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

CA (CPA) Application No: 162/2022
High Court Colombo Case No: HC/SPL/20/2018

In the matter of an Application for Revision against the Order dated 08.12.2022 delivered by the Provincial High Court of Western Province holden at Colombo; in terms of Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 11(1) of the High Court of the Provinces (Special Provisions Act) No. 19 of 1990 (as amended).

In the matter of an Application under Section 9 of the Civil Aspects of International Child Abduction Act No: 10 of 2001 read with the Hague Convention on the Civil Aspects of International Child Abduction of 1980, Re: Diyon Anuhas de Silva & Sandasi Anuththara de Silva.

W.M.R. Adikari,
Secretary to the Ministry of Justice & Prison Reforms,
Superior Courts Complex,
Colombo 12.

PETITIONER

-Vs-

1. Hakkini Gihan Indu Kumara de Silva,
   23900 Lecco (LC)- via Isidoro Calloni No.8,
   Italy.

2. Samarathunga Arachchilage Anusha
   Sandamali Samarathunga - de Silva,
   No.155/82, Andiris Mawatha,
   Old Kesbewa Road,
   Gangodawila, Nugegoda.

RESPONDENTS

AND NOW BETWEEN

2. Samarathunga Arachchilage Anusha
Sandamali Samarathunga - de Silva,
No.155/82, Andiris Mawatha,
Old Kesbewa Road,
Gangodawila, Nugegoda.

2nd RESPONDENT-PETITIONER

Vs.

W.M.R. Adikari,
Secretary to the Ministry of Justice & Prison Reforms,
Superior Courts Complex,
Colombo 12.

PETITIONER- RESPONDENT

1. Hakkini Gihan Indu Kumara de Silva,
23900 Lecco (LC)- via Isidoro Calloni
No.8,
Italy.

1ST RESPONDENT-RESPONDENT

Before: S. U. B. Karalliyadde, J.

Mayadunne Corea, J.

Counsel: Charith Galhena with Shalani Jayasinghe and Madushika Jayasinghe instructed by Mayomi Ranawaka for the 2nd Respondent-Petitioner.

Parinda Ranasinghe, PC, SASG, with Hashini Opatha, SSC, for the Petitioner-Respondent.

Saliya Pieris, PC, with Geeth Karunarathne and Mark Fernando for the 1st Respondent - Respondent.

Written submissions tendered on:

18.10.2024 by the Petitioner-Respondent.

21.10.2024 by the 1st Respondent-Respondent.

18.10.2024 by 2nd Respondent-Petitioner.

Argued on: 12.12.2023, 26.03.2024, 28.03.2024, 05.04.2024 and 10.09.2024

Decided on: 03.03.2025

S. U. B. Karalliyadde, J.

This Revision Application is against the Order dated 08.12.2022 (P1) of the learned Provincial High Court judge of Colombo in Application No. HC/SPL/20/2018. The Central Authority has preferred the said Application, the Secretary to the Ministry of Justice and Prison Reforms (the Petitioner-Respondent) in terms of Section 9 of the Civil Aspects of International Child Abduction Act, No. 10 of 2001 (the Act). The Petitioner-Respondent in the Application before the Provincial High Court of Colombo sought the return of the two children to Italy on the basis that the 2nd Respondent-Petitioner to this Application (the Petitioner) abducted the children from their habitual residence in Italy. The Application before the Provincial High Court of Colombo has been instituted by the Petitioner-Respondent, pursuant to an application made by the appropriate authority in Italy on the request made by the father of the children who is the 1st Respondent-Respondent to this Application (1st Respondent). By the Order marked as P1, the learned Provincial High Court Judge of Colombo acting in terms of

Section 10 of the Act ordered the return of the two children to Italy concluding that the Petitioner abducted the children from their habitual residence in Italy. The mother, the Petitioner filed this instant Application seeking a revision of the Order marked as P1.

