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Review

International Child Abduction in South Africa

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Abstract: This chapter evaluates how South Africa approaches and applies certain aspects of the Hague Convention on the Civil Aspects of International Child Abduction, the challenges it faces, and how it submits proposals to improve its application. The SA courts are the upper guardians of children in terms of the common law and uphold the best interests of the child as a paramount principle. The Chief Family Advocate ("FA") has been appointed as the Central Authority ("CA") and falls under the Department of Justice and Correctional Services. The Chief Liaison Judge is based in the Appeal Court and has appointed Liaison Judges in the Provincial Divisions. How SA approaches international child abduction, and applies the HC, is explored. SA has a rich jurisprudence around the practical application of the HC. The procedure in these matters; the general rules and exceptions; the voice, representation and participation of the child; and the approach to children's best interests and measures to protect their interests are evaluated. SA's approach in regard to HC matters could be improved. How the challenges of an independent best-interests factor, outcomes veering away from the return principles, the FA's compromised role as the CA, and the delays in outcomes prejudice the HC's philosophy and the application thereof are considered. Recommendations are made for the acceleration of proceedings, more certainty in the consideration of Article 13 defences incorporating protective measures in return orders, further clarity from courts or the implementation of practice directives in these matters, the use of mediation, and further guidelines/directives to be provided. Given the importance of the HC in international child abduction matters, hopefully the aims and purposes of the HC can be fully realised in SA's future.

Keywords: voice of the child; Art 13 defences; best interests of child; Hague Convention provisions; return orders

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1. Introduction

International child abduction is a 'global and growing phenomenon' (Freeman and Taylor 2020, p. 154). This paper evaluates how South Africa ('SA') approaches and applies certain aspects of the Hague Convention on the Civil Aspects of International Child Abduction ('HC'), the challenges it faces, and how it submits proposals to improve its application (HCCH 1980). The HC was ratified by SA on 16 July 1995, with the Children's Act 38 of 2005 ("the Children's Act") incorporating the HC, as Schedule 2 to Chapter 17, into our law through s275. The courts in SA are 'the upper guardians of children in terms of the common law' and uphold the best interests of the child as a paramount principle (Du Toit 2018, p. 59). The Chief Family Advocate ("FA") has been appointed as the Central Authority ("CA") and falls under the Department of Justice and Correctional Services. The Chief Liaison Judge is based in the Appeal Court and has appointed Liaison Judges in the Provincial Divisions.

2. Habitual Residence

Habitual residence is not defined in the Children's Act nor in the HC. Its meaning is determined by considering all the facts and circumstances in a specific case, with the idea of a 'stable territorial link' being realised through the length of time the child has lived

there or evidence indicating the child has a close connection to the place (du Toit C 2017, p. 453). *Central Authority v TK* appeared to support a child-centric approach in determining habitual residence and confirms that determining what the child's habitual residence was is a factual inquiry that considers the child's views and looks into whether the child has been there for enough time to have acclimatised or become attached and believes that they may be living there permanently or not.[1] In *Central Authority v ER*, a return order for the child to the UK was overturned on appeal.[2] The mother was an asylum seeker in the UK whose applications were repeatedly unsuccessful. The CA's position was that the immigration status was not relevant for the purposes of the HC. However, the judge pointed out that an asylum seeker is, by definition, seeking to change her habitual residence, and until the mother could attain some sort of immigration status, she would not acquire habitual residence; hence the mother of the child had not been habitually resident in the UK prior to the removal.[3]

In *Central Authority for the Republic of SA and SC v SC*, the applicants bore the onus pertaining to the habitual residence of the minor children and the respondent bore the onus in respect of the defence raised under Article 13(b) of the HC.[4] In both instances, the parties had to prove the relevant elements on a balance of probabilities. When applying the principles to the facts, it was not possible to determine any common intention regarding habitual residence. However, it was found that the children's experiences underlay a factual connection to Texas, USA, on a 'cultural, social and linguistic level'.[5] The case of *KG v CB* was quoted, noting that the order is linked to the return of the child and not to the 'left-behind' parent. It is not about a removal of care from one parent to another parent. Crucially, the court has to put into place protective measures so that the child will not be in a harmful situation upon return.[6]

Opperman J further noted that the HC does not define habitual residence and referred to Bridget Clark, who viewed habitual residence as without technical definition but as a question of fact in each individual case. It may be voluntarily acquired by 'assuming residence in a country for settled purpose [and] may be lost when a person leaves that country with the settled intention not to return . . .'.[7] Habitual residence is not acquired in one day but rather in an appreciable period of time and with a settled intention to enable the person to become habitually resident.[8]

Opperman J referred to three models—namely, the dependency model, the parental rights model and the child-centred model—when determining habitual residence of a child.

> 'In terms of the dependency model, a child acquires the habitual residence of his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country. The parental rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives. Where both parents have the right to determine where the child should live, neither may change the child's habitual residence without the consent of the other. In terms of the child-centred model, the habitual residence of a child depends on the child's connections or intentions, and the child's habitual residence is defined

1 *Central Authority v TK* 2015 (5) SA 408 (GJ) at 34–42.
2 (2014) JDR 0297 (GNP).
3 *Central Authority v ER* (2014) JDR 0297 (GNP).
4 *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 27.
5 *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 28.
6 *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 37.
7 *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 22.
8 SC (n7) at 22.

as the place where the child has been physically present for an amount of time sufficient to form social, cultural, linguistic and other connections'.[9]

SA courts follow a hybrid model, with the courts taking into account 'the life experiences of the child' such as whether the child has established a stable territorial link or whether the child has a factual connection to the State (e.g., culturally, socially and linguistically) and what the parents' intentions are.[10] Young children's habitual residence usually follows that of the custodial parent.

