BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 37 of 2017

BETWEEN:

STEPHANOS PIERIDES **APPLICANT/HUSBAND**

AND

SUSAN MARY COLE **RESPONDENT/WIFE**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates of Hearing: 2017 January 13th, 19th, 20th, 23rd, 26th
Date of Decision: January 31st

Appearances:

Mrs. Marguerite Woodstock-Riley Q.C. and Ms. Amanda Riley Attorneys-at-Law for the Applicant/Husband
Ms. Margot Greene Q.C., Mrs. Peta-Gay Lee-Brace and Ms. Janeille Thompson Attorneys-at-Law for the Respondent/Wife

Decision

Factual Background

[1] This matter began with an oral Ex Parte Application subsequently filed under a Certificate of Urgency.

[2] This first Application was heard on the 11th January 2017 by the Chief Justice who made the following Orders:

> "1. The minor children, Michael Petros Pierides and Alexander Pierides, be made wards of the Court, until further Order.
> 2. The Respondent, her servants, relatives and/or agents be restrained from removing Michael Petros Pierides and Alexander Ryan Pierides, the minor sons of the parties, from the jurisdiction of the Court, or causing or permitting Michael Petros Sperides and Alexander Ryan Pierides to go out of the jurisdiction.
> 3. The Applicant be permitted to serve the relevant immigration authorities and all airline companies operative in the island of Barbados with a copy of this Order restricting the removal of Michael Petros Pierides and Alexander Ryan Pierides from the jurisdiction until further order.
> 4. That the passports of Michael Petros Pierides, Cypriot passport No. CYPK00294610 and Alexander Ryan Pierides, Cypriot passport No. CYPK00294607 held by the Respondent be delivered up to the Registrar of the Supreme Court within 24 hours of service of this Order.
> 5. Liberty to apply."

[3] This action involved the alleged abduction of twin boys by their mother, the Respondent, from their home in Limassol Cyprus.

[4] The parties, a Cyprus National and British National respectively, met in the UK in 2007, were married in 2010 in Cyprus, became the parents of twin boys in 2011, the marriage broke down in 2012 and the parties divorced in 2013. Initially, an Interim Order was issued by the Court of Cyprus prohibiting the Wife from taking the children out of the jurisdiction. This Interim Order was later finalized and an Order was made prohibiting both parties from taking the children out of the jurisdiction of the Republic of Cyprus.

[5] As recently as November 18th 2016 a Consent Order was recorded in the Court in Cyprus preceded by several court hearings, welfare involvement and reporting.

[6] There appears to be some lack of clarity on the interpretation of this Order as counsel for the Respondent suggests that a reading of the translated Order suggests that both parties have full rights of custody in respect of the minor children. However, that determination is not determinative of this proceeding.

[7] It is evident from the subsequently filed Affidavits in this Court (the above issue notwithstanding), that in contravention of the above Order of the Court in Cyprus, and without the knowledge and consent the Applicant, the Respondent left the Republic of Cyprus on the 20th December 2016 from an informal point of exit, flying firstly to Turkey. By dint of quick and accurate investigative work the Applicant established that the Respondent took a flight to Colombia therefrom, and thereafter another flight to Barbados, arriving in Barbados on the 21st December 2016.

[8] Further investigative work, by the engaging of Barbadian counsel and investigators, established the residential address of the Respondent at a house in St. Peter as well as details of the school where they had already been enrolled as pupils, all before January 12th 2017 (the date of the Applicant's arrival in Barbados), less than three (3) weeks after her departure from Cyprus.

The Current Application

[9] Pursuant to the Order of this Court made on the 13th January 2017, the Ex parte Application of January 12th 2017 was made *'inter partes'* by this Court summoning the Respondent to appear before it, on the excellent and precise information provided by the Applicant.

[10] Under this Application, the Applicant Stephanos Pierides applies for the following Orders:

> "1. That Michael Petros Pierides Cypriot and Alexander Ryan Pierides Cypriot be forthwith returned to Cyprus in the custody care and control of their father Stephanos Pierides.
> 2. That Susan Cole forthwith deliver the children Michael Petros Pierides Cypriot and Alexander Ryan Pierides to their father Stephanos Pierides.
> 3. That the said children cease to be wards of the court."

[11] Seven (7) Grounds are set out in the said Application. Substantial Affidavits have been filed by the parties as follows:

1. Affidavit of Amanda Riley of January 12th 2017
2. Affidavit of Lalita Vaswani of January 12th 2017
3. Affidavit of Stephanos Pierides of January 13th 2017
4. Affidavit of Stephanos Pierides dated January 17th 2017
5. Affidavit of Stephanos Pierides dated January 20th 2017
6. Affidavit of Susan Mary Cole of January 18th 2017

[12] Written Submissions with supporting authorities were filed by both parties on January 19th 2017, but further oral submissions were made.

[13] Counsel for the Respondent emphasizes the fact that the minor children are Wards of the Court of Barbados as a result of the Husband having invoked the

Wardship jurisdiction of the Court. Counsel also emphasizes that the Wife is NOT in breach of any of the laws of Barbados. This is a significant submission by the Respondent, and perhaps explains her decision not to travel to the United Kingdom (and also Canada where she is a Citizen) where this would have been treated as a Hague Convention case, and characterized, at best, as a wrongful retention of the children, at worst, a kidnapping or even abduction.

