THE COURT ORDERED that no one shall publish or reveal the names of the parties and the children who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the parties and the children in connection with these proceedings.

IN THE HIGH COURT OF BELIZE

CLAIM No. Civ 11 of 2020

IN RE C.G.L (MINORS) (ABDUCTION: CUSTODY RIGHTS)

Appearances:

Mrs Roberta Magnus-Usher of Magnus Usher & Associates and Tiffany Cadle of Tiffany M Cadle & Co. for the appellant

Mrs Melissa Balderamos Mahler and Ms Erin Alexis Quiros of Balderamos Arthurs LPP for the respondent

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29 October 2024

26 November 2024

JUDGMENT

CHILD ABDUCTION - International Child Abduction Act, Cap 177 – Convention on the Civil Aspects of International Child Abduction, 1980 - Approach to determining habitual residence – When forthwith return should be ordered – Consideration of whether a child has settled in a new country – When relevant - Article 13(b) grave risk exception – Meaning of grave risk – High threshold test – Hague Convention matters and need for active case management - Cases should be judge-led, generally on affidavit evidence, with expedited hearings and appeals - CIVIL PRACTICE AND PROCEDURE – Appeal from decision issued by the Family Court – Standard of appellate review in Hague Convention matters - Supreme Court of Judicature (Inferior Court Appeals Rules) 1991 - Failure to prosecute appeal – Deemed Abandonment – Validity of notice of appeal and proceedings not progressed in the manner and within the timelines set out in the 1991 ICA Rules.

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[1] **HONDORA J.:** The appellant LR and the respondent CG are the mother and father, respectively, of three minor children who were the subject of a decision issued by the Family Court on 13 November 2020 in a matter initiated under the International Child Abduction Act, which domesticated the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). In that decision, Magistrate Morrison-Novelo ruled that the children, who had been retained in Belize by their mother without their father's consent, were habitually resident in Florida, USA. The learned magistrate ordered that the children be returned to the USA on or before 30 November 2020. After filing a notice of appeal on 13 November 2020, the children's mother secured a stay of execution of Magistrate Morrison-Novelo's order.

[2] In April this year, the matter was placed on my docket. I am now called upon to decide whether there is before this court a valid appeal and, if so, whether the learned magistrate's decision was tainted by one or more errors of law and/or fact. My judgment is structured as follows:

Section I – Context

Section II - Chronology - proceedings before the Family Court

Section III – Chronology – procedural issues before the High Court

Section IV – Issues arising for determination

1. Is there before this court a valid appeal?
2. Principles on the exercise of jurisdiction, approaches to determining habitual residence, when to consider whether a child is settled in a new environment and the article 13(b) grave risk exception
3. Assessment of grounds of appeal

Section V – Observations

Section V – Disposal

I. Context

[3] LR, the mother of the three children, is a dual Belizean and Canadian national. LR now lives in Belize together with the three children. The respondent, CG is a national of the USA and lives in that country.

[4] LR and CG met at college in the USA in **2008** and got married in **2012**. They have two sons C and G who were born in the USA in **2013** and **2016**, respectively. Their daughter (and youngest child) L was born in Belize in **2018**. Until 2017, the parents and their two eldest children lived in their family home in Florida, USA, which was purchased and owned by both parties. The respondent has never lived in Belize. However, the appellant and the three children have been living in Belize since **July 2017**. Unlike the rest of the family, L never lived in the US.

[5] It would appear that 2017 was the parties' annus horribilis**.** The respondent father joined the US army in **May 2017** in an effort, he said, to support his family. **In May/June 2017**, the parties agreed that the appellant and (at the time) their two sons would temporarily travel and stay in Belize while the respondent father underwent military training. The parties agreed that after the respondent had completed his military training, the appellant and their two minor children would return home and live in Florida, USA.

[6] Consequent to that agreement, the appellant and the parties' two sons left the USA in **July 2017**, and moved in with her parents in Blue Creek, Belize. To facilitate the children's travel to Belize, the respondent signed a consent letter, which indicated that the children were to remain in Belize for a limited period of time.

[7] After the respondent finished his basic military training, the appellant travelled to the USA together with G, the middle child for her husband's graduation and passing out parade. According to the appellant's evidence, it was during that trip that she conceived L, their daughter. Thereafter the appellant returned to Belize while the respondent attended Officer Candidate School in Fort Benning, Georgia.

[8] In **July 2018**, the respondent visited his wife and by then their three children in Belize. During that visit, the respondent signed a consent letter permitting his wife and children to travel with the children – in recognition of the requirement imposed by airlines for individuals travelling alone with minor children.

[9] On **8 October 2018**, the appellant emailed the respondent and informed him that she would not be returning to the USA with the children.

[10] In response, the respondent sought the assistance of, among others, the Department of Human Services (DHS), which acts as the Central Authority in Belize for cases brought under the 1989 International Child Abduction Act, Cap 177 and by extension, the Hague Convention. In his application to the DHS, dated **15 May 2019**, the respondent requested the return of the three minor children to the USA pursuant to the Hague Convention on the basis that Florida, USA was their country of habitual residence and that their retention in Belize was in breach of his parental rights of custody.

[11] On **20 September 2019**, the appellant was served with the Hague Convention application. It is unclear why it took the Department of Human Services three to four months to process and progress the children's father's Hague Convention application.

II. Chronology - proceedings before the Family court

[12] In this part, I provide a brief chronology, so far as is material to my decision, of the proceedings before the Family Court that occurred between **8 October 2020** (*which is the date indicated by Magistrate Morrison-Novelo as the one on which proceedings were commenced before the Family Court*) and **April 2024** (*when the notice of appeal dated 13 November 2020 was brought to my attention*).

[13] Apparently, the matter was called for a hearing before the Family Court on **30 October 2019**. Thereafter, it was set down before Magistrate Morrison-Novelo for a hearing on **30 June 2020**. I have not been able to discern from the limited record I have any reasons for the over seven-month delay in setting down the matter for hearing before the lower court. That said, this period coincided with the Covid-19 pandemic and the cessation of in-person trials.

(a) The mother's objections to the holding of a virtual hearing

[14] On **30 June 2020**, the learned Magistrate issued case management directions and set down the matter for hearing for **27 August 2020**. Those case management orders resulted in the appellant's then attorneys-at-law objecting to the holding of a trial by video link pursuant to a practice direction that was issued by the Chief Justice to enable the holding of virtual hearings following the outbreak of the Covid-19 pandemic. Apparently, the objection was dismissed. Thereafter, the matter was set down for hearing on **8 October 2020**, oral submissions were heard on **14 October 2020** and a decision was issued on **13 November 2020**.