The facts of the case in a nutshell are as follows; The Petitioner and the 1st Respondent got married in the year 2009 and thereafter migrated to Italy in the year 2010. The first child who is a boy was born on 26.11.2011 and the second who is a girl on 24.02.2014 and both children were born in Lecco Italy. On 26.09.2014, the Petitioner and the 1st Respondent along with the two children came to Sri Lanka to construct a house and later the 1st Respondent returned to Italy for his employment. As a result of a breakdown of their marriage, on or around 09.06.2015, the Petitioner instituted divorce proceedings before the District Court of Mount Lavinia. Thereafter the Petitioner returned to Italy with the two children on the request of the 1st Respondent to attend the citizenship awarding ceremony on 21.06.2015, and when the Petitioner attempted to return to Sri Lanka with the two children, she was stopped by the police at the airport, consequent to a complaint made by the 1st Respondent, who alleged that the Petitioner is attempting to abduct the children. While the Petitioner remained in Italy, the 1st Respondent attacked the Petitioner with a hammer, leading to hospitalising her. As a result, on 23.05.2016 the legal custody of the two children was given to the Municipality of residence in Lecco by a court order from the Juvenile Court of Milan, and physical custody was granted to the Petitioner with the right of access to the 1st respondent under

the supervision of the Institution.[1] Thereafter on 01.01.2017, the Petitioner filed a request with the court in Verona for her to return to Sri Lanka with the children. However, the court rejected her request after considering the objections of the 1st Respondent (1R2a). On 07.09.2017, the Juvenile Court of Venice granted the Petitioner permission to take the two children to Sri Lanka for a period of 10 days to attend her divorce case (1R5). Thereafter, on 22.09.2017, the Petitioner with her two children returned to Sri Lanka. However, as the Petitioner failed to return to Italy in violation of the said order marked as 1R5, on the request of the 1st Respondent, the Italian authority requested the Petitioner-Respondent to return the children to Italy. Upon such request made by the appropriate authority in Italy, Petitioner-Respondent instituted the proceedings before the Provincial High Court of Colombo for the return of the two children acting under and in terms of Section 9 of the Act.

In terms of Section 10 of the Act, subject to the exceptions provided in Section 11, the High Court can order the return of a child, if the Court is satisfied that there has been a wrongful removal or retention of a child within the meaning of Section 3 of the Act and a period less than one year had not been elapsed between the alleged removal or retention and the date of the Application. However, in terms of the proviso to Section 10 of the Act, even if a period of more than one year has elapsed, the High Court can order the return of a child unless the court is satisfied that the child is settled in his or her new environment. Section 10 of the Act reads thus,

[1] Page 297 of the High Court brief

"*Where the High Court is satisfied, upon an application made to it under section 9, but subject to section 11 that-*

(a) the child in respect of whom the application is made has been wrongfully removed to. or retained in, Sri Lanka as the case may be, within the meaning of section 3; and

(b) a period of less than one year has elapsed between the date of the alleged removal or retention, as the case may be, and the date of such application.

shall forthwith order the return of such child to the specified country in which that child has his or her habitual residence:

"Provided that the High Court may order the return of a child to the specified country in which that child has his or her habitual residence even in a case where more than one year has elapsed between the date of the alleged removal or retention, as the case may be, and the date of the application, unless it is satisfied that the child is settled in his or her new environment."

Section 10(a) refers to the removal or retention of a child within the meaning of Section 3 of the Act. Section 3 defines what constitutes wrongful removal or retention of a child. Section 3(1) is as follows,

"For the purposes of this Act, the removal to, or retention, in, Sri Lanka of a child shall be deemed to be wrongful where-

(a) the removal or retention, as the case may be, is in breach of rights of custody attributed to any person or institution or other body, either jointly or alone, under the law of the specified country in which that child had his or her habitual residence, immediately prior to such removal or retention, as the case may be;

(b) at the time of the removal or retention, as the case may be, those rights were actually exercised, either jointly or alone, by such person, institution or other body or would have been exercised by such person, institution, or other body but for such removal or retention, as the case may be."

