IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA26/2016

Appeal from Family Tribunal Decision No. 141 of 2016

[2017] SCSC 196

M D
Appellantversus

B L
Respondent

Heard: 18th day of January 2017

Counsel: Mr. L. Boniface for Appellant

Ms. A. Benoiton for the Respondent

Delivered: 1st day of March 2017

JUDGMENT

Govinden-J

[1] This is an appeal from a Ruling of the Family Tribunal in Case No. 141 of 2016 delivered on the 19th day of October 2016 (hereinafter referred to as the "Tribunal's Ruling").

[2] At this juncture, it is also opportune to note that the "execution" of the Tribunal's Ruling has been stayed by this Honourable Court pending the final determination of this Appeal by way of Ruling delivered on the 27th day of December 2016 in MA 315 of 2016.

[3] The Tribunal's Ruling arose as a result of an application for custody filed by the Appellant in respect of minor twins M and R LD (hereinafter referred to as the "Minors") of the 3rd day of May 2016.

[4] It followed that by way of a reply of the 7th day of September 2016, the Respondent being the father of the minors raised a preliminary objection on a point of law to the effect that the Family Tribunal did not have Jurisdiction to hear and determine the matter as filed namely the issue of custody for the minors were habitual residents of France and therefore subject to the Jurisdiction of the French Courts. It was further argued that the Appellant had breached the Hague Convention on the Civil Aspect of International Child Abduction (hereinafter referred to as the "Hague Convention") by removing the minors from France where they resided since birth.

[5] The Tribunal after having heard the parties by way of written submissions decided in a gist as follows:

"Page 4 paragraph 2: "…The minors had resided in France since their birth on 18th October, 2014 and had never travelled to Seychelles prior to 8th April 2016. At the time of the filing of the present application the minors had been in Seychelles for less than a month and were already the subject of a custody and access order before the French Tribunal. ***The fact that the minors have recently moved to Seychelles and that the Applicant wishes to reside in Seychelles does not make the minors habitual residents of Seychelles. The Applicant's contention is not only not supported by law but also by commonsense. The underlying principle of custody jurisdiction law is that the child's home jurisdiction is the primary in determining child's custody jurisdiction."***

"Page 4 paragraph 3: Custody jurisdiction law essentially makes sure that a person cannot move children to another state in order to get favourable custody order in the new state's court or tribunal to evade an existing order. In the case of ***'Gonthier v/s Carbognin case No. 322/11', this very Tribunal held that where there is already a custody or access order in place and one wants the order to be varied, that person needs to go to the court of the state that originally issued or granted the order unless neither parent resides in that state anymore.*** *This principle was upheld in the case of 'Pragassen v/s Pragassen', Civil Appeal No. 20/2015. In view of the foregoing, this Tribunal finds that the minor twins M and R L D are habitual residents of France and not that of Seychelles."*

"Page 6 paragraph 3: "Seychelles acceded to the Hague Convention on the Civil Aspect of International Child Abduction in April 2008 and since then, we have seen its application in a number of cases before this Tribunal. Any uncertainty as to the legality and the effect of the Hague Convention in our jurisdiction was laid to rest in the case of Pragassen (supra) where the Learned Chief Justice held that "the convention imposes a duty on the authorities in Seychelles including the courts to facilitate the return of the child to the jurisdiction in which the child has residence.'

"Page 6 paragraph 4: For the reasons given above, this Tribunal finds that the minors M and R L D are habitual residents of France and that this Tribunal does not have the jurisdiction to hear this matter. The application for custody dated 3rd May 2016 is therefore dismissed."

(Emphasis is mine).

[6] The Appellant's grounds of appeal are clearly set out in the Memorandum of Appeal of the 19th day of December 2016 to the following effect:

(i) That the Family Tribunal erred in deciding that the minor twins M and R LD as habitual residents of France and not that of Seychelles;

(ii) That the Family Tribunal erred in determining that the parents of M and R LD shared joint parental custody of the minors;

(iii) That the Family Tribunal erred in stating that the father "enjoyed visitation rights" which were affected when the minors were removed from France;

(iv) That the Family Tribunal erred in finding that the minors removal from France without the consent of the father was a violation of Articles 3 and 5 of the Hague Convention; and

(v) That the Family Tribunal failed to consider factors which would not be in favour of the minors before being returned to France.

[7] The Appellant hence moves as a result for the reversal of the Tribunal's Ruling.

