationship with his cousins in Georgia. This satisfied the requirement of proper physical and material surroundings for his good welfare. The above primary factors which contribute to the welfare of the child were shown to exist in Atlanta in respect of the child "A".

Prima facie, up to December 2005, the child "A", in his mental awareness and existence had a closer connection with Atlanta, Georgia. That jurisdiction

therefore presents itself as, the more relevant and appropriate to determine any further issues concerning the welfare of the child "A".

Miss Justice Smith, in the court below, was correct to find, at page 26 of her judgment that:

> "4. The relevant child 'AMDP' was ordinarily resident in the U.S.A. having been taken there by his parents when they migrated there in February 2004.
>
> 5. That the U.S.A. is the country with which the child now has the most real and substantial connections.
>
> This is where he was attending school. This is the place where he was attending church and Sunday school and was in training as an acolyte.
>
> This is also the place where he had his doctor, a number of close relatives especially his young cousins, and his therapist who had been working with him for some time."

In addition, because the conduct of the parents is relevant to the welfare of the child in custody proceedings, the various allegations by the mother of improper behaviour by the father in Atlanta are best aired and resolved in the courts of Atlanta. It is worthy of note that these allegations were investigated by the Fulton County Department of Family and Children Services in Georgia. By letter dated 17th February 2006, signed by an officer from that department, the allegations were found to have been unsubstantiated.

All the persons who could be called as witnesses in a court considering the welfare of the child "A", in custody proceedings, are in Georgia, USA and therefore more available to the foreign court. Furthermore, if the mother decides

to raise further in the Court, the complaint of improper conduct of the father in Georgia, in respect of the child "A", the witnesses would be more accessible and the records and report of the Fulton County Department of Family and Children Services would be available to that foreign court.

In ***In re H (Infants)*** [1966] 1 W.L.R. 381, two boys United States of America citizens, whose divorced parents were American citizens, were brought to England by their mother, in March 1965, without the knowledge of their father or the Supreme Court of New York State, which in December 1964, had given custody to the mother and ordered that they remain in a defined area, living with the mother in New York. This was a consent order. In June 1965, the mother bought a house in England. In June 1965, the New York Court ordered that the children be returned to New York. In July 1965, the mother started wardship proceedings in the English Court. In October 1965 the father asked that the court order the two children be returned to him to be taken to New York and that the wardship proceedings be discharged. Cross, J, ordered that on the facts and evidence, considering the welfare of the children, who had a home in New York, they should be returned to New York where that court would decide with whom they should reside. The mother appealed on the ground that the judge was wrong to abdicate his responsibility by ordering the return of the boys without first hearing the evidence and then exercising his discretion. The Court of Appeal (England) held, citing ***McKee v McKee,*** (supra), that the judge was correct to return the boys, and there was no authority requiring him to inquire into all the matters before doing so. The Court found that Cross, J had in mind the welfare

of the child, that a consent order by the New York Court, not on the merits of the case, did not, in the circumstances, militate against the return of the boys and there was no justification by the mother for the taking of the boys to England.

In the marriage of Mittelman & Mittelman [1984] FLC 91-578 the husband, a citizen of the United States of America applied to the Family Court of Australia in August 1984 for an Order that the two children of the marriage be returned to the United States from Australia where they had been taken by the wife, an Australian citizen, in July 1984, in breach of custody and residential orders of the Superior Court of California made in January 1984. Also in July 1984, the California Court granted physical and legal custody of the children to the husband and ordered that the wife return them to the United States. Nygh, J. acknowledging that the first principle was the welfare of the children, held that an order of a foreign court was not entitled to automatic recognition, that the factors relevant to the application included, the risk of alienation of the children from their accustomed background and separation from one parent, the capability of the parent seeking the return to act as a single parent and whether the law of the country to which the children would be returned would protect their interests. It was desirable that one court, the California Court in this case, which was seised of the matter, determine the issue of custody, as soon as possible. The evidence of both the father's and the mother's fitness for custody, on the factual circumstances, existed in California and so was best considered in that country. He said at page 79, 668:

> "It is my view that in the interests of the children it is desirable that the matter be referred back to the court which has the best evidence available, is most advanced in the hearing of the matter and can resolve the matter with the least possible delay because it is already seised of it." (Emphasis added)

A peremptory order was made to return both children to the United States of America.