3. Child Participation

A child's right to participate in any matters that affect them is entrenched in Article 12 of the *UNCRC* 1989. Article 4(2) of the *ACRWC* 1990 provides that opportunities should be given for the child's views to be 'heard either directly or through an impartial representative, as a party to proceedings' that affect the child, where the child is able to communicate their own views, and that the child's views must be considered 'in accordance with the provisions of the' applicable law (Organization of African Unity (OAU) 1990). In SA, there have been frequent cases of children litigating 'independently of parental guardian assistance, where the interests of the parent or guardian are adversarial' to those of the child (Du Toit 2018, p. 59). It can be argued that SA courts have a stronger obligation to look at the child's views and objections, given the below-mentioned Children's Act provisions, than may be the case in foreign jurisdictions' HC applications. However, in principle, the HC prevails over domestic law.

The provisions of the Children's Act deal with the voice and representation of children in matters affecting them. Section 6(2)(a) sets out that the proceedings must 'respect, protect, promote and fulfil the child's rights' as noted in the Bill of Rights, the child's best interests (s7), and the principles and rights in the Children's Act 'subject to any lawful limitation'.[11] All matters concerning children should follow an approach that is 'conducive to conciliation and problem solving', with confrontational approaches and delays in any decisions being 'avoided as far as possible'.[12]

A child 'must be informed of any action or decision taken' significantly affecting them (s6(5)).[13] A child of such an 'age, maturity and stage of development' that they have the ability to take part in any matters involving them has the 'right to participate' in a manner considered appropriate, and the child's views 'must be given due consideration' (s10).[14] Section 278(3) affords a child the chance to object to their return, and if they do so, then the court is obliged to 'give due weight to that objection, taking into account the age and maturity of the child'.[15]

Under s278(1), courts have the power to demand that the CA 'provide a report on the domestic circumstances of a child prior to the alleged abduction' in order to ascertain if there has been a wrongful retention or removal under Article 3 of the HC's meaning.[16] Section 279 notes that the child must be represented by a legal representative 'in all applications' under the HC.[17]

S9 provides that the best interests of the child are 'of paramount importance', with s28(2) of the Constitution entrenching this.[18] Children have the right to be assigned a legal practitioner 'by the State, at the State's expense in civil proceedings affecting the child, if

9 SC (n7) at 23.
10 SC (n7) at 23.
11 Children's Act 38 of 2005.
12 S6(4) Children's Act 38 of 2005.
13 (n11).
14 Children's Act. (n11).
15 Children's Act (n11).
16 (n11).
17 Children's Act. (n11).
18 Children's Act. (n11).

substantial injustice would otherwise result'.[19] All children have the right to 'bring and to be assisted in bringing a matter to court'.[20] This seems to broaden this right of the child to be legally represented beyond the substantial injustice test. However, in practice, the ability to access State-funded legal representation is generally limited. It has been argued that the rights should not be linked to State representation and expense and the right to representation should be a separate right.[21] NGOs such as the Centre for Child Law may intervene pro bono on behalf of the child.

4. Different Mechanisms Are Utilised to Hear Children's Voices

- The submission of an FA report regarding the child's best interests may occur and is typically assembled by a social worker in conjunction with the FA (Du Toit 2018, p. 59). The FA and the CA are the same institution, which in principle could amount to conflictual roles. Not only must the CA manage the return application, but they also have to, in their role as FAs, be investigating the child's best interests within the HC parameters—where the 'welfare principle' may show that a return is not the best solution, as Nicholson notes (Nicholson 1999, p. 240).
- Submission of a court-ordered report that incorporates 'the recommendations of a suitably qualified person' may occur (Du Toit 2018, p. 59).
- Submission of independent expert reports may also occur, which may be 'privately funded by a party to the proceedings' and might convey the child's views or wishes as perceived and assessed by this independent expert (Du Toit 2018, p. 59).
- During the course of a mediation process.
- A child may have a meeting directly with the judge. However, this happens rarely. There is a lack of specialised training and indicators in regard to the conduct of such a meeting.
- It is possible to appoint a curator ad litem to act on the child's behalf; however, they cannot act as if they are the child's legal representative. Their report would thus 'be tempered by the curator's independent view of the best interests of the child and would not just reflect' the child's views (Du Toit 2018, p. 60).
- The child's views can be presented by their guardian.[22]
- The appointment of legal representatives to act on the child's behalf. *Soller NO v G* distinguished between the FA's role and the legal representative's role. The FA acts as a neutral mediator and a medium of communication between family members, whilst the legal representative presents and argues the wishes of the child in court, applying adult insight, expertise, and legal knowledge to these wishes and giving the child a voice without being just a mouthpiece.[23] The legal representative is thus not neutral and is in the child's corner. In *FB v MB*, the court confirmed that whilst the Children's Act does not prescribe the way in which a child is to be legally assisted, the 'paramount consideration' is the child's best interests.[24] The child's request to be independently represented by his own legal counsel was upheld, with the court noting that the child should not be placed in a worse position than the other parties who had the right of legal representation.[25] *Centre of Child Law v the Governing Body of Hoërskool Fochville* endorsed children's rights to representation that is separate from their parents and that this flows from their participation rights in matters that affect them, further noting that 'in every weighing of rights and interests and value judgment' that the child's best interests should be of 'paramount consideration'.[26]