[14] The children have remained in Barbados, and are in the care and control of the Husband, who is staying at the Hilton Hotel. All travel documents have been secured and are in the possession of counsel for the Respondent. The Wife has liberal telephone contact with the children, and in the face of the Court the parties interacted co-operatively and positively in making arrangements for the children. The children were observed to be overjoyed to be re-united with their father and his companion, who clearly has a warm relationship with them. The parties were observed to be cooperatively making arrangements for the Wife to have physical contact with the children, without the need for intervention by the Court.

[15] There is no reason to question the love and devotion of these parents to these two boys who appear to be healthy, well-cared for and rambunctious four year olds.

[16] It is to the Wife's credit, that (while attempting to mask her location) she allowed the children daily telephone access to their father, as well as access by video conferencing and by Skype before he verified their location and arrived in Barbados.

[17] It is not in dispute that Barbados is not a signatory to the Hague Convention for the Civil Aspects of International Child Abduction, and that Barbados has no reciprocal agreement with Cyprus with respect to the enforcement of orders made in either jurisdiction.

The Case for the Applicant

[18] Simply put, it is the submission of counsel for the Applicant that this Court should on the strength of the evidence before it make a Peremptory Order for the return of the children to Cyprus, and that such an order will take into account the best interests of the children by permitting the return of normalcy to their lives. Of importance, is her submission that this Court should not conduct a full investigation or an extensive investigation as the matter has been fully ventilated by the Courts in Cyprus, there having been extensive involvement and investigation by the Courts there, and it cannot be said that the Respondent has been unfairly treated (see fully translated Welfare Report produced to Court by counsel for the Applicant). Counsel emphasized the fact

that the last order of the Courts of Cyprus was a Consent Order giving the Respondent greater access to the children.

[19] Counsel's view was that the Court should place great weight on the circumstances of the 'kidnapping' in this case: the Respondent had permission to take the children to England and could have done so; instead she left Cyprus through the northern exit to go to Istanbul, then to Colombia and on to Barbados. Her actions, counsel submitted, showed deception and disregard for the safety of herself and that of the minor children. This shows a history given her November 2013 actions, (the event resulting in her removal by the Cyprus courts as the primary caregiver) and reveals an immaturity and self-centeredness addressed by the welfare report.

[20] Counsel relied heavily on the principles advocated by **Baroness Hale** in the case of **Re J (a Child) (return to foreign jurisdiction**: **Convention rights) [2005] UKHL 40** discussed below.

[21] In fairness to counsel for the Applicant, she espoused adherence to the importance of the welfare or best interests of the children principle, but her strongest arguments appeared to favour the application of "forum non conveniens": the connection to Cyprus (and by contrast the lack of connection to Barbados), the nationality of the children, the history of the matter with the courts of Cyprus, the welfare reporting and investigation carried out by the

authorities in Cyprus, all indicate that Cyprus would be the better forum for this matter to be heard.

[22] Counsel stressed the fact that the Respondent has the option to further litigate her matter in Cyprus and appeal if dissatisfied. In counsel's Written Submissions (at page 17 thereof) she sets out the appeal procedure in Cyprus as provided by section 21(1) of Family Courts Laws of 1990. Under Cyprus law also, she submitted that there are provisions for annulment and/or variation of Court Orders where circumstances have changed. (Section 20 of the law on the Relationship between Parents and Children of 1990 as amended (Law 216/1990).

[23] Counsel also noted that should there be any proof of impartiality or unfairness, the Respondent has recourse to the European Court of Human Rights.

[24] The following cases were relied on by counsel for the Applicant in support of her submissions: **Brown v Brown HCV No. 287 of 1983 (unreported); G v G (Minors) (Abduction) [1991] 2FLR 506; Re J (supra); TT v HM [2016] NIFam 10; LM v DR [2016] EWHC 1943; S v S (Abduction: Inherent Jurisdiction) [2014] EWHC 575 (Fam)**.

The Respondent's Case

[25] Counsel for the Respondent commenced by referencing the several authorities, the first of which was **Re R (minors) (wardship jurisdiction)**

(1981) 2 FLR 416, which stresses (like most of the applicable cases) that while the kidnapping of the child or the orders of a foreign court are relevant considerations, the weight to be given to either of them must be measured in terms of determining what is in the best interest of the children. Factors such as penalizing the kidnapper or comity should never result in a sacrifice of the child's welfare.

[26] Counsel emphasized that these are Wardship proceedings under the ambit of the **Minors Act**, under which the Welfare Principle is the primary consideration and everything else is secondary. There should be no apportioning of blame, regardless of any misconduct on the part of the parents; the children have rights in law to access both parents and to apportion blame is to take away the right of contact or access from the child.

[27] Counsel referenced also the **Privy Council** case of **McKee v McKee [1951] 1All ER 942,** and its proposition that in circumstances such as this, where an order of a foreign court exists, it need not be blindly followed; an independent judgment on the question must be formed, even though in doing so, it will permit the Court to give proper weight to the foreign judgment, but what is the proper weight will depend on the circumstances of each case.

[28] Counsel decries the emphasis placed by counsel for the Applicant on 'forum non conveniens'.

[29] The Respondent alleges that she fears that she will never get fair treatment in Cyprus, because she is a foreigner, and the Applicant's family is wealthy and well-connected in Cyprus. She implies that the Orders to date have all been weighed against her because of this, with her time with the children being severely limited. She has expressed herself to be uncomfortable with the Cypriot justice system in matters of this nature.

[30] The Respondent speaks of two incidents in Cyprus in November/December 2016, one an assault upon her (thankfully she was physically unhurt but deeply disturbed by the event) and the other a slashing of her tyres. She alleges that she no longer felt safe in Cyprus.

[31] She describes her leaving Cyprus as an act of desperation.