The right of custody mentioned in Section 3(1) of the Act is defined in the Subsection 2 of Section 3 as follows;

"The rights of custody referred to in subsection (1) include rights of custody arising-

(a) by operation of law of;

(b) by reason of a judicial or administrative decision of; or

(c) by reason of any agreement having legal effect under the law of'

The specified country in which the child had his or her habitual residence, immediately prior to such removal or retention, as the case may be."

Before coming to the conclusion whether a child has been wrongfully removed or retained, one must first establish where the habitual residence of the child is. In the Order marked as P1, the learned High Court judge had concluded that the habitual residence of the two children is in Italy. However, it is the argument of the learned Counsel appearing for the Petitioner that, the Petitioner and the 1st Respondent came to Sri Lanka along with the children on 26.09.2014 with the intention of building their matrimonial home in Sri Lanka and had the intention to have the habitual residence in Sri Lanka. The Learned Counsel argued that there is no shared intention between both the Petitioner and the 1st Respondent to establish a matrimonial home or habitual residence in Italy and the Court should look into the intention of the parties to establish their habitual residence.

The learned Counsel appearing for the Petitioner further argued that the learned High Court judge erred in coming to the conclusion that the habitual residence of the children is in Italy by relying only on the fact that the Petitioner removed the children by violating the Court Order marked as 1R3(a), the children are Italian citizens and they have been educated in Italy, and the learned High Court judge failed to take into consideration the circumstances that led the Petitioner and the children to stay in Italy from July 2015 to the date of alleged removal (22.09.2017).

The learned Counsel appearing for the Petitioner citing the decision of the Supreme Court of the United Kingdom in the case of *A v. A and another (Children: Habitual*

Residence)[2], argued that the habitual residence of the children is not a matter that would depend on the legal definitions of citizenship and domicile but is a question of fact and therefore habitual residence cannot solely be decided on the citizenship of a minor.

I will first address the issue of habitual residence. Neither the Act nor the Hague Convention on the Civil Aspects of International Child Abduction defines the child's 'habitual residence'. As pointed out by the learned Counsel appearing for the Petitioner by citing the case of *A v. A and another* (supra), the question of habitual residence in fact is a question of facts to be decided by referring to all the circumstances of any particular case. It was also decided by the United States Court of Appeal in the case of *Miller v. Miller*[3] that deciding habitual residence "*is a fact-specific inquiry that should be made on a case-by-case basis*". It is also an important fact to keep in mind that both the Hague Convention and the Act refer to habitual residence "*immediately prior to such removal or retention*". Section 3(1)(a) of the Act is reproduced as follows;

> *"the removal or retention, as the case may be, is in breach of rights of custody attributed to any person or institution or other body, either jointly or alone, under the law of the specified country in which that child had his or her* ***habitual residence, immediately prior to such removal or retention****, as the case may be;"*

The fact that what matters is where the child's habitual residence was immediately before the removal or retention. This has also been highlighted by Lord Hughes in *A v.*

[2] [2013] UKSC 60
[3] 240 F.3d 392, 400 (4th Cir. 2001).

A and another (supra)[4]. In the said case lady Hale emphasized that the preferable test to decide the question of habitual residence is the test adopted by the Court of Justice of the European Union which lays down that habitual residence is "*the place in which reflects some degree of integration in social and family environment*". Further, lady Hale in paragraph 48 of the said case quotes the judgement of the Court of Justice of the European Union in the case of *Proceedings brought by A*[5] which lays down the approach to address the issue of habitual residence as follows,

> *"2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case*."