[8] The Respondent on his part through his Learned Counsel Ms. Alexandra Benoiton vehemently objects to the Appeal as per the grounds as cited.

[9] Both Learned Counsels were invited to submit written submissions in this Appeal to expedite the matter in view of its nature and Learned Counsels were further invited by the Court to submit a Statement of Agreed Facts (for the purpose of this Appeal) which was promptly acceded to and the latter so as to enable this Honourable Court to properly adjudicate over all the issues encompassed in this matter and more particularly to be enlightened on the issue of the residential status of the minors' parents and the minors themselves both in France and in Seychelles.

[10] Now, as per the Statement of Agreed facts the parties have agreed as follows, that:

(1) The minors were **born in France and up until April 2016 lived exclusively in France**;

(2) The **minors' parents shared custody of the minors by virtue of a Judgement of the 'Tribunal de Grande Instance de Nanterre' dated the 29th day of April 2015**;

(3) The Appellant later moved the minors to the South of France at which point the **Respondent applied for variation of access in order to have more time with the minors and the restriction of Jurisdiction removal was removed on the 15th day of January 2016.**

(4) **On or around the 8th day of April 2016, the Appellant left France with the minors without informing the Respondent** where she was going. **The Appellant wrote a letter to her lawyer on the 8th April 2016 saying that she was going to Seychelles for a few weeks**;

(5) Within three weeks of arriving in Seychelles, the Appellant applied to the Family Tribunal for custody of the minors;

(6) The Appellant was residing in France for many years prior to coming to Seychelles. The children were born and grew in France and up until the time that the Appellant decided to come to Seychelles in April they had never visited Seychelles.

(7) The Respondent, his family and friends of the minors are currently in France;

(8) The Appellant is a Seychellois by birth and obtained French nationality only because of her father being a French national.

(Emphasis is mine).

[11] Further the Court noting the supporting documentations to the Memorandum of Appeal which documents were duly served on the Learned Counsel for the Respondent and which remain uncontested to date, both minors have Seychellois nationality and hold Seychellois passports issued by the Seychelles Immigration Authorities.

[12] After having carefully considered the thorough written submissions of both Learned Counsels as submitted to this Court (of which they are commanded), as well as having carefully scrutinised the Tribunal's Ruling in the light of the proceedings before it and submitted to Court for the purpose of this Appeal, this Court is being called upon to decide on a very specific legal issue of the **"Jurisdiction of the Family Tribunal vis-à-vis the Application for custody as filed by the Appellant before the Family Tribunal by virtue of Section 78 (1) (a) of the Children Act, 1982 (as amended) and (hereinafter referred to as "the Act") in pursuance to the Tribunal's exercise of its statutory Jurisdiction to hear and determine an application for custody with regards to the minors".**

(Emphasis is mine).

[13] The most relevant question to be asked by and answered by this very Court with direct reference to the above issue is no other than "What is the enforceability status in Seychelles of the Hague Convention as acceded to by Seychelles by its Instrument of Accession to the depository at the Hague on the 10th day of September 2008 and entering into force for the Republic on the 1st December 2008.

[14] First and foremost, it is important to state at this juncture that the extent to which a treaty is enforceable in a State Party (to any Convention either by way of ratification and or accession 'which two latter terms are two different ways for the States to become party,

but the fact of being a party then convey the same obligations under the treaty')and in this case the Hague Convention, depends entirely on the law and legal system of the State and in this case Seychelles as read with the applicable doctrine of accession to international conventions, which can be either "monism" or "dualism". These terms are used to describe two different theories of the relationship between international law and national law. Many States, perhaps most, are partly monist and partly dualist in their actual application of international law in their national systems.

[15] Perhaps at this stage it is only reasonable that the specificities of those two different theories are briefly explained in the search as to which one is either "singly" and or "dually" applicable in Seychelles for the purpose of enforcement of treaties at national law level.

[16] Monists accept that the internal and international legal systems form a unity. Both national legal rules and international rules that a State has accepted, for example by way of a treaty, determine whether actions are legal or illegal. In a pure monist State, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law. International law can be directly applied by a national Judge, and can be directly invoked by citizens, just as if it were national law. In that light, in its pure sense, a Judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority.