[32] She makes mention in her Affidavit of a Barbadian husband (unnamed) to whom she has been married since 2015 (counsel for the Applicant points out that she gives two dates of marriage in 2015). This fact has never been revealed before now to the Applicant, and there is no assertion that he is known to the children. (This contrasts significantly with how the Applicant introduced his former girlfriend, now wife, to the children and the Respondent). In her oral evidence to the Court, the Respondent alleges that the children have met her new husband on Skype calls.

[33] She asserts that she now lives in Barbados with her current husband and claims Barbados as her domicile. She stated in her oral evidence that she is applying for Barbadian citizenship. Cross-examination revealed that her Barbadian husband immigrated to England 20 years ago, and his most recent visit to Barbados more than two years ago.

[34] The Respondent/Wife wishes to remain in Barbados with the children and allow the Applicant/Husband generous access to the children. A warrant of arrest has been issued against her in Cyprus and she currently faces criminal prosecution if she returns to that country. She fears being thrown in jail if she returns to Cyprus.

[35] She states that Barbados is a safe alternative for her children and alleges at paragraph 71 of her Affidavit as follows:

> "71. Cyprus now exists in a polarised state and the country is divided between the Greek Cypriots and the Turkish Cypriots . The North is inhabited mainly by Turkish Cypriots. The South is inhabited mainly by Greek Cypriots.
>
> 72. There is a United Nation buffer zone separating the two (2) sections. The borders are open and there is movement between the two (2) sides but this remains a real problem in Cyprus.
>
> 73. In addition to this political conflict, the huge racial tensions and violent clashes in the country. Additionally there is real hostility by Cypriots to outsiders-persons who are not Cypriots.
>
> 74. I am not Cypriot. I am British and over time it became apparent that I do not have a very good chance of being treated fairly in Cyprus.
>
> 75. The Applicant is not only Cypriot but is from a wealthy and very influential family. He has the two (2) advantages of being a native of the place and of having money and influence. He also has the advantage of being male. Women are treated as second rate citizens."

[36] Counsel for the Respondent relied on the following authorities: **McKee v McKee [1951] All ER 942; Re R (Minors) (Wardship: Jurisdiction) (1981) 2 FLR 416; Re JA (Child Abduction: Non-Convention Country) [1998] 1FLR 231; Re B's Settlement, B v B [1940] Ch 54; Re Kernot (an Infant), Kernot v Kernot [1965] Ch. 217**.

The Preliminary Point Raised

[37] Counsel for the Applicant objected strenuously to the taking of evidence in this proceeding, expressing the view that the Court should determine this matter on the strength of the affidavit evidence and submissions. This Court strongly believes such an approach to be a derogation of its duty to conduct an inquiry to determine the best interests of the minor children, now wards of the Courts of Barbados.

[38] It is my firmly held view that "a swift realistic and unsentimental assessment of the best interests of the child" can only be undertaken after an inquiry, a key element of which must be the examination and cross-examination, at the very least, of the parties to the litigation, to make assessments of credibility when determining disputes of fact.

[39] The further evidence and cross-examination of the parties was allowed. In this case, this Court wanted to evaluate the parties, to hear more on the

Respondent's connection to Barbados, and in particular her proposals for the future care of the children.

[40] It was not this Court's view that only these persons should have provided evidence, but it was of the view given the quality and content of the affidavit evidence, that it was not necessary in these circumstances (and at this stage) for there to be further oral evidence and cross-examination.

[41] In this regard, this Court finds support in the approach taken by **Mangatal J** in **Strong-Forrester v Forrester JM 2007 SC 91 (unreported)** where she adopts the guidance of **Smith JA** in **Panton v Panton** where he stated:

> "The nature and extent of the enquiry undertaken by the trial judge will vary from case to case. The learned judge may be satisfied that in the circumstances of a case the undisputed evidence comprises all the material she needs to determine the application for a summary return order. In other words, in the context of the welfare principle it is for the trial judge to decide whether in the particular case an examination of the conflicting affidavit evidence is necessary before granting or refusing a summary return order."

A Discussion of the Relevant Law and Proper Approach

[42] The issue to be determined in all of this is whether the Barbadian Courts should issue a Peremptory Order or whether summary return of these twin boys to Cyprus is in their best interests; and in making that determination what factors should be taken into account by the Court.

The Barbadian Perspective

[43] Applications of this nature are usually brought under the Minors Act, which was the case here.

[44] While the section is not referenced by the Applicant, it is clear that it is **section 8** of the **Minors Act Cap. 215**, which provides as follows:

> "8. Where, in any proceeding before the Court, the custody or upbringing of a minor or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application, is superior to that of the mother or the claim of the mother is superior to that of the father."

[45] Not to be forgotten is the Court's jurisdiction as "*parens patriae*" and the added jurisdiction provided by the **Supreme Court of Judicature Act Cap 117A**.

[46] The source of the Court's jurisdiction as "*parens patriae*" was explored by **Lord Denning MR** in **Re P, (G.E.) (an infant) [1964] 3 All ER 977** as follows:

> "…The fount of the jurisdiction of the Court of Chancery is the Crown which, as *parens patriae* takes under its protection every infant child who is ordinarily resident within the realm, whether he is a British subject or an alien."

A Local Regional and Commonwealth Perspective

[47] An application of this type is not unusual in this jurisdiction or in the region, and some insight may be achieved by a summary look as some of the outcomes.