In both cases, non-Convention cases, the court ordered the summary return of the children concerned, having considered material factors in the context of the welfare of the child, including allegations against the father as to his conduct that he was unfit to maintain custody of the said children.

The law therefore requires a court considering an application for the summary return of a child to another jurisdiction to balance the factors favourable to and disadvantageous to the welfare of the child in order to make a proper determination. A judge hearing such an application must weigh the competing issues in that balancing exercise.

The principles that may be applied in respect of a summary return order by a court, without investigating the merits, are the same as when there is a full investigation, because of the overriding duty to regard the welfare of the child as paramount. In ***Re L (Minors)*** [1974] 1 WLR 250 the Court of Appeal dismissed the appeal of the mother who had been ordered to return the two children to Germany in wardship proceedings, in circumstances where she had taken the two children of the marriage from Germany to England, with the initial consent of their German father, but made them wards of the court in England, Buckley, L.J. at page 264 said:

> "Where a court makes a summary order for the return of a child to a foreign country without investigating the merits, the same principles, in my judgment, apply, but the decision must be justified on somewhat different grounds.
>
> To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the child should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child."

These principles were also relied on by Nygh, J. in ***Mittelman v Mittelman*** (supra) and approved by the House of Lords in ***Re J (a child),*** (supra).

The prime focus of the court in considering the application for an order for the peremptory return of the child "A" is, his removal from an established existence of school, friends, happy and healthy life, physical and psychological, well-being, any risk to "A" being apart from his mother and being cared for effectively by his father solely, and the fact that it was more desirable that one court decide the issue of his custody in order to avoid any conflict.

Learned Queen's Counsel for the mother argued that Miss Justice Smith, in finding that the child "A's" "real and substantial connections are now with Atlanta, Georgia" failed to "make any mention of the nineteen or more criteria which establish the child's real, substantial and continued connection with Jamaica."

Mr. Braham for the respondent submitted that there was "extensive evidence of the child's settled life in Georgia" and that the child had no home, school, friends or close relations in Jamaica prior to the mother's unilateral decision that he remain in Jamaica after December 2005.

Miss Justice Smith's finding in the context of the welfare principle, at paragraphs 4 and 5 on page 26 of her judgment (supra), was not as a result of having conducted an enquiry on its merits, nor was she required to do so. Neither was she required to, nor was she enumerating points in favour and against the respective party's contention of the child's ordinary residence. The balance required is a choice between a summary return based on a closer relationship and an in-depth hearing on its merits. Her decision to exercise her

discretion on the uncontradicted evidence cannot be faulted. The learned judge found that -

> "... the relevant child remained in the physical care and control of 'DP' from the 10th June 2004 (date of the divorce) to the time he arrived in Jamaica in December 2005, with periodic access to the mother."

And re-iterating the paramount importance of the welfare of the child, she acknowledged the existence of the custody order in the Fulton Court, Georgia, by consent and maintained, correctly, that that Court,

> "... should be made to resolve any disputes which might have arisen between the parties."

The learned judge in making her said order sought to "restore certainty and stability..." in the child's life, by returning him "... in the care and control of his father." The learned judge on the uncontested evidence saw no risk in doing so. In addition, the learned judge "found some consolation in the words of the mother" in the e-mail sent to the father on 24th May 2004, which inter alia read:

> "I thank God for sending you to be Alex' dad he could not have sent a better person for that job and I would like the world to know that."

Although it was argued that this letter was written at a time when the parties were living together and therefore should not have been relied on by learned judge in assessing the conduct of the father, the mother in her affidavit dated 15th February 2006, placed in perspective the relationship of the parties then. She said, at paragraph 52:

> "It is agreed that we moved to Atlanta on the 25th day of February, 2004 as a family or so I thought but by April 2004 he [father] was adamant that he wanted a divorce by any means. (Emphasis added)

Therefore when the e-mail on 24th May 2004, therefore, a "parting of the ways" was already imminent.

Miss Justice Smith considered, in the context of the welfare of the child A, the separation from an environment ensuring "the child's happiness, his moral and religious upbringing, the social and educational influences, his psychological well being and his age, "the absence of risk in separation from his mother, the capability of the father as a sole parent, with the help of a nanny and maintained that:

> "The fact that there is an existing Custody order in the Georgia Court in respect of the child "AMDP", if this Court was to embark on another custody hearing and come to a different decision then there would be in existence two conflicting orders. This would lead to uncertainty and confusion which no doubt would result in serious conflict and damage to the child."