[19] S28(1)(h) of the Constitution of the Republic of SA, 1996.
[20] S14 Children's Act 38 of 2005.
[21] *Brossy v Brossy 602/11 (212) ZASCA 151* (28 September 2012).
[22] S18(3) of the Children's Act 35 of 2005.
[23] *Soller NO v G* 2003 (5) SA 430 (W) at 439 J.
[24] *FB and Another v MB* (2012) (2) SA 394 (GSJ) at 13.
[25] FB (n24) at 13.
[26] *Centre of Child Law v The Governing Body of Hoerskool Fochville* 4 ALL SA 571 (SCA) 2016 at 19, 26.

A child-centred approach necessitates an individualized close consideration of the exact situation and reality of the specific child involved, as well as acknowledging children's dignity, and that it would not be in the child's best interests to simply apply a predetermined formula irrespective of the situation. 'If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a near extension of his or her parents, umbilically destined to sink or swim with them'.[27] Where a child is mature enough to express their feelings accurately, or able to make an 'intelligent judgment', then due consideration should be afforded to the child's expressed preference.[28] Developments in case law and legislation have provided for a child's rights to participation and separate legal representation, with the Constitutional Court promoting an approach that 'respects the views, wishes and opinions of children in all matters where they are concerned'.[29]

SA courts have denied some return orders on the basis of the child objecting. In *Central Authority v K*, the child noted they wanted to stay in SA and the court held it would be inappropriate to order the child's return.[30] *Family Advocate v B* held that the seven-year-old was mature enough to have an informed decision, although uncertainty around how the child's voice should be heard and weighted, with debates around the appropriate approach, was noted.[31] Here, the child's objection to returning was instrumental in the court's decision to deny the return order.[32]

Central Authority of the Republic of SA v B noted that, where the child objects, being of 'sufficient age and maturity to take his views into account', judges have to make sure that this objection is independent and not swayed by the parent that abducted them, nor is it due to them preferring this parent.[33] The objection is merely a factor to be taken into account. The court found that the child's objection is a separate defence to the grave harm objection. Return orders do not determine custody disputes. The court held that the child's views were independent and, on the basis of his strong objection, as well as the evidence, denied the return application.[34] However, the court noted a lack of clear guidelines around at what stage the child should have their opinion considered, and this challenge may lead to uncertainty. Furthermore, the courts still follow a contradictory approach in regard to the child's objection and Article 13(1)(b) defence being two separate issues, although the *Guide to Good Practice* has been useful in alleviating this to an extent. This case emphasised the paramountcy of the child's best interests, noting that this 'should inform understandings of the exceptions, without undermining the integrity' of the HC (Du Toit 2018, p. 61). These cases convey that the courts in SA take children's views and objections seriously and employ progressive approaches towards children participating in these Hague abduction cases, with courts recognising the significance of listening to the child's voice in matters that affect them. Other jurisdictions have been critiqued for dismissing the child's objections, with SA being praised for its progressive approach and inclusion of the child's voice within HC decisions (Freeman and Taylor 2020, p. 172). SA's approach gives effect to both the relevant sections of the Children's Act, Constitution, and HC.

Implementation of the hearing of children's voices is, however, often problematic, inter alia, due to lack of resources, skills, and adverse cultural and social attitudes around children's role in both families and communities. Advocacy, education, and awareness-raising could assist (Freeman and Taylor 2020, p. 171).

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27 *S v. M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA232 (CC) at 18.
28 *McCall v McCall* 1994 (3) SA 201 (C).
29 *T Boezaart Child Law in South Africa* 2ed (2017) Juta 110.
30 *Central Authority for the Republic of South Africa v K* 2015 (5) SA 408 (GJ) at 52.
31 *Family Advocate v B* 2007 (1) All SA 602 (SE) at 28.
32 B (n31)at 28.
33 *Central Authority of the Republic of South Africa v B* 2012 (2) SA 296 (GSJ) at 13.
34 *Central Authority of the Republic of South Africa v B* 2012 (2) SA 296 (GSJ) at 20.

5. The Tension between the Child's Best Interests and the Convention

SA cases have debated the approach to international child abductions, with many questioning whether the HC's return remedy contradicts the best interests of the child. The courts have developed the application of its discretion in regard to the best-interests principle and the manner of consideration of the defences, sometimes in a contradictory manner.