Barbados

[48] **Brown v Brown BB1983 HC 89 (unreported)** (cited by counsel for the Applicant) was decided by **Chief Justice Douglas** in December 1983 and concerned, inter alia, an application to return a five year old child of a marriage between a Bermudan and a Jamaican to Bermuda, where there was an order that she not be removed without the leave of the court. **Chief Justice Douglas** characterized this as a Kidnapping case and purported to follow the dicta of **Buckley LJ** in **Re L (minors) [1974] 1 All ER 913** to the effect that the action of kidnapping is just one of the factors to be taken into account by the Court and not the determining factor; each case must be determined on its particular circumstances and the welfare of the infant must always be the paramount consideration. In considering the facts of the case **Chief Justice Douglas** applied the guidelines in **Re L (supra)** and concluded as follows:

> "In weighing the facts in this case I have to bear in mind the guide-lines laid down in **Re L (Minors)** above. One of the most important facts in the case is that Maya is Bermudan by birth. She has a Bermudan father domiciled in Bermuda and a Bermudan grandmother. She has Bermudan nationality and is entitled to all those rights which flow from Bermudan nationality. She spent her early childhood in the matrimonial home which was Bermuda. Her parents' marriage was dissolved by a Bermudan Court and the question of her custody is pending before that Court. Most of the evidence in regard to that question will have to be given by people resident in Bermuda. In my view it is in the best interest of Maya that she should return to Bermuda so that the Supreme Court of Bermuda may adjudicate as to her custody and control. If the respondent wishes to pursue the issue she has raised about Maya's paternity, then the Supreme Court of Bermuda is the proper forum for the trial of that issue also. Neither the respondent or Maya has any real connexion with

> Barbados. The respondent is here because she has a contract with the Caribbean Development Bank as a communications specialist. In keeping Maya in Barbados the respondent is cutting her off not only from her native land but from the society and support of the applicant, who is entitled to be considered her father until the contrary is proved. I am convinced that Maya's best interests require that the question of her custody and control be decided at the earliest possible date by the Supreme Court of Bermuda whose jurisdiction the respondent involved in the first place."

[49] **Gill v Gill No. 302 of 1988 (unreported)** was delivered by **Chief Justice, Sir Denys Williams** (as he then was) in July 1988. In that case the Plaintiff sought the enforcement of an order for custody made in British Columbia in 1985. The Defendant had, in contravention of this order, removed two minor children (at the time of hearing 14 and 13 respectively) from British Colombia and brought them to Barbados. It is noted that in that case, both Plaintiff and Defendant gave evidence and were cross-examined and the Chief Justice interviewed the two minors. After adverting to the conflicts resulting in the breakdown of the marriage **Chief Justice Williams** stated:

> "It really is unnecessary for me to attempt to resolve the various conflicts which the evidence discloses. I have to decide what is best for the children – that is the first and paramount consideration."

[50] While observing that the Defendant used trickery to get the children out of British Columbia in clear contravention of the law, that the Order of the Court was an Interim Order (the substantive matters were never gone into by that Court), and stressing that *"This Court should not condone the flouting of*

orders of courts of other jurisdictions", ... "...in the last resort it is the best interests of the children that fall to be determined and the breach of a court order is only one consideration."

[51] One cannot help concluding that the fact that the children had been living in Barbados since 1985, had acclimated well, were doing well in school and expressed a strong wish as young teenagers to remain in Barbados, weighed heavily with the Chief Justice in his finding that *"it is in the best interests of the two children not to be uprooted from Barbados"* at this time. He stated:

> "… they have been here now for over two and a half years and are doing extremely well at school. Aged about 14 and 13 respectively they are getting close to their 'O' Level and 'A' Level examinations in which given their school records they would do extremely well. They need to feel safe and secure. They would have formed their own friendships and associations in their schools and in the neighbourhood where they live. They would have adapted to life in Barbados with their father and it would be unsettling, and possibly upsetting for them now to be taken away from the environment to which they have grown accustomed and made to live in a completely different environment. From my conversation with them I formed the impression that they, particularly Kofo, would be extremely upset if she is made to live away from her father. It is on the grounds set out above that I dismissed the application and made the orders sought by the respondent."

[52] **Goodridge J.** (as she then was) addressed in **Condon v Condon BB 2007 HC 31 (unreported)**, the issue of whether it was in the interest/welfare of the minor child that he be returned to the UK as requested by the Applicant or be allowed to remain in Barbados. **Goodridge J.** applied **section 8** of the **Minors Act**, which in her opinion advocated that in deciding this question the Court

shall have regard to the welfare of the minor as the "first and paramount consideration" and shall not take into account whether from any point of view the claim of the father is superior to that of the mother. The Court endorsed the statements of **Lord MacDermott in J v C [1970] AC 688** as the applicable law in this jurisdiction and determined after careful consideration that the children should remain wards of the Court and in the custody of the mother.

Trinidad

[53] Trinidad, unlike Barbados, has a Child Abduction Act 2008 and, unlike Barbados, was a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980, but the Act indicates that the Convention is not yet in bilateral operation between the United States of America and Trinidad and Tobago). The Court, however is required to have regard to the welfare of the child at all stages of the proceedings in accordance with **section 3** of the **Family law (Guardianship of Minor, Domicile and Maintenance) Act**, and it was against this backdrop that their High Court approached the issue of whether the children should be summarily returned to the USA for determination of issues relating to their custody in the case of **Hunkovic v Hunkovic TT 2011 HC 70 (unreported)**.

[54] It is interesting and consistent with this own Court's views on the matter, that the learned trial judge ruled at the commencement of the proceeding that it was necessary to hear oral evidence in order to enable the court to determine whether it was in the children's best interest to be summarily returned to the USA.