(b) The lower court's decision on the merits

[15] Before the Family Court, the children's father, as the substantive applicant, requested the court to rule that the children were habitually resident in the USA and had been wrongfully retained by their mother in Belize as of **8 October 2018** and that they ought to be returned to the USA. In opposition, the children's mother contended that the children's place of habitual residence was Belize and that if returned to the USA there was a grave risk of the children being subjected to physical or psychological harm by their father.

[16] In her decision delivered on **13 November 2020**, the learned magistrate ruled that (a) the children's place of habitual residence was the United States; (b) the children's mother had wrongfully retained the three children in Belize; and (c) the children's mother had failed to prove to the appropriate standard that there was a grave risk of the children being exposed to physical or psychological harm or placed in an intolerable situation if they were returned to the United States. The learned magistrate ordered that the children be returned to the USA on or before 30 November 2020.

[17] In all, it took eighteen months for the matter to be resolved before the Family Court, i.e., calculated from May 2019 when the DHS initiated the Hague Application to 13 November 2020 when the Family Court issued its decision.

(c) Notice of appeal

[18] On **13 November 2020**, the children's mother filed a Notice of Appeal to the High Court pursuant to **Order LXXIII of the Inferior Courts (Appeals) Rules, 1991** (the 1991 ICA Rules). The Notice of Appeal, which is dated 13 November 2020 was not accompanied by any grounds of appeal.

(d) Stay of execution

[19] The children's mother also sought a High Court order staying the of execution of Magistrate Morrison-Novelo's 13 November 2020 decision. In that application, which it appears was filed on or around **27 November 2020**, the mother indicated that she intended to appeal to the High Court on the grounds that the first instance court's decision was:

> "(a) unreasonable or could not be supported having regard to the evidence; (b) erroneous since the evidence was wrongly rejected by the inferior court; (c) erroneous in *(sic)* point of law; and (d) such that the inferior court viewing the circumstances reasonably could not properly have so decided."

[20] The application for a stay of execution does **not** appear to have been accompanied by an affidavit or any other explanatory statement outlining in brief (a) the basis for the bare assertions that the learned magistrate's decision was unreasonable in the context of the evidence placed before her; (b) the evidence, which it is said the learned magistrate rejected, and if so, why the learned magistrate's decision constituted an appealable error; and (c) the points of law, on which it is said, the learned magistrate erred and the reasons thereof. The fourth stated ground of appeal was irredeemably vague and appears to be a repetition of the first stated ground alleging unreasonableness.

[21] As of that date, the appellant had neither sought nor received a copy of the learned magistrate's reasoned decision. It is unclear how it was that the appellant was able and permitted to advance the stated grounds of appeal, which made no effort to demonstrate that the appellant's proclaimed appeal had any realistic as opposed to a fanciful prospect of success. Of particular note is the fact that the appellant did not claim and did not attempt to demonstrate in brief that in her decision, Magistrate Morrison-Novelo had made findings of fact that were plainly wrong and/or that she had erred on a specified and clearly demonstrated point of law.

[22] The application for stay a of execution was filed on **27 November 2020** and was heard by Justice Arana (then the Acting Chief Justice) sitting as a judge of the High Court on **7 December** 2020 after

which judgment was reserved. On **11 March 2021**, Justice Arana gave an oral decision granting the appellant's request for a stay of execution. In her submissions, Mrs Mahler, learned counsel for the respondent, indicated that the High Court issued its written decision twenty-six months later, i.e., on or around **June 2023**.

[23] In my judgment, I refer to the parties' pleadings and not a formal appeal record because, as I explain in detail in **section IV** below, I do not have (and was not provided with) a formal copy of the record of proceedings in the main matter before the Family Court and the stay of execution proceedings before the High Court.

[24] In the material part outlining her decision granting the stay of execution, Justice Arana stated:

> "Having reviewed the evidence and the submissions made, it is my view that the Applicant has satisfied this Court that in all the circumstances of this case, she is entitled to a stay of execution. This is so because I agree with Mr Smith's submissions that the evidence shows that the habitual residence is Belize and not the United States since all three children have been living in this country, benefitting from strong family support and attending school immediately prior to the commencement of this case. I also agree that the welfare principle underlying these cases dictates that the children stay in a safe, secure environment here in Belize while the merits of the appeal is *(sic)* decided. I am satisfied that the Applicant has established that her appeal is highly likely to succeed. It is clear that the Applicant would have great difficulty and expense in having an Order of this Court enforced in the United States if she is successful on appeal. I also wish to emphasize the fact that this Court takes very seriously the evidence of sexual and psychological abuse of one of the children by the Respondent which led to the Magistrate to impose a condition of supervised visits in her order. For these reasons, the stay of execution is granted."

[25] This court's 11 March 2021 order should ideally have been accompanied by directions for the expedited hearing of the appellant's proclaimed appeal.

[26] In the respondent's written submissions dated **18 October 2024**, it is further stated that on **27 November 2020,** the Belize Family Court heard and dismissed an application filed by the children's mother for the stay of execution of the 13 November 2020 decision. A copy of that application and the decision issued were not availed to this court.

(e) Steps taken by the children's mother after her application for stay of execution

[27] Following Justice Arana's **11 March 2021** order granting the appellant a stay of execution, the children's mother **took no steps** to progress her appeal against the learned magistrate's 13 November 2020 decision ordering the return of the children to the USA. Relatedly, the children's father does not appear to have taken any steps to have Justice Arana's stay of execution order lifted and set aside on the grounds that the children's mother had taken no steps to prosecute her proclaimed appeal. Thereafter the case stagnated. Certainly, none of the parties took any steps to

secure the expedited hearing and resolution by this court of the dispute. Neither was any relevant order issued by this court.

[28] In her chronology filed on **23 October 2024** in response to this court's order dated **18 October 2024**, the appellant's legal counsel indicates that the appellant "obtained" the "*Notes of Evidence/Record of Appeal from the Family Court on **15 May 2024***."