The learned judge was thereby satisfying another aspect of the proper test to be applied in determining on application for a summary return order. (See ***Re L (Minors)*** supra, followed ***In the marriage of Mittelman & Mittelman*** supra).

There is no virtue in these complaints by learned Queen's counsel for the mother.

It was further argued that the learned judge failed to consider the import of the mandatory addendum filed in the Fulton Court, Georgia, particularly in respect of the notation "50/50" in respect of shared physical custody between the parties. In my view the learned judge was not incorrect in not doing so.

The consent agreement dated 9th June 2004 was signed by both parties and was "incorporated ... and made a part of [the] Final Judgment and Decree [of divorce]" dated 10th June 2004. The agreement, sanctioned by the Superior Court of Fulton County, made the father "primary physical custodian" of the child. The mandatory addendum entitled "Mandatory Addendum to Final Order", signed by both parties in the presence of the Judge of the Court, is concerned with the financial arrangements for the support of the child, and highlights the income of mother and father. The mandatory addendum is not concerned with nor purports to deal with the custody of the child. The paragraph relied on by learned Queen's Counsel, as omitted from consideration of the learned judge Miss Justice Smith reads:

> "The – (a) Party/parties, OR ____ (b) Trier of Fact, has considered the existence of special circumstances and has found the following special circumstances marked with an 'X' to be present in this case: ...
>
> - 5 Shared physical custody arrangements, including extended visitation; ..."

Following the word "visitation" on the printed form is the notation in handwriting "50/50". The latter notation is not a requirement of the printed form, nor is any provision made on the said form for such a notation. Consequently, the "50/50" notation which seeks to specify the nature of the shared custody must be ignored. The purpose of the mandatory addendum is conclusively revealed in the final paragraph, which inter alia reads:

> "Having found that ___(a) no special circumstances exist, OR___(b) special circumstances marked with an 'X' to be present in this case, the final award of child support which _____ shall pay to _____for support of the child(ren) is _____dollars per _____(a) week, OR _____(b) month, OR _____(c) other period."

The learned judge was correct in not interpreting the mandatory addendum as granting to the mother an equal share to the custody of the child "A" or as in any way detracting from the primary care and control given to the father, by the Fulton Court.

Miss Justice Smith was not incorrect to view the Jamaican nationality of the parties and the child "A" as a mere "element" and not determinate of the issue of whether or not to make the summary return order in the child's welfare. The dictum of Bingham, J and the decision of the Court of Appeal in ***Thompson v. Thompson,*** supra, recognizing the obligation of the Jamaican Court to assume jurisdiction in a case involving its nationals, must be viewed and understood in the particular circumstances of that case, and not as supplanting the paramouncy in importance of the welfare of the child principle.

The existence of a custody order in a foreign court is not binding on this Court, but this Court will pay due recognition to its existence. The mother and father consented to the custody order, as evidenced by the final judgment and decree of the Fulton Court, in Atlanta on 10th June 2004. Although a court in considering the option of a summary return order must not penalize a parent for the unlawful retention of a child, it is not insignificant to observe, that the mother disobeyed an order to which she was a consenting party and caused a contempt

order to be made against her. Miss Justice Smith did not use the fact of the breach of the foreign order as a reason for the summary return order, but noted that the father stated that "the mother would be purged of this contempt if she complies with the court's order and returns the child to that jurisdiction." It is regarded as undesirable that conflicting orders in different jurisdictions exist. That undesirable state of affairs may well cause uncertainty and conflict in the life of a child.