Concerns Have Furthermore Been Raised Regarding the Implementation of the HC vis a vis Children

- Whether too much deference is given to the wishes of the child who may, inter alia, be uncertain, influenced by their parents and forced to make choices, struggling with psychological harm, or feeling guilty and manipulated or 'compromised by the choices' the child has to make (Du Toit 2018, p. 60). However, SA has been lauded for its child-centric approach and its paramountcy principle.
- The impact of potential control, intimidation, and harassment; uneven resources; proceedings being drawn out; lack of support for the child; psychological or physical abuse; neglect; the conflict between the parents; or being exposed to grave risk of harm to the child.
- The contradictory judgments regarding Article 13 defences and the evaluation of the child's best interests, short-term and long-term, under the HC.
- The court being unable to 'get to the bottom of factual disputes and the risks a child will face if grave harm is a reality' (Du Toit 2018, p. 60).
- Determining what protective measures are available in the country of return, as well as the 'effectiveness of or the ability to implement such measures' (Du Toit 2018, p. 60).
- Undertakings which 'are not always enforceable and may not achieve the purpose of protection', despite judges liaising (Du Toit 2018, p. 60).
- When considering whether to take into account the child's views or not, a minimum age has not been set nor is there guidance around the assessment of the maturity of a child. In developing caselaw, the discretion is not exercised consistently.
- The lack of regular and consistent training in these matters.
- SA's non-specialised justice system. However, each High Court does have liaison judges, 'appointed to specifically act' in HC matters (Du Toit 2018, p. 60).
- Long delays.

Sonderup v Tondelli considered the HC's constitutionality in light of the paramountcy of the child's best interests under the SA Constitution. It would be contrary to the intention and terms of the HC if the application were converted into a care and contact application.[35] Goldstone J pointed out that the court would be able to impose substantial conditions in the mitigation of interim prejudice to a child caused by a court order to the return. The ability to shape a protective order ensures a limitation to achieve the important purpose of the HC. It was argued that the HC was not aligned with the best-interests standard, as return orders did not provide for having considerations that were individualised around the child's distinctive circumstances.[36] The court found that the HC safeguards and acknowledges the child's long-term best interests in regard to the custody.[37] The short-term best interests of the child might be limited by deciding to return the child, but the court held that this was a justifiable limitation due to the HC's important purposes.[38] The court further noted that the HC's exceptions to the peremptory return rule conveyed that there was only a limiting of short-term best interests where this is needed to ensure the HC's aims are achieved, with the HC employing means that are proportional to the result it aims to achieve.[39]

[35] *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).
[36] *Sonderup* (n35).
[37] *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 32.
[38] *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 30–36.
[39] *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 35.

The idea that the best interests of the child are somehow contradicted by the HC's peremptory return remedy is still debated in SA cases, despite *Sonderup* providing a good analysis around this. The *Central Authority v LC* case raised this again recently, with it being submitted that S7 of the Children's Act around best interests hierarchically trumped the HC in SA jurisdiction.[40] It was further argued that s7 should be viewed as an independent defence, and not merely one that only applies along with Article 13(1)(b).[41] This argument was strongly dismissed, with the court holding that the HC and the Children's Act were not inconsistent with each other, that one does not trump the other, and that they are rather supplementary to each other.[42] The court did note that rigidly implementing the HC might result in injustice within some specific cases. However, the court was in agreement with the *Sonderup* suggestions of the remedy for this being in the significance of making orders that are aimed at mitigating the short-term prejudicial effects of the child when the return order is given, and that extensive conditions could be incorporated into the return order where necessary.[43] This judgment confirms *Sonderup* and indicates that there are still disagreements around the approach to, and application of, the HC within the SA context.

Another recent case is *LD v Central Authority*, which has been critiqued for its approach of privileging the role that best interests has to play over that of a prompt return, within the context of interpreting the facts around whether the Article 13(1)(b) defence had been established or not.[44] The majority judgment noted that the order to return the child would result in disrupting and replacing a family and siblings, which they viewed as conflicting with the child's rights under the Constitution's s28(1)(b), which they considered to be inclusive of the "nurturing and support that a child receives from its immediate family group".[45] This appears to imply that an individual best-interests standard may be utilised. The minority judgment strongly disavows this by noting that that the majority went astray through their erroneous asking of whether returning the child would be in its best interests or not, as well as their problematic approach when considering "what harms might flow" from a return order from the court.[46] The minority also held that the child's best interests would not have been damaged by a return order if this order had appropriate protective measures included within it. The minority judgment reinforced *Sonderup* and noted that the 'paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention'.[47] The minority approach should arguably be the preferred approach in future HC cases. The majority judgment indicates a concerning approach in SA to the application of the HC, with it conflicting with the judgment in *Sonderup*.

This concerning trend was again noticeable in the decision of *Central Authority, Republic of South Africa v Y.R*.[48] After travelling to SA for a brief holiday, the mother (YR) refused to return with the child to Canada. The judge considered whether the Article 13 Exception to return a child to Canada raised by the abducting mother had been established. A curatrix was appointed by the court to the child and an expert appointed by the mother filed a report.[49]

YR argued that the parties had a verbal and physically abusive relationship after the birth of CJ, and if she were to return to Canada, the same intolerable circumstances that plagued her before and contributed to her emotional state and post-partum depression would arise and affect CJ. CJ had settled in SA and had the support of an extended

40 *Central Authority v LC Case* 20/18381 (Gauteng Local Division) 2020 unreported at 100.
41 *Central Authority v LC Case* 20/18381 (Gauteng Local Division) 2020 unreported at 96.
42 *Central Authority v LC Case* 20/18381 (Gauteng Local Division) 2020 unreported at 105.
43 *Central Authority v LC Case* 20/18381 (Gauteng Local Division) 2020 unreported at 106.
44 *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA).
45 *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA) at 37.
46 *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA) at 62.
47 LD (n46).
48 *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023).
49 *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 16.