[17] Just by way of illustration the principle of monism in action, in some States, like in Germany, treaties have the same effect as legislation, and by principle of 'lex posterior', only take precedence over national legislation enacted prior to their ratification. In its most pure form, monism dictates that national law that contradicts international law is null and void, even if it predates international law, and even if it is in the Constitution.

[18] On the other hand, the theory of dualism simply separates national law and international law as two independent/different systems there the name dualism.

[19] Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If therefore, a State accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens to that matter cannot rely on it and Judges cannot apply it. National laws that contradict it remain in force. According to dualists, national Judges never apply international law, only International law that has been translated into national law.

[20] It follows, therefore, under the monist theory that "international law as such can confer no rights cognisable in the municipal courts. It is only insofar as the rules of international law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.

[21] Now, if international law is not directly applicable, as is the case in dualist systems, then it must be translated into national law and existing national law that contradicts international law must be "translated away".

[22] On the other hand a third category of "mixed" monist-dualist system also exist in states like the United States latter by way of example whereby international law applies directly in the US courts in some instances but not in others. The US Constitution, at its Article VI for example, does indeed say that treaties are part of the Supreme Law of the land. However, there are instances of recent status where the Supreme Court has restated that some treaties are not "self-executory". Such treaties must be implemented by statute before their provisions may be given effect by national and subnational courts. Similarly, with regards to customary international law, its Supreme Court stated, in the case of **[Pacquete Habana (1900)]**, that "international law is part of our law". However, it also stated that international law would not be applied if there is a controlling legislative, executive, or judicial act to the contrary.

[23] After having explored to my mind with reasonable certainty, the theoretical definitions and practical implications of the implementation of the above-mentioned international

law principles by signatory States to treaties, it brings me back to the specific circumstances of this case with direct reference to the Seychelles with respect to the Hague Convention.

[24] What is the approach adopted in Seychelles? In order to answer that question, I refer to the Supreme Law of the land which is no other than our Constitution at its Article 1 as read with Articles 5, 48 and 64 thereof. For the sake of clarity:

Article 1 of the Constitution provides that:

"Seychelles is a sovereign democratic State";

Article 5 of the Constitution provides that:

"This Constitution is the Supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void";

Article 48 (with marginal note Consistency with international obligations of Seychelles) of the Constitution provides inter alia that:

"This Chapter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles in relation to human rights and freedoms and a **court shall, when interpreting the provision of this chapter, take judicial notice of –**

(a) the international instruments containing these obligations"; and

Article 64 (3) and (4) of the Constitution (with marginal note: Diplomatic representation and execution of treaties) lastly, provides that:

Sub-Article 3:

"The President may execute or cause to be executed treaties, agreements or conventions in the name of the Republic"; and

Sub-Article (4):

"**A treaty, agreement or convention in respect of international relations executed by or under the authority of the President shall not bind the Republic unless it is ratified by-**

(a) An Act; or

(b) A resolution passed by the votes of a majority of the members of the National Assembly."

(Emphasis is mine)

[25] A careful scrutiny of the above-cited Constitutional provisions which to my mind are relevant with regards to the international obligations of Seychelles in relation to execution of treaties, calls for the legal interpretation of the Constitution in its legal context which is totally dependent on the nature of the legal context and incorporated in this system of the recognition of the uniqueness of our legal context.

[26] Now in adapting the above highlighted approach as **Lord Simon explained in the case of [Maunsell v Olins (1975) AC 373]**,*"The first task of a court of construction is to put itself in the shoes of the draftsman to consider what knowledge he had and, importantly, what statutory objective he had…being thus placed… the court proceeds to ascertain the meaning of the statutory language."*

[27] Further in the case of **[Attorney General v/s Nigel Mutuna and Ors (SCZ/8/185/2012)**, *the following was said:*

"The primary rule of interpretation applicable in construing the Constitution is that the words should be given the ordinary grammatical and natural meaning and that it is only where there is ambiguity in the natural meaning of the words used that the court may resort to purposive interpretation of the constitution."

[28] It is therefore, common cause that many courts have applied literal rule of interpretation to constitutional texts. So applying this literal meaning in this context, it simply means that 'treaties, conventions and agreements in respect of international relations executed by or under the authority of the President (as is the case for the Hague Convention), shall

not bind the Republic unless it is ratified by an Act; or a Resolution passed by the votes of majority of the members of the National Assembly'.