The said custody order in existence in Atlanta, Georgia, effectively binds the parties. However, Miss Justice Smith correctly held that such "orders are not final orders." Each expert witness for the parties, Stephen C Steele and Allan Earl Alberga, attorneys, have advised that the law relating to child custody contained in the Official Georgia Code Amendment regards the paramount consideration as "what is in the best interest of the child." Alberga, at paragraph 13 of his affidavit dated 7th March 2006 said:

> "A Georgia court exercising jurisdiction in child custody proceedings will make the interest and welfare of the child the center of its investigation. Even after the grant of a divorce, a parent can initiate an independent lawsuit requesting a change of custody if there is a material change of circumstances substantially affecting the interest and welfare of the child since the decree.
> ***Parker v Parker,*** 213 Ga. 198, 97 SE 2d. 580 (157)
> ***Barnes v Tant,*** 217 Ga 67(1). 121 SE 2d, 125 (1961)"

Both the law of the State of Georgia and Jamaica law therefore is the same, in respect of the welfare of the child being "the first and paramount consideration" (section 18 of the Act (Jamaica)). In addition, in Georgia either

party may apply to vary a custody order "...if there is a material change of circumstances," as in Jamaica. Section 7(5) of the Act reads:

> "5. Any order so made may, on the application either of the father or mother of the child, be varied or discharged by a subsequent order."

The existing custody order in respect of the child "A" may be varied by the Atlanta Court, on the application of either party if circumstances warrant such a variation.

Miss Justice Smith applied the proper test in taking into consideration the uncontradicted affidavit evidence in the case, in deciding the appropriate jurisdiction to determine the custody proceedings in respect of the child "A". The summary return order as opposed to a hearing on the merits was the correct order in the circumstances of the instant case. This Court should not therefore disturb the findings of the learned judge who applied the proper test, and took into consideration the relevant factors. She cannot be said to have been "plainly wrong."

During the currency of this hearing an application was made to this Court by the mother to adduce the fresh evidence contained in the affidavits of the mother and one Dorothy Hanna dated 20th May 2006 and 22nd May 2006 respectively. The attorneys-at-law for the father opposed the application. The affidavits alleged certain conduct of the father in regard to the child "A". The case of ***Ladd v. Marshall*** [1954] 1 WLR 1489 is relevant to such an application, and was referred to by both parties. In order to consider such evidence, an appellate court must be satisfied that such evidence (a) was not available at the

trial, (b) is credible (c) is relevant and (d) if it had been led it would have affected the decision arrived at. That test is a cumulative one, we did not find the evidence to be credible. The mother in her affidavit evidence said that a complaint was made to her on 3rd June, 2006 by her mother Dorothy Hanna of what the child "A" said. However, the grandmother said that the child "A" first made the report to her on 4th June 2006. It is our view that such a report of a child who would not be able to give evidence clearly is hearsay and in addition is unreliable. Furthermore, the discrepancy which arises quite starkly in respect of the respective dates of the report is a major discrepancy and therefore being unexplained is unacceptable and not credible.

The application for fresh evidence should be disallowed.

In view of the above reasons, it is unnecessary to reveal my thoughts in respect of the respondent's counter-notice filed.

The appeal should be dismissed and the order of Miss Justice Smith ordering the summary return of the child "A" to Atlanta Georgia to the care and custody of his father should stand.

SMITH, J.A.:

I have had the benefit of reading in draft the judgment of the learned President and I agree with his reasoning and conclusion. However, I must confess that I was concerned with the learned trial judge's treatment of the affidavit evidence. I was initially of the view that in the circumstances of this case, she had a duty in law to conduct an investigation of the merits of the case and that she had abdicated her duty by making the summary return order. For this reason, I propose to comment on this aspect of the appeal and in particular on the learned judge's treatment of the affidavit evidence.

On the 10th June, 2004, the Superior Court of Fulton County in the State of Georgia, U.S.A. gave its **imprimatur** to the custody agreement between the parents of a child of tender years. This agreement was incorporated in a final Judgment and Decree of Divorce. By this Order the primary physical custody of the child was given to the father (the respondent) with visiting parental rights to the mother (the appellant). In August 2004, the mother sought to set aside the Consent Order on the ground of fraud and mistake. The Superior Court of Fulton held that the final judgment incorporating the custody agreement was valid and binding. Both parents, who are Jamaicans, were at the time residing in the U.S.A.

In June, 2005, the mother returned to Jamaica. In December, 2005, as was agreed by the parties, the child came to Jamaica to spend time with his mother. The child was not returned to his father as was agreed. Instead, in January, 2006, the mother sought and obtained an **exparte** Interim Order granting her custody and control of the child and an injunction restraining the removal of the child from this jurisdiction pending the trial which was fixed for June, 2006. The father responded by applying to the Supreme Court of Fulton County in Atlanta, Georgia for an order to commit the mother for contempt of court for her breach of the June 9, 2004 agreement. On 27th January, 2006 the mother was found guilty of contempt of court in that she failed to return the child to the custody of the father.