III. Chronology – procedural matters before the High Court

[29] In this part, I outline, so far as is material to my decision, procedural matters between **April 2024** (*the date when the matter was placed on my docket*) and **29 October 2024** (*the date on which after several adjournment requests by the appellant's counsel, the parties appeared and made their oral submissions).*

(a) Case management

[30] As noted above, this matter was placed on my docket list in **April 2024**. In the court file was a pro-forma Notice of Appeal dated 13 November 2020 and a pro forma notice of application for stay of execution before the High Court also dated 13 November 2020. There was nothing else on file and certainly nothing to indicate whether there was a live appeal pending between the cited parties. There was also nothing on file to indicate that the matter related to Hague Convention proceedings.

[31] I instructed the court office to secure relevant pleadings from the lower court. I did so with the objective of determining how best to case management the matter. When the file was returned to my marshal in **July**, it had a transcript of proceedings before Magistrate Morrison-Novelo and her decision as well as an undated and unsigned copy of Justice Arana's decision on the application for a stay of execution. I was not provided with a perfected order. In her written submissions filed in response to the case management orders I issued on 18 October 2024, Mrs Mahler indicated that after obtaining in June 2023, Justice Arana's reasoned decision on the children's mother's application for stay of execution, the appellant's legal practitioners did not file a perfected court order. Learned senior counsel did not in her written or oral submissions dispute Mrs Mahler's submissions.

[32] After I ascertained that the matter pertained to Hague Convention proceedings, and in an effort to determine whether there was still a live dispute between the parties owing to the passage of time, I issued on **24 July 2024** a notice for a Report Hearing set for **30 July 2024**.

[33] During the **30 July 2024** hearing, the children's mother was represented by Mr Hector Guerra and

the respondent by Ms Erin Quiros, who was holding brief for Ms Mahler. I enquired from the attorneys whether the dispute between the parties was still live or had been resolved. Mr Guerra indicated that the children's mothers' appeal was still pending. I informed the parties that the grounds of appeal were not on file. I issued case management orders and directed (a) Mr Guerra to file the appellant's grounds of appeal by **9 August 2024; and** (b) the appellant and respondent to file their written submissions by **27 September 2024** and **11 October 2024**, respectively. The matter was set down for hearing of oral submissions for **15 October 2024**.

[34] During the **30 July 2024** report hearing and in response to my question on the grounds on which the appellant was challenging Magistrate Morrison-Novelo's decision, Mr Guerra repeated the grounds of appeal outlined in the Application for stay of execution dated 13 November 2020. However, as noted above, those grounds were perfunctory and not substantiated in any way. I repeat them for ease of reference:

> "The Applicant intends to appeal the order on the basis that Magistrate Mrs. Shanti Morrison Novelo's decision was:
> a. Unreasonable or could not be supported having regard to the evidence;
> b. erroneous since the evidence was wrongly rejected by the inferior court;
> c. erroneous in point of law; and
> d. such that the inferior court viewing the circumstances reasonably could not properly have so decided."

(b) The children's mother's grounds of appeal

[35] I had expected Mr Guerra to file the grounds of appeal referenced in **para. 34 above**, but fully fleshed out. However, on **9 August 2024**, Mr Guerra filed differently formulated and very much unsubstantiated grounds contending that the learned magistrate:

(a) misinterpreted and misapplied the principle of habitual residence and failed to adhere to established legal principles on determining habitual residence, which required the consideration of all of the surrounding facts, including the children's integration into the family and social environment in Belize;

(b) erred in failing to appreciate that Article 4 of the Hague Convention did not apply to the youngest child, L, who was born in Belize and had never been to the USA;

(c) erred in failing to appreciate that the second child, G, had only spent a little over a year of his life in the USA and could not in law be considered to have been habitually resident in the USA;

(d) erred in determining that the children's habitual residence was in the USA despite evidence demonstrating that the children had integrated into the social and family environment in Belize;

(e) erred in ruling that the respondent's visits to the children be supervised because that it was not open to the magistrate to issue such a ruling and the magistrate did not properly consider the risk of

psychological or physical harm to the first child, C; and

(f) erred in misapplying or failing to appreciate the grave risk exception under Article 13(b) of the Hague Child Abduction Convention and the "credible evidence presented by the appellant demonstrating a substantial risk of physical and/or psychological harm to C and his siblings.

[36] On **14 August 2024**, Messrs Roberta Magnus Usher and Associates filed a notice of assumption of agency.

(c) Appellant's request for changes to case management orders

[37] On **23 September 2024**, Mrs Magnus-Usher SC applied for an extension of time to file the appellant's written submissions. Learned senior counsel stated that she had been recently instructed and requested a two-week extension. The submission by learned senior counsel that she had recently been instructed was not accurate since she assumed agency for the appellant at least four weeks prior.

[38] The respondent's attorney opposed learned senior counsel's request. On **25 September 2024**, I granted learned senior counsel's request and issued new orders listing the case for an oral hearing on **25 October 2024.** That shifted the date for oral submissions from **15 October 2024** to **25 October 2024** - a ten working-day time extension. I also directed that save for exceptional reasons, no further requests for adjournments or changes to the court's case management orders relating to the filing of pleadings and submissions would be entertained.

[39] On **18 October 2024**, I issued further case management orders directing the parties to file and exchange no later than **22 October 2024** further information and written submissions on a number of issues arising from the case, including explanations for the delay in the progression of the appeal and the validity of the appeal proceedings, i.e., to say whether there was before this court any valid appeal.

(d) Appellant's request for changes to case management orders

[40] Via an email sent to the court office on **Tuesday, October 22, 2024, at 12:25 PM** to which was attached a letter, Messrs Magnus-Usher requested an extension of time to comply with this court's **18 October 2024 Order**. I declined the request as it did not disclose any relevant reasons justifying a departure from the order I had issued on 25 September 2024. The respondent complied with the court's order of 18 October 2024, but the appellant's counsel did not. No reasons were given.

(e) Appellant's request for an adjournment

[41] The matter came up for the hearing of oral submissions as scheduled on **Friday, 25 October 2024 at 9:30AM**. Learned senior counsel, Ms Magnus-Usher SC did not attend the hearing. It was brought to my attention during the hearing that learned senior counsel's secretary, a Ms Michelle Crawford, had sent an email bearing the date "**Friday, October 25, 2024, 8:49 AM"** to which was attached a letter signed by Ms Crawford, requesting an adjournment of the hearing of oral submissions for seven days because learned senior counsel was unwell and had been signed off-sick for a stomach ailment. Ms Crawford also attached to that email communication what was said to be a medical report dated 25 October 2024 prepared by a Dr Alain Gonzalez stating that he had examined and treated Ms Magnus-Usher and had treated her for a stomach ailment and had recommended a "minimum of seven day's bed rest."

