REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 28983/2014

DATE: 5 DECEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

THE CENTRAL AUTHORITY

(REPUBLIC OF SOUTH AFRICA) **FIRST APPLICANT**

R[...] P[...] B[...] **SECOND APPLICANT**

and

R[...] A[...] R[...] **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] This is an application in terms of the Hague Convention on the Civil Aspects of International Child Abduction (鍍he Convention・). 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.[1]

[2] In this instance, the applicants, the Central Authority of the Republic of South Africa (the "Central Authority"), and Mr R[...] P[...] B[...] (Mr B[...]"), seek an order for the return of the minor child, H[...] B[...] ("H[...]") to the jurisdiction of the courts of England, the United Kingdom (the "UK"), together with ancillary relief.

[3] It is necessary to set out the factual background leading to the current proceedings. H[...] is the biological son of Mr B[...] and Ms R[...] A[...] R[...] (Ms R[...]). The couple got married in South Africa in 2007 and settled in the United Kingdom after the marriage. Out of this marriage one minor child, H[...], was born. In 2010 the coupie separated and have been living apart for almost four years now. Since that time the parties have been trying to finalise their divorce. H[...] has been living with Ms R[...] and Mr B[...] has been visiting him at Ms R[...]'s home. In January 2013, with the consent of Mr B[...], Ms R[...] came to South Africa (RSA) with H[...] to visit her family. Ms R[...] had indicated to Mr B[...] that they will be returning to the United Kingdom in March 2013. There is a dispute as to until when such consent was extended. Mr B[...] is alleging that he had given consent until May 2013 whilst Ms R[...]'s contention is that the extension was until September 2013. However, Ms R[...] has to date hereof not returned to the United Kingdom and refuses to return H[...] to the United Kingdom, hence these proceedings.

[4] Article 3 of the Convention provided 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.
>
> In terms of art 4 of the Convention, the Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

[5] It is common cause that H[...] is a habitual resident of the UK. He was born in the UK and has been living there with his parents all his life. It is also not in dispute that H[...] was a habitual resident of the UK immediately before his 'unlawful' retention in RSA.

[6] I refer to the retention of H[...] in RSA as 爽nlawful・ because it is common cause that Ms R[...] did not follow proper procedures to keep H[...] in RSA. From the papers it is evident that Ms R[...] knew and was at all material times aware that she could retain H[...] in RSA only with the consent of Mr B[...] or by an order

of the court in the UK. In her own version, she retained H[...] in RSA after September 2013 without the consent of the applicant or an order of court. It is trite that a custodian parent who removes a child from the state of the child痴 habitual residence without the consent of the other parent (or the leave of the court) commits a breach of 喪ights of custody・ of the other parent within the meaning of the Convention and hence a 層rongful removal・.[2]

[7] The parties are agreed that Mr B[....], as the father of H[...], who is still married to Ms R[...], has rights of custody and that he exercised those rights at all material times. Most importantly, he exercised such rights at the time H[...] was removed from the UK and would have continued to exercise such rights but for the retention of H[...] in RSA.[3]

[8] The first paragraph of art 12 of the Convention stipulates that where the removal of the child is wrongful and where less than one year has elapsed from the date of such removal or retention then, subject to certain exceptions, the court concerned is obliged to order the return of the child forthwith.

[9] From the papers in front of me, it can be ascertained, and it is common cause between the parties, that this application was launched on 11 April 2014 which is a period well within the required period of one year as envisaged in the first paragraph of art 12 of the Convention. In her own evidence Ms R[...] contends that Mr B[...]' consent to retain H[...] in RSA lapsed in September 2013. Similarly, in this instance, the proceedings having been launched within a period of one year, I am, subject to the exceptions, obligated to order the immediate return of H[...] to the UK. The article is peremptory and must be complied with subject, of course, to the exceptions contained in art 13 of the Convention.

[10] From the aforesaid, it is evident that Mr B[...] has established his case on a balance of probabilities. Ms R[...]'s counsel conceded as much. What therefore remains to be considered at this stage is whether Ms R[...] has a defence against the relief sought by Mr B[...]. In order to succeed in her defence, Ms R[...] must, prove the exception she seeks to use as a defence on a preponderance of probabilities. The defences available to her are in terms of the exceptions set out in art 13 of the Convention.

