THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2012/0124

IN THE MATTER of the Inherent Jurisdiction of the Eastern Caribbean Supreme Court
And
IN THE MATTER of the Inter-American Convention of the International Return of the Children ratified by the House of Representatives pursuant to the Ratification of Treaties Act 1987 (No. 1 of 1987) on the 10th January 1994.
And
IN THE MATTER of Guardianship of Infants Act Cap. 197 of the laws of Antigua and Barbuda Revised Edition 1992
And
IN THE MATTER of the Juvenile Act, Cap 229 of the Laws of Antigua and Barbuda Revised edition 1992

BETWEEN:

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Applicant

AND

MICHAEL GERARD MOORE

Respondent

Appearances:
Dr. David Dorsett, Ms. Alicia Aska and Ms. Sherrie-Ann Bradshaw for the Applicant
Ms. Nelisa Spencer for the Respondent

2012: April 11

JUDGMENT

FACTUAL BACKGROUND

[1] The Applicant in this matter is the Attorney General of Antigua and Barbuda acting in the capacity of the designated "Central Authority" under the Inter American Convention on the International Return of Children ("the Inter-American Convention").

[2] The Central Authority has in this matter acted based on a request which it received on behalf of the mother of the two minor children involved, Ms. Beatriz Nunez (the mother).

[3] The Respondent Michael Gerard Moore is the father of the children namely Michael Galo Moore Nunez Delarco born on the 17th December 2004 and Deborah Taylor Moore Nunez Delarco born on the 13th February 2008. He is an American Citizen and is the husband of Ms. Beatriz Nunez, an Ecuadorian citizen. Mr. Moore and Ms. Nunez were married in Ecuador in 2000. The children were born in the United States of America (USA). They have dual citizenship, namely American and Ecuadorian citizenship.

[4] Since 2000 until around early 2008, the couple lived in New York, United States of America where both children were born. In 2008 the family moved to Ecuador.

[5] On 8th July, 2011 the father, with the express written permission of the mother, travelled with the children from Ecuador to the United States. According to a document exhibited with the Affidavit of the mother, the children left Ecuador with the father "due to vacation purposes". According to the Affidavit of the mother filed on the 22nd February 2012 in support of the Fixed Date Claim filed on the same date, the mother, on the 1st July 2011, authorized the Respondent to travel with the children from Ecuador to New York on American Airlines on July 8th 2011 for one week during their school's vacation. The school vacation started on July 10th 2011 and the children were required to be back at school on July 18th 2011.

[6] The children were not returned to Ecuador for the start of the new school term beginning 18th July 2011 and have not been back to Ecuador since their departure of 8th July 2011.

[7] On or about 23rd August 2011, while in the USA, the father petitioned the Supreme Court of the State of New York seeking custody of the children. On 24th August 2011 the Honourable John C. Bivona ("Judge Bivona") issued an "Order to Show Cause" which among other things stipulated that "Pending the Hearing and Determination of this Petition, the Respondent [the wife], nor her

agents or employees, shall remove the infant issue from jurisdiction of the State of New York, U.S.A".

[8] On 9th September 2011 the mother made a request to the Central Authority of Ecuador seeking its assistance with respect to the return of the children from the United States provided for by the Hague Convention on the Civil Aspects of International Child Abduction ("The Hague Convention"). The Ecuadorian Central Authority made the request to the American Central Authority, the United States Department of State ("Department of State").

[9] By letter dated 29th September 2011, the Department of State wrote to the father encouraging him "to voluntarily return ... [the children] to Ecuador for a custody determination there". By a second letter dated 29th September 2011 the Department of State wrote to Judge Bivona so that he "should therefore be aware that an application for the return of ... [the children] to Ecuador under the 1980 Hague Convention".

[10] In November of 2011, the Respondent left New York, USA with the children and travelled to Antigua and Barbuda.

[11] By letter dated 4th January 2012, the Ecuador Central Authority wrote to the Applicant, the Central Authority under the Inter American Convention on the International Return of Children ("the Inter-American Convention), requesting that he "promote an urgency procedure to obtain the return of the children to their habitual residence that is in Ecuador".

[12] By letter dated 20th February 2012, the Solicitor General on behalf of the Applicant wrote to the father to inform him of the Applicants "intention to proceed in accordance with the Inter-American Convention on the International Return of Children" and inviting him to a meeting on 21st February 2012. That meeting never took place.

[13] On 22nd February 2012 the Applicant by Fixed Date Claim Form (supported by evidence on Affidavit) initiated the instant proceedings seeking an order that the father present and return the

children to the Applicant (or alternatively to the Court) and an injunction restraining the father from removing the children from the jurisdiction pending the final determination of this matter.

[14] On 22nd February 2012 this Court, among other things, ordered that the father do present and return forthwith the children to the Applicant and further ordered that the father be restrained from removing the children from the jurisdiction of Antigua and Barbuda pending the final determination of the matter.

[15] Several applications have been made in the matter and a number of affidavits have been filed as shown in the following table.

Table of Affidavits filed in the matter

No.	Date	Deponent	Title
1	22 February, 2012	The Mother	Affidavit in Support of Fixed Claim Form
2	22 February, 2012	The Mother	Affidavit of Urgency in Support of Application without Notice
3	05 March, 2012	The Father	Affidavit of Objection to Application
4	06 March, 2012	The Father	Affidavit of Urgency in Support of Application
5	08 March, 2012	The Mother	Affidavit of Beatrice Nunez Del Arco Garcia
6	12 March, 2012	Lebretch Hesse	Affidavit in reply to the Respondent's Objection
7	16 March, 2012	The Father	Affidavit in reply to Affidavits of Lebretch Hesse and Beatrice Nunez Del Arco Garcia
8	22 March, 2012	Lebretch Hesse	Supplemental Affidavit
9	28 March, 2012	Lebretch Hesse	Supplemental Affidavit
10	28 March, 2012	The Father	Affidavit pursuant to order
11	28 March, 2012	The Mother	Affidavit of Beatrice Nunez Del Arco Garcia
12	28 March, 2012	The Mother	Affidavit of Beatrice Nunez Del Arco Garcia in Response to Defendant's affidavit of 28th/March/2012

THE APPLICABLE LAW

[16] The application before the Court was brought primarily under the Inter-American Convention on the International Return of the Children (the Inter-American Convention) which was ratified by the House of Representatives of this Country pursuant to the Ratification of Treaties Act 1987 (No 1 of 1987) by way of Statutory Instrument No. 4 of 1994. The purpose of the Convention is as stated in Article 1 thereof.

> ARTICLE 1
>
> "The purpose of this Convention is to secure the prompt return of children habitually resident in one State Party who have been wrongfully removed from any State to a State Party or who, having been lawfully removed, have been wrongfully retained. This Convention further seeks to secure enforcement of visitation and custody rights of parties entitled to them."

[17] Article 2 states that "for the purposes of this Convention, child shall be any person below the age of sixteen years." In the instant case, the children are aged 7 years and 4 years respectively.

PRELIMINARY ISSUE/ISSUE # 1.

[18] In her closing submissions, Ms. Nellisa Spencer, Counsel for the father, the Respondent Michael Moore contends that: -

> "Although ratified it (the Inter-American Convention) is not part of domestic law as made clear by section 3(3) of the Ratification of Treaties Act, Cap 362 of the Laws of Antigua and Barbuda Revised Edition."
>
> The sub- section states:
> "No provision of a treaty shall become, or be enforceable as part of the law of Antigua and Barbuda except by or under an Act of Parliament."