family group, and if returned would not have access to this extended family, which might contravene S28(1)(b) of the Constitution. Additionally, CJ's developmental problems had not been picked up by the Canadian doctors, whilst they had been by experts in SA. CJ might not receive proper medical attention in Canada and developmental problems may arise again.[50] CR argued that during YR's period of postpartum depression, she had threatened an intention to harm or abandon CJ, and he had then become intensely involved in the care for CJ, with the court noting that it appeared that CR was a 'very involved and loving parent'.[51]

The Judge found that the child's return would be intolerable, mainly because of the child's 'medical history' based on the findings of the medical experts in SA.[52] It would be irresponsible to expose the child in the same circumstances and developmental delays in Canada. The Judge criticized the expert who had not dealt with the consequences of the return of the child with the mother in her report, commented that the curatrix had strayed too close to the best-interests principle and that Article 13 had to be treated as a limited and more restrictive enquiry.[53] The Judge therefore dismissed the application for return.

The judgment may be criticized in that it does not appear to have taken into account, nor addressed in any detail, what preventative and protective measures could be put in place and what the effectiveness thereof would be, were there to be a return of the child. It also seems as if the judgment moved in a degree to a best-interests assessment instead of implementing the prompt return policy. Despite the mother's questionable behavior in regard to the retention of the child in SA, she succeeded with her Article 13 defence.

The inconsistent approach around the paramountcy of the best interests of the child and whether this should be seen as an independent defence in HC applications is concerning. SA courts should be careful of undermining the HC's integrity when considering how to involve the child's best interests in their analysis. As *Sonderup* noted, the HC does not necessarily contradict best interests.[54]

The *Guide to Good Practice* confirms, in regard to Article 13 of the HC, that in assessing whether there is a 'grave risk' that returning the child would result in their exposure to 'physical or psychological harm' or would otherwise place the child in 'an intolerable situation', the availability of effective and adequate measures to ensure protection within the State habitual residence should be included.[55] An objective approach is required, which was confirmed in *KG v CB* also quoting the UK case *Re: E* confirming the restricted application of the exception, with the onus being on the parent opposing the return to substantiate the exception on the balance of probabilities.[56] This case confirmed that the exception is narrowly interpreted and requires objectivity as well as particularity to the child and their circumstances.

Sonderup v Tondelli emphasised the grave risk and noted that harm needs to be 'of a serious nature' when considering the intolerable situation.[57] The exception and the defences have been dealt with in various cases as referred to below. In *Central Authority of the Republic of SA v JW*, the mother alleged that she had suffered emotional and physical abuse by the father, with the court finding that the children would be put into an intolerable situation if returned without their mother, as she was the primary caregiver, and thus denied the return order.[58] More recently, *Central Authority v H* also raised this exception, with the court holding that harm which is a 'natural consequence of a child's removal' from

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50 *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 65.

51 *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 12.

52 *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 68.

53 *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 67.

54 See (n35) above.

55 Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part VI Article 13(1)(b) as published by The Hague Conference on Private International Law (2020).

56 *KG v CB* 2012 (4) SA 136 (SCA), Re E (Children) (Wrongful Removal: Exceptions to Return) 2011 All ER 517(SC) at 31.

57 *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 47.

58 *Central Authority of the Republic of South Africa v JW* 2013 JDR 1117 (GNP) at 54.

the country of habitual residence, a return order, and a challenged custody dispute would not meet the seriousness required for the exception.[59] The exception was thus applied in a restrictive manner.

Family Advocate Cape Town v Chirume noted that the 'intolerability of the situation should be looked at from the viewpoint of the minor child and not of the respondent' and that the grave risk should come from the child's return, and 'not from the refusal of the mother to accompany the child'.[60] The court upheld the high threshold when establishing a 'grave risk' of physical, psychological harm in order to refuse return in *Family Advocate PE v Hide*, which highlighted how mirror orders or undertakings can be important, and confirmed that the SA courts are able to set conditions for the child's return in the court's final order, with this order being encouraged to be made an order of the court in the country that the child is being returned to, if possible.[61] Contrary to the approach above, in *Central Authority v MR*, the court noted that the exceptions under Article 13 and 20 cater to 'cases where specific circumstances might' allow for the child not being returned, with exceptions existing to protect the child's welfare.[62] Mitigation of the exception's extent and nature should occur, with s28(2) of the Constitution being kept in mind when Article 13 is applied. The court found that it was worthwhile to consider the views of the child here, even though they were mainly related to 'short term views and interests' and also confirmed that the child objecting to their return was indeed a defence that is separate from the grave harm defence.[63]

Pennello v Pennello confirmed that the person resisting the return order on the basis of Article 13(b) bears the civil onus of proof, on a preponderance of probabilities. The return application cannot be converted into a custody application. The SCA reiterated that the grave risk should require 'clear and compelling evidence', which must be substantial and 'of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence'.[64] In *Central Authority of the Republic of SA v Engelenhoven*, the siblings had disparate views about the return. The court refused a return on the basis that it would not consider the separation of the siblings, as that would, in itself, create an intolerable situation for the children.[65]

Central Authority for the Republic of SA v SC discussed the interpretation of Article 13(b), and *Koch NO v Adhoc Central Authority for the RSA* was quoted, noting that the defence:

> *'looks to the future: the situation as it would be if the child were returned forthwith to his/her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place . . . Where the risk is serious enough the court will be concerned not only with the child's immediate future, because the need for protection may persist'*.[66]