[11] Article 13 of the Convention provides as follows:

> "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."

[12] From the papers before me, it is evident that Ms R[...] opted to rely on the exception that there is a grave risk that if returned to the UK, H[...] will suffer psychological harm and may be placed in an intolerable situation.

[13] Article 13 (1) *(b)* of the Convention provides that, the court is not bound to order the return of the abducted child if the person opposing the return establishes that

(b) there is 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.

[14] The contention by Ms R[...]'s counsel in argument before me is that the exception should not be adjudicated in isolation without taking the provisions of the Children's Act, 38 of 2005 (the Act), into consideration. In particular s 7 thereof, which provides for the best interest of the child. Counsel contends that the best interest of the child is not relevant only for custody but for any matter pertaining to a child. According to counsel, and she is correct, the Convention is subservient to the Children's Act.

[15] An apt approach on matters of this nature was stated in the Supreme Court of the United Kingdom, which followed an approach similar to that adopted by the Constitutional Court in Sonderup v Tondelli,[4] in *Re E (Children) (Wrongful Removal: Exceptions to Return)*[5] where it was held that:

"There is no provision expressly requiring the court hearing a Hague Convention case to make the best interests of the child its primary consideration; still less can we accept the argument... that s 1 (1) of the 1989 Act [the United Kingdom Children's Act 1989] applies so as to make them the paramount consideration. These are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the child should be when that issue is decided, whether by agreement or in

legal proceedings between the parents or in any other way.

...

The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interest of the child will be served by a prompt return to the country where she is habitually resident...

Those assumptions may be rebutted, albeit in a limited range of circumstances, but all of them inspired by the best interests of the child. Thus the requested state may decline to order the return of the child if proceedings were begun more than a year after her removal and she is now settled in her environment (art 12); or if the person left behind had consented to or acquiesced in the removal or retention or was not exercising his rights at the time (art 13 (a); or if the child objects to being returned and has exercised an age and maturity at which it is appropriate to take account of her views (art 13); or, of course, if "there is 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" (art 13 (b)). These are all situations in which the general underlying assumption about what will best serve the interests of the child may not be valid...."

[16] The respondent's counsel is correct to say that in determining the issues before me I should not lose sight of the best interest of the child. It is indeed so that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. I am, however, not in agreement with the manner in which counsel argued her case and the grounds she used in support of Ms R[...]'s case.

[17] It is my view that the question of the best interest of the child can in the circumstances of this case be considered against the assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, as in the vast majority of cases, it will be in the best interest of the child if he or she is returned to his or her country of habitual residence.[6]

[18] As enunciated in the *Re E (Children) (Wrongful Removal: Exceptions to Return)*-judgment, it is clear that the best interest of the child will be served by a prompt return to the country where the child is habitually resident. What will best serve the interests of the child may not be valid only where one of the exceptions is applicable. In my understanding, the general rule is that it is in the best interest of the child to order his or her return to the state of habitual residence. The exception to the general rule applies only where the art 13

exceptions comes into play.

[19] In this instance, Ms R[...], as I have already stated, contends that if returned to the state of habitual residence, H[...] will suffer psychological harm and be placed in an intolerable situation. In support of this exception or defence, the respondent is relying on the report provided by Dr Thelma Laubscher ("Ms Laubscher"), a practising educational psychologist Ms Laubscher's recommendation is couched as follows:

> "Based on the information obtained during this assessment and investigation, the undersigned psychologist recommends that H[...] D[...] B[...] not be returned to the United Kingdom and that he is allowed to stay with his mother, as he always has. The findings show that he will be psychologically harmed and that there is a big possibility that he could be placed in an intolerable situation if he had to return to the United Kingdom to stay and be raised by his biological father, Mr R[...] P[...] B[...]."