[19] Counsel submits that a mere resolution ratifying the Convention is not equivalent to an Act of Parliament and as such it does not have status as domestic law. She adds further that, Mr. Hesse, Solicitor General, of Antigua and Barbuda for the past seventeen years, under cross-examination accepted this position as being accurate. She further states that, the effect of the Convention not being part of domestic law is that in the exercise of any discretion a court may not rely on International law where same conflicts with domestic law. In such instances domestic law still

prevails. She states that it is very well established that an international legal act must be transformed in domestic law before it can give rise to binding rights or obligations for subjects in the legal system. The Ratification of Treaties Act of Antigua is clear as to how this transformation must take place. This point has been repeatedly highlighted by the courts also. (**J. Astaphan and Co (1970) Ltd v Attorney General of the Commonwealth of Dominica**[1]; **Higgs v Minister of National Security and Others**[2]; **Attorney General et al v Boyce and Joseph (2006)**[3].

[20] Counsel for the Respondent further submits that:-

a) The Court is apparently being asked to order the return of the children to Ecuador and the Convention contains various principles which the court should consider in coming to its decision as to whether or not to return the children to Ecuador.

b) Since the primary provision under which the proceedings were initiated is the Convention, her submissions focus primarily on the various factors as set out in the Convention. The Court is reminded from the outset that "the principles of domestic law trump the principles set out in the Convention."

c) The Court is seized with jurisdiction under various pieces of domestic legislation and the court is also seized with its inherent jurisdiction. This matter involves the welfare of the children and the court is well aware of the fundamental principle which runs through domestic law that the welfare of the children is paramount in determining matters which will directly affect children.

d) Notwithstanding any factors or tests set out in the Convention, the applicable and governing principle under which this matter ought to be determined is the welfare/best interests of the two minor children.

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[1] Civil Appeal No. 5 of 1997
[2] [2000] 2 AC 228
[3] CCJ Appeal No. CV 2 of 2005.

[21] Counsel for the Applicant have addressed the issue of the ratification of the Inter-American Convention as follows:-

(a) Section 3(1)-(3) of the Ratification of Treaties Act provides as follows:

"3. (1) Where a treaty to which Antigua and Barbuda becomes party after the coming into force of this Act is one which affects or concerns-

a) the status of Antigua and Barbuda under international law or the maintenance or support of such status, or
b) the security of Antigua and Barbuda, its sovereignty, independence, unity or territorial integrity, or
c) the relationship of Antigua and Barbuda with any international organization, agency, association or similar body,

such treaty shall not enter into force with respect to Antigua and Barbuda unless it has been ratified or its ratification has been authorized or approved in accordance with the provisions of this Act.

(2) A treaty to which subsection (1) applies shall be ratified or shall have its ratification authorized or approved as follows-

a) where such treaty concerns a matter referred to in paragraph (a) or (b) of subsection (1) or contains any provisions which is to become, or to be enforceable as part of the law of Antigua and Barbuda, by Act of Parliament;
b) where such treaty concerns a matter referred in paragraph (c), by Resolution of the House of Representatives.

(3) No provision of a treaty shall become, or be enforceable as, part of the law of Antigua and Barbuda except by or under an **Act of Parliament**. [emphasis supplied]

[22] Counsel submit further that as far as is relevant, section 55 (1) of the Interpretation Act provides as follows:-

55. (1) In an enactment –
"Act" means an Act of Parliament and when used in relation to legislation shall include private Act and **any statutory instrument or other subsidiary legislation made under the authority of any Act** [emphasis supplied]

[23] Counsel for the Applicant further contend that on 10th January 1994 the House of Representatives by Resolution ratified the Inter-American Convention as a Treaty under section 3(1) (c) of the Ratification of Treaties Act. By statutory Instrument No. 4 of 1994 the Inter-American Convention became "enforceable as, part of the law of Antigua and Barbuda" as provided by the conjoined effects of section 3 of the Ratification of Treaties Act and section 55(1) in the Interpretation Act. According to Counsel for the Applicant, any suggestion that the Inter-American Convention is not

part of the Law of Antigua and Barbuda "must be rejected as disingenuous and heretical to the orthodoxy of giving statute a plain and purposive interpretation".

[24] It is the further contention of Counsel for the Applicant that the legal status of the Inter-American Convention" is not to be determined by semantic analysis of oral evidence". Rather, the status of the Inter-American Convention as a matter of law is to be determined by a proper and principled construction of the relevant texts, namely, the Ratification of Treaties Act and Statutory Instrument No. 4 of 1994.

[25] The case of Attorney General et al vs Jeffrey Joseph and Lenox Ricardo Boyce, a decision of the Caribbean Court of Justice, Appellate Jurisdiction, on appeal from the Court of Appeal of Barbados, (a case cited by Counsel for the Respondents), is instructive on this issue. Paragraph 55 of the judgment states: -

> Paragraph 55 - "In states that International lawyers refer to as 'dualist', and these include the United Kingdom, Barbados and other Commonwealth Caribbean states, the common law has over the centuries developed rules about the relationship between domestic and international law. The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot *ipso facto* add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty-making on the other hand is a power that lies in the hands of the Executive. See: J H Rayner (Mincing Lane) Ltd. v Dept of Trade & Industry. Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty, If domestic legislation conflicts with a treaty, the courts will ignore the treaty and apply the local law. See: The Parliament Belge."

[26] Paragraph 56 of the judgment goes on to state: -

> "It does not at all follow that observance of these rules means that domestic courts are to have absolutely no regard for ratified but unincorporated treaties. The classic view is that the court will presume that the local Parliament intended to legislate in conformity with such a treaty where there is ambiguity or uncertainty in a subsequent Act of Parliament....." There seems to be a lacuna and uncertainty in the domestic law resulting in questions: - whether Antigua is a Non-Inter American Convention country and whether in a case where Antigua is regarded as a non-convention country , the Court can take into account the principles set out in the Convention.

[27] Paragraph 107 of the above judgment goes on to state:-

> "The Australian decision in Minister of State for Immigration and Ethnic Affairs v Teoh appears to have been received and approved throughout the common law world as an appropriate response to the evolving situation. The view seems to have emerged that, unless municipal law rules this out, a ratified but unincorporated treaty can give rise to a legitimate expectation of a procedural benefit. When a treaty evidences internationally accepted standards to be applied by administrative authorities in dealing with basic human rights, courts will be hesitant to regard the relevant terms of the treaty as mere "window-dressing" capable of being entirely ignored on the domestic plane."

[28] The Court, after considering the submissions of Counsel on the above issue, is of the view that it has jurisdiction to determine the instant case based on the Inter-American Convention as the said Convention can be considered part of the domestic law of Antigua and Barbuda. The Court is of the further view that most importantly, there is nothing in the domestic law that conflicts with the treaty, namely the Inter-American Convention. Further, Counsel for the Respondent, in her submissions, did not pinpoint any such conflict. Even if the Inter-American Convention is not part of the domestic law of Antigua, in my view this does not preclude the Court in the exercise of its inherent jurisdiction and its available statutory powers from taking into account the relevant principles and defences set out in the Inter –American Convention, despite the procedural differences which arise where the application is not made under the Inter-American Convention. The Court is of the further view that, in the event that it is wrong in its conclusion, at the very least, and on the authority of the Ethnic Affairs v Teoh case cited above, the instant case gives rise to a legitimate expectation in the mother that the domestic court will give effect to the procedural benefit of an application under the Inter-American Convention. It is the view of the Court that the "procedural benefit" in this case would be that of a summary procedure. The intention of the Inter-American Convention (like the Hague Convention) is to provide a "simple and summary procedure", in which proceedings are not "held up by protracted hearings and investigation." Further, since, as stated above, the children are under the age of 16 years, the Court has jurisdiction to entertain the proceedings in the instant case.

