
Media Summary

This appeal concerns a child, Sofia, who was brought to South Africa from Canada by her mother and kept here in violation of an order of the Supreme Court of British Columbia and against the wishes of her father. In the High Court, the Family Advocate brought an urgent application seeking an order for the return of Sofia to British Columbia in terms of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention).

In the High Court, the mother challenged the constitutionality of the Convention. The judge held that there is no conflict between the Convention and section 28(2) of the Constitution since both instruments consider the child's best interests. He determined that the best interests of the child would be to allow the court in the best position to dispose of the case, here the Supreme Court of British Columbia, to do so. He also decided that it was not inconsistent with Sofia's best interests to return her to the jurisdiction of that court and thus ordered her return.

Writing for a unanimous Constitutional Court, Goldstone J first determined that the Hague Convention applies to the facts of the case. He held that the mother's actions fell within the scope of the Convention because she had breached an agreement that had been made an order of court that Sofia would be returned to Canada by a certain date.

Goldstone J then considered the constitutionality of the Convention and held that even if the Convention were assumed to be inconsistent with section 28(2) of the Constitution which requires that the best interest of the child be paramount in every matter concerning the child, the inconsistency would be justified under a limitations analysis in terms of section 36 of the Constitution. The Court decided that the Convention has the important purpose of ensuring appropriate jurisdiction for custody matters, encouraging comity between countries, and discouraging unilateral parental self-help and giving some finality to custodial disputes.

The Court also found that the Convention is carefully-tailored to achieve its ends with consideration given to the interests of the child since the Convention gives a requested state discretion to refuse to return a child under the "grave risk" exception in Article 13. The Court found that courts applying the Convention within the spirit of the Constitution could take steps to protect the interests of the child by expansively interpreting what harms fell within "grave risk" and by crafting court orders to protect the child.

Finally, the Court evaluated the evidence before it and determined, within the parameters of the Convention, that the return of Sofia posed no grave risk of harm to her. Accordingly, the Court ordered she be returned to British Columbia. The Court made efforts to assure that the mother and child would not be returned to Canada before the authorities there could guarantee the mother would not be arrested for her actions. In addition, the Court satisfied itself that on return, the custody matter would be heard by the Canadian court on an expedited basis and the needs of Sofia and her mother would be properly catered for in the interim.