[20] The recommendation is in my view misguided. On perusal of Ms Laubscher's report, it appears that her mandate was also not correct. In her report, under the heading "Reason for Evaluation" Ms Laubscher states as follows:

> "... Ms R[...] A[...] R[...] indicated that she is not returning to the UK to live there. She has also indicated that she is not taking H[...] D[...] R[...] back to the UK, as she believes that it is in his best interest to live with her as the biological mother in the RSA...
>
> Mr Vernus Kruger from Kruger & Partners Inc. Attorneys requested the Undersigned Psychologist, on Mrs R[...] A[...] R[...]'s behalf, to evaluate H[...] B[...] and his biological mother, Ms R[...] A[...] R[...] and to investigate what would be in the best interest of H[...] D[...] B[...]. .."

[21] The mandate and, as such, the recommendation, misses a very important point. It loses sight of the fact the return of the child is to the jurisdiction of the state or country from which the child was abducted and not to the parent left behind. The child is not removed from the care of one nor is the child returned to the custody of the parent left behind. The return is to the jurisdiction of the place of habitual residence of the abducted child.[7]

[22] Misguided by her mandate, Ms Laubscher's assessment and investigation centred on what is the best interest of H[...], in the sense that who between the two parents is better placed to live with H[...] rather than to determine whether it was in the best interest of H[...] to be returned to the place of habitual residence or not. I find therefore that in so doing, Ms Laubscher's report is based mainly on the custodial rights of H[...].

[23] It was argued, correctly so, before me, that the proceedings before me are not for the determination of custody. But, the proceedings are meant to secure the prompt return of a child, in this instance H[...], who is

wrongfully retained in South Africa to the jurisdiction of the requesting state, namely the UK, so that custody and other similar issues can be determined there. As a result any evidence which turns to support an argument based on the custody of the child is irrelevant. And in that sense the findings and recommendations of Ms Laubscher as contained in her report, and to the extent that they refer to the custodial rights of H[...], are irrelevant for purposes of these proceedings.

[24] In her heads of argument, and in argument in court, Ms R[...]'s counsel urged me to consider the following factors:

> a. That Ms R[...] and H[...] have been in South Africa since January 2013 to date hereof which is almost two years and are presently residing with Ms R[...]'s mother in Nelspruit. It was even suggested that they stay in a cul-de sac consisting of five houses three of which are occupied by Ms R[...]'s relations. H[...] has also been placed in an Afrikaans school. If he is taken back to the UK H[...] situation will not be the same. He will not go to the same house, same school or environment he is used to. Mr B[...] indicated that H[...] will be placed in a public school whilst Ms R[...] has placed her in a private school and he even used to go to a private nursery school.
>
> b. That since the birth of H[...] in September 2008, he has spent almost half his life in South Africa in that he visited and/or resided in South Africa with Ms R[...].
>
> c. That since October 2010 H[...] has been in the primary care of Ms R[...], when the parties separated.
>
> d. That Ms R[...] does not have employment in the UK, but is the owner of a coffee shop in Nelspruit.
>
> e. That during the divorce proceedings (which were subsequently dismissed) in the UK Mr B[...] did not place custody of H[...] in issue.

[25] All these are to me factors which pertain to a custody action and should as such be argued and determined at such a forum. However, it is said that in applications in terms of the Convention all the factors in s 7 of the Act need to be considered and that most of them will be applied, although these are not 'custody proceedings・.[8]

[26] It is, however, my opinion that in this instance, the factors will not be applicable because the mother intends to accompany H[...] to the UK.

[27] It was also argued that when the custody issue is eventually argued the same issues raised by Ms R[...] in her application will have to be argued again and the court hearing the custody will issue the same order as I

am requested to grant, i.e. an order that H[...] be allowed to reside in RSA. This argument, as suggested by Mr B[...] counsel, is pure speculation and cannot be entertained.

[28] Sight should also not be lost of the fact that the purpose of the Convention is to ensure, save in the exceptional cases provided in article 13, that the best interest of the child whose custody is in dispute should be considered by the appropriate court.

[29] Factors stated in paragraph [24] of this judgment can also be argued and determined where the question of settlement of the child is in issue. However, this issue is not before me. And the applicant's contention is correct, that in circumstances as in this instance, where the proceedings have been launched within a period of one year, the question of settlement of the child is irrelevant. For indeed, it is only where the proceedings have been launched after the lapse of the period of one year that, in accordance with article 12 (2), a court has a discretion whether or not to order the child's return. In such a case, the court shall also be entitled to consider whether the child is now settled in its new environment or not.