[55] The Court held itself bound by the principles adumbrated by **Lord Simonds** in **McKee vs McKee (1951) 1 All ER 942** a Canadian Appeal determined by the Judicial Committee of the Privy Council (as the Privy Council was and still is Trinidad's final court of appeal). The Court was powerfully persuaded by the principles expressed in **Re J (Child Returned Abroad: Convention Rights) [2005] 3 All ER 291** in determining the issue of summary return and carefully considered and applied each one in its refusal to order the summary return of the children to the United States and thereafter ordered a full determination of the custody issue in Trinidad.

[56] Reference is made in that case to other decisions in that jurisdiction, the clear implication being that the same approach was taken in those matters.

Jamaica

[57] The Jamaica Court of Appeal addressed similar issues in **Williamson v Williamson JM 2008 CA 58 (unreported)** a matter characterized by that Court as a "Kidnapping" case in which they issued a summary order returning

the children to Florida, after a finding that the children were domiciled and ordinarily resident there, and that that was the jurisdiction in which the question of their custody and maintenance may be properly determined.

[58] The Jamaica Courts' jurisdiction to determine questions relevant to the care and upbringing of a child is grounded in **section 2** of their **Children (Guardianship and Custody) Act**. **Harris JA** spoke to the added jurisdiction (like Barbados) that the court exercises as a Court of Chancery, as '*parens patriae'* to the children, which demands that the Supreme Court exercises its jurisdiction whenever the circumstances so require. She emphasized that *"The Court is loathe to decline jurisdiction but may exercise such powers if the circumstances so dictate."*

[59] The Court made reference particularly to section 18 of the Act which makes the welfare of the child the primary and paramount consideration and stated that *"It supersedes all other considerations"*.

[60] Like our neighboring jurisdictions, the Court was guided by **Baroness Hale in Re J (a child)** referencing the principles that summary return is not automatic; that the court must pay attention to the best interests of the child in determining whether to order the summary return of a child to a jurisdiction other than the one in which it was found. **Harris JA** approached the

determination of this matter from the direction of 'forum non conveniens', stating as follows:

> "It follows therefore, that the court must first consider which court shall determine the child's best interest. Thereafter, if it is established that the local court in preference to the foreign court should make a decision as to the welfare of the child, then, the local court may proceed to make the orders sought."

[61] I do not agree with this interpretation and approach, and take the view that 'forum non conveniens' is just one of the factors to be taken into account by the Court, and that it is at the discretion of the Judge on which factor[s] he places the greatest weight dependent on the particular circumstances of the case (see **Baroness Hale** in **Re J** (supra). But, it must be noted, that neither the Barbados Court of Appeal or Caribbean Court of Justice (CCJ) have ruled on this point, and **Re J** is only of persuasive authority as, not only is Barbados a non-convention country, but Barbados was not bound by that decision as on that date the CCJ was already our final Court of Appeal.

[62] Nonetheless, the learned judge went on later in the judgment to more clearly articulate that's Court's position as follows:

> "In considering whether a child should be summarily returned, a court must carefully assess which forum best suits the welfare of the child. Scrupulous care must be given in assessing the application of the welfare test. In making a proper determination, the court, in conducting such an exercise, may pay due regard to all the circumstances surrounding the child. The best interests of the child pre-dominate all other considerations. This requires an assessment of his or her happiness, his or her moral and religious upbringing, the social and educational influences, his or her psychological and physical well-being and his or her material surroundings. Re J (a child) (supra), the court therefore, in

> its quest to arrive at a decision as to whether an order for summary return should be made, must embark on a balancing exercise by weighing the competing issues. The court is bound to take into account all relevant factors in deciding whether to make a summary return order or whether to assume jurisdiction."

[63] Nonetheless, it clear that the Jamaican Court of Appeal in this case, used 'forum non conveniens' as a starting point in its finding that the foreign jurisdiction (Florida) was the ordinary residence of the child and that where children are ordinarily resident in a foreign jurisdiction, the foreign jurisdiction is the appropriate forum for questions of custody. This conflicts somewhat with the reasoning of **Baroness Hale** in **Re J** that the idea is not to apply the technical concept of habitual residence, but to ask in a commonsense way with which country the child has the closer connection. And in doing so, looking at factors such as the child's nationality, first language , his race or ethnicity , his religion, his culture, and his education to date would be looked at: see **Re L**.

[64] **Mangatal J.** addressed similar issues in **Strong-Forrester v Forrester JM 2007 SC 91**, citing her own Court of Appeal in **Panton v Panton, No. 21 of 2006**, where that court made it clear that in relation to summary return or peremptory return applications or in questions relating to children and the jurisdiction of their Court in the context of private international law, the welfare principle is the applicable principle; the court must be guided at all

stages by the principles of what would be in the best interest of the child. She noted the lucid and discerning judgment of **Baroness Hale of Richmond** in **Re J (A Child) (return to Foreign Jurisdiction): (Convention Rights)** as a useful starting point in an analysis of the relevant principles. She went on to examine those principles in exquisite detail followed thereafter by a thorough and insightful analysis of the evidence, against the backdrop of those principles/factors.

[65] It is noted that **Re B (Minors) (Wardship: Interim Care and Control) (1983) 4 FLR 472**, referenced by **Mangatal J.** bears a striking factual similarity to this case.

[66] On the issue of 'forum non conveniens', **Mangatal J**. observed that in Australia, although there has been a line of conflicting decisions, the Courts have taken the view that the doctrine of 'forum non conveniens' is not applicable to a custody case where the child is within the jurisdiction. But she acknowledges that "… in Jamaica it has been accepted that the doctrine of 'forum conveniens' or 'forum non conveniens' applies" (see **Panton v Panton** and **Thompson v Thompson [1993] 3 WLR 972** (which applied the well-known decision on 'forum non conveniens' in the commercial law case, **Spiliada Maritime Corporation v Consulex Limited [1983] 3 WLR 972**, that is, a real and substantial connection).