Further, by a Notice of Application for Court Orders dated the 30th January, 2006, the father applied to the local Supreme Court for the following orders:

(1) That the Exparte Order made on January 17, 2006 by the Hon. Mrs. Justice Sinclair-Haynes granting custody, care and control of "AMDP" to his mother, "LHP", be discharged.

(2) That the Exparte Order made on January 17, 2006 by the Hon. Mrs. Justice Sinclair-Haynes that the relevant child is not to be removed from the jurisdiction until further order be varied to permit the father, "DP", to take the relevant child out of the

jurisdiction to return home to reside with the father at 4190 Rosewell Road, Atlanta Georgia U.S.A. on the father's undertaking to return the relevant child to this jurisdiction if this Honourable Court deems it necessary or expedient.

(3) Further and/or in the alternative that the court in the exercise of its summary and/or interlocutory jurisdiction do peremptorily order and direct that the relevant child be forthwith returned to the state of Georgia in the U.S.A. and in care and control of his father and in the best interests of the child.

(4) That the relevant child's passport is to be handed over to the Registrar of the Supreme Court forthwith for collection by the father "DP's" attorney-at-law, if not sooner handed over to the attorneys for the father "DP".

(5) Any other interim or other orders necessary or expedient to be made in the best interests of the child .

(6) Liberty to apply.

This Notice of Application for Court Orders was heard by Gloria Smith, J who on the 20th March, 2006 granted the orders sought.

Some twenty grounds of appeal were filed. At least two of these concern the judge's treatment of the affidavit evidence.

Treatment of Affidavit Evidence

At page 28 of her judgment the learned trial judge stated:

> "B. On careful examination of the undisputed parts of the evidence contained in the affidavits... its my considered view that the welfare of this child 'AMDP' demands that his life must now proceed with certainty, stability and regularity..."

Mrs. Benka-Coker, Q.C. submitted that the learned judge should have considered all the affidavit evidence and not only the undisputed parts in determining what is in the best interests of the child. Learned Queen's Counsel complained that in her judgment the learned judge gave no consideration to the affidavit evidence submitted by the mother. It is her contention that this is a fatal error of law. The only reasonable way for the court to approach the affidavit evidence, she argued, would be as follows:

> "(i) accept the evidence with which the mother and father agreed;
>
> (ii) the disputed evidence should not be looked at as to whether it is true or not but whether if it is true would it be in the best interests of the child that he be returned to the U.S.A in the custody and care of the father or, alternatively, is there a serious risk to the child if the allegations prove to be true.

She further complained that:

> (iii) the learned judge could not properly make positive findings on conflicting affidavit evidence in the absence of cross-examination. Counsel cited ***Chin v Chin*** [2001] 58W.I.R 355;

(iv) the learned judge should have addressed the allegations of abuse using the approach in ***Krainz v Krainz*** [2003] H.C.V. 190/03;

(v) the learned judge failed to give satisfactory reasons for her decision not to address the conflicting affidavit evidence. Counsel relied on ***Flannery v Halifax Estate Agencies*** [2000] 1 All ER 373;

(vi) the learned judge should have first determined what is in the best interest of the child by a careful consideration of all the circumstances of the case and then go on to decide which court would best determine those interests.

Mr. Braham and Mrs. Gibson Henlin for the father, submitted that the learned trial judge properly decided to "put aside" the conflicting evidence and correctly held instead that "the order for custody care and control of this child which was made in the ...Georgia [Court]... should be allowed to stand and if there have been any material changes, then such applications as are necessary should be made in that court."