[30] Another issue of concern in Ms Laubscher's report is that her findings are based on her understanding that Ms R[...] will not go to England with H[...] if such order can be granted In this respect she is wrong. It was apparent during argument before me that it is common cause that if I make an order that H[...] be returned to the UK, the respondent will accompany him. In this regard Ms Laubscher's findings that H[...] will suffer psychological harm or will be placed in an intolerable situation falls to be rejected because they have no foundation.

[31] As a result, Mr B[...] is right to say that Ms R[...] failed to prove on the papers before me that the risk is grave and that the situation will be intolerable for H[...] because Ms R[...] intends accompanying H[...] to the UK.

[32] On 6 May 2014, the court appointed Advocate Elizabeth Nieuwoudt (Ms Nieuwoudt) as legal representative for the minor child, H[...]. Nieuwoudt also prepared a report after consultation with H[...] and Ms R[...]. Arrangements were made for an interview with Mr B[...] when he visited H[...] in September 2013 for his birthday. I am told that Mr B[...] declined to meet with Ms N[...] and as such the interview did not take place. In her report, Ms N[...], recommends that the court listen to H[...] and allow him to stay in South Africa with his mother as he does not want to stay in England.

[33] Ms Nieuwoudt's recommendation is based on her findings that: H[...] is already settled in his new environment; Mr B[...] is not H[...]'s primary care giver and if H[...] is returned to the UK it will be to someone with limited rights and with whom he does not have a strong bond; by returning H[...] to the UK he will be separated from his mother and as such put him in an intolerable situation; and that H[...] is mature

enough for the court to take his views into consideration. When addressing me, she argued that from his interview with H[...], she did not get and impression that he was in any way influenced by his mother or anyone else. The answers he provided were his own opinion.

[34] In argument before me, Ms R[...]'s counsel also contends that the views of H[...] be taken into account. She urged me to take note of what is in Ms Laubscher's report in regard to the maturity and development of H[...].

[35] Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration. [9]

[36] The challenge, in this instance, is that, as already indicated before, the approach of Ms Laubscher to the issues was completely wrong. This is the same approach that was taken by Ms Nieuwoudt. I as a result find myself constrained to can rely on their respective reports. There is no indication that H[...] was asked the correct questions during the consultation and interview to determine whether he would want to return to the UK. Indeed, he would indicate that he does not want to stay in the UK because an alternate scenario, where he will return to the UK with his mother, was not put to him. Nor was he properly informed of the reason why he may be required to return to the UK. The approach by both Ms Laubscher and Ms Nieuwoudt was that H[...] was returning to the UK to stay with his father and that Ms R[...] was not going to accompany him to the UK, which in fact is not the truth. The child would, of course, object to separation with the mother and this is not even a proper objection for purposes of these proceedings. The object of his returning to the UK was either not put to him at all or not properly put to him. And, considering the circumstances of this case, Mr B[...]' counsel is correct to say there is even doubt as to whether H[...] objected at all to return to the UK.

[37] Even if H[...] was informed of the correct reason why he may have to return to the UK, I do not think he would have had the maturity and development to understand the legal implications of what was expected of him. Ms Nieuwoudt should have acted as his *curator ad I item* and taken that decision on his behalf.

[38] Consequently, I would hold that Mr B[...] be granted the relief he seeks. He has In his founding papers provided various undertaking which must be included in the order I intend to grant, I also intend to expand these undertakings to ensure that H[...] is not compromised in any way.

[39] Should Ms R[...] decide to accompany H[...] to the UK she will also not be totally compromised. The unchallenged evidence of Mr B[...], which evidence I accept, is that: Ms R[...] has a British citizenship and both she and H[...] are entitled to various UK government financial assisted benefits; she is entitled to obtain employment in the UK; Mr B[...] has offered to provide accommodation for Ms R[...] and H[...]; he has also

undertaken to pay the reasonable maintenance requirements for Ms R[...] and H[...]. He is willing to increase the current maintenance amount to £400 *per* month until the respondent and H[...] are settled, and thereafter to pay £300 *per* month. Ms R[...] is furthermore entitled to approach the courts in the UK in the event that she requires and is entitled to an increase in respect of maintenance. Mr B[...] should also be liable for medical expenses and school fees for H[...] which is not covered by the state. Furthermore, as H[...] would be going to school, Ms R[...] should be able to secure part-time employment which would enable her to contribute towards her own and H[...]'s financial needs. I intend also to order that the travelling expenses for Ms R[...] and H[...] from Neslpruit to the UK must be paid for by Mr B[...].