[42] As I was considering the email and its attachments, Ms Tiffany Cadle, an attorney, appeared and requested to address the court. Learned counsel indicated that she had been instructed by Ms Magnus-Usher SC to appear and request an adjournment of at least seven days because learned senior counsel was unwell. Ms Cadle also indicated that she had not familiarised herself with the matter and was unable to assist the court beyond the application for a seven-day adjournment.

[43] Prior to Ms Cadle's appearance and in response to my question on when she had last talked to her attorney, the appellant (the children's mother) indicated that she had met learned senior counsel in person at her offices in Belize City early in the morning. The children's mother indicated that Ms Magnus-Usher had informed her of the adjournment application and advised the appellant to attend court and repeat the request.

[44] In sum, I was being asked to believe that before **8:49AM on 25 October 2024** (*which is the time the email was sent to the court office*) (i) senior counsel was attended to by a doctor (ii) the doctor drafted and provided senior counsel with a medical letter; (iii) senior counsel travelled to her office and had a conference with her client and subsequently, Ms Cadle; (iv) senior counsel's secretary drafted and signed a letter applying for an adjournment.

[45] The respondent's attorney objected to the adjournment request. After hearing both parties, I reluctantly granted an adjournment and rescheduled the hearing of oral submissions to **Tuesday 29 October 2024**.

[46] I was not prepared to adjourn the hearing for any lengthy period because the only other available

hearing date on my calendar would have been in the third week of January 2025.

[47] Additionally, since the issues arising for resolution turned on the review of the rules on appeals from inferior courts and the legal principles applicable to Hague Convention matters and whether those had been applied correctly by the learned magistrate and whether on the facts, the learned magistrate's decision was plainly wrong, I considered that Ms Cadle would be able to familiarise herself with the papers and appear and make oral submissions on 29 October 2024. I also considered that that failing, the appellant would have been able to secure alternative legal counsel. I was not prepared to continue the trend of adjournments and delays, which are wholly unacceptable in Hague Convention matters, that had characterised the case.

[48] Further, the parties had filed their written submissions and additional statements per my 18 October 2024 Order, which laid a sufficient basis for the court to make its determination on whether there was a valid appeal before the court and if so, whether the appellant's grounds of appeal had merit.

(f) Another request for adjournment of the hearing of oral submissions

[49] On **29 October 2024** at 9AM all parties were in attendance. Learned senior counsel appeared after proceedings had commenced together with Ms Cadle who appeared as her junior. When she commenced her oral submissions, learned senior counsel indicated that she had filed amended grounds of appeal and was applying for a seven-day adjournment of the hearing.

[50] I was handed a copy of a letter sent by Ms Crawford of Messrs Magnus Usher Associates via an email dated **Monday, October 28, 2024 4:36 PM** to which was attached a "Notice of Amended Grounds of Appeal." The relevant grounds/application had not been filed through the registry. Attached to that application was an affidavit deposed by the children's mother who stated that she retained learned senior counsel in August 2024. She also stated that:

> "My attorney has since been working diligently on my Appeal for the past month and half, by researching, writing and preparing principal submissions on the ordered date as well as the two (2) other submissions requested by the court" (at para 4).
>
> My attorney has however after reviewing the documents received in respect of the hearing in the Family Court and obtaining additional documents, found that there is a need to amend the Grounds of Appeal" (at para 5).

[51] The appellant's statements (outlined in **para. 50 above**) did not advance the appellant's application for permission to file amended grounds of appeal and an adjournment. During her submissions, I requested learned senior counsel to address me on why the amendment was being sought at such

a late stage. Learned senior counsel justified the application on the grounds of her experience at the bar and that the issues raised by the additional grounds were critically important to the resolution of the appeal and that the matter had been delayed anyway and another seven-day adjournment would not be prejudicial to the respondent. She also indicated that the children's father (who had travelled to Belize from the USA for the appeal hearing) could participate in an adjourned hearing virtually. That approach marked a departure from the appellant's 2020 litigation position against the main matter being heard virtually by the Family Court.

[52] The grounds of appeal that Ms Magnus-Usher SC wished to add were stated as follows:

> h. The Learned Magistrate erred in law by finding that "there was a breach of any custodial rights".
>
> i. The Learned Magistrate erred in law when she decided that the Appellant had wrongfully retained the children in Belize as at October 8th, 2018 and that therefore the Hague Convention applied.
>
> j. The learned Magistrate erred in law when she wrongfully refused the admission of evidence from the mother (the Appellant) by way of affidavit during the Family Court Proceedings and upheld the objection of the Respondent's attorney to the Appellant being questioned about her marriage.
>
> k. The decision of the learned Magistrate is against the weight of the evidence."

[53] The respondent objected to Ms Magnus-Usher SC's oral application for the admission of the amended grounds of appeal and the request for an adjournment of the hearing of oral submissions. After hearing both counsel, I dismissed Ms Magnus-Usher SC's applications. And I did so for several reasons.

[54] First, the court was not provided any reason(s) why on taking instructions on or before 14 August 2024, learned senior counsel had not immediately made an application for permission to amend the grounds of appeal. Learned senior counsel's experience at the bar is notable and I was grateful for her submissions on the substantive issues arising in this matter. However, learned counsel's experience is not a valid basis to permit a late application for an amendment of grounds of appeal and in particular one that was predicated on the need for an adjournment. In my view, learned senior counsel had more than ample time to consider her client's instructions and her pleadings and to lodge an application for leave to file amended grounds had she been so instructed.

[55] Second, the proposed grounds of appeal were not adequately pleaded – consisting of bare and unsubstantiated allegations of irregularity in the learned magistrate's 13 November 2020 decision.

[56] The ground of appeal **listed as (h),** i.e., asserting that "*the Learned Magistrate erred in law by finding*

that "there was a breach of any custodial rights"" was not substantiated. Further, the ground had no merit because the appellant acknowledged under cross examination that she and the respondent exercised joint rights of custody. When asked if she had sent her eldest child to be medically examined, the appellant stated that she had not been given permission by the respondent. That demonstrated that as of the date of the court hearing, the respondent was exercising rights of custody. As noted in the case of ***In re F (A MINOR) (ABDUCTION: CUSTODY RIGHTS ABROAD)*** [1995] 3 All ER 641, under the Hague Convention, rights of custody are broadly defined to include "*rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence*" (see article 5).