[29] The Court has also taken into account the Affidavit of the Respondent filed on the 5th March 2012. In paragraph 56 of the said Affidavit, the Respondent states as follows:-

"I am advised and believe that the paramount consideration of the children's welfare runs throughout various laws of Antigua and Barbuda and also that it is covered in other treaties to which Antigua and Barbuda is a signatory, including Article 3 (1) of the United Nations Convention on the Rights of the Child which states that:-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[30] At paragraph 57 of the same Affidavit (5th March, 2012), the Respondent deposes:-

> "I am advised and believe that the above Convention on the Rights of the Child (the United Nations Convention) has been ratified by Antigua and that as such the provisions form part of domestic law of Antigua and that the court will consider this."

[31] The Respondent, in asking the Court to grant him the relief that he seeks, namely, not to return the children to Ecuador, urges the Court to give effect to the Convention on the Rights of the Child on the basis that the said Convention has been ratified by Antigua **and that as such the provisions form part of domestic law of Antigua**. In the view of the Court, the Respondent is contending that the mere ratification of the United Nations Convention is sufficient to clothe it with the status of domestic law. The Respondent, however, asks the Court to apply a different yardstick when dealing with the Inter-American Convention. The Respondent cannot approbate and reprobate. He cannot on the one hand contend that the United Nations Convention should be considered part of the domestic law of Antigua on the basis that it has been ratified, and on the other hand submit that the Inter-American Convention should not be considered part of the domestic law although it has been ratified, but, in his view, does not comply with the Ratification of Treaties Act of Antigua. He cannot ask the Court to exercise its discretion in an inconsistent or arbitrary manner, and the Court will refrain from doing so.

ISSUE 2 - HABITUAL RESIDENCE

[32] Article 1 of the Convention reads as follows:

> The purpose of this Convention is to secure the prompt return of children **habitually resident** in one State Party or who, having been wrongfully removed from any State to a State Party or who, **having been lawfully removed, have been wrongfully retained.** [emphasis supplied]. This

Convention further seeks to secure enforcement of visitation and custody rights of parties entitled to them.

[33] As a threshold issue, the duty to return a child arises only if the removal or retention was "wrongful." In the instant case, the retention can only be wrongful if the children were habitually resident in Ecuador immediately before they were wrongfully retained in the USA. So the Applicant must first show that the Respondent removed the children from their habitual residence.

[34] Article 4 of the convention states that:

> "The removal or retention of a child shall be considered wrongful **whenever it is in breach of custody rights that parents,** institutions or others having such rights **individually or jointly exercise over the child under the law of the child's habitual residence immediately prior to the removal or retention** [emphasis supplied].

[35] The Inter-American Convention is in many ways pari materia with the Hague Convention. Yet in neither the Inter-American Convention nor the Hague Convention is the term "habitual residence" defined. This has caused considerable confusion as to how courts should interpret "habitual residence". According to Halsbury's Laws of England[4], the term "habitual residence" ... is not to be treated as a term of art with some special meaning, but should be understood according to the ordinary and natural meaning of the words; it is a question of fact to be decided by reference to all the circumstances of a particular case. An appreciable period of time and a settled intention are necessary for a person to become habitually resident in a country. Concurrent habitual residence in more than one place at the same time is incompatible with the Hague Convention; however, where a sufficient degree of continuity is established, it is possible for a person to be habitually resident in one country for part of the year and in another for the remainder of the year... the habitual residence of the child falls to be considered immediately in relation to the period before the wrongful removal or retention."

[4] 4th edition, 2008 re-issue, page 80, paragraph 806

[36] To compound the difficulty and confusion, habitual residence for the purposes of the court's family law jurisdiction has a different meaning from that of the Hague Convention. As stated by the Learned Judge in the Court of Appeal decision of Ikimi v Ikimi, at paragraph 31 of the judgment:-

> "I am further of the opinion that it is essential that the same meaning be given to "habitually" wherever it appears in family law statutes. I would not however necessarily make the same extension to the Hague Convention which is an international instrument, the construction of which is settled and developed within the wider field of international jurisprudence."

[37] Counsel for the Applicant submit that the habitual residence of the children is Ecuador. They rely on the following authorities: -

a) Re J. (A Minor) (Abduction: Custody Rights)[5]
b) Re P-J (Children) (Abduction: Consent)[6]
c) **Mark v Mark**[7]
d) **R v Barnet London Borough Council, Ex p Nilish Shah**[8].
e) **Al Habtoor v Fotheringham**[9].
f) **Hazbon Escaf v Rodriquez**[10].
g) **ZH (Tanzania) v Secretary of State for the Home Department**[11]

[38] The rival submission of Counsel for the Respondent is that the habitual residence of the children is the United States of America (U.S.A.) She relies on and cites the following authorities: -

a) **M-T v T**[12];
b) **Ikimi v Ikimi**[13];
c) **Nessa v The Chief Adjudication Officer and Another**[14].
d) **Holder v Holder**[15].

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[5] [1990] 2 AC 562 at 578F-579A
[6] [2009] EWCA Civ 588, [2010] 1 WLR 1237 at [26]
[7] [2006] 1 AC 98
[8] [1983] 2 AC 309
[9] [2001] 1 FLR 951
[10] 200 F. Supp. 2d 603; 2002 U.S. Dist. LEXIS 8330
[11] [2011] UKSC 4, [2011]; 2 AC 166 at [32]
[12] [2005] EWHC 79 (Fam) at paragraphs 68-75
[13] [2001] 2 FLR 1288 [2001] 3 WLR 672
[14] [1999] 1 WLR 1937

[39] The issue to be determined is whether the children's habitual residence was Ecuador immediately prior to the alleged wrongful removal or wrongful retention. If, as alleged by Mr. Moore, the children's habitual residence was the United States, then the Convention would not compel the children's return to Ecuador because they would have been neither "removed" from the State of habitual residence nor "retained" in another state. In order to determine the meaning of "habitual residence" in the present context, I must look at all the circumstances of this particular case, as the question of habitual residence is one of fact to be decided by reference to all the circumstances of any particular case. I will then determine whether these facts add up to a finding of habitual residence. I will also consider the approach which the court has adopted in other cases, including some of those cited by Counsel above.

[40] According to Balcombe LJ in Re M (Minors) (Residence Order: Jurisdiction) [1993] 1 FLR 495 at 499-500, four basic propositions may be deduced from the authorities:

> 1) "Habitual" or "ordinary residence" refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being whether of short or of long duration...
>
> 2) Habitual residence is primarily a question of fact to be decided by reference to all the circumstances of any particular case...
>
> 3) There is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in Country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B...
>
> 4) Where the habitual residence of a young child is in question, the element of volition will usually be that of the person or persons who has or have the parental responsibility for that child."

[41] A mere stay for a holiday is not habitual residence. In the case of Re V (a Minor) (Abduction: habitual residence) [1996] 3 FCR 173, the Court held that residence in a country for an intended

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[15] 392, F. 3d 1009 (9th Circuit 2004)

period of no more than six weeks for the purpose of holiday contact cannot amount to habitual residence. The cases illustrate that habitual residence requires that a person is in a place voluntarily and for a settled purpose and with a settled intention. In considering what factors may make "the factum of residence 'habitual'", Waite J in the case of Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993 at 995 had this to say:-

> "Habitual residence is a term referring, when it is applied in the context of married parents living together , to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.
>
> All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled."

[42] The learned Judge goes on to say that "a settled purpose is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression."