[40] Much as it may be difficult for H[...] to return to the UK, this must be done because of the peremptory nature of art 12 of the Convention. Ms R[...] has been unable, on a balance of probabilities, to establish that such return will expose H[...] to psychological harm or otherwise put him in an intolerable situation. It is clear from the respective reports of Ms Laubscher and Ms Nieuwoudt that H[...] is well cared for by Ms R[...]. H[...] is thus more attached to her than to Mr B[...] or to any place. His mother is his centre and gives him security. There is no doubt that Ms R[...] will return to the UK with H[...] should I order that H[...] be returned. She has in her papers confirmed as much. To refuse the return application in these circumstances will be to undermine the objects of the Convention.

[41] The relief sought by Mr B[...] includes an order directing the sheriff, should Ms R[...] fail and/or refuse to comply with any order in terms of these proceedings, to collect H[...] and hand him over to the family advocate. This to me is a drastic step which should be avoided in circumstances such as these, where a child is involved. H[...] is still very young and should not be exposed to drastic actions that may traumatise him. I am of the view that an order directing the family advocate to collect H[...], should the need arise, will suffice. I am not inclined, therefore, to grant such an order.

[42] I was not specifically addressed by any of the counsel in respect of costs. In cases of this nature there is no winner or loser. It is taken that both parents, in contesting this case, acted in what they believed was the best interest of the child. In my view, it is not necessary to settle the parties with a cost order.

[43] I, therefore, order as follows:

a. The applicants are successful in their case.

b. The order marked with an "X" and initialled is made an order of this court.

E M KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCE

HEARD ON THE: 01 DECEMBER 3014

DATS Of JUDGMENT: 05 DECEMBER 3014

APPLICANTS' COUNSEL: ADV C WOODROW

APPLICANTS' ATTORNEY: THE STATE ATTORNEY PRETORIA

RESPONDENT'S COUNSEL: ADV N VAN DER MERWE

RESPONDENTS ATTORNEY: KRUGER AND PARTNERS

C/O **FRIEDLAND HART SOLOMON A NtCOLSON**

CHILD'S REPRESENTATIVE: ADV NIEUWOUDT

REPUBLIC OF SOUTH AFRICA

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R[...] P[...] B[...] **SECOND APPLICANT**

and

R[...] A[...] R[...] **RESPONDENT**

ORDER

Having listened to the arguments of both counsel for the applicants and the respondent, I make the following order:

1. It is ordered and directed that the minor child, H[...] Daniel B[...] (H[...]), be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority for England and Wales.

2. Ms R[...] A[...] R[...] (Ms R[...]) must notify the Office of the Family Advocate, Pretoria (the family advocate) within one week of the date of issue of this order that she intends to accompany H[...] on his return to the United Kingdom, and in that event the provisions of the following hereunder sub-paragraphs shall apply:

2.1 Mr R[...] P[...] B[...] (Mr B[...]) shall in one month of the date of issue of this order, institute proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in the United Kingdom pertaining to the terms of this order.

2.2 Unless otherwise ordered by the appropriate court in the United Kingdom, Mr B[...] is ordered to arrange and pay for, suitable accommodation for Ms R[...] and H[...] in the United Kingdom. Mr B[...] shall provide proof to the satisfaction of the family advocate, prior to departure of Ms R[...] and H[...] from South Africa, of the nature and location of such accommodation and that such accommodation is available for Ms R[...] and H[...] immediately upon their arrival in the United Kingdom. The Central Authority of England and Wales shall decide whether the accommodation thus arranged by Mr B[...] is suitable for the needs of Ms R[...] and H[...]. Should there be any dispute between the parties in this regard the decision of the Central Authority for England and Wales shall be binding on the parties.

