IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Suhada Gamalath
Secretary to the Ministry of Justice
And Law Reforms
Superior Courts Complex,
Colombo 12.

PETITIONER-PETITIONER

C.A Revision No (PHC) APN 3/2010
H. C. Colombo HCWA 1/2009

Vs.

Kristina Ivasauskaite-Rosario
90, Avenue De Saint Ouen
75018 Paris
France.

1ST RESPONDENT-RESPONDENT

Prajith Rosario
539/A/1, Eldeniya
Kadawatha.

2nd RESPONDENT-RESPONDENT

BEFORE: Sisira de Abrew J. &
Anil Gooneratne J.

COUNSEL: N. Wigneswaran S.C with Deepthi Thilakawardene S.C
for the Petitioner
Harsha Nanayakkara for the 1st Respondent-Respondent
Romesh de Silva President's Counsel with
Shanaka Ranasinghe, Sugath Caldera, Ranil Samarasuriya
and Shanaka Cooray for the 2nd Respondent-Respondent

ARGUED ON: 9.3.2011, 10.3.2011, 15.3.2011 and 18.3.2011

DECIDED ON: 01.06.2011

GOONERATNE J.

I have had the advantage of reading the judgment of my brother Justice, Sisira de Abrew. I find myself able to agree with reasons and conclusions, reached by him. However this case being on an important issue concerning a child who is not of Sri Lankan origin and where her parents both foreigners involved in a legal battle to take over the child. I thought it fit to express my own views. No doubt our order would benefit one of the parents but I would emphasis the fact that the function of this court is only to consider whether the order of the learned High Court Judge need to be revised, in keeping with the provisions of Act No. 10 of 2001, which cast an obligation to return the child to the relevant country if the child has been wrongfully removed from one country to another.

The scheme of the said Act is to give effect to the Hague Convention on the civil aspects of International Child Abduction. The learned High Court Judge has on a very basic matter held that the Petitioner before the High Court (now 1st Respondent) had not complied with Section 6(3) of the said Act. The said Section 6 deal with application to Central Authority for assistance to secure return of the child. Subsection (3) of Section 6 requires the application and the annexed documents to same shall have a translation in Sinhala, Tamil or English. This is no doubt a procedural

aspect. An absence of a English or Sinhala translation, which could be obtained at any point of time during the proceedings in the High Court, should not be a ground to refuse or reject such application. It is highly technical to make use of such a provision which is not imperative to reject an application. The real intention of the legislature and the entire subject matter or the whole scope of the act is to give effect to the Hague Convention on child abduction which takes place universally. When I consider the preamble to the Act and as well as Section 10 & 11 of the Act, suggesting the grounds for return of the child or refusal to return such child which embody several aspects, are the more important provisions in law. Section 6 (3) of the said Act is only a procedural requirement which could, I believe be cured at any point of time. It is not a serious lapse which could be a ground to refuse an application. This is one of the grounds to refuse the application. The requirement is more or less directory. The following authorities were considered.

Maxwell on The Interpretation of Statutes 12 Ed. – pg. 314/315

> It is impossible to lay down any general rule for determining whether a provision is imperative or directory. "No universal rule," said Lord Campbell L.C., "can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the

> statute to be construed. And Lord Penzance said: "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act: and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

N S Bindra's Interpretation of Statutes M N Rao Amita Dhanda Tenth Edition pgs.1015/1016...

In Howard v Bodington, Lord Penzance said:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

The question, whether a particular provision is mandatory or directory, is in many instances extremely difficult. And strong grounds are needed to read a mandatory provision as directory and vice versa. The language employed is not always a sure index and it is scarcely possible to lay down a hard and fast rule of general application. Broadly speaking, however, there are three fundamental tests which are often applied with remarkable success in the determination of this question. They are based on considerations of the scope and object, sometimes called the scheme and purpose, of the enactment in question, on considerations of justice and balance of convenience and on a consideration of the nature of the particular provision, namely, whether it affects the performance of a public duty or relates to a right, privilege or power-in the former case the enactment is generally directory, in the latter mandatory. A provision which is directory in form might be mandatory in substance. Whether it is one or the other must

depend upon a number of things such as the declared object of the statute, the indications to be found in the various portions thereof, the persons for whose benefit the power is to be exercised and such other matters as might appear on the statute.