[43] I have taken into consideration the following factors:-

a. It is undisputed that the Respondent and Ms. Nunez were married in 2000 and that the children were born in the USA. The parties resided in the USA from 2000 until on or about early 2008.

b. The evidence of the Respondent as contained in his Affidavit filed on March 5th 2012, is that the family moved to Ecuador in order for them to be with Ms. Nunez's ailing parents. In paragraph 23 of the Affidavit, the Respondent deposes as follows:-

> "My wife and I were married in December, 2000. The family resided in New York, United States and this is our domicile and habitual residence. It was only when my wife's parents became ill in 2008 that the family temporarily moved to Ecuador to allow my wife to be with them in what was likely to be their final moments. They passed away on the 21st of August, 2011 and November, 28th 2010 and but for the fact that my wife became involved in certain other activities ... the family had no further reason to remain in Ecuador."

[44] In paragraph 24 of the same Affidavit, the Respondent states:-

> ".....It was never the intention of the family to reside permanently or on any long term basis in Ecuador and my wife was aware of this. Additionally since 2008 when the family temporarily moved to Ecuador, we have made at least nine trips to the United States. ....."

[45] Ms. Nunez, on the other hand, states that the move to Ecuador had nothing to do with the illness of her parents. At paragraph 22 of her Affidavit filed on the 8th March 2012, Ms. Nunez deposes:-

> ".....In relation to his (the Respondent's) paragraph 23, I state that we moved to Ecuador in July 2007 and this had nothing to do with my parents becoming ill. My father was never ill. He died of a sudden heart attack. My mother was diagnosed with cancer in December 2009. Our children were enrolled in schools for at least three academic years, another proof that Ecuador is their habitual residence. They visited the doctors for relevant medical check-ups and the like. My mother did pass away on November 28th 2010."

[46] The Respondent further states in paragraph 36 of his Affidavit (March 5th 2012) as follows:-

> ".....Additionally, in March 2011 I took the family on a two week trip to Florida and then we returned to Ecuador to be with my wife's ailing mother....."

[47] The Court is of the view that the evidence of the Respondent as stated above lends credence to the evidence of Ms. Nunez that the move to Ecuador in 2007 was not for the purpose of taking care of her ailing parents as alleged by the Respondent. Ms. Nunez's father died in November 2010; this is not disputed by the Respondent and is in fact confirmed in his evidence. If, as alleged by the Respondent, the family moved to Ecuador in 2008 to take care of Ms. Nunez's "ailing parents in what was likely to be their final moments", the Court has great difficulty in accepting that during the period 2008 to March 2011, the family, including Ms. Nunez would have made nine trips to the USA, presumably for vacation. In particular, that the family would have gone on a two week vacation to Florida in March 2011, leaving behind the mother who was presumably close to her "final moments."

[48] There is no evidence that the parties were divorced during the period in which they resided in Ecuador with their children as a family. The conduct of the parties during that period is consistent with a shared intention to make Ecuador their home. The Court finds that the family moved

voluntarily to Ecuador in early 2008, after the birth of the second child. Although the children were both born in the USA, they have dual citizenship. While in Ecuador, arrangements were made with respect to the Respondent and the children regarding their residence there. The children are both registered in the Ecuadoran Civil Registry. They are Ecuadoran citizens and are the valid holders of Ecuadoran passports. This evidence was never disputed by the Respondent. The children attended school in Ecuador. The Respondent obtained Ecuadoran documents in order to regularize his stay in Ecuador as a non-citizen for long periods of time. While in Ecuador, the family travelled to the USA for short intervals since 2008. The mother deposes in her Affidavit filed on 8th March 2012 that the purpose of these trips were "for vacation only and to maintain the US resident status that my older daughter and I have." The 'older daughter' referred to is a daughter from the mother's previous relationship. It cannot be said that the family was in Ecuador on vacation. If they were, they would be not be travelling to the USA "on vacation" during their stay in Ecuador.

[49] In his Petition verified on the 23rd day of August 2011 and filed with the Supreme Court of the State of New York, County of Suffolk, the Respondent stated, in paragraph 50 thereof, " I am a trader by profession and can do it from anywhere in the world, because all I need is a computer." The Court can infer that the Respondent worked during the almost four year period that the family resided in Ecuador. It is the view of the Court that a reasonable inference of that fact can also be made from paragraph 35 of the Affidavit of the Respondent filed on the 15th March 2012, in which the Respondent deposes:-

> "Where my wife refers to me shipping a container of items, this is misleading. I did ship a container of items but I deny that it contained 'most of the family's belongings' as she has alleged. The items which were shipped totaled approximately Fifteen Hundred Dollars United States currency (US $1500) AND INCLUDED MANY ITEMS FOR MY OFFICE AND WORK BUT DID NOT INCLUDE ANY COMPUTERS or magic jack from the rental apartment as alleged by my wife....."(my emphasis)

[50] In the view of the Court, the above paragraph 35 is evidence that when the family moved to Ecuador, they either brought possessions with them or else acquired these possessions while in Ecuador; a further indication of habitual residence.

[51] For the purposes of the Inter-American Convention, it is the habitual residence of the children immediately prior to the removal or retention that counts. In Re B (Minors) (Abduction) (No.2) [1993] 1 FLR 993, 995, Waite J. said:-

> "1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court"
>
> 2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration. All that the law requires for a "settled purpose" is that the parents' shared intentions living where they do should have a degree of continuity about them to be properly described as settled."

[52] The Respondent states that "it was never the intention of the family to reside permanently or on any long term basis in Ecuador". This is not an argument that can defeat the issue of habitual residence. Habitual residence is not the same as permanent residence.

[53] In the instant case, in light of the facts and circumstances of the case and taking a "general panoramic view of the evidence", as well as taking into account the relevant authorities, it is my considered view that the habitual residence of the children immediately prior to the said children leaving Ecuador for the United States of America was Ecuador. The Respondent cannot change the habitual residence of the children by taking them to the USA and neither the Respondent nor Ms. Nunez can change it without the express or tacit consent of the other or an order of the court.

ISSUE # 3 --- WRONGFUL RETENTION

[54] The Court now moves to address the issue of wrongful removal or retention.

[55] Article 14 of the Convention states: -

> "Proceedings under this Convention shall be commenced within one calendar year of the **wrongful removal or retention** [emphasis supplied.]
>
> As to children whose location is unknown, the period shall run from the time they are located.

Nevertheless, expiration of the one-year period shall not bar the child's return if, in the opinion of the requested authority, the circumstances so warrant, unless it is demonstrated that the child is settled in its new environment."

[56] As submitted by Counsel for the Applicant, "the Inter-American Convention is comparable to Article 12 of the Hague Convention, and is in almost virtually identical language." With respect to Article 12 of the Hague Convention (equivalent to Article 14 of the Inter-American Convention), Lord Brandon of Oakbrook in re H. (Minors) (Abduction: Custody Rights) [1991] 2 AC 476 stated:

> "The period of one year referred to in this article is a period measured from the date of the wrongful removal or retention. That appears to me to show clearly that, for the purposes of the Convention, **both removal and retention are events occurring on a specific occasion** [emphasis supplied], for otherwise it would be impossible to measure a period of one year from their occurrence (at 499 F-G).
>
> With regard to the second point , whether removal and retention are mutually exclusive concepts it appears to me that, once it is accepted that retention is not a continuing state of affairs but an event occurring on a specific occasion, it necessarily follows that removal and retention are mutually exclusive concepts. For the purposes of the convention, removal occurs when a child, which has previously been in the state of habitual residence, is taken away across the frontier of that state; whereas **retention occurs where a child, which has previously been for a limited period of time outside the state of its habitual residence, is not returned to that state on the expiry of such limited period. That being so, it seems to me that removal and retention are basically different concepts, so that it is impossible either for them to overlap each other or for either to follow upon the other** [emphasis supplied]. This interpretation of the Convention is strongly supported by the fact that, throughout the Convention, removal and retention are linked by the word "or" rather than by the word "and," which indicates that each is intended to be a real alternative to the other (at 500A-D)."