What this Court should look into in the matter at hand is in which country (Italy or Sri Lanka) was the children had some degree of integration in a social and family

[4] At paragraph 77
[5] [2010] Fam 42

environment. The alleged removal of the children from Italy had taken place on 22.09.2017. The learned Counsel appearing for the Petitioner argues that the alleged removal took place in 2015 when the Petitioner attempted to come back to Sri Lanka along with the children after attending the citizenship ceremony. However, this Court cannot accept that argument on the fact that it was an attempt to remove and not the actual removal of the children from Italy. Both children were born in Italy respectively on 26.11.2011 (1R10(a)) and 24.02.2014 (1R10(b)) and were awarded Italian citizenship in the year 2015 (1R11(a) and 1R11(b)). According to the argument of the Counsel appearing for the Petitioner, the children had remained in Sri Lanka for more than 8 months after they were brought to Sri Lanka on 26.09.2014 until returning to Italy to attend the citizenship ceremony on 21.06.2015. Thereafter, until the date of removal of the children (22.09.2017), both children had received education in Italy as the eldest child had attended school and the second child attended nursery (1R14(a) and 1R14(b)). In paragraphs 11(XI) and 11(XII) of the Petition to the instant Application, the Petitioner has stated that she returned to Italy on 09.03.2015 along with the children for a short period as a result of the 1st Respondent neglecting his matrimonial and parental duties to maintain her and the children and returned to Sri Lanka. However, the Petitioner has not adduced any evidence as to the date of her return to Sri Lanka and how long she stayed in Italy after returning to Italy on 09.03.2015. Therefore, it is clear that the children stayed for 6 months in Sri Lanka from 26.09.2014 until returning to

Italy on 09.03.2015. The children stayed in Italy for an unknown period until returning to Sri Lanka and once again returning back to Italy on 21.06.2015.

Even though the Petitioner contends that the habitual residence of the children is in Sri Lanka, the only materials brought before the Court to prove it is the fact that the eldest child attended school in Sri Lanka after they returned to Sri Lanka in the year 2014 and the fact that the parents had a settled intention to have their habitual residence in Sri Lanka.

The learned SASG appearing for the Petitioner-Respondent citing the case *Friedrich v. Friedrich*[6] where it was held that, "*to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions*" argued that the habitual resident of the children cannot solely be decided upon an intention to build a matrimonial home in Sri Lanka. When examining the brief of the case before the High Court of Colombo, even though the 1st Respondent has admitted that they came to Sri Lanka to build a house, no other evidence has been brought before the High Court to prove that the parents had a settled intention to change their habitual residence to Sri Lanka. Considering the above fact this Court is inclined to accept the argument of the Learned SASG that the intention between the parents cannot be the sole fact to decide the habitual residence of the Children.

[6] 983 F.2d at 1401.

Considering the fact that the duration of residence of the children from birth to the alleged removal and the fact that the children stayed in Sri Lanka only for a period of 6 months, the Petitioner and the 1st Respondent established their matrimonial home in Italy after their marriage, the children's nationality which is Italian and the fact that they received education in Italy, this Court can be satisfied that the children had some degree of integration in social and family environment in Italy. Therefore, considering the above-stated facts and authorities this Court is of the opinion that the learned High Court judge has not erred in concluding that the habitual residence of the two children is in Italy.

The learned Counsel appearing for the Petitioner argued that the learned High Court judge had erred in his judgement when coming to the conclusion that no fact had been proved to the satisfaction of the Court for the refusal of an order of return under Section 11 of the Act, while there is expert evidence (2වා28) to support that the children will be exposed to grave psychological harm if they return to Italy. In response, the learned President's Counsel appearing 1st Respondent argues that, even though the Petitioner has marked a document of the psychological assessment of the eldest child, the said document is incomplete and that the Petitioner has failed to call the expert who issued such document before the High Court to prove the said document. When examining the document marked as 2වා28[7] is indeed an incomplete diagnosis as the physiologist herself at the end of it stated that the information stated in 2වා28 had been gathered by