[29] Further extending that literal interpretation to the provisions of Article 48 of the Constitution with direct reference to the courts, it is also clear that legislators intended to lay guideline and the procedure as to how the courts should approach and interpret national laws including the constitution with respect to the provisions of international instruments and this by way of "judicial notice" and to my mind judicial notice in that context is to be read in the light of the provisions in this case with Article 2 of the Hague Convention which states that: "Contracting states shall take all appropriate measures to secure within their territories the implementation of the objects of the convention. For this purpose they shall use the most expeditious procedures available". Why I make reference to Article 2 in line with interpretation of section 48 in relation to our courts is simply because 'the legislation whereby Seychelles would implement the Hague Convention has still not been incorporated in national law as per the provisions of Article 64 of the Constitution as cited.

[30] "Judicial notice" is thus not to render the international instruments provisions directly enforceable into Seychelles national law but to take cognisance of the international obligations of Seychelles as a signatory State in line with the provisions of Article 2 of the Hague Convention (supra). This approach is to my mind the best approach to be adopted in this case and will further reinforce the "moral obligation of Seychelles" vis-à-vis the legal enforceability of the Hague Convention provisions in its national law in context.

[31] Now, having laid down the foundation for ascertaining which theory is adopted by Seychelles with regards to implementation of the Hague Convention subject to the 'qualifications' as explained above (paragraph [30] refers) with reference to courts, I hold the view that the provisions of Article 68 of the Constitution are unambiguous and clear as to Seychelles status a l'egard to the Hague convention namely in that "unless enacted in national law by way of an Act; and or majority votes of the members of assembly, it is not legally enforceable at national level. It is my opinion therefore, that this should be the

case so as to guard jealously the sanctity of our Constitution hence not giving constitutional provisions a meaning that may impeach the explicit, implicit and clear language hence construing the provisions of Articles 48 and 68 in its ordinary sense.

[32] To that end, I find that albeit Seychelles having acceded to the Hague Convention, its elevation to the status of national law by the Family Tribunal and taking precedence over the Children Act (supra) which is the sole national legislation with respect to custody applications in force in Seychelles and applicable in this case is grossly erroneous in law and reliance on the cited case law of **[Pragassen v/s Pragassen, (Civil Appeal 20 of 2015)],** was not interpreted in context. The courts are to be a facilitator in terms of its obligation to take judicial notice of international treaties but not to enforce nationally the non-domesticated international instrument.

[33] In the specific circumstances of this case and in order to give a wholesome Judgement with regards to all issues raised in this appeal other than the national enforceability status of the Hague Convention in Seychelles which to my mind goes to the crux of this Appeal and treated at (paragraph [32] above), I deem it crucial to also consider the other scenario should the Hague Convention have been directly enforceable under our national law taking note of the specific facts of this case as endorsed by the statement of agreed facts and proceedings before the Family Tribunal and taken into consideration in its impugned Ruling.

[34] I thus in furtherance to the first ground of appeal (supra) refer to the provisions of Article 4 of the Hague Convention which provides for the Convention's applicability in cases of a child who was habitually resident in a contracting state immediately before any breach of custody or access rights. Right of custody is defined as "rights relating to the care of the person of the child and in particular, the right to determine the child's place of residence and access rights is defined in turn as "including the right to take a child for a limited period of time to a place other than the child's habitual residence".

[35] The Family Tribunal in its impugned Ruling considered that the habitual residents of the minors as being France based on its analysis of the period the time the minors remained

in France since birth and the time they spent in Seychelles prior to the application before the Family Tribunal leading to their conclusion at page 4 of its Ruling that:

"…The minors had resided in France since their birth on 18th October, 2014 and had never travelled to Seychelles prior to 8th April 2016. At the time of the filing of the present application the minors had been in Seychelles for less than a month and were already the subject of a custody and access order before the French Tribunal. ***The fact that the minors have recently moved to Seychelles and that the Applicant wishes to reside in Seychelles does not make the minors habitual residents of Seychelles. The Applicant's contention is not only not supported by law but also by common sense. The underlying principle of custody jurisdiction law is that the child's home jurisdiction is the primary consideration in determining child's custody jurisdiction."***

(Emphasis is mine).