[57] The ground of appeal **listed as (i),** i.e., the contention that "*The Learned Magistrate erred in law when she decided that the Appellant had wrongfully retained the children in Belize as at (sic) October 8th, 2018 and that therefore the Hague Convention applied*" made little sense. Relatedly, the learned magistrate did not make any such decision. That the children were unilaterally retained by the appellant on 8 October 2018 was not in dispute between the parties. And the learned magistrate did not at any point rule that the Hague Convention applied to the facts of the case because the mother had retained the children in Belize.

[58] The ground of appeal **listed as (j),** i.e., the contention that "*The learned Magistrate erred in law when she wrongfully refused the admission of evidence from the mother (the Appellant) by way of affidavit during the Family Court Proceedings and upheld the objection of the Respondent's attorney to the Appellant being questioned about her marriage*" was equally unmeritorious. In the exercise of her inherent power, the learned magistrate decided that the parties were to present oral testimony, which both parties did, and which was accompanied by extensive cross-examination. This fact was acknowledged by the appellant's former legal practitioners in their written submissions dated 20 October 2020 (see para. 2). There was no suggestion that the appellant's right to a fair hearing had been breached or that the appellant had not been granted adequate time to present her opposition, including through her witnesses. Consequently, this ground did not demonstrate the existence of any error of law.

[59] In my view, the learned magistrate ought to have proceeded by way of affidavit evidence only without the need for oral evidence. In general, resort to oral evidence delays the resolution of Hague Convention matters. See ***In re F (A MINOR) (ABDUCTION: CUSTODY RIGHTS ABROAD)*** [1995] 3 All ER 641.

[60] That said, the learned magistrate's exercise of her inherent power to control the proceedings and presentation of evidence is not to be interfered with by this court where no material prejudice and/or error has been demonstrated.

[61] Further, the issue of the state of the parties' marriage was irrelevant to the issue before the court, which concerned the question of the country in which the children were habitually resident and whether the appellant had established a grave risk of harm if the children were returned to the USA. If the issue of the parties' marriage was relevant (and I was not given any reason to believe that it was) its relevance was not demonstrated in the appellant's application to file amended grounds of appeal or in the oral submissions.

[62] The ground of appeal **listed as (k)**, i.e., the unsubstantiated contention that "*The decision of the learned Magistrate is against the weight of the evidence*" – is a meritless indiscriminate attack on the learned magistrate's decision.

[63] I also considered that Ms Magnus-Usher SC expressly linked her application for permission to file amended grounds of appeal to her renewed request for a seven-day adjournment to (in learned counsel's words) allow the respondent time to file its opposition. The interests of justice and the objective of the prompt determination by this court of the Hague Convention matter were not served by an adjournment to accommodate what I considered to be meritless assertions that Magistrate Morrison-Novelo's decision was tainted by errors of law and that her decision was against the weight of evidence. In arriving at my decision, I also considered the opinion expressed by the Chief Justice of Canada in the Supreme Court case of ***Office of the Children's Lawyer v Balev*** [2018] 1 SCR 398 at para. 89 that "*Hague Convention proceedings should be judge-led, not party-driven*" to ensure the just and expeditious resolution of the questions arising for determination. That approach is followed in other Hague Convention member countries like the UK and is the approach that should, as a general rule, be followed in this jurisdiction.

[64] After I pronounced my ruling dismissing her interlinked applications, learned senior counsel indicated, albeit without taking instructions from the appellant, that she intended to appeal my decision. I noted learned counsel's assertion and indicated that the proceedings would nevertheless continue.

IV. Issues arising for determination

[65] In this section, I address:

(a) whether there is before the court a valid appeal against Magistrate Morrison-Novelo's 13

November 2020 decision; and

(b) each of the appellant's grounds of appeal.

1. Is there before the court a valid appeal?

(a) Context

[66] On **18 October 2024**, I directed the parties to file and exchange statements and written submissions no later than **22 October 2024** addressing the law on which the children's mother based her proclaimed appeal and whether there was before the court a valid appeal. I took this decision because in its citation, the appellant's Notice of Appeal dated 13 November 2020 referred to **Order LXXIII of the Inferior Courts (Appeals) Rules, 1991** (the 1991 ICA Rules) and it was not clear to me if the appellant had prosecuted her appeal in compliance with those Rules or if her appeal had been progressed using a different legal framework.

(b) The law

[67] It is common ground between the parties that this appeal is regulated by the now repealed 1991 ICA Rules. This is affirmed by Rule 19 of the **Supreme Court (Inferior Courts Appeals) Rules, 2021** (**2021 ICA Rules**), which provides:

> "(1) Order LXXIII and Appendix O of the Supreme Court Rules is repealed.
> (2) Notwithstanding sub-rule (1), every appeal commenced before the entry into force of these Rules shall be continued and dealt with in all respects as if these Rules had not come into force."

[68] Below, I set out provisions of the **1991 ICA Rules**, which (a) provide relevant context to my decision; and (b) are material to the determination of whether the appellant has a valid appeal before this court.

[69] Pursuant to **Rule 2.1(a) of the 1991 ICA Rules,** a litigant has two alternative ways of noting an appeal against a decision issued by a lower court. Under the first option, a litigant may inform the opposite party in open court of their intention to appeal a decision issued by the court. The rule also requires the Magistrate to take formal notice of a party's statement of their intention to appeal. Under the second option, a litigant has 21 days after the pronouncement of the impugned decision to lodge a "*written notice of appeal in Form 1 and to serve a copy on the opposite party."*

[70] **Rule 3(1) of the 1991 ICA Rules** requires a litigant that intends to file an appeal to deposit $3 with the Clerk of Court. On the court file there is a copy of a receipt for $3 issued to the appellant's former lawyers, Messrs Marine Parade Chambers.

[71] **Rule 5(1) of the 1991 ICA Rules** stipulates that following a litigant's compliance with Rules 2 and 3 of the 1991 ICA Rules, the relevant magistrate "***shall draw up a formal…order and a statement of his reasons for the decision appealed against***." **Rule 5(2)** of the **1991 ICA Rules** requires the magistrate's statement of reasons to be lodged with the clerk within **one month** of the appellant's compliance with **Rule 2 and 3** of the **1991 ICA Rules**.

[72] It is not in dispute that the appellant complied with Rule 2 and 3 of 1991 ICA Rules.