[7] At page 409 and 410 of the brief

only observing the eldest child and his mother and there had been no opportunity to observe the behaviour of the child in the presence of the 1st Respondent who is the father of the children. The last paragraph of 2වැ28 is as follows,

> *"Sessions could not be continued due to the lockdown. It also needs to be kept in mind that information was gathered only by observing Anuhas and his mother Anusha and sister, and there has been no opportunity to observe his behaviour in the presence of his father."*

As pointed out by the learned President's Counsel appearing for the 1st Respondent, the Petitioner has not proved the document marked as 2වැ28 to the satisfaction of the Court. Furthermore, the learned Counsel appearing for the Petitioner argued that the return of the children to Italy would place them in an intolerable situation as stipulated in Section 11(1)(b) of the Act. The basis of this argument of the learned Counsel is that the 1st Respondent only had the right to access in Italy and there is a risk of forfeiture of the 1st Respondent's parental responsibility as per the order of the Law Court for Minors in Milan marked as 1R7(a). The learned Counsel further argues that since the custody of the children is with the Italian Social Services, the children might be handed over to a foster family in Italy upon their arrival and this fact has been admitted by the 1st Respondent.

It is important to examine what Section 11 of the Act provides for. In terms of Section 11, the High Court has the power to refuse to make an order under Section 10 of the

Act for the return of minors to the specified country if the person opposing such refusal establishes the exceptions provided under Section 11. Section 11 reads thus,

(1) The High Court may refuse to make an order under section 10 for the return of a child to the specified country in which that child has his or her habitual residence if the person or body opposing such return satisfies the Court that -

(a) the person, institution or other body having the care of the person of the child was not exercising such rights of custody at the time of removal or retention. as the case may be, or had consented to, or subsequently acquiesced in, such removal or retention, as the case may be; or

(b) there is grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

(2) The High Court may refuse to make an order under section 10 for the return of a child to the specified country in which that child has his or her habitual residence, if the child objects to being returned and the court is satisfied that the child has attained an age and a degree of maturity at which it is appropriate to take account of the child's views.

The learned Counsel appearing for the Petitioner relying upon the order of the Law Court for Minors in Milan marked as 1R7(a), argues that there is a risk of forfeiture of parental responsibility of the 1st Respondent. However, this Court cannot accept the

argument presented by the learned Counsel. In the order marked as 1R7(a), the Law Court for Minors in Milan made the following observations,

> *"Given the persistence of a heated conflict between the minors? parents it is necessary to maintain the custody of the minors inside an institution and give all the support tasks to the nucleus, which will be absolved by the Services of the Municipality of the new residence. It will then be necessary that the social services where the minors live, together with those competent in the residence of the father, have to regulate the meetings between the father and the minors, which will have to take place, if requested, and not disturbing for minors, in a neutral space with the mediation of an educator, at least initially.*
>
> *At present, since the psychodiagnostics assessments on the personality of each parents have not been received, the forfeiture of parental responsibility should not be declared. In fact, even though he has behaved in an absolutely inadmissible and inadequate manner in front of minors, hitting the former partner with a hammer, he appears to have a sufficiently good and serene relationship, with his children. In addition, in order to better value the situation, since the investigations is still in progress and has to be received, in order to be able to declare the father's forfeiture, the documents of this legal proceeding are forwarded to the Public Prosecutor's Office at the Law Court for Minors of Venice as far as-its authority permits."*

It is clear from the above-stated facts that the Law Court for Minors in Milan has observed that even though there is a conflict between the parents, there appears to be a sufficiently good relationship between the 1st Respondent and the children. Further, it is clear from these observations that even the Law Court for Minors in Milan is reluctant to forfeiture of parental responsibility of the 1st Respondent due to the lack of a psychological assessment of both parents and for the reasons of the investigations that are still in progress. In the said order the Law Court for Minors in Milan has entrusted the custody of the children to the Municipality of the residence to keep the children with the mother. The Law Court for Minors in Milan had also instructed to regulate the relationship between the 1st Respondent and the children and if requested, it to be observed and protected with the help of an educator at the initial stage.