[36] Now, based on the recent developments on the meaning of habitual residence in alleged child abduction cases, ***Paul Beaumont and Jayne Holliday at the conference on "Private International law in the Jurisprudence of European Court Family at Focus" held in Osijek, Croatia, June 2014*** *presented that at the popular choice of connecting factor with the Hague Conference since the 1960's, the concept of habitual residence of the child has clearly changed since it was chosen as the sole connecting factor within the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The view held at the time of drafting, that a person's habitual residence was simply a question of fact and therefore a formal definition was of no practical use proved not as simple to apply in relation to the habitual residence of the child as first thought, with the issue of where the child is habitually resident often being contentious. The child's habitual residence for the purpose of the Convention looks to the habitual residence immediately prior to the child's wrongful removal or retention. Without the identification of the habitual residence at the time of the wrongful act it is not possible to work out whether the child's removal or retention was lawful or not."*

[37] Children it should be noted '*was further argued may acquire a new habitual residence in the country they have been abducted to or retained in view to the passing of the time or*

more speedily if their relocation there was lawful at the time they moved there. In other situations a child may be found to have more than one habitual residence or none at all. Indeed a question that pushes the concept of habitual residence to its limits is in respect of a very young child (a newborn child) as to whether the child can be habitually resident in a country that the child has never been to, arguing thus that it makes sense that the newborn acquires the habitual residence of the custodial parent(s)'.

[38] It is logical that the use of the connecting factor of the child's habitual residence within the Abduction Convention was originally designed to protect children from harm in cases of wrongful removal or retention by securing their prompt return of the children to the State with which they had the strongest connection. The idea being that, the child's habitual residence immediately prior to the abduction would provide the most appropriate forum for a custody hearing.

[39] In order to determine the child's habitual residence it has been argued, '*the courts were to give the concept of habitual residence an autonomous definition but with differences in how it should be interpreted in the absence of a formal definition, have become apparent'*.

[40] In furtherance to the above differences in approach in mostly lack of agreement on the weight to be given to the intentions of the custodial parents in determining the habitual residence of their children, three main approaches have been identified. The first favours the intention of the person exercising parental responsibility to determine the child's habitual residence; the second approach values the child as an "autonomous individual" and uses the child's connection with the country to determine the habitual residence; and **the third and the most recent approach, which is the approach taken by the Court of Justice of the European Union (CJEU), is a combined method, which looks at all the circumstances of the case in order to see where the child's centre of interests are but recognizes as one factor in doing so the relevance of the intention of those holding parental responsibility for the purpose of ascertaining where the child is habitually resident.**

(Emphasis is mine).

[41] In determining the latest recent approach in the context of jurisdiction for parental responsibility cases, it has been the view of the CJEU that ***"the parental intention to settle with the child in a new State if manifested by some tangible evidence should only be seen as a piece of evidence indicative of where the child is habitually resident. That that evidence should be weighed by the court alongside all the circumstances of the case to see which residence of the child reflects 'some degree of integration in a social and family environment.' Hence the resulting test developed being "the place which reflects some degree of integration by the child in a social and family environment. In particular duration, regularity, conditions and reasons for the stay on the territory of the member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school (if any), linguistic knowledge and the family and social relationships of the child in that State should all be taken into consideration obviously appropriate to the child's age."***

(Emphasis is mine).

[42] Now, ***with regards to the aspect concerning family and social relationships, it was considered that the relationships to be considered according to the child's age. If the child was very young and was dependent on the custodial parents then the court needed to consider the social and family relationships of the parents with the lawful custody in order to determine the habitual residence of the child.***

(Emphasis is mine).

[43] It is important to note at this juncture, that prior to the latest current test for the habitual residence of a child, the definition that was initially used by UK Courts for determining habitual residence for the purpose of the Abduction Convention followed the parental intention approach equating the concept of habitual residence with that of ordinary residence, placing emphasis on the residence having a settled purpose.

[44] Now, it is the opinion of this Court that the most suitable and appropriate approach which encompasses all the intertwined elements of the definition of 'habitual residence of a child for the purpose of the Convention' is the third and the most recent approach, which

is the approach taken by the CJEU, '*being a combined method, which looks at all the circumstances of the case in order to see where the child's centre of interests are but recognizes as one factor in doing so the relevance of the intention of those holding parental responsibility for the purpose of ascertaining where the child is habitually resident'*. (Paragraph 40 refers).