[57] Article 4 of the Inter-American Convention states:-

> "The removal or retention of a child shall be considered wrongful whenever it is in breach of the custody rights that parents, institutions or others having such rights individually or jointly exercise over the child under the law of the child's habitual residence immediately prior to the removal or retention."

[58] Counsel for the Respondent submits that "it should be noted at the outset that Counsel for the Applicant rightfully conceded at the hearing of the matter that the removal from Ecuador was not wrongful or unlawful." There is no dispute from the mother with respect to that issue.

[59] In his Affidavit filed on the 5th March 2012, the Respondent, in the penultimate paragraph, deposes inter alia:-

(a) "……
(b) My wife consented to the removal of the children from Ecuador and that I have lawfully retained them with me since to her full knowledge, consent or acquiescence."

[60] In paragraph 33 of the same Affidavit, the Respondent deposed as follows:-

> "I informed my wife of the threat on my life and my concerns for my safety and the safety of our children who may well have been with me when the threat was realized. My wife was nonchalant about it. However I eventually discussed it more with her and I told her that I wanted to take the children out of that environment and she agreed. As such my wife expressly consented to my removing the children from Ecuador and also to my retaining them outside of the jurisdiction given the safety concerns in respect of them being in Ecuador."

[61] The Respondent continues, in paragraph 34 as follows:-

> "My wife has attached the letter of authority for travel which she signed but as she rightly indicated I do not speak or read Spanish and so I was not aware of the actual contents of the letter but I do know that my wife agreed that I would take the children out of Ecuador to have them and myself in a safer environment."

[62] According to the Respondent, therefore, the removal of the children from Ecuador was for the purpose of getting the children out of harm's way, and that he did so, with the mother's consent and approval. The Court is of the view, however, that this explanation by the Respondent is not supported by the evidence. Looking at the evidence, what emerges is that:-

i). Prior to their removal on 8th July 2011, they children were enrolled in school in Ecuador. The Respondent did not challenge that the children attended a "safe, private, Catholic school" in Ecuador.

ii). The letter of authorization exhibited to the Affidavit of the mother (BG4) clearly states that the children were leaving for the U.S.A. for "vacation purposes" with the consent and agreement of both parents. That authorization does not state that the Respondent and the children were returning permanently to the U.S.A.

[63] The Court does not accept the Respondent's assertion that he did not know, or understand or appreciate the contents of that letter of authorization because he does not read or speak Spanish. The Court accepts without hesitation the mother's evidence that she gave her consent to the children travelling to the U.S.A with their father for the school vacation, and not for the purpose of moving there permanently. The Court is of the further view that no cogent evidence has been presented to the Court to substantiate the Respondent's allegations of threats against him, or even more importantly, that he took steps either in Ecuador or in the U.S.A. to report these threats to the authorities.

[64] Implicit in my finding that the removal from Ecuador was for the (lawful) purpose of a vacation, the retention thereafter falls to be examined and a determination made as to whether the said retention was unlawful. As stated by David Hodson in the text The INTERNATIONAL FAMILY LAW Practice, Second Edition, at page 424:-

> "Removal is at the date of departure. Retention is the date when permission to take abroad ended, either by the terms of the original agreement or conduct including words inconsistent with an intention to return the child.....although the original removal and retention may not have been wrongful because, for example, the unmarried father had no rights of custody capable of being breached, once he had acquired such rights by virtue of a subsequent order giving him care and control, any retention of the child thereafter contrary to that order becomes wrongful. The fact that the abductor had obtained an order from the foreign court permitting the child to stay in the foreign country is irrelevant."

[65] It is the submission of Counsel for the Respondent that the letter of authority ("BG4" of the mother's Affidavit filed on the 22nd February 2012) "did not on its face make any reference to the duration being for a week or any specified period for that matter." Counsel further submits that "in order for the court to make a determination on this point, the court would have had to have before it a return date for the children. The court would then have been able to determine that the children's stay abroad having exceeded the permitted duration then became unlawful. No such date or period having been supported by any evidence, it is submitted that the retention of the children cannot be deemed unlawful."

[66] With the greatest of respect, I have to disagree with Counsel's submission. It cannot be that "vacation purposes" in the USA for the children meant an indefinite vacation and any submission to

that effect is, with respect, disingenuous. As stated above, retention can be ascertained by "conduct inconsistent with an intention to return the child." Hodson (supra) further states that "an apparent lawful removal for a holiday can become a wrongful retention (or even an unlawful removal if the original intention to retain was concealed) before the end of the agreed period if the parent with the child makes clear an intention not to return. This might be shown by making court applications in the country in which they are on holiday with the child to seek to return the child." In the instant case, the Respondent's conduct certainly evinced an intention not to return the children to Ecuador. His application in the U.S.A. for custody for the children is such conduct. This application was made on the 23rd August 2011. The Court is of the view that, even if the Court were to accept the submission of Counsel for the Respondent that the letter of permission does not specify a return date, the Court will infer, based on the above, that the unlawful retention commenced, in any event on the 23rd August 2011.

[67] Counsel for the Respondent further submits that "if the Applicant seeks to rely on the removal of the children from America to Antigua as evidence of the unlawful retention.....the applicable law is the law of the United States of America that State having been the habitual residence of the children at the relevant time." The Court has already found that the habitual residence of the children prior to their removal is Ecuador. Counsel's argument seems to be suggestive of the fact that in this case, there were two acts of "removal." It cannot be so. Removal is not a continuing state of affairs; neither is retention. Removal is at the date of departure. In the instant case, departure from Ecuador on the 8th July, 2011. It is undisputed that this removal was lawful. There is no question of a second removal. Once the Respondent retained the children by failing to return them to Ecuador and keeping them instead in the U.S.A., the retention is referable to the 18th day of July 2011, which is the date on which the mother deposes they should have been returned, or in the absence of a specific date as contended by Counsel for the Respondent, on the 23rd August 2011, as stated in paragraph 66 above. The Respondent's taking the children from the U.S.A. to Antigua does not constitute a second act of removal, but is further evidence of retention of the children by the Respondent. There is no evidence that the Respondent consulted or contacted the mother prior to leaving the USA with the children for Antigua. There is no evidence before the Court that the mother consented to the children being taken to

Antigua. The Court will deal with the issue of the alleged consent or acquiescence of the mother later in the judgment.

[68] The Court's finding therefore on the above issue - Issue # 3, is that the children were wrongfully retained by the Respondent.

ISSUE # 4 - HAS THE RESPONDENT SUCCEEDED IN ESTABLISHING THE CRITERIA SET OUT IN ARTICLE 11 OF THE INTER-AMERICAN CONVENTION?

If the answer is in the affirmative, then the Court will not be required to order the children's return to their habitual residence.

[69] At paragraph 3 of his Affidavit filed on 5th March 2012, the Respondent deposes that his objection to the return of the children is based on Articles 11(a) and (b) of the Inter-American Convention.

[70] Article 11 of the Convention provides: -

> "A judicial or administrative authority of the requested State is not required to order the child's return if the party raising objections to the return establishes that:
>
> a) The party seeking the child's return was not actually exercising its rights at the time of the removal or retention, or had consented to or subsequently acquiesced in such removal or retention; or
> b) There is a grave risk that the child's return would expose the child to physical or psychological danger.
>
> The requested authority may also refuse to order the child's return if it finds that the child is opposed to it and if, in the judgment of the requested authority, the child's age and maturity warrant taking its views into account."

[71] With respect to Article 11 (a), the Court has to look at two issues namely, (1) was the party seeking the return of the children, namely their mother Ms. Nunez, "exercising her rights at the time of the removal or retention", (2) had the mother consented to or subsequently acquiesced in such removal or retention?

Was Ms. Nunez exercising her rights of custody at the time of the removal or retention of the children?