6. Domestic Violence

Establishing domestic violence by a party's behaviour is not itself sufficient reason for justifying the court holding that the child could possibly face grave risk were they to be returned, with the establishment of an 'established pattern of domestic violence' from the other party's behaviour needing to be shown, as well as the definition of domestic violence needing to be met (Trimmings and Momoh 2021, p. 9). Allegations of domestic abuse and/or the child witnessing this abuse, should be considered and evaluated by people with extensive training relating to this. The *Domestic Violence Amendment Act* 14 of 2021 defines

[59] *Central Authority (Republic of South Africa) v H* 2019 ZAGPPHC 138 at 54.
[60] *Family Advocate Cape Town v Chirume* (6090/05) [2005] ZAWCHC 94 at 36.
[61] *Family Advocate Port Elizabeth v Hide* (2007) 3 All SA 248 (SE).
[62] *Central Authority v MR (LS Intervening)* (2011) (2) (SA) (428) (GNP) at 13.
[63] *Central Authority v MR (LS Intervening)* (2011) (2) (SA) (428) (GNP) at 29.
[64] *Pennello v Penello (Chief Family Advocate as amicus curiae)* 2004 (3) SA 117 (SCA) at 34.
[65] *Central Authority of the Republic of South Africa v Engelenhoven* (Case No. 43352/2021) ZAGPPHC 699 at 50.
[66] *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 38.

domestic violence as encompassing physical, sexual, verbal, emotional, or psychological abuse—and can include harassment, 'controlling behaviour', and exposure of children to domestic violence—with this conduct harming or inspiring 'reasonable belief that harm may be caused to the complainant'.[67] It has been noted that SA courts have followed a wider approach in these defences, and have considered the rising cases of domestic violence as well as the child's safety (Weideman and Robinson 2011, p. 90). Indeed, courts should consider the circumstances of each case pertaining to each individual child, with the need to avoid mechanical approaches, especially in domestic violence cases.

L v Ad Hoc Central Authority for the Republic of SA was an application for leave to appeal against a court order for the return of three children to Thailand. Allegations that the removal was wrongful in terms of Article 3 of the HC and of sexual misconduct were made. The SCA dealt with the Article 13(b) defence. The High Court order was aimed at mitigating any interim prejudice that may arise by the children being returned, with 'built-in mechanisms and a wide range of protective measures'.[68] The order hoped to ensure the children's protection, and included the children residing with the applicant, 'maintenance for the applicant', access to occupational therapists and psychologists, 'financial commitments on the part of second respondent, and the assistance of the Thai CA'.[69] The SCA found that the High Court's order was 'tailored' to meet all the children's needs, in order 'to achieve the objectives of the Convention' and to 'effectively encompass protective mechanisms' so that the children's best interests received protection.[70] The appeal was thus dismissed.

Central Authority for the Republic of SA v SC was an application for the return of children that the mother had brought to SA, with her alleging a s13(b) defence, inter alia, relating to a nomadic life the children had led in Texas, which had caused instability.[71] Allegedly, the father was 'manipulative, domineering and controlling. . .physically and emotionally' abusive of the mother, excessively controlling of the children, and erratically employed.[72] Factual disputes were raised. The children's views were represented by a curator ad litem. There was psychological evidence regarding the children's best interests, the father's contact with the children, and his interactions with them. The court found that there were certain intolerable aspects of the children's family life, immediately before they had departed to SA, and was of the view that an order could not be shaped to mitigate the prejudice to the children, failing the assurance that the father would be able to 'financially afford and otherwise comply with his undertakings'.[73] Cognisance was taken of the realities and the children's best interests, without discriminating against the father. The application for return was dismissed.

In *Sonderup*, Goldstone J stated that in the application of Article 13, acknowledgement must be given to the role that domestic violence has in inducing mothers 'to seek to protect themselves and their children by escaping to another jurisdiction'.[74] He emphasised that the impact of domestic violence on women and children should not be trivialised and indicated that, 'where there is an established pattern of domestic violence, even though not directed at the child, it may very well be that the return might place the child at grave risk of harm as contemplated by Article 13'.[75] If Article 13 is applied restrictively and the child is returned, the mother has to make a decision about her return and the danger of further domestic violence (Freeman and Taylor 2020, p. 157). Although protective measures may mitigate risks, there is a gap between the theory of protective measures versus their

[67] S1 Domestic Violence Amendment Act 14 of 2021.
[68] *L v Ad Hoc Central Authority for the Republic of South Africa and Others* (1143/2020) [2021] ZASCA 107 at 11.
[69] L (n68) at 11.
[70] *L v Ad Hoc Central Authority for the Republic of South Africa and Others* (1143/2020) [2021] ZASCA 107 at 15.
[71] *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 38 at 1.
[72] *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 43.
[73] *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 82.
[74] *Sonderup* (n57) at 34.
[75] *Sonderup* (n57) at 34.

practical implementation in the returning State (Trimmings and Momoh 2021, p. 4). Indeed, 'a thorough, limited and expeditious examination of disputed allegations of domestic violence should be carried out by court in return proceedings before the court proceeds to determining the availability of protective measures' (Trimmings and Momoh 2021, p. 9), and courts should consider the extent to which these measures will actually be enforceable in the returning State, as it seems recent SA cases have endeavoured to do.