[73] **Rule 5(2) of the 1991 ICA Rules** stipulates that **within 14 days** of receipt of the magistrate's statement, i.e., her reasoned decision, **"the clerk shall**" prepare a copy of the record of proceedings, including the reasons for the decision and thereafter notify the appellant that the record of proceedings is ready for collection on payment of the prescribed fee.

[74] If a Magistrate fails to draw up reasons for her decision after the appellant has complied with Rule 2 and 3, **Rule 5(2A) of the 1991 ICA Rules** empowers the appellant (and the respondent) to make an ex parte application to a High Court judge in chambers for an order directing the magistrate to provide a reasoned decision within a timeline to be fixed by the judge.

[75] **ICA Rule 5(3)** provides:

> "The appellant **shall,** within fourteen days *after receipt of the notice*, draw up a notice of the grounds of appeal in Form 3, and lodge it with the clerk and serve a copy thereon on the opposite party." [Emphasis added]

[76] The phrase "*after receipt of the notice*" contained in **Rule 5(3) of the 1991 ICA Rules** refers to the Rule 5(2) notice issued by the clerk of court and sent to the appellant informing them that "*a copy of the proceedings, including reasons for the decision*" are ready for collection on payment of the prescribed fee.

[77] **Rule 8(1) of the 1991 ICA Rules** requires an appellant's grounds of appeal to be lodged with the Magistrates Court. The Rule provides:

> "Within seven days of the notice of the grounds of appeal being lodged, the magistrate shall transmit to the Registrar a copy of the record, **duly certified** under his hand, consisting of the complaint or information and plea…the notes of evidence taken in the cause and the adjudication…the notice of appeal if it is in writing, the notice of the grounds of appeal, the recognisance, if any, all documentary exhibits and all other documents connected with the cause, including the magistrate's statement of his reasons for the decision. [Emphasis added]

[78] **Rule 8(2) of the 1991 ICA Rules** provides that on receipt of the copy of the certified copy of the

record of proceedings before the lower court below, the Registrar "**shall**" notify the appellant in writing of that fact. That rule also requires the appellant, within ten days of the receipt of the Registrar's notice, to prepare and lodge with the Registrar an additional copy of the certified copy of the record of proceedings before the lower court after which the Registrar is required to enter the appeal in the list for hearing before a High Court judge.

[79] **Rule 9(1) of the 1991 ICA Rules** provides that "*if anyone that is entitled to appeal is unavoidably prevented from so doing in the manner or within the time [specified in the 1991 ICA Rules] he may apply to the Court for special leave to appeal.*"

[80] **ICA Rule 10(1)** provides: "*If the appellant makes default in the due prosecution of his appeal…he **shall** be deemed to have abandoned his appeal…*"

(c) Discussion

[81] In her written and oral submissions, learned senior counsel submitted that the issue of the validity of the appellant's appeal was not raised by the respondent in his learned counsel's written submissions. This is correct. However, that submission did not answer the question I raised on whether there was any valid appeal before the court. Learned senior counsel did not argue that the court was precluded from raising the issue mero motu and inviting the parties to file statements and submissions. Notably, learned senior counsel did not argue that there was before the court a valid appeal.

[82] Ms Mahler, counsel for the respondent, argued that there was not before the court a valid appeal because the appellant took no steps to progress her appeal in the manner and within the timelines set out in the 1991 ICA Rules after filing her notice of appeal on 13 November 2020. Learned counsel also submitted that the appellant must be deemed to have abandoned her appeal. I agree.

i. Abandonment through failure to progress appeal

[83] The appellant filed her notice of appeal on **13 November 2020.** In her chronology, the appellant states that she obtained Magistrate Morrison-Novelo's decision on **15 May 2024.** This means that the appellant waited three years and six months to obtain the learned magistrate's decision. The appellant has not tendered any reasons or explanation for not taking any action to secure the reasoned decision sooner.

[84] The appellant could have but chose to not make any use of **Rule 5(2A) of the 1991 ICA Rules** to secure ex parte an order from a judge of the High Court mandating Magistrate Morrison-Novelo to produce a reasoned decision within a set period. Despite this court's 18 October 2024 order, the

appellant chose not to inform the court of (a) the steps, if any that she took to secure Magistrate Morrison-Novelo's order; (b) the challenges, if any, that she faced in that regard; and (c) why she chose to not approach the High Court pursuant to Rule 5(2A) of the 1991 ICA Rules to secure a copy of the learned magistrate's reasoned decision.

[85] Between **15 May 2024** and **29 October 2024** (*the date on which oral submissions were heard after several requests for adjournments*) the appellant **did not take any steps to**:

(a) file with the clerk of the Family court any grounds of appeal in Form 3 as required by Rule 5(3) of the ICA Rules;

(b) apply to the Family Court for special leave to appeal pursuant to Rule 9 of the 1991 ICA Rules or provide reasons why she did not apply to the Family Court for special leave to appeal;

(c) engage the clerk of court as envisaged by Rule 8(1) of the 1991 ICA Rules to procure the transmission by the clerk of court to the Registrar of the Senior Courts of the Family Court's record of proceedings and the magistrate's reasoned decision;

(d) prepare and file with the Registrar of the Senior Courts a copy of the record of the Family Court's proceedings and the learned magistrate's reasoned decision (see Rule 8(2) of the 1991 ICA Rules (*as a result of that failure the Registrar did not enter the appeal in the list for hearing and the matter is being heard because this court called the matter for a report hearing and exercised its case management powers to determine if there was a live dispute pending between the parties*);

(e) provide reasons for her failure to take steps to prosecute her appeal after obtaining the lower court's reasoned decision on 15 May 2024 (*and the record does not demonstrate the existence of any good reasons for the appellant's failure to prosecute her appeal with due expedition within the timelines and in the manner set out in the 1991 ICA Rules*); and

(f) request an order that the failures noted in **para. (a) to (e)** above **do not** constitute abandonment of the 13 November 2020 notice of appeal.

[86] Rule 10(1) of the 1991 ICA Rules requires this court to deem an appellant as having abandoned their appeal if they make default in its due prosecution. I find on the facts that:

(a) the appellant defaulted in the due prosecution of her 13 November 2020 notice of appeal, i.e., in the manner and within the timelines set out in the 1991 ICA Rules;

(b) the appellant has not provided any explanation for her failure to comply with the manner and

timelines for prosecuting appeals set out in the 1991 ICA Rules; and

(c) there has been an inordinate, unexplained and in my view inexcusable delay and failure by the appellant in the due prosecution of her 13 November 2020 notice of appeal.