[45] Now, applying the facts of this case to the adopted test, it is obvious that the Tribunal accepted in its impugned Ruling at page 2 thereof, as background of the case that:

"The parties are the minors' parents born on the 18th October 2014 in Paris, France. The Appellant is a Seychellois and French national who studied in France and was residing in France at the time of the birth of the minors. The Respondent is a French national. Following the birth of the minors the parties separated and a battle for custody of the minors ensued before the French Tribunals. On the 29th April 2015, the "Tribunal de Grande Instance De Nanterre" gave a summary judgment granting inter alia joint custody to the parents. The summary judgment further specified that the habitual residence of the minors was to be with their mother and their father, the Respondent to the present application was to have visitation rights to the minors on Wednesdays and Saturdays as well as Mondays and Thursdays on the second weeks of July and August 2015. Asocial inquiry report was also ordered and the minors were not to leave jurisdiction of France without prior consent of both parents.

That on the 15th January 2016, the same Tribunal gave its final judgement confirming joint parental custody to the parents and extended the father's visitation rights to two week-ends per month and 6 consecutive days per month on top of half school holidays access. By virtue of the same Judgement the non-removal order forbidding the removal of the minors from the jurisdiction of France was lifted. Following the said Judgement the minors were removed from the jurisdiction of France and brought to Seychelles by their mother on the 8th April 2016, without the consent of their father who at the time share joint parental custody of the minors.

On the 28th April 2016 the Respondent to the present application filed a fresh application for sole custody before the Tribunal de Grande Instance de Valence" and same was heard

ex-parte and on the 16th June 2016 the said Tribunal gave its judgement declaring the minors to be habitual residents of France and granted sole parental custody of the minors to their father, the Respondent. That following the delivery of the afore-mentioned judgement the Seychelles Social Services Department received information from the central authority of France that the Respondent, had lodged an application for the return of the minors to France under the Hague Convention. This was brought to the attention of the Tribunal by way of letter dated 31st August 2016 from the Social Services."

[46] The basics of the facts of the case leading to the Tribunal's Ruling as to habitual residence of the minors is based on an ex-parte Order of a Tribunal in France which in effect was not properly produced in evidence for it did not follow the strict guidelines of the Evidence Act to the relevant effect hence why its reliance upon is being questioned by this Court and the same applies to a letter sent to the Tribunal by the Social Services of Seychelles from allegedly French Authorities based on the Hague Convention's enforceability in Seychelles in respect of "child abduction cases. Noting the age of the minors and the consequences on their wellbeing and welfare and best interest, the Family Tribunal with respect ought to have been more professional in handling evidence in accordance to law in this matter but in my opinion grossly disregarded same for reasons better known to the Family Tribunal.

[47] Further, it is clear that the 'Tribunal de Grande Instance de Nanterre' more particularly ***"Sur la demande relative a l'interdiction de sortie du territoire français" and I quote "En l'espèce, les parents s'accordent pour demander la main levée de l'interdiction de sortie du territoire des enfants. Il convient dès lors d'ordonner cette main levée***" and further with regards to ***"la résidence des enfants: En l'espèce, conformément a l'accord des parties, à la situation actuelle des enfants en considération de leur intérêt, la résidence habituelle de Melodie et Raphael est fixée au domicile de la mère".***

[48] It follows that the fact that the Appellant being the mother of the minors travelled to Seychelles with the minors could not in the light of the reproduction of the extracts of the French Tribunal de Grande Instance de Nanterre's Judgement, be said to have flouted the Order hence abducting the minors from French territory.

[49] It is undisputed that the Appellant and her minor children are Seychellois nationals and all have Seychellois passports and legally in Seychelles by virtue of their nationality and they all enjoy freedom of movement within Seychelles territory, the right to reside in any part of Seychelles, the right to leave and not to be expelled from Seychelles in line with the provisions enshrined in Article 25 of our Constitution excepted as provided in the Exceptions thereto namely being relevant to this case to my mind being more particularly, for the prevention of a crime or compliance with an order of a court".

[50] I reiterate as far as prevention of a crime under the Convention is concerned in relation to the abduction of the minors and breach of the Hague Convention, these aspects with respect has not been proven to the required standard before the Family Tribunal (for it endorsed a non-executory foreign Judgement in our Courts) and un-authenticated for all intents and purposes.

[51] Further, as to the habitual residence of the minors, it is clear that the Family Tribunal to my mind was guided by a very narrow interpretation of the definition of the term "habitual residence" of the minors given the specific circumstances of this case namely their nationality and that of the Appellant being their natural mother and having a right of protection of her family as a fundamental element of society as enshrined in Article 32 of our Constitution.