7. Certain Measures May Be Taken to Safeguard and Protect the Child's Best Interests

- Liaison Judges and CAs in the various jurisdictions should exchange information.
- The 'availability of protective measures, the efficacy of its implementation and the obtaining of enforcement orders or mirror orders' as well as the withdrawal of criminal complaints should be investigated (Du Toit 2018, p. 62).
- The provision of undertakings, which could relate to care, financial issues, custody and contact, non-prosecution, 'protection of the parent who abducted the child', protection of the child on their return, and 'expedited court proceedings in the country of return' should be considered (Du Toit 2018, p. 62).
- Access to justice for the parties should be established.
- Considering supervision of contact and whether its implementation is viable.
- Considering interdicts/non-molestation orders.
- Considering whether safe and separate housing can be provided.
- Considering 'payment for the costs of the return, maintenance in the interim pending the proceedings in the country of return', and accommodation (Du Toit 2018, p. 62).
- Considering if 'counselling, treatment and monitoring (e.g., follow up by the CA, the FA, or social services) of a child are available' (Du Toit 2018, p. 62).
- Considering 'expedited proceedings upon the return' (Du Toit 2018, p. 62).
- A 'litigation kitty may be established for the returning parent in order to have more of an equal playing field to litigate' regarding, e.g., custody and contact (Du Toit 2018, p. 62).
- Management of the child's expectations and understanding of the process.

8. Failure to Comply with the Requirement for Expeditious Proceedings

The HC's requirement for expeditious proceedings has been difficult to implement in SA. Regulation 23(1) to the Children's Act sets out that 'proceedings for the return of a child under the Hague Convention must be completed within six weeks from the date on which judicial proceedings were instituted in the High Court, except where exceptional circumstances make this impossible'.[76] Regulation 23(2) sets out the procedural steps that are taken in such proceedings. The judiciary has developed practice directives around 'timeframes for the set down and conclusion of the hearings' (Sloth-Nielsen 2023).

A cost order was awarded against the FA because of the inexplicable delays in their bringing of the urgent return application in *Central Authority v B*, with the child having had, at the hearing of the appeal, spent more than half of her life in SA.[77] In *KG v CB*, the child was abducted and brought to SA in early 2009, and in June 2010, the High Court ordered the child's return.[78] The mother appealed the decision, with the appeal only being heard in February 2012.[79] The SCA highlighted the delays, finding them 'unacceptable' in light of the HC and also the Children's Act requirements that HC cases be finished within six weeks from their commencement in the High Court.[80] The mother argued that there had been drastic changes to the circumstances of the child due to delays. Despite the mother's

[76] Children's Act 38 of 2005 Regulations Relating to Children's Courts And International Child Abduction, 2010 Published Under Gn R250 In Gg 33067 of 31 March 2010.

[77] *Central Authority v B* 2009 (10) SA 624 (W).

[78] *KG v CB* 2012 (4) SA 136 (SCA).

[79] *KG v CB* 2012 (4) SA 136 (SCA) at 1.

[80] *KG v CB* 2012 (4) SA 136 (SCA) at 58.

arguments and immense delays, an order to return the child was surprisingly still made.[81] In *Central Authority v Houwert*, the matter only reached the SCA once a period of three and a half years had passed since the abduction, and with the court upholding the principles of the HC and ordering the return of the child, despite the long delay, criticizing the systemic delays that plagued the matter.[82]

N v The Central Authority for the Republic of SA dealt with the unlawful removal from Northern Ireland of a child retained in SA by the mother. From the date of the removal on 31 December 2012, it took until 10 May 2016 for the appeal judgment to be delivered. The judge notes that the courts are 'held to ransom' by both the appellant's 'delaying tactics' and the respondent's ineptitude in not making sure that the matter was speedily looked at.[83] The court decried the 'dilatory manner' in which the SA CA had 'handled the litigation' and hoped that future respondents would give more focus toward finalising matters like these, since failing to finalise these speedily 'inevitably causes psychological prejudice to the families involved'.[84] The abducting parent's strategies exploited the time delays to establish a settled status quo, thereby creating an advantage and a complicated choice for the courts. In *LD v Central Authority RSA*, the child was removed on 4 October 2018 and the SCA judgment was given on 17 January 2022.[85] These delays are unacceptable and prejudicial within the spirit of the implementation of the HC.

Humphrey discusses the Regulations to the Children's Act and makes certain proposals to expedite proceedings [Regulation 17(1)] (Humphrey 2023). He provides, inter alia, that the CA must bring an application to the court within ten days after the child has been located, and proposes that Practice Directives be instituted, inter alia, to allocate a special case number. The CA should be cited or served in the event of a private application. A copy of the application must be delivered to the Liaison Judge on the same date that the application is issued (Humphrey 2023). An expedited timetable should procedurally be followed, and an expedited date for argument of the application on a special opposed roll should be allocated. The Judge hearing the application shall deliver judgment and an order within a period of 3 court days from the date on which the application was argued. An application for leave to appeal should also be subject to expedited dates and procedure. The Liaison Judge should case-manage the application and any appeal thereafter (Humphrey 2023). It is suggested that mediation could also provide a helpful tool to circumvent and/or shorten litigation in these cases.