The submissions of counsel for the father may be summarized as follows:

(i) There is no legal authority for the argument that the trial judge must consider all the evidence or have cross-examination in summary order proceedings. The cases relied on by counsel for the appellant's mother are not applicable to the instant case because they concern full trials on the merits. Reliance is placed on ***Re M (Abduction: Peremptory Return) Order*** [1996] 1FL.R.478 at 479; ***Re M (Jurisdiction: Forum Conveniens)*** [1995] 2 F.L.R. 224 at 228; ***Re J (A***

Child) (FC) [2005]UKHL 40 at para. 26 ***W & W v H (Child Abduction: Surrogacy)*** No. 2 [2002] 2 FLR 252 at 253 and ***Re T (Infants)*** [1968] 3 W.L.R. 430 at 436G;

(ii) The approach of the learned trial judge is correct as the court is obliged under the welfare principle in the summary return context to <u>first</u> determine the best court to decide custody. Reliance is placed on ***Re F (Abduction: Custody Rights)*** [1991] Fam. 25 at p.31E; ***Karides v Wilson*** [1998], Fam. CA 105 at pages 10-12; 2 ***ZP v PS*** [1994] 181 C.L.R. 639 at p. 648.

(iii) The argument that the learned judge had a duty in law to examine the unproven [and]... contested allegations to determine the extent to which, if true, such allegations could impact the welfare of [the child] is entirely without legal support and is against basic principles of justice. Counsel referred to ***Re M and R (Minors) (Sexual Abuse: Expert Evidence)*** [1996] 4 All ER 239 at para 36.

(iv) The argument that the allegations were potentially serious and could have affected the welfare of the child and therefore the Jamaican Court should have decided custody, is without legal support. In fact several courts have ordered a summary return of the child despite grave allegations of abuse of the child by one parent under the welfare principle. See ***Kirsh v Kirsh (sexual abuse and drug abuse)*** [1999] 2All SA. 193 at p. 13; ***Re HC Infants (Physical***

Violence) and assault) [1966]; 1 W.L.R. 381 at p. 385H. ***In the marriage of Mittelman and Mittelman (neglect of child)*** [1984]F.L.C. at p.578 at 79, 664 and ***Re (Child Abduction: Mother's Asylum) (Physical Violence and Cruelty in front of a Child)*** [2003] 2 F.L.R. 1105.

(v) Even if the learned judge in dealing with the allegation of sexual abuse had taken the approach suggested by counsel for the mother she would have been entitled to reject the mother's allegations because (1) there was no independent evidence supporting them; (2) the allegations of abuse were raised only after the father had provided independent evidence refuting all the allegations in her initial affidavits; (3) there were clear contradictions in the mother's affidavit evidence.

A large number of authorities were examined by counsel on both sides. Those relevant to the issues in the instant appeal make it clear that, in jurisdictions such as this one, in proceedings relating to custody the welfare of the child, is of paramount consideration. As indicated at the outset, my comments will mainly concern the judge's treatment of the affidavit evidence.

The authorities clearly show that the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the

merits ***Re J (A Child)*** (FC) 2005 UK HL40 at para. 26. The many cases cited by counsel on both sides disclose varied approaches adopted by the courts in dealing with an application for the summary return of a child. Accordingly, it is difficult from these cases to identify a general procedure. Each case, it seems, must be decided on its own particular circumstances. The principles and factors which govern the summary return of a child without a full investigation were summed up by Lord Justice Buckley in ***Re L (Minors) (Wardship Jurisdiction)*** [1984] 1WLR 250 at 264. These principles were accepted by the House of Lords in ***Re J(A Child)*** (F.C.) supra. Buckley L.J. said:

> "To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country."

Of course some of the circumstances referred to in the above statement of principles are far removed from the circumstances of the instant case. However, this statement of principles clearly indicate that there may well be circumstances where a full investigation of the merits of the case by the court in which the application for summary return is made, would be incompatible with the welfare of the child.

The judge must decide whether there should be a summary return or not. As Baroness Hale of Richmond stated in ***Re J*** (supra) at para. 28 there is always a choice to be made. "Summary return should not be the automatic reaction to any and every unauthorized taking or keeping a child from his home country. On the other hand, summary return may very well be in the interests of the individual child." Baroness Hale asked, "How then is the trial judge to set about making that choice?" She went on to say that the judge's focus has to be on the individual child in the particular circumstances of the case. She made mention of the **Hague Convention** principles with particular reference to the concept of "habitual residence" and concluded (para. 31):

> "There is no warrant for introducing similar technicalities into the swift, realistic and unsentimental assessment of the best interests of the child in non-Convention cases."