[72] Counsel for the Applicant submit that the Respondent's "immediate confession upon cross-examination that prior to the departure of the children from Ecuador in July 2011 that he and the mother exercised joint custody with respect to the children jettisons any objection with respect to the return of the children based on Article 11(a) of the Convention."

[73] The first limb of Article 11(a) deals with the issue of custody rights. A child abduction only occurs where it is in breach of rights of custody.

[74] In his Affidavit filed on the 5th March 2012, the Respondent stated that he was advised by his Attorney in Ecuador that "the request sent to the Antiguan authorities did not bear the signature of a judge in Ecuador and that this will render the request a nullity." The Court, on the 16th day of March 2012 made an Interim Order that, inter alia, the Attorney General as the Central Authority in Antigua under the Inter-American Convention, request information from the Central Authority of Ecuador, in order to ascertain the applicable law as it related to the issues before it, as provided by Article 12 of the Inter-American Convention.

[75] In his Affidavit filed on the 22nd March 2012, Mr. Lebretch Hesse, Solicitor General of Antigua and Barbuda, deposed that he was advised by the Central Authority of Ecuador that the Order of the Court of Ecuador granting parental rights of the children to the mother which was previously sent to the Office of the Attorney General of Antigua and Barbuda by the Central Authority of Ecuador, "is a valid Order of the Court of Ecuador." Mr. Hesse stated that a judicial resolution was granted to the Respondent on March 13th 2012, which in effect had nullified the Order in favour of Ms. Nunez. He stated that an Appeal was filed on the 16th March 2012 in the Court of Ecuador by the Attorneys on behalf of Ms. Nunez, seeking to revoke the judicial resolution issued on the 13th March 2012 to the Respondent. An Order revoking the said judicial resolution issued to the Respondent was granted by an Ecuadorian Court Order, dated the 19th March, 2012. Both documents were exhibited to the Affidavit of Mr. Hesse ("LH7").

[76] Mr. Hesse deposed that the Court Order dated 19th March, 2012 revoking the resolution dated the 16th March 2012, issued to the Respondent was confirmed to him by the Central Authority of Ecuador and was forwarded to the Applicant by the Central Authority of Ecuador through the Diplomatic Channels from the Central Authority of Ecuador or directly from the Central Authority of Ecuador. Mr. Hesse correctly stated that, by virtue of Article 9 (4) of the Inter-American Convention, these documents do not require certification.

[77] On March 28th 2012, the Respondent filed an Affidavit in which he deposed that on the 20th March 2012, his Attorney had filed another objection to the Order of Ms. Nunez. On 29th March 2012, Ms. Nunez filed another Affidavit. Ms. Nunez has exhibited to this Affidavit a copy of the entry of the judicial resolution made in her favour in her matter ("BN2") She deposes that this exhibit states that the judicial resolution made on the 22nd March 2012 was "finalized, registered and entered on the records of the Ecuadoran courts on 28th March 2012."

[78] The Court re-iterates that matters concerning the custody of the children are not issues to be determined by this Court and it has no jurisdiction to determine this issue. It is the issue of the "rights of custody" which falls to be determined under Article 11(a) of the Inter-American Convention. According to Bromley's Family Law at (page 639), "the general approach in determining this issue has been well summarized by Dyson LJ in Hunter v Murrow (Abduction: Rights of Custody). The first task, the so-called 'domestic law question', is to establish what rights, if any, the Applicant (the mother) had under the law of the state in which the child was habitually resident immediately before his or her removal or retention. This question is determined in accordance with the domestic law of that State and involves deciding what rights are recognized by that law and how these rights are characterized."

[79] In the instant case it is undisputed that custody rights with respect to the children vested jointly in the mother and the Respondent. The Respondent, under cross-examination, conceded that this was so. In the Affidavit of Mr. Hesse filed on the 22nd March 2012, he exhibits a document ("LN5"). This is a letter/opinion from the Central Authority of Ecuador forwarded to the Central Authority of Antigua and Barbuda (as per the latter's request). This letter , together with its attachments, is conclusive on the issue of the custody rights, namely that Ms. Nunez had rights of

custody under the laws of Ecuador immediately prior to the children leaving Ecuador and was exercising her custody rights when she gave permission to the Respondent to travel to the USA , as required by law. The Respondent therefore cannot rely on Article 11(a) of the Inter-American Convention in order to establish an objection to the return of the children.

[80] With respect to the second limb of Article 11(a), it is a defence to a return order that the parent left behind consented or subsequently acquiesced to the removal or retention of the child. As with all defences, the burden of proof lies on the person seeking to invoke it; in this case, the burden of proving the consent or acquiescence lies on the Respondent. He must prove that Ms. Nunez consented or acquiesced in the retention of the children. The leading case on the meaning of 'acquiescence' under Article 13 of the Hague Convention (which is pari materia with Article 11 of the Inter-American Convention) is Re H (Minors) (Abduction: Acquiescence) [1988] AC 72, HL, in which the House of Lords held that a common approach was to be applied in all cases. That approach was summarised by Lord Browne-Wilkinson as follows:-

> "(1) For the purposes of Article 13 of the convention (the Hague Convention), the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819 at 838: ".....the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact."
>
> (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
>
> (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to the bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
>
> (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

[81] The burden of proving acquiescence is on the Respondent. The evidence to establish acquiescence, as well as consent, must be "clear, cogent, compelling and unequivocal". In the view of the Court, the Respondent has not discharged the burden of proof.

[82] Under Article 11(b) of the Inter-American Convention, the Court may refuse to order the child's return if it is shown that "there is a grave risk that the child's return would expose the child to physical or psychological danger."

[83] The wording of Article 13(b) of the Hague Convention is somewhat different from that of Article 11(b) of the Inter-American Convention. Under the Hague Convention, the court may refuse to order the child's return if it is shown that 'there is a grave risk that his or her return would expose the child to physical or psychological **harm or otherwise place the child in an intolerable situation.**' (my emphasis). The Inter-American Convention speaks of physical or psychological **danger** (as opposed to **harm**) and omits the words '**or otherwise place the child in an intolerable situation.**'

[84] Notwithstanding the disparity in language, the Court is of the view that the principles are not incompatible and that the case law under the Hague Convention is helpful and useful in determining Article 11(b) of the Inter-American Convention. According to Bromley (supra), page 654, "while the epithet 'grave' is and was intended to be an 'intensive qualifier', it is important to appreciate, however, that 'grave' qualifies the risk and not the ensuing harm." So it is the gravity of the risk with which the Court is concerned. The Court also notes that in Article 13(b) of the Hague Convention, the words 'Or otherwise place the child in an intolerable situation' are disjunctive and not conjunctive.

[85] The burden of proving grave risk lies with the party raising objections to the return of the children, in this case, on the Respondent and is difficult to discharge. As stated by Ward L in Re C (Abduction; Grave Risk of Psychological Harm), so far as the English Courts are concerned there is:

> ".....an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, 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."

[86] Counsel for the Applicant has correctly submitted that the grave risk posed has to be specific to the children. Further, that the Courts must apply a "stringent" test in ascertaining grave risk. As stated by Sir Christopher Slade in re F (A Minor) (Abduction: Custody Rights Abroad) Fam 224 at 238 F-G:-

> ".....I understand that the courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the court's discretion under article 13 (b) are satisfied. They are in my view quite right to be cautious and to apply a stringent test. The invocation of article 13(b), with scant justification, is all too likely to be the last resort for parents who have wrongfully removed their child to another jurisdiction."

[87] The Court is mindful of the principles outlined by Baroness Hale and Lord Wilson in Re E (Children) (Abduction: Custody Appeal) as being appropriate to the proper interpretation and application of Article 13 (b) of the Hague Convention. As submitted by Counsel for the Applicant, these principles apply with equal appropriateness to Article 11(b) of the Inter-American Convention.