[87] Consequently, I rule that the appellant be and is hereby deemed to have abandoned her 13 November 2020 notice of appeal.

[88] Rule 10(1) of the 1991 ICA Rules uses peremptory language and requires the court to deem an appellant as having abandoned their appeal if they make default in its due prosecution. To avoid the effects of Rule 10(1), an appellant that has not prosecuted their proclaimed appeal in the manner and/or the timelines set out in the 1991 ICA Rules is required on their own motion to make an application supported by cogent reasons for an order that they ought not be deemed to have abandoned their appeal. In the absence of any such application and a reasonable explanation, the failure to prosecute an appeal in the manner and timelines set out in the 1991 ICA Rules, will result in the notice of appeal being struck out on the grounds of a deemed abandonment. It is not for the court to find an excuse for a litigant or to exercise its discretion in favour of a litigant when the court has not been called upon to do so. Relatedly, there is justification evident on the facts to not apply Rule 10(1) of the 1991 ICA Rules. In placing the onus on the losing party to prosecute their appeal with due expedition, ICA Rule 10(1) serves a critically important function in the effective administration of justice. The ends of justice are frustrated when there are serious, unjustified and unexplained delays in the due prosecution of appeal proceedings.

[89] The appellant failed to make any effective use of the offer made by this court on 18 October 2024 to the parties, i.e., the invitation to file additional statements and written submissions on the validity of the appeal proceedings. That offer presented the appellant with a window to seek on application an order that her failure to prosecute her appeal in accordance with the 1991 ICA Rules should not be deemed as abandonment. In the circumstances, I have not been given any basis not to declare that the appellant abandoned her proclaimed appeal.

ii. Failure to properly invoke the High Court's appellate jurisdiction

[90] I also hold that to properly invoke this court's appellate jurisdiction and to secure a hearing on the substantive merits of the grounds of appeal filed on 9 August 2024, the appellant needed to but did not apply for special leave before the Family Court. By 9 August 2024, i.e., when the grounds of appeal were filed, the appellant was, and ought to have been, aware that her appeal was defective for non-compliance with the 1991 ICA Rules.

[91] An appellant is entitled to be heard on appeal by this court, if:

(a) they have filed and progressed their proclaimed appeal in the manner and within the timelines outlined in the 1991 ICA Rules; or that failing

(b) they have sought and secured special leave from the lower court to continue their appeal after demonstrating to the satisfaction of the lower court that they had been "*unavoidably prevented*" from initiating or progressing their appeal "*in the manner or within the time…specified*" in the 1991 ICA Rules, and potentially on renewing such an application before this court.

[92] The appellant is a legally represented litigant, who well aware of the inherent power of the court to control its orders and the rules of court, was able to seek and secure a stay of execution of the 13 November 2020 order issued by Magistrate Morrison-Novelo. Both before the Family Court and these proceedings, the appellant has been represented by eminent senior legal counsel.

[93] In the circumstances, I hold that there is not before me any valid appeal and the appellant's notice of appeal is struck out on this additional ground. In arriving at this decision, I have also considered the recent Court of Appeal case of ***Belgrave v Thompson*** Civil Appeal No. 8 of 2022, where Forster JA noted (see para. 20) that "*the legal consequence of not seeking and obtaining leave to appeal where leave was required, is that the notice of appeal…is a nullity*." In ***Belgrave***, the relevant notice and grounds of appeal against several interlocutory orders were struck out because the appellant needed, but did not seek, leave to appeal. The principle of law outlined in ***Belgrave*** applies with equal force to these proceedings because the children's mother needed but failed to seek and secure special leave to enable her to continue to prosecute her appeal.

iii. 30 July 2024 Order did not cure the appellant's non-compliance with the 1991 ICA Rules

[94] Implicit in learned senior counsel's written submissions filed on 23 October 2024 is the contention that the appeal proceedings are valid and the 9 August 2024 grounds of appeal should be determined on their merits because this court issued, on 30 July 2024, case management orders directing the filing of grounds of appeal as well as written submissions.

[95] If that be the appellant's case, it is based on a misapprehension of the context within which the directions were issued and their legal import. During the 30 July 2024 hearing, the issue of whether the appellant had complied with the provisions of the 1991 ICA Rules was not on the court's radar and did not arise for determination. Consequently, my 30 July 2024 directions did not condone non-compliance with the 1991 ICA Rules.

[96] Relatedly, the court with primary jurisdiction to determine whether special leave should be granted to permit a litigant to continue with her proclaimed appeal despite not prosecuting it in the manner and timelines set out in the 1991 ICA Rules is the lower court. In the absence of a pronouncement by the lower court on whether special leave ought to be granted to a litigant, this court has no power to do so in the absence of an express request by the appellant. That said, and not having heard any argument, I am not prepared to rule that this court has authority to permit the leapfrogging of the lower court's primary jurisdiction to determine whether a litigant should be granted special leave to continue their appeal.

(d) Summary

[97] In summary, I have struck out the appellant's Notice of Appeal on the grounds that:

(a) the appellant is to be deemed to have abandoned her appeal because (i) she did not prosecute her proclaimed appeal in the manner and within the timelines set out in the 1991 ICA Rules; (ii) she has not provided any explanation for her failure to do so; and (iii) she has not applied for an order that her non-compliance with 1991 ICA Rules should not be deemed as abandonment; and

(b) the appellant's notice of appeal is a nullity because she did not seek and was not granted special leave to continue her proclaimed appeal after failing to prosecute her appeal in the manner and within the timelines set out in the 1991 ICA Rules.

[98] I also determine that the interlocutory order issued by Justice Arana on 11 March 2021 staying the execution of Magistrate Morrison-Novelo's 13 November 2020 decision be and is hereby lifted. This is necessitated by my decision declaring that the appellant is deemed to have abandoned her appeal and that there is not before this court any valid notice of appeal. Justice Arana's order granting the appellant a stay of execution was predicated on the appellant's statement that she intended to appeal against Magistrate Morrison-Novelo's 13 November 2020 decision. The law expected the appellant to prosecute her appeal in the manner and within the timeframes set out in the 1991 ICA Rules and she failed to do so. In view of my decision striking out the 27 November 2020 Notice of Appeal, there is no reason, and none have been advanced, for continuing the stay of execution imposed on Magistrate Morrison-Novelo's 13 November 2020 decision.