[67] In the final analysis, **Mangatal J.** declined, in the best interest of the children, to grant a summary/peremptory order and scheduled the substantive hearing by the Jamaican Courts.

[68] In a review of this judgment, the Jamaica Court of Appeal (in a judgment delivered by **Smith JA** in May 2008) commended the learned judge's analysis of the evidence, concluded that she took relevant factors into consideration, and found that there was absolutely no reason to disturb her judgment. The appeal was accordingly dismissed. That Court of Appeal's reasoning in upholding **Mangatal J.** (who appeared to have taken a different path/footprint to that advocated by the Court of Appeal which seems to be that the welfare of the child must be assessed in the context of which Court would best serve the requirements of the child's best interest) makes interesting reading. In the final analysis, however, each case is dependent on its particular circumstances, and it was no doubt compelling that the learned judge's careful analysis of the facts and balancing of the relevant factors could not be faulted.

[69] See also that Court's ruling in **RE: A, An Infant, JM 2005 CA 48**, also an appeal from the first instance order of **Mangatal J.** in which the Court of Appeal made findings of fact as to the ordinary residence of the minor in an effort to determine which Court should settle the issue of custody. **Mangatal J** decided on Barbados, but the Court of Appeal found that she erred in her

balancing act and set aside that order and decided on Jamaica as the place of ordinary residence.

[70] As in **Re J.** the Jamaica Court of Appeal addressed the issue of how judicial discretion is reviewed on Appeal in cases concerned with the welfare of the child.

The Bahamas

[71] The decisions of **Lyons J and Davis J in R v L BS 2007 SC 14 (unreported) and Proctor v Goldsberry et al BS 2003 SC1 (unreported)** respectively, make an interesting contrast and reflect rigid adherence to the peremptory return approach as a first approach Convention principle.

[72] The Commonwealth of the Bahamas is signatory to the Hague Convention on Child Abduction (which came into force 1995), and in these two cases displayed a rigid adherence to compliance. It also has an International Child Abduction Act 1993.

[73] In **Proctor**, described as a Child Abduction case, **Davis J** ruled on whether a child was wrongfully removed under art. 3 of the Convention and whether they were any defences under the convention that would move the court to exercise its discretion not to order the return of the child. The parties were both Canadian, but the First Defendant (mother) removed the child to the Bahamas, where she now lived, in contravention of a custody order. The

Plaintiff's Application was filed under the Hague Convention and forwarded to the Bahamian Ministry of Foreign Affairs under the Child Abduction Act.

[74] Careful attention was paid in this decision to the making of a finding of fact as to the "habitual residence" of the minor who alternated between British Columbia and the Bahamas. **Davis J** found that the Child's "habitual residence" was British Columbia, stating: *"... I will not disrespect the orders of the British Columbia, Supreme Court by allowing her to usurp its authority to determine at her whim where should be the habitual residence of the child as she has attempted to do"*.

[75] **Davis J** clearly stated that it is not the business of the Bahamian Courts to determine the custody issue and that the court should not presume to be the proper forum to determine the custody issue, but should confine itself to the abduction issue. Since he could find no defense to the abduction issue, he ordered the peremptory return of the minor child to British Columbia.

[76] **Lyons J** took a similar approach in **R v L**, stating that as a signatory to the Hague Convention on Child Abduction, it is part of the law of the Common wealth of the Bahamas, and *"it is expected to be followed"*.

[77] **Lyons J** made it clear that in his opinion the primary consideration was not the child's welfare, "... *but rather whether the child should be returned speedily to the jurisdiction"*.

[78] **Lyons J** ended by stating, after having made the finding that the children's habitual residence was the United States of America, as follows: -

> "It would seem to me therefore that, on being satisfied that the Hague Convention was applicable and that the applicant had satisfied me on these requirements, then as a matter of law I must order that the children be returned."

Australia

[79] Australia is a signatory to and has ratified the Hague Convention on the Civil Aspects of International Child Abduction 1980 and in 1987 effected the Family Law (Child Abduction Convention) Regulations.

[80] An overview of Australia's position on Child Abduction cases can be found at **Chap. 7 Family Law in Australia, 7th Edition 7.164** under the rubric 'International Child Abduction' where it states:

> "A significant consequence of this (being a signatory and the statutory affirmation) is that the primary concern of the court is to secure the return of the child to its home jurisdiction: the 'best interests of the child' is not the paramount consideration."

[81] In practice there are exceptions under the 1987 Regulations.

[82] The Australian Courts (from a quick review of the cases are making a different statement) appear to have taken the view that even where one parent has removed a child in contravention of court orders, in subsequent proceedings concerning the residence of the child there should not be a departure from the basic principle that the best interests of the child are the paramount consideration.

[83] In **Schenck and Schenck (1981) FLC 91-023**, it was held that the argument that a kidnapping parent should be awarded custody only if the other parent is unfit is not correct. It was held that there is to be no departure from the basic principle that the welfare of the child should remain with the father despite his actions; the court considered the way in which the father had cared for the child, future proposals, uncertainties in the mother's situation and weighing of what each parent could offer the child.