[52] The Family Tribunal by adopting a narrow interpretation of the habitual residence definition disregarded and omitted to give due regard to the minor age of the minors, their upbringing by the Appellant with the assistance of her mother who is also in Seychelles with her, the domicile of the Appellant being her country Seychelles for it did transpire in the proceedings before the Family Tribunal and remain undisputed that the Appellant and Respondent separated after the minors were only three months old and in their best interests the 'Tribunal de Grande Instance de Nanterre', albeit granting joint custody to both parents, decided that the habitual residence of the minors would be that of "le domicile de la mere".

[53] The Appellant being in Seychelles as a Seychelloise with her Seychellois minors and indicating to the Family Tribunal of her intention to remain in her own country with

proof of appurtenance and work-related duties (latter cut short only due to the intervention of the Respondent) and in her own social and family environment together with her children upon arriving in Seychelles after a month of her arrival and the conditions for her stay on the territory, the Family Tribunal in the opinion of this Court ought to have considered the best interest of the child first in view of their minor age and their dependence on the Appellant), as recognised by the Tribunal in France at First Instance), prior to ruling simply on the issue of residency as it did.

[54] Further even our local case law have further reinforced the current habitual residency test as upheld by the CJEU (supra), in the matter of **[Air Seychelles Limited v/s Richard Grice (Civil Side No. 254 of 1993)]**, (albeit facts being different to the current matter but the principle remains), that the Court ruled citing **Dicey and Morris on Conflict of Laws 11th Edition) as to the meaning of the word residence as follows:**

"The word 'Residence' has different meanings in different branches of law. It is clear that it must be distinguished from mere presence, the state of being found in a country, but the nature of the distinction and the factors which should be taken into account will vary with the subject matter"

"Article 102 (1) of the Civil Code states that:

The residence of a person shall be the place in which he resides in fact and shall not depend upon his legal right to reside in a country."

"Article 102 (2) is as follows:

"In determining whether a person is habitually resident in a place, account shall be taken of the duration and continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence".

[55] It is thus the humble opinion of this Court that based on the illustration of the current latest approach to the definition of the "habitual residence" for the purpose of the Hague Convention (subject to this Court's Ruling on its enforceability in Seychelles) (supra), I

find that the Family Tribunal erred in coming to the conclusion as it did that the minors were not habitual residents in Seychelles given the specificities of this case upon the filing of the custody application before it.

[56] Having dealt with the grounds of appeal in direct reference to the "enforceability of the Hague Convention in Seychelles" more particularly ground of appeal No. 4, and which was I should say the basis for the Family Tribunal surrendering its Jurisdiction to the French Courts and the "habitual residency" of the minors specific to the first ground of appeal (should the Convention have been applicable in any effect), the Court will further move to consider grounds 2, 3 and 5 of the grounds of appeal which is mostly based on the interpretation of the Orders of the Tribunal de Grande Instance de Nanterre (supra).

[57] As to the second ground of appeal in that the Family Tribunal erred in determining that the parents of the minors held joint custody, it is clear and needs not to over-dwelled upon by this Court that this ground is unsupported by the facts as admitted by the parties before the Family Tribunal. The Judgment of the 'Tribunal de Grande Instance de Nanterre' clearly states that and I quote *"L'exercise de l'autorité parentale: s'agissant de l'autorité parentale…. En conséquence, l'autorité parentale est exercée en commun par les deux parents."*

[58] A clear literal interpretation of the said Judgement cannot be faulted in that both parents shared joint custody hence the Family Tribunal cannot be faulted on that ground.

[59] As to the third ground of appeal in that the Family Tribunal erred in finding that the father "enjoyed visitation rights" which were affected when the minors were removed from France", here it is subject to the Ruling on the applicability of the Hague Convention in Seychelles (supra), the humble opinion of this Court that the Family Tribunal based on the Judgement of the 'Tribunal de Grande Instance de Nanterre' also rightly ruled as to the "visitation rights of the Respondent as prescribed in that Judgement and as per "le droit d'accueil du père" as enumerated at page 3 of the said Judgement. However, as to whether such rights were affected when the minors were removed from France, it is the opinion of this Court, on appeal, that the Family Tribunal exercising its Jurisdiction under Section 78 of the Children's Act as far as the custody application is

concerned ought to take into account the conditions as set out for "visitation rights" in the French Courts prior to the move of the minors to Seychelles and in doing that ensuring that both parties are protected to enjoy their right to their family and consider the impact on the best interest of the minors and this would also be ensured provided the Family Tribunal looks into the merits of the case before it (which it chose not to do at first instance hence this appeal).