Baroness Hale suggested as a convenient starting point "<u>the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there.</u>" Those who oppose this

proposition must make out a case against its application. The weight to be given to this initial proposition will vary enormously from case to case. In this regard, their Lordships, made the following observations:

(i) One important variable is the degree of connection of the child with each country. Their Lordships cautioned that this is not to apply to the technical concept of "habitual residence" but to ask in a common sense way with which country the child has the closer connection.

(ii) The length of time the child has spent in each country is a relevant factor. Uprooting a child from one environment and bringing him to a completely unfamiliar one may not be in his best interests. On the other hand, the circumstances may be such that it would be less disruptive for him to remain a little while longer while his medium and long term interests are decided, than it would be to return him.

(iii) Another relevant factor is the question of legal conceptions of welfare. Will the other court apply principles which are acceptable to our courts as being appropriate? Their Lordships opined that the extent to which it is relevant that the legal system of the other country is different from our own depends upon the facts of the particular case. It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly

corresponds to that which is current here. Their Lordships observed that no one should be so arrogant as to think that his legal system is the best.

(iv) There are no **a priori** assumptions about what is best for any individual child. The court must look at the child and weigh a number of factors in the balance. These factors include the child's wishes and feelings, his physical, emotional and educational needs and the relative capacities of the adults around him to meet those needs, the effect of change, his own characteristics and background including his ethnicity, culture and religion , and any harm he has suffered or risks suffering in the future.

These are but some of their Lordships' observations and of course it was not their Lordships' intention to give an exhaustive list of the relevant factors.

The Affidavit Evidence

I now turn to the judge's treatment of the affidavit evidence. We have seen that, in deciding whether or not there should be a summary return of the child, a convenient starting point is the proposition that it is likely to be better for the child to return to his home country. Counsel for the appellant's mother sought to persuade the trial judge not to exercise her discretion to return the child on a summary or peremptory order as it would not be in his best interests to do so. The learned trial judge listed

the factors which she took into account in arriving at her conclusion. In my view the factors taken into account by the judge are unexceptionable. She did not start from any **a priori** assumptions about what is best for the child. There can be no doubt that she applied the welfare principle. After listing the factors taken into account the learned trial judge said of the welfare principle:

> "This principle supersedes and overrides all others in cases involving custody and upbringing of children. Subsumed in this principle are all the other considerations I am required to weigh in the balance in trying to do justice in this case."(emphasis supplied)

The learned judge then listed certain findings of fact. In conclusion, she said, among other things:

> "On a careful examination of the undisputed parts of the evidence contained in the affidavits, the arguments and submissions made and the authorities cited, its my considered view that the welfare of this child "AMDP" demands that his life must now proceed with certainty, stability and regularity. For him to be shunted from one jurisdiction to the next in unending litigation would not be in his best interest."

Is the contention of counsel for the appellant that the learned judge erred in not examining all the affidavit evidence before making an order for the summary return of the child, correct? I think not. In this regard, I accept as correct the submissions of counsel for the father/respondent that in summary order proceedings there is no legal requirement for the judge to examine conflicting evidence in all cases.

The nature and extent of the enquiry undertaken by the trial judge will vary from case to case. The learned judge may be satisfied that in the circumstances of a case the undisputed evidence comprises all the material she needs to determine the application for a summary return order. In other words, in the context of the welfare principle it is for the trial judge to decide whether in the particular case an examination of the conflicting affidavit evidence is necessary before granting or refusing a summary return order. This Court will not disturb the decision of the judge unless it is shown that she was plainly wrong in not examining the conflicting affidavit evidence.

Did the learned judge make any positive findings of fact on conflicting evidence? Counsel for the mother contended that she did and that she was not entitled to do so in the absence of cross-examination. The findings of fact made by the learned judge all seem to be based on the proven and undisputed parts of the evidence contained in the affidavits and not on the unproven and disputed aspects. Learned Queen's Counsel's reliance on ***Chin v Chin*** (supra), ***Krainz v Krainz*** (supra) and ***M v M*** (supra) is, in my view, misplaced. I say this, because, as Counsel for the respondents correctly pointed out these cases involve full trial on the merits. As regards the welfare of the child, learned Queen's Counsel submitted, with force that the decision of the learned judge not to examine the disputed aspects of the affidavit evidence was plainly

wrong because the allegations were potentially serious and could have affected the welfare of the child. As stated before, she contended that it was the duty of the judge to examine the unproven allegations or the contested allegations to determine, the extent to which, if true, such allegations could adversely impact on the welfare of the child.