[84] It is noted however by the learned authors of **Family Law in Australia** (supra) that the courts have made it clear that a parent who deliberately removes a child from contact with the other parent in circumstances where the child's welfare did not render such action necessary or reasonable will generally be seen as having thereby acted contrary to the welfare of the child. See **Marriage of Schenck** (above) and **Marriage of Krerr [1976] 2 Fam LR11, 330**, where the court noted that the taking of the child by the father and the subsequent concealment of the child manifested a lack of feeling which must weigh in the balance against the father so far as being the child's primary caregiver.

Canada

[85] The case of **McKee V Mckee** relied on by counsel for the Respondent offers a snapshot of the Canadian approach. In that case the American parents of a

minor were divorced; the father took the minor from the United States to Canada in breach of a Court order of an American Court. Custody was granted to the father in habeas corpus proceedings. The mother appealed to the Supreme Court of Canada and was successful in obtaining custody. The father appealed to the Judicial Committee of the Privy Council which advised that the question of custody ought to be reheard in Canada in spite of the fact that the father had removed the minor from the United States in order to avoid obedience to the order of the Court of that jurisdiction.

[86] What comes across clearly from this judgment is that the welfare of the child is the paramount consideration; it predominates all other considerations. In fact, the head note to that case reads as follows: in proceedings relating to custody the welfare and happiness of the infant was the paramount consideration; the order of a foreign court as to his custody must be given the weight which was due to it in the circumstances of the case, but such an order was only one of the facts which must be taken into consideration and, therefore, it was the duty of the Canadian court to form an independent judgment on the merits of the matter.

Re J (a Child) (return to foreign jurisdiction: convention rights).

[87] This is an important decision for many reasons.

[88] It is difficult not to point out the irony in the fact that this is a decision of the House of Lords telling non-convention countries what law (or principles) should be applied in their jurisdictions in matters of this nature. In reality, the recommended principles represent the underlying philosophy of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 being: that it is in general in the best interests of all children to have their lives subjected to the minimum of upset after parental breakdown, by ensuring that disputes as to their future should be disposed of in the Courts of their country of **habitual residence** (my emphasis) and also by dealing at the same time, peremptorily, with attempts by one parent to abduct the children to a country which may be supposed to offer a better chance of securing the outcome preferred by that parent. It is meant to ensure that rights of custody and access under the law of one contracting state are effectively reproduced in the other contracting state.

[89] This fact, however, does not derogate from the soundness, comprehensiveness and innate practicality of the guidelines advocated.

[90] It also provides an excellent review of the English authorities on this issue.

[91] Thirdly, it speaks powerfully to the role of the Court of Appeal when it ruled that, where a trial judge has a discretion in which various factors were relevant, the evaluation and balancing of those factors was a matter for him.

Only if his decision was so plainly wrong that he must have given far too much weight to a particular factor was the appellate court entitled to interfere.

[92] This was a case involving Saudi Nationals with the mother having dual Saudi and British Nationality. The child was born in the United States of America and was thereby a citizen of these three jurisdictions. The mother travelled to the UK with the father's consent and there commenced legal proceedings. At first instance the judge refused the father's application for the summary return of the child to Saudi Arabia. The trial judge expressed the view that had it not been for one particular factor he would have ordered the summary return of the child to Saudi Arabia. This factor was that the father had raised, and then withdrawn, allegations about the mother's association with another man and the effect of such allegations in Saudi Arabia Shariah law.

[93] The Court of Appeal held that there could be no criticism of the judge's direction on the law, but allowed the father's appeal on the basis that the judge's conclusion on the risk to the child's interests had not been justified by the evidence and that he had given it too much weight in his overall conclusion. The issue arose in the mother's appeal to the House of Lords as to how, if at all, it was relevant that the laws and procedures in the country to which the child would be returned were different from those which would apply if the child's future were to be decided in England. The House of Lords

allowed the mother's appeal. In her judgment **Baroness Hale** enumerated the following factors to be considered (to be weighed in the balance) by a Court in determining whether to make a repatriation order as follows:

1. The degree of connection of the child with each country: see **Re L (minors) (wardship) jurisdiction [1974] 1 All ER 913**;
2. The length of time he has spent in each country;
3. The question of different legal concepts of welfare (whether the other court will apply principles which are acceptable to the English courts): see **Re L and Re R (minors) (wardship: jurisdiction) (1981) 2 FLR 416; Re F (minor: abduction: jurisdiction) [1990] 3All ER 97; Re M (Minors) (Abduction: Non-Convention Country) [1995] 2 FCR 265; Re S (Minors) (Abduction: Peremptory Return Order 2 FCR 499 (Pakistan); Re M (Minors) (Abduction Peremptory Return Order) [1996] 1 FCR 557 (Dubai)**;
4. The wishes and feelings of the child (where appropriate), his physical, emotional and educational needs and the relative capacities of the adults around him to meet those needs, the effect of change, his own characteristics and background, including ethnicity, culture and religion, and any harm he has suffered or risks suffering in the future;
5. The effect of the decision on the child's primary caregiver as this may impact on the welfare of the child.

Disposal

[94] This Court is convinced of the sincerity of the Respondent's love for her children and her passionate wish to be a full time mother to them, but her methods are misconceived and naïve. This Court believes this entire scenario to be part of an ill-conceived plan to disappear with the children solely to

provide leverage/a tactical advantage to renegotiate her access arrangement with her ex-husband.

[95] The welfare of the children has become a pawn in the furtherance of that objective. In my opinion, this action by the Respondent is designed to effect the outcome preferred by her rather than the outcome selflessly determined to be in the best interest of her children.

[96] It is clear that the Respondent was well-advised in Cyprus and in England and that her avoidance of the United Kingdom, where she has a strong family support system, was based on that advice. In her oral examination before this Court she made clear her understanding that England, no matter how sympathetic to her plight, would forthwith return the children to Cyprus. (see paragraph 20 of Baroness Hale's judgment).