(a) "First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce the evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

(b) Second, the risk of the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterized as "grave". Although "grave" characterizes the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

(c) Third, the words "physical or psychological harm" are not qualified. ...

(d) Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this in not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home."

[88] Notwithstanding the norm against cross-examination, as stated in (a) above, in the instant case, the Court permitted it in the interests of a full exposure of the circumstances surrounding this case.

[89] It is the submission of Counsel for the Respondent that there is indeed a grave risk that the children, if returned to Ecuador, will be exposed to physical or psychological danger. Counsel grounds her submission on several factors including the following:-

a) The Respondent has produced to the Court bundles of documents indicating the political climate in Ecuador and the number of safety concerns not the Respondent's sole concerns but the concerns as expressed by "global and reputable news agencies (e.g. BBC News) as well as international bodies including the Inter American Commission on Human Rights, the Foreign and Commonwealth Office as well as observations and reports of the US State Department."

b) From the documents referred to in (a) above, it is clear that there is "political unrest" and that persons are unable to speak freely out against the government and that there is little respect for universal fundamental rights.

c) Under cross examination, Ms. Nunez accepted that two articles from the BBC news and from RefWorld made reference to the same report of hired killers in Ecuador being paid very small sums of money ($20) to commit murder.

d) The information provided by the Respondent is extensive and speaks to reports of government censorship of the press and physical reprisals of persons who oppose the current regime in Ecuador, as well as reports about persons having to flee the country to seek refuge elsewhere

e) Ms. Nunez's older daughter was herself the victim of a violent crime on the doorstep of her grandparent's home and was robbed at gunpoint.

[90] I will now address the submission of Counsel for the Respondent that the "political climate" in Ecuador and the "number of safety concerns" are factors which the Court must take into account in exercising its discretion not to return the children to Ecuador. The unfortunate but stark reality is

that political unrest is widespread throughout the globe; it has become a fact of life in several countries. The scale and intensity may vary from country to country, but the fact of political unrest is not novel. It is also an unfortunate reality that violent crimes have become almost commonplace the world over. Counsel for the Respondent has stated that Ms. Nunez's older daughter was herself the victim of a violent crime on the doorstep of her grandparents' home and was robbed at gunpoint. This incident is certainly and most definitely not unique to Ecuador. On any given day, CNN, the BBC and other international as well as national television networks report incidents of violence, murder, mayhem and acts of atrocity in all manner and form perpetrated all over the world; in the U.S.A., the U.K, Europe, Africa. There have been incidents of mass killings of students by students in schools and colleges in the USA. Judges have been murdered even in the hallowed halls of their courtrooms. Not even the Caribbean is immune to these acts of wanton violence. The tragedy of modern life is that with all our scientific inventions and discoveries, and all our technological advances, we seem powerless to prevent the incidence or intensity of man's inhumanity to man.

[91] The Court therefore cannot refuse to return the children to Ecuador on the basis of an allegation of political unrest and violence there. This does not meet the threshold of "grave risk" contemplated by Article 11 of the Inter-American Convention. Counsel for the Respondent also contends that the mother has "clear political opposition to President Correa and is open about her political stance." Counsel further contends that the mother is an "open political activist in Ecuador" and that the danger to the children is compounded as a result. The Court is of the view that, notwithstanding the allegations in this regard, no cogent evidence has been presented to the Court to substantiate these allegations. In fact, under cross examination, the Respondent admitted that "No Mas Correa" was not a political movement. The evidence of Ms. Nunez is that "No Mas Correa" is "a website started about two years ago." There is no evidence that there have been any reprisals against the children while they resided in Ecuador as a result of any real or alleged political involvement of Ms. Nunez. The Court cannot engage in an exercise with respect to the activities of Ms. Nunez. It has no jurisdiction to do so.

[92] As stated above, the Courts have adopted a strict interpretation to Article 13 (b) of the Hague Convention (equivalent in many respects to Article 11(b) of the Inter-American Convention). As was pointed out in a unanimous House of Lords decision in In re D [2007] 1 AC 619, para 51:

> "It is obvious, as Professor Perez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated: para 34. The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result."

[93] The following cases illustrate the restrictive application of the Courts in dealing with the "grave risk" objection:-

a) In Re S (a child) (abduction: custody rights) [2002] 2 FLR 815, the Court held that where there is a state of war in the country to which the child is to be returned, the issue is not whether there is a war, but whether it poses a grave risk to the child; violence and terrorism in Israel were insufficient to satisfy the stringent test of grave risk of harm to a child so as to permit an exception to her return.

b) In Re L (abduction: pending criminal proceedings) [1999] 1 FLR 433, the Court held that neither criminal proceedings instituted against the abducting mother, nor threat of her arrest and removal at the airport was sufficient.

[94] The Respondent in paragraph 42 of his Affidavit of 5th March 2012, deposes as follows:-

> "On the other hand however, I fear that if the children are returned to Ecuador, my wife will subject them to the same treatment to which she has subjected her older daughter from a prior relationship. My wife has persistently refused to respond to her daughter's requests for information about her biological father and my wife has been extremely hostile in denying her daughter the opportunity to ever meet with her biological father. I fear that my wife may take this same course of action against me and I believe that this will subject my children to psychological harm to be cut off from me."

[95] The Court makes no comment or adjudication with respect to the merits or otherwise of the above paragraph, save and except that it does not meet the threshold for the exception stated in Article 11(b) of the Inter-American Convention. In the view of the Court, the issue deals with custody and has no bearing on Article 11(b) of the Inter-American Convention.

[96] It is the finding of the Court, as stated above, that the children have been wrongfully retained by the Respondent. The Court is of the considered view that the Respondent has failed to discharge the burden of establishing the exceptions stated in Article 11 of the Inter-American Convention. He has failed to satisfy the Court that it should exercise its discretion in favour of not returning the children to their habitual residence, namely Ecuador.

[97] It is important to re-iterate that the purpose of the Inter-American Convention, like the Hague Convention, is to secure the prompt return of children under the age of sixteen, habitually resident in a contracting state who have been lawfully removed from that state or who, having been lawfully removed, have been wrongfully retained. The further purpose is to secure enforcement of visitation and custody rights of parties entitled to them. As stated in Halsbury's Laws of England, Fourth Edition , 2008 re-issue, Vol .5 (4) , page 69, paragraph 799:-

> "The underlying principle of the Hague Convention,-(and by extension the Inter-American Convention) - is that it is in the interests of children that parents and others should not abduct them from one jurisdiction to another, and that any decision relating to the custody of children is best decided in the jurisdiction of their habitual residence."

[98] The headnote to the Court of Appeal decision in re F: (A Minor) (Abduction: Custody Rights Abroad) 1995 reads in part as follows:-

> "Held .....that it was repugnant to the philosophy of the Convention (the Hague Convention) for one parent unilaterally, secretly and with full knowledge that it would be against the wishes of the other parent who possessed rights of custody over a child, to remove that child from the jurisdiction of his habitual residence.....

[99] Because the welfare of the child is at issue, the above Conventions impose a duty on the Court to act expeditiously. According to Bromley's Family Law, (supra) at page 613:-

> "No matter how the abduction is perpetrated, its effects on the children can be devastating. It is likely to be traumatic in the short term and potentially permanently damaging in the long term. As the International Forum on Parental Child Abduction put it:
>
> 'Children who are abducted will have already suffered from their parents' separation but, in addition, they will experience the trauma of being suddenly cut off from their familiar environment – a parent, grandparents, school and friends. This experience is devastating enough, but many children do not understand what is happening or why the abducting parent is hiding from the police

or taking precautions against re-abduction. Such a "state of war" between parents catches the children in a horrible cross-fire."