The learned judge did not give any reason for the apparent exclusion of the disputed evidence from a "careful examination". However, the reason for so doing may be evident from a cursory reading of the affidavits and other material which were before her. A cursory examination of these affidavits and material will disclose that some of the allegations made against the father were already made and investigated in the foreign jurisdiction and some could have been made then but were not. During the hearing of this appeal an attempt was made by the mother to adduce fresh evidence containing "new" allegations but this was not allowed.

The obligation to provide reasons must depend upon the circumstances of the particular case. It is clear that the learned judge was satisfied that the proven or undisputed evidence was sufficient to warrant a summary exercise of her discretion and that to subject the disputed allegations to a careful examination would not be in the best interests of the child in a summary return order context. Some of the undisputed or proven facts which are listed in the findings of fact are :

"(6) The parties arrived at an agreement which was incorporated in a Final Judgment and Decree of Divorce in the Fulton County Court, Georgia U.S.A. which gave joint custody of the child 'AMDP' to the parties with physical care and control to 'DP'.

(7) That the relevant child remained in the physical care and control of 'DP' from the 10th June, 2004 (date of divorce) to the time he arrived in Jamaica in December, 2005, with periodic access to the mother.

(8) That the child was retained by his mother in Jamaica contrary to the agreement of the parties."

Some of the undisputed and proven facts which were not referred to in the findings of fact are:

(1) In August, 2004, the mother sought to set aside the divorce granted by the Supreme Court of Fulton County. The grounds on which the Motion was based were inter alia that the father lied to the Court about the parties' residence, that the father had committed fraud and that the mother was forced to enter the agreement with the father concerning the custody of the child.

(2) The Motion was contested and judgment delivered on 25th August, 2004. The Court found that the mother's allegations were not credible and dismissed the Motion.

(3) In April, 2005, the mother made allegations of the father biting the child and of inadequate supervision pertaining to the child, to

the Fulton County Department of Family and Children Services. The Social Services Care Manager appointed to investigate the allegations found that there was "no evidence or insufficient evidence to substantiate the occurrence of child maltreatment."

(4) Dr. Vanna Jackson the child's paediatrician since June 2004, stated in a letter dated February 16, 2006 that she was recently made aware of allegations by the child's mother that his father has been licking his bottom and biting him. The mother she said, had never discussed this with her during the mother's visits and she had not seen any evidence of bite marks on examination of the child who was a well adjusted child.

It is my view that in the light of the foregoing it cannot be said that the learned trial judge was plainly wrong in granting a summary return order based on the undisputed parts of the affidavit evidence. The learned judge has demonstrated that she was always mindful that the welfare of the child was first and paramount.

Before leaving this matter I must mention that much has been said, and many cases were cited, in respect of the applicability of doctrine of **forum non-conveniens.** I do not think that any good purpose would be served in examining these cases here. I will say, however, that in my view, if there are new, serious and credible allegations of child abuse and the child is within the jurisdiction of the Court, then, generally not much

importance should be attached to this doctrine. In such circumstances the Court cannot, in my judgment, abdicate its duty to ascertain whether the best interests of the child will be served by granting a summary return order. Perhaps, a partial enquiry would be appropriate in such a case. In each case it is for the trial judge to determine what factors should be taken into account and what importance should be attached thereto. The doctrine of **forum non conveniens** might well be relevant to one case but not relevant to another.

Conclusion

I am not persuaded that the learned judge erred in the exercise of her discretion. Accordingly, I agree that the appeal should be dismissed and that the order made below should be affirmed.

McCALLA, J.A.:

I have had the advantage of reading in draft the judgments of Harrison, P. and Smith J.A. I am in agreement with their reasoning and conclusion that it has not been established that the learned trial judge was in error, in the circumstances of this case, in exercising her discretion to make an order for the summary return of the child "A" to the care and

control of his father in Atlanta, Georgia. Consequently, I agree that the appeal should be dismissed and the order made by Smith J should stand.

ORDER:

HARRISON, P:

Appeal dismissed. The order of Miss Justice Smith for the summary return of the child "A" to Atlanta, Georgia is affirmed.

Each party shall bear his own costs.