[97] It is a significant fact that the Applicant has been the primary care-giver since November 2013 when the Cyprus Courts so ordered. Thereafter he moved into the home of his parents, who together with his sister (also living in the home) and domestic help, assist with the care of the children. In July 2016 he remarried and his new wife is now a vital part of the children's care. This fact (and understandably so) upsets the Respondent, who genuinely wants to be a full-time mother to her two boys.

[98] This Court is persuaded, not that the return of the children should be a starting point (that is a Convention concept and Barbados is not a Convention signatory. The effect of this approach would be to apply the Hague Convention. It is noted that in **Forrester v Strong-Forrester** the Jamaica Court of Appeal accepted this as a correct statement of the applicable principle.), but that a swift, realistic and unsentimental assessment of the best interests of these children leads inexorably to the conclusion that they should be returned to their native land of Cyprus, before the excitement of this adventure turns to distress and trauma.

[99] I entirely accept the opinion of **Baroness Hale** in her analysis and determination of an approach to these matters that in Non-convention countries the court always has a choice as follows:

> "[28] It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorized taken or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child."

[100] In my consideration of the 'choice' above-mentioned, the words of **Lord Justice Buckley** in **Re L (Minors) (Wardship) [1974] 1 WLR 250**, generally considered the *'locus classicus'* before **Re J** resonate with this Court:

> "To take a child from his native land, to remove him from there to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he had been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child,

> particularly, at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interest of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English Court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country."

[101] My choice is clear and is made in those terms after giving consideration to the degree of connection of these children to Barbados (which is tenuous at best), the fact that Cyprus is the only home they have known in their short lives, that the Applicant has been the primary care-giver since November 2013, the fact that they have a loving support system there capable of meeting their physical, psychological, emotional, educational, financial and other needs; that in Barbados the Respondent is without the support system of her family (who reside in England) which she clearly needs; that her financial proposals for her care and those of the children are sketchy and lack careful consideration. These are just among some of the concerns of this Court about the circumstances of the Respondent.

[102] Time does not permit the examination of the Cyprus legal system and whether their legal concept of the welfare of the child mirrors ours, but the objective examination of the materials submitted by both sides leads this court to the view that the welfare of the children is an extremely significant consideration. Such an examination of the respective legal concepts would have been more

appropriate if this Court had decided to conduct a full custody hearing in this jurisdiction and it has declined to do so.

[103] Nonetheless, it is evident that the Respondent's dealings with that system, and with her ex-husband, display a steady increase in her access to her children, after having been initially ousted from her position of primary caregiver as a result of what was the initially adversarial posture adopted by both parties. In other words, those dealings show significant attention to the needs/interests of the children. On that trajectory, it is quite conceivable that the parties were on course to an all-round satisfactory arrangement had the Respondent not adopted this ill-advised course of action.

[104] This Court is not persuaded that this Respondent did not get a fair hearing in Cyprus (she appears to have been ably represented by three different legal advisors in Cyprus one of whom she deposes in her sworn affidavit was an expert family lawyer), and that she will not get one in the future, although it is inevitable that future dealings will be clouded by these recent developments. But that of itself is a factor for this Court to consider, but not the only factor, and in these circumstances not a determining factor.

[105] These matters are now dealt with in the glare of public international opinion, making it less likely that personal influence will impact on the impartiality of a court of law, especially in a country like Cyprus with a highly developed

tourist product and a highly developed international business platform. In other words, international comity is more likely than not to be a powerful force.

[106] The Respondent is a United Kingdom National, and it is not in doubt that that country as a signatory to the Hague Convention and others will be vigilant in its protection of the rights of its nationals.

[107] The Respondent has already contacted two institutions/organizations that render mediation and other services to persons in her position and will no doubt solicit their assistance in the future as needed.

[108] The issue of the Respondent's concerns for her personal safety has been considered bearing in mind that her personal security and emotional well-being is an important consideration to the welfare of the children, but in the opinion of this Court should be addressed, (with the help of her legal counsel there), by the Cypriot authorities, to better assess whether these events were random or otherwise. This Court cannot realistically make that assessment.

[109] In all this, the matter causing this Court pause, is the concern that these recent events will prejudice the Respondent when the children are returned to Cyprus, and the Respondent's statement that she will never return to Cyprus. This Court gives great weight to a child's need for a meaningful relationship with both its parents. A warrant has been issued for her arrest there and she

faces the possibility of incarceration. The Applicant has expressed, without prompting and very early in this process, his intent to withdraw the said complaint should the children be returned to Cyprus. This Court is persuaded as to the sincerity of his commitment to the Respondent being part of their lives, and the recognition of its importance to their psychological well-being and development.

[110] In view of this concern, this Court will accept the written legal opinion of the Applicant's counsel in Cyprus vetted by counsel for the Respondent (in Cyprus, England or Barbados, as advised) as to the legal effect of the Applicant's withdrawal of the criminal complaint.

[111] This Court orders the summary return of the children to the custody of the Applicant and to Cyprus, but that order is stayed pending the timely resolution of the above to ensure the Respondent's ability to return to Cyprus, (whether to live there or otherwise) and her ability to maintain that critical presence in her children's lives.

[112] Until such time the children remain Wards of the Court.

[113] No order is made as to costs.

[114] This matters remains under a Certificate of Urgency, with liberty to apply.

[115] I wish to commend counsel for the parties for the quality of their submissions (written and oral) and their work in this matter.

MARGARET A. REIFER
Judge of the High Court