[60] With regards to the last and fifth ground of appeal in that the Family Tribunal failed to consider factors which would not be in favour of the minors before being returned to France, I believe this Court cannot be but clearer as far as the interest of the minors are concerned. The whole basis of our Children Act and the relevant provisions vis-a-vis custody applications are erred towards Judicial decisions and Judgements to be delivered in the best interests of the child. Best interests of the child is to be decided on the facts of each case individually and the Family Tribunal in this case again subject to the Ruling as far as to the applicability of the Hague Convention is concerned (supra), should have also had sight of the very provisions of the Hague Convention in that respect namely Article 13 thereof which provides that *"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 there is inter alia, "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 and that 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."*

[61] I further wish to stress that Article 20 of the Hague Convention further states that the return of a child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms whilst safeguarding arrangements for organising effective exercise of access in the same way as an application for the return of a child. As to the latter, Article 21 of the Hague Convention refers.

[62] What is to be derived from those articles of the Hague Convention is that, even international law protects the family unit believing that if the family unit is protected then all the family members will be protected within it. Further, interests of the child is a concept of evolving capacities of the child which reflects children's different rates of development. Hence the pace of a child's development must be taken into account not in a way that deprives children of their rights but in a dynamic creative manner which enhances their rights and what better way to describe interests of the child.

[63] Did the Family Tribunal fail to consider factors which would not be in the favour of the minors being returned to France? The answer based on the above analysis of principles is in the affirmative. Why? There was evidence before the Family Tribunal through pleadings of the incidents leading to the Judgement of the 'Tribunal de Grande Instance de Nanterre', namely the character of the Respondent towards the Appellant, their accommodation conditions in France and I should say temporary status in France in view of the status of the Appellant in France and her mother's medical condition (which latter evidence was before the Tribunal at the time of the hearing of the plea in limine litis as to Jurisdiction). This led to the fears of the Appellant as stated before the Family Tribunal towards her minor children being returned to France.

[64] Noting the peculiar social background as was displayed by the pleadings before the Family Tribunal and all the circumstances of this matter as illustrated above and ruled upon, I humbly find on appeal, that noting the background of the parties and the minors in this matter prior to their being moved to Seychelles 'especially in view of their very minor age', it would not have been in the best interests of the children to be returned to France where they lived with the Appellant "as a student", as ruled by the Family Tribunal.

[65] In further reinforcing the decision of this Court on this Appeal as illustrated at paragraph [64], I find support in the 'ratio' of the, '*the leading case in Africa which set the pace for determining the custody of a child while putting much consideration was in the celebrated case of Fletcher v Fletcher (1948) (1) SA 130 (A) whereby the Appellate*

Division confirmed that the most important factor to be considered in issues such as custody and access is the best interests of the children and not the rights of parents'.

[66] Having considered all the grounds of appeal, I find that the Appeal succeeds on the basis of non-applicability of the un-domesticated provisions of the Hague Convention in Seychelles as analysed and that the Family Tribunal as a result should not have abjudicated its Jurisdiction to that of the French Courts in the circumstances of this case with reference to the Appellant's custody application.

[67] I further find however, that Seychelles being a state party to the Hague Convention, the Convention itself at its Article 13 thereof does not preclude the courts of a party State's national jurisdiction from ordering the non-return of a child under the Convention on the basis of the best interest of the child and I so further find as per paragraph 64 above, that based on the best interests of the child subject to the Ruling on the non-applicability of the Hague Convention, that it would not be in the best interests of the minors to be returned to France as ordered by the Family Tribunal.

[68] This appeal therefore succeeds and the Family Tribunal is hereby ordered to hear the Application for custody as filed under the Children Act on its merits and the status quo of the minors custody as per the Stay Order of the 27th day of December 2016 remains unchanged subject to access rights to be determined by the Family Tribunal to the benefit of the Respondent.

[69] All the above said, the appeal is allowed and the Department of Social Services, the Police and Immigration Authorities are to be informed accordingly and the Family Tribunal is hereby ordered to give effect to this Judgment with immediate effect.

Signed, dated and delivered at Ile du Port on 1st day of March 2017.

Govinden-J
Judge of the Supreme Court