When I consider the subject matter and the importance of the provision which is alleged to be disregarded, I cannot conclude that it would be a ground to reject an application.

The other ground for rejection of the application is the Petitioner's failure to comply with Article 12 of the Hague Convention on Civil Aspects of International Child Abduction. The above Article 12 contemplates of a period of 1 year within which an application need to be made and as the learned High Court Judge observes the 1st Respondent had waited for over a year to make an application through the French Central Authority to the Central Authority of Sri Lanka. The other aspect of the above Article 12 is that the child being settled in the new environment the child cannot be returned. The child had lived for more than 2 years in Sri Lanka. The learned High Court Judge relies on the report placed before court by a Consultant Psychiatrist namely Professor Hemamali Perera. The learned High Court Judge refers to an extract from the report (P5) where it is stated that "He claimed that he preferred to live in Sri Lanka with his father rather than with his mother in France". The learned High Court Judge takes

the view that this shows that the corpus is well settled in his new environment.

It appears to me that in order to fulfill the requirement of the said Article 12, a period of 1 year or more and the child being settled in the new environment would be sufficient to reject an application. To my mind report P5 need to be considered in it's entirety, and one should be cautious to accept the report, and same to be conclusive, to refuse an application on the basis that the child is settled.

Though P5 suggest a preference of the child I find that following material also surface from P5.

(a) There was no significant low mood, he did not appear to be a relaxed and happy child.
(b) Non committal when asked whether he would live with both parents in Sri Lanka.
(c) When the father was not physically present in the vicinity child was noticed to interact well with his mother and appeared relaxed and happy in her company.
(d) No obvious causes for concern regarding child's mental health.
(e) Not possible to draw firm conclusions regarding satisfaction and adjusting about current living arrangements or whether he prefers an alternative.

When I consider the entirety of the report, I am unable to arrive at a conclusion that the child is settled in our country, based on P5.

When I consider the entirety of the report marked P5 I am unable to state with certainty that the child's best interest would be served by

allowing the child to continue to live with the father in Sri Lanka. Though this court is not bound to consider the fact that the father the 2nd Respondent, had breached the laws of another country, his act of removal of the child from the country of origin would be disadvantages to the child as it is not sufficient to consider only the physical characteristic of settlement. Equal regard must be paid to the emotional and psychological elements. (vide Cannon vs. Cannon 2004 EWCA. Civ 1330, (2004) 3 FCR 438. The stay in Sri Lanka for a period of 2 years or more was due to the conduct and acts of the 2nd Respondent who is subject to an international search warrant. What could the innocent child do when he is removed from the country of origin who due to tender years unable to consent or refuse, consent to leave one's country of origin. Missing one of the parents from life of child is a serious draw back, and bound to affect or bring above an imbalance of the mental state.

The prime concern of the Hague Convention is the restoration of children who have been wrongfully removed, whether or not this is in breach of a custody order in one of the contracting states. So it goes wider than the recognition and enforcement of custody orders and protects rights to custody even where there has been no order. Private International Law – 12 Ed. P.M. North – J.J Fawcett pgs. 733/734

The child being settled in a new environment is discussed in this text. At pg 736…

> Settlement in this context means more than mere adjustment to surroundings. It involves both the physical element of being established in a community and an environment, and as emotional constituent of securing and stability. Even if settlement is established the court still has a discretion to order the return of the child (see Re S C A minor) (abduction) 1991 FCR 656; (1991) 2 FRR 1)

In all the above circumstances I would agree with my brother Judge's conclusions and directions given in his judgment and allow the relief claimed in the petition.

Petition allowed.

JUDGE OF THE COURT OF APPEAL