When considering the above facts, one cannot presume that once the children return to Italy the 1st Respondent will be forfeited from his parental responsibilities based on the document marked as 1R7(a). Therefore, this Court is not inclined to accept the argument of the learned Counsel appearing for the Petitioner in that regard based on a presumption that the 1st Respondent's parental rights might be forfeited which might lead to placing the children in an intolerable situation upon their return to Italy. Considering the above facts this Court is of the opinion that the learned High Court judge had not erred in concluding that the Petitioner has not proved the exceptions provided by Section 11(1) of the Act.

The learned Counsel appearing for the Petitioner further argued that the learned High Court judge erred in his judgement by failing to take into consideration the applications for the return of the children made by the appropriate authority in Italy marked as P3a and P3b. The learned Counsel's argument is that the request is to return the children to Italy to the usual residence with the mother until a court of law in Italy or Sri Lanka makes a definitive decision on their custody and such order of custody has already been passed by the Civil Appellate High Court of the Western Province in the case No. WP/HHCA/MT/73/2019/F - A and B.

In terms of Section 11(4) of the Act, the High Court shall take into account a decision on custody of the child when making an order of return to the specified country under Section 10 of the Act and such decision on custody shall not be the only reason to refuse to make an order of return. Section 11(4) reads thus,

> *"The High Court shall not refuse to make an order under in section 10 for the return of a child to the specified country in which that child has his or her habitual residence, on the ground only that there is in force, a decision of a court in Sri Lanka or a decision entitled to be recognized by a court in Sri Lanka relating to the custody of such child, but the High Court shall, in making an order under section 10, take into account the reasons for such decision."*

Simply said, what Section 11(4) of the Act means is that if there is an order of custody given in favour of a parent who is seeking the return of the child, the High Court can

consider such order for the return of the child. Even though the learned Counsel argue that the requests for return made by the Italian authority marked as P3a and P3b are for the return of the children along with the mother to Italy until a final determination of the custody, the Act only empowers the High Court either to make an order of return of a child under Section 10 or to refuse to make an order of return under Section 11 of the Act. When in a situation where the Act itself restricts the jurisdiction of the High Court, merely for the fact that the appropriate Italian authority has made such request in the documents marked as P3a and P3b, this Court is not inclined to accept the argument put forward by the learned Counsel appearing for the Petitioner.

Furthermore, this Court observed the fact that in terms of Section 20 of the Act, no court in Sri Lanka can make any determination on any question on custody on the merits of the case until the Central Authority or a court of Sri Lanka refuses an application made under Section 6 or Section 9 of the Act. Section 20 reads thus,

> *"Where the Central Authority receives notice that a child has been wrongfully removed to Sri Lanka from a specified country, no court in Sri Lanka shall decide or determine any question on the merits relating to the custody of the child to whom the notice relates -*
>
> *(a) until after the Central Authority or a court in Sri Lanka has refused an application made under section 6 or section 9, as the case may be, for the return of such child to the specified country; or*

(b) until after the expiration of the period of six weeks from the date of such notice, and no application under section 6 for the return of that child to the specified country has been made during that period.

Considering all the above-stated facts and circumstances with the Court decisions this Court is of the view that the learned High Court judge has not erred in coming to the conclusion that the habitual residence of the children is in Italy and they have been wrongfully removed or retained in Sri Lanka in terms of Section 3 of the Act. Therefore, the learned High Court judge has not erred in making an order of return under Section 10 of the Act. Therefore, the Application for Revision is refused. No costs ordered.

JUDGE OF THE COURT OF APPEAL

Mayadunne Corea, J.

I agree.

JUDGE OF THE COURT OF APPEAL