2.3 Mr B[...] is ordered to pay Ms R[...] maintenance for herself and H[...] from the date of H[...]'s arrival in the United Kingdom at the rate of £400 *per* month. The first *pro rata* payment shall be made to Ms R[...] on the day upon which she and H[...] arrive in the United Kingdom and thereafter monthly in advance on the first day of every month. The amount of £400 shall be reduced to an amount of £300 *per* month once Ms R[...] and H[...] shall have settled. The Central Authority of England and Wales shall decide when Ms R[...] and H[...] shall be settled.

2.4 Mr B[...] is ordered to pay any medical and dental expenses reasonably incurred by Ms R[...] in respect of H[...], such as are not covered by the National Health Service in the United Kingdom.

2.5 Mr B[...] is ordered to pay for the reasonable costs of H[...]'s schooling and also costs of his other reasonable educational and extramural requirements in the United Kingdom, such as are not provided by the state.

2.6 Mr B[...] is ordered to purchase and pay for economy-class air ticket, and if necessary, pay for rail and other travel, for Ms R[...] and H[...] to travel to the most direct route from Nelspruit, South Africa, to the town and/or city in the United Kingdom where Mr B[...] will accommodate Ms R[...] and H[...].

2.7 Mr B[...] and Ms R[...] are ordered to cooperate fully with the family advocate, the Central Authority for England and Wales, the relevant court or courts in the United Kingdom, and any professionals approved by the Central Authority of England and Wales to conduct any assessment to determine what future residence and contact arrangements will be in the best interest of H[...].

2.8 Mr B[...] is granted reasonable contact with H[...].

3. In the event of Ms R[...] giving the notice to the family advocate referred to in paragraph 2 above, the order for the return of H[...] shall be stayed until the appropriate court in the United Kingdom has made the order referred in the sub-paragraphs in paragraph 2 and, upon the family advocate being satisfied that such an order has been made, he or she shall notify Ms R[...] accordingly and ensure that the terms of paragraph 1 are complied with.

4. In the event Ms R[...] failing to notify the family advocate in terms of paragraph 2 above of her willingness to accompany H[...] on his return to the United Kingdom, it is to be accepted that she is not prepared to accompany H[...], in which event the family advocate is authorised to make arrangements as may be necessary to ensure that H[...] is safely returned to the custody of the Central Authority for England and Wales and to take such steps as are necessary to ensure that such arrangements are complied with.

5. Pending the return of H[...] to the United Kingdom as provided for in this order, Ms R[...] shall not remove H[...] on a permanent basis from the Province of Mpumalanga and, until then, she shall keep the family advocate informed of her physical address and contact telephone numbers.

6. Pending the return of H[...] to the United Kingdom, Mr B[...] is to have reasonable telephone access to H[...].

7. There is no order as to costs.

8. The family advocate is directed to seek the assistance of the Central Authority for England and Wales in order to ensure that the terms of this order are complied with as soon as possible.

9. In the event of Ms R[...] notifying the family advocate, in terms of paragraph 2 above, that she is willing to accompany H[...] to the United Kingdom, the family advocate shall forthwith give notice thereof to the registrar of the Gauteng Division of the High Court of South Africa, in Pretoria, to the Central Authority for England and Wales, and to Mr B[...].

10. In the event the appropriate court in the United Kingdom failing or refusing to make the order referred to in the sub-paragraphs in paragraph 2 above, the family advocate and/or Mr B[...] is given leave to approach this court for variation of this order.

11. A copy of this order shall forthwith be transmitted by the family advocate to the Central Authority for England and Wales.

BY THE COURT

REGISTRAR

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1 Article 1 of the Convention

2 *KG v CB 2012* (4) SA 136 (SCA) para [26]

3 Article 13 (1) (a) of the Convention

4 2001 (1) SA 1171 (CC)

5 *[2011] 4 All ER 517 (SC)*

6 *KG* v *CB* above para [18]

7 *Pennello v Penello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA117 (SCA) [53].

8 *Central Authority v MR (LS Intervening)* 2011 (2) SA 428 (GNP) para [26.3] at 438H-I

9 Section 10 of the Act 38 of 2005