The effects on the parents are also traumatic. Again as the Forum put it: 'victim parents are suddenly plunged into a bewildering world were helplessness, despair and disorientation compete. The emotional trauma is compounded by the daunting practical obstacles to retrieving children or even to gaining access to them. Simply finding out where to get help can be difficult. Parents often face unfamiliar legal, cultural, and linguistic barriers. Their emotional and financial resources can be stretched to the limit. In the meantime, the abducted children are often led to believe that the victim parent has abandoned them. Then the children, in anger and hurt, assert that they do not want contact with the victim parent. As the years pass, the chances of recovering the children diminish. Many victim parents feel it would be easier to come to terms with the shock of bereavement than with a situation marked by prolonged uncertainty and anxiety."

[100] Judge Mc Keown in the case of Holder v Holder, a decision of the United States Court of Appeals for the Ninth Circuit, and cited by Counsel for the Respondent, very succinctly but poignantly states:-

"The cases which deal with petitions under the Convention (the Hague Convention) are always heart-wrenching, and there is inevitably one party who is crushed by the outcome. We cannot alleviate the parents' emotional trauma, but at a minimum we can hope to provide them and their children with a prompt resolution so that they can escape legal limbo."

[101] To secure the prompt return of children and to achieve the other obligations under the Convention, the Inter-American Convention (as well as the Hague Convention), the Central authorities are expected to co-operate with each other. The relevant part of Article 7 of the Inter-American Convention states:-

"The Central Authorities of the States Parties shall cooperate with one another and exchange information on the operation of the Convention in order to secure the prompt return and to achieve the other purposes of this Convention."

[102] Article 16 of the Inter-American Convention (like Article 16 of the Hague Convention) expressly forbids the Court of the requested State from deciding on the merits of the rights of custody until it has been determined that the child is not to be returned under the Convention. This is because, as stated in Bromley (supra) "the Convention (the Hague Convention) is predicated upon the premise

that children's interests are generally best served in cases of wrongful removal or retention by promptly returning them to the State of their habitual residence."

[103] As is evident from the above, the task of the Court in deciding whether to order the prompt return of a child under the Inter –American Convention (as well as the Hague Convention) has serious consequences for the parents as well as the children involved. The Court has to give effect to the general policy considerations of the Convention. With respect to the Hague Convention, these include "the swift return of abducted children, comity between contracting states and the deterrence of abduction." – see re M and another (Children) (Abduction: Rights of Custody) HL [2007] UKHL 55. At the same time, the Court must ensure that the welfare of the child is not sacrificed on the altar of the Convention. The facts and circumstances of each case are as varied as the reasons for the child abduction. The one constant factor is that, no matter what country or state they are abducted from or to what country or state it is sought to return them, children everywhere have physical, emotional and psychological needs, and that, to borrow the words of Baroness Hale of Richmond in In re D [2007], 1 AC 619, paragraph 51, referred to in paragraph 92 above "there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the objects of the Convention (the Hague Convention) to require it."

[104] Applying the law to the particular facts and circumstances of the instant case, I am of the view that the instant case is not one in which it would be inimical to the interests of the children that they should be returned to their habitual residence in Ecuador. I am of the view that the Applicant has succeeded in making out its case for the return of the children to their habitual residence in Ecuador. In arriving at my decision, I have taken into account the several factors mentioned above. I have also had regard to the fact that the children are citizens of Ecuador and will be returning to a country which is familiar and not strange to them.

[105] I am reminded that Article 15 of the Inter-American Convention states that "the fact of a child's return shall not prejudge the ultimate custody decision." I am making it abundantly clear that this Court does not seek to "prejudge the ultimate custody decision" of this case. That issue is outside the jurisdiction of this Court. As stated previously, this issue is to be decided in the jurisdiction of

the habitual residence of the children. For this reason, I have refrained from making any comment or adjudication with respect to any issue which touches and concerns the issue of **CUSTODY** (my emphasis) of the children.

[106] Counsel for the Respondent has urged the Court to have regard to Article 25 of the Inter-American Convention. Article 25 states that:-

> "A child's return under this Convention may be refused where it would be manifestly in violation of the fundamental principles of the requested State recognized by universal and regional instruments on human rights or on the rights of children."

[107] It is the submission of Counsel for the Respondent that "to return the children to Ecuador would ... be manifestly in violation of the fundamental principles of the requested State", which fundamental principles "are enshrined in the Antigua and Barbuda Constitution Order 1981." Counsel contends that a return to Ecuador would manifestly be in violation of the following rights / freedoms:

i). Protection of right to personal liberty;

ii). Protection of freedom of expression including freedom of the press;

[108] With respect to that submission, the Court is of the view that while Article 25 addresses human rights in general, its main focus is with respect to the rights of the child. The Court is of the further view that the return of the children under the Inter-American Convention in the instant case, is not in violation of the fundamental rights and freedoms of the individual enshrined in the Constitution of Antigua and Barbuda including in particular the right of every individual to the protection for his family life, as well as the right to the protection of the law. The Inter-American Convention (like the Hague Convention), the Convention on the Rights of the Child, among others, respects and protects the rights of all its inhabitants and especially the rights of children and adolescents (all children under sixteen years of age). It seeks to provide what is in the best interest of children wrongfully removed or retained in another State party by securing their prompt return to the State of their habitual residence.

[109] The Court is also of the view that, in conclusion, it is important to re-iterate the purpose of the Inter-American Convention. As stated by David Hodson (supra) at page 415-416: -

> "... Instead the requested state will merely secure the child's early and safe return. It (the Convention) is designed to encourage prompt return through administrative and judicial procedures so parents do not resort to self-help and secondary abduction. This is not departing from the principle that the welfare of the child is paramount but applying it, including the belief that it is not in the best interests of a child to be abducted but instead the decisions about the child should be left to the country where the child is or was habitually resident."

[110] In her closing submissions Counsel for the Respondent correctly states: "it is noteworthy that whether by inadvertence or not the court has not been actually been moved to make an order that the children be returned to Ecuador, neither in the Fixed Date Claim nor in the Application."

[111] In the Fixed Date Claim filed by the Applicant, notwithstanding the omission in the said claim, the Applicant asks the Court to make "such other Order as the Court deems just." On the basis thereof and on the finding of the Court that the Applicant has proved its case, the Court makes the Order as hereunder stated:-

ORDER

[112] My Order is as follows:-

1. The Applicant is to arrange with appropriate dispatch the return of the children to their habitual residence in Ecuador.

2. The Applicant is to do all things and execute all documents necessary or convenient on its part to effect that return.

3. For the purpose of giving effect to this Order, temporary custody is immediately granted to the mother – who is presently in Antigua and Barbuda – so as to facilitate her travelling with, and accompanying the children to their habitual residence. For the avoidance of doubt, the responsibility of the Central Authority as well as the other administrative authorities charged with safeguarding the children and protecting their welfare remains

until the said children are safely placed in the aircraft and their passports handed over to the mother.

4. The Respondent is hereby ordered to refrain from contacting the children or from visiting them on their departure, at the airport, in order to avoid any friction.

5. The Respondent is directed to pay the necessary expenses incurred by the mother including her travel costs. Such costs are to be assessed if not agreed, within 7 days. The Respondent is to make provision for such costs to be satisfied prior to his departure from the jurisdiction.

6. The Respondent shall pay to the Applicant costs in the sum of $10,000. E.C.

Jennifer A. Remy
High Court Judge

Post Script: Shortly before the delivery of the judgment, the Court was informed that the mother Ms. Nunez had left the jurisdiction on the previous evening, taking the children with her. In light of this, the Court is of the view that number 5 of the above order ought not to be enforced.