[99] I also rule that Magistrate Morrison-Novelo's decision issued on 13 November 2020 stands. I order the appellant to return the children to the United States of America pursuant to Magistrate Morrison-Novelo's 13 November 2020 decision on or before 15 December 2024. If the children's mother is

unwilling to travel with the children to the United States of America, the respondent is at liberty to make relevant arrangements for their travel out of Belize to the United States with effect from 15 December 2024. And this judgment may be used as proof of authorisation.

[100] Although my decision concludes the matter, I will address each of the appellant's grounds of appeal focusing on the issues of general importance arising therefrom. I do so exceptionally because this is the first Hague Convention matter to come on appeal before this court. I am mindful that this court ought to provide general guidance on the principles and guidance relevant to Hague Convention matters. See by way of example, the dictum expressed in the case ***Office of the Children's Lawyer v Balev*** [2018] 1 SCR 398, at para. 4. I must add that I am grateful to Ms Magnus-Usher SC and Ms Mahler for their written and oral submissions.

2. Principles on the exercise of appellate jurisdiction, approaches to determining habitual residence and grave risk exception

[101] In this section, I address three key issues. The first relates to the principle on the standard of appellate review as it relates to Hague Convention matters. The second relates to the approaches to determining a child's habitual residence. The third relates to the approach to interpreting and applying article 3, 12 and 13 of the Hague Convention.

(a) Standard of appellate review of first instant decisions

[102] Neither the International Child Abduction Act nor the 1980 Hague Convention set out the standard of appellate review of decisions issued by a first instance court relating to Hague Convention disputes. It is important to outline the standard of appellate review to provide guidance to practitioners on the standard of pleading expected in grounds of appeal challenging decisions made in Hague Convention matters. It also assists courts in determining whether to grant applications for stays of execution of orders issued in relation to decisions issued by the Family Court.

[103] In my view in Hague Convention matters, appellant should be required to produce grounds of appeal together with their notices of appeal. This will facilitate speedier identification of real issues arising for determination and permit expedited hearings.

i. Belize

[104] In this jurisdiction, a lower court's decision will only be set aside on the ground of a material error of law and/or a material error of fact. In the recent case of ***Belgrade***, Forster JA stated, at para. 27, that:

> "The appellate court [must] uphold the exercise of the judge's discretion unless it was based on a misunderstanding or misapprehension of the law or of the evidence, or there is new evidence or a material change of circumstances since the hearing before the judge, or the decision of the judge is so aberrant that no reasonable judge mindful of his duty to act judicially would have reached it…The function of the Court in reviewing the judge's discretion is not to interfere with the judge's exercise of discretion merely upon the ground that the members of the appellate court would have exercised the discretion differently."

[105] This standard of appellate review reflects the law and practice in common law countries that are members states of the Hague Convention, including the United Kingdom, the United States of America and countries whose final appellate courts are the Caribbean Court of Justice and the Privy Council. In broad terms, there exists an increasingly clear and consistent practice on the standard of appellate review by a significant number of Hague Convention members states.

ii. Standard of appellate review - member countries of the Caribbean Court of Justice

[106] In the case of ***Rodrigues Architects Limited v New Building Society Limited*** [2018] CCJ 09 (AJ) the CCJ declared at para. 6 that:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered or that his decision was wholly wrong because the court is forced to the conclusion that he has not fairly balanced the various factors fairly in the scale."[1]

[107] In this regard, see also the case of ***Jeffery Sersland MD and another v St. Matthews University School of Medicine Limited*** [2022] CCJ 16 (AJ) BZ, at para. 73.

iii. Standard of appellate review - member countries to the Privy Council

[108] In ***Nilon Ltd v Royal Westminster Investments SA*** [2015] UKPC 2, (2015) 86 WIR 285 the Privy Council reiterated at para. 16 that:

> "It is…trite law that in appeals from the exercise of a discretion, an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court." [Emphasis added]

iv. Standard of appellate review - United Kingdom

[109] The approach in England and Wales, which has influenced much of the jurisprudence in common law countries was aptly stated by Viscount Simon LC as far back as 1941 in the case of ***Charles Osenton & Co v Johnston*** [1941] 2 ALL ER 245 at 250 where he stated:

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[1] See also ***Shir Affron Nabi and Others v Ashmidphiraque Sheermohamed and Others*** [2020] CCJ 15 (AJ) GY, at 23.

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion by the judge. In other words, the appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion had it attached to them, in a different way. If, however the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight or no sufficient weight has been given to relevant considerations…the reversal of the order may be justified."[2] [Emphasis added]

[110] The UK has not deviated from this general principle and approach to appellate review. As it relates to Hague Convention cases reference can be made to the case of ***P-J (Children***) B4/2009/0751, at 31)). In ***AR v RN*** [2015] UKSC 35, Baroness Hale stated at para. 18 that:

> "…it is relevant to note the limited function of an appellate court in relation to a lower court's finding as to habitual residence. Where the lower court has applied the correct legal principles to the relevant facts, its **evaluation** is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it." [Emphasis added]

v. Standard of appellate review - United States of America

[111] Similarly, the US Supreme Court explained in the Hague Convention case of ***Monasky v Taglieri***, 140 S. Ct. 719 (2020) that:

> "Absent a treaty or statutory prescription, the appropriate level of deference to a trial court's habitual-residence determination depends on whether that determination resolves a question of law, a question of fact, or a mixed question of law and fact. Generally, questions of law are reviewed de novo and questions of fact, for clear error, while the appropriate standard of appellant review for a mixed question 'depends…on whether answering it entails primarily legal or factual work.'"

[112] With respect to Hague Convention matters, the court aptly noted that:

> "Clear error review has a particular virtue in Hague Convention cases. As a deferential standard of review, clear-error review speeds up appeals and thus serves the Convention's premium on expedition…Notably, courts of our treaty partners review first-instance habitual residence determinations deferentially. [Emphasis added]

vi. Standard of appellate review - Canada

[113] Canada follows a similar approach. In the 2018 ***Balev***, the Supreme Court held:

> "…whether habitual residence is viewed as a question of fact or a question of mixed fact and law, appellate courts must defer to the application judge's decision on a child's habitual residence, absent palpable and overriding error." [Emphasis added]

vii. Summary

[114] I hold that in this jurisdiction in so far as it pertains to Hague Convention matters, and in conformity

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[2] See also, Lord Woolfe MR statement in ***Phonographic Performance Limited v AEI Rediffusion Music Limited*** [1999] 1 WLR 1507 who stated that: "*Before the Court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale*."