9. Mediation

SA, with its lack of resources, struggles with overburdened court rolls, drawn out litigation, and delays in finalizing matters (Ferreira 2019, p. 26). If the swift return of a child is not achieved, the philosophy of the HC may be compromised. Mediation, as part of the legal framework for family disputes, has become popular in HC disputes, and Ferreira suggests that this should not only be an alternative to the litigation but also a mandatory requirement in these matters (Ferreira 2019, p. 26). Her view is that the outcomes imposed by courts may not always be a good fit in family matters, given the personal nature of the issues necessitating comprehensive considerations, and that ADR provides faster, non-confrontational, conciliatory approaches (Ferreira 2019, p. 26). The Children's Act also encourages conciliatory resolution of matters involving children, which would, inter alia, facilitate parent and child participation. Mediation as a tool should be publicised and education in this regard should take place.

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81 *KG v CB* 2012 (4) SA 136 (SCA) at 62.
82 *Central Authority v Houwert* 2007 JOL 20032 (SCA).
83 *N v The Central Authority for the Republic of SA* 2016 ZAKZPHC 43 at 25.
84 *N v The Central Authority for the Republic of SA* 2016 ZAKZPHC 43 at 29–30.
85 *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA).

10. Mirror Orders

SA Courts have often given elaborate orders that spell out all the details of a return order. In *LD v Central Authority*, the minority judge's detailed order for protecting the child's interests conveys that mirror orders could have an important role to play in future cases.[86] Mirror orders could support such international safeguards and interim care and contact arrangements. However, many jurisdictions do not allow mirror orders, and undertakings are then relied upon instead.

Arcaro proposes that, inter alia, a uniform international registry system for child care and contact orders, and undertakings for return if a child goes overseas, should be considered (Arcaro 2018, p. 262). Domestic law is going to vary from country to country; thus, it is vital 'to determine if the order will be enforced as written, harmonious with foreign law, and if the order would be modifiable in the foreign country' (Arcaro 2018, p. 262), with the language being amended so that it is able to be enforced in the foreign country. Despite potential impediments arising when trying to organise and enforce these rights, these are legitimate priorities within the HC, and legal and practical implementation measures must be filed to maintain parent/child relations post Hague proceedings.

11. Proposals to Ameliorate Concerns Regarding Implementation of the Convention

- The conflicting roles of the CA and the FA should perhaps be addressed, and a solution found regarding the reporting and mediating role of the FA in HC cases.
- The Children's Act provides for parents entering into parenting plans. These should deal with the place of habitual residence, confirm that the children may only be taken to foreign countries that have acceded to the HC on holiday or if relocating, and should record that, in terms of the HC, they both have rights of custody as defined in Article 3.
- Return orders should include the obligation to register a mirror order in the country of habitual residence and, failing the ability to register such mirror orders, undertakings regarding accommodation, non-prosecution for criminal offences, maintenance, undertakings not to abuse, checks by government social services, psychological ongoing evaluations, visitation restrictions, contact, transportation details, therapy, psychological services, and so on.
- The return order should include time periods within which a custody dispute should be instituted in the court having jurisdiction, and/or within which mediation/arbitration should take place.
- The child's country of habitual residence will have exclusive jurisdiction to resolve the underlying custodial dispute and organise the litigant's rights of custody and access pursuant to the domestic law of that state.
- Therapeutic support should be provided to children that addresses their concerns and needs in crises, and connects them to both informal and formal support systems so they receive continuing support (Titi et al. 2022). There should be access to, for example, universal parenting programmes, community-based organisations, government social services, early detection of remaining issues, services, treatment, and safety in a therapeutic relationship (Titi et al. 2022). The focus in return orders should also be on the continuing life of the returning child in the country of habitual residence.
- Clarity is needed from the courts so that a consistent approach, which recognises that the HC and the best interests of the child can be supplementary, is realised. Alternately, legislation could be implemented, or regulations issued, that provide certainty through clarifying appropriate approaches with definite guidelines, regulations, and parameters around determining the factors to consider when looking at which stage the child is thought to have settled into their new environment (Nicholson 1999, p. 242). The Guide to Good Practice has been useful and notes that the defence is of 'restricted application'.[87] Judge Saldulker has also noted that some of the High Court divisions

[86] See n85 above.

[87] See n55 above.

have implemented practice directives around HC matters (Ramotsho 2019). The SCA has also attempted to set up rules that they are hoping to approach the Rules Board with, around how these matters should be handled in courts (Ramotsho 2019). Practice directives and rules could assist the various Divisions with reducing uncertainties. There is room for improvement regarding SA's approach to the role that the best interests of the child plays within return proceedings and the consideration of Article 13 defences.

12. Conclusions

How SA approaches international child abduction, and applies the HC, has been explored. SA clearly has a rich jurisprudence around the practical application of the HC. The procedure in these matters, the general rules and exceptions, the voice, representation and participation of the child, and the approach to children's best interests and measures to protect their interests have been evaluated. SA's approach in regard to HC matters could be improved. The challenges of an independent best-interests factor and outcomes veering away from the return principles, the FA's compromised role as CA, and the delays in outcomes prejudice the HC's philosophy and the application thereof. Recommendations have been made for the acceleration of proceedings, more certainty in the consideration of Article 13 defences, incorporating protective measures in return orders, further clarity from courts or the implementation of practice directives in these matters, the use of mediation, and further guidelines/directives to be provided. Given the importance of the HC in international child abduction matters, hopefully the aims and purposes of the HC can be fully realised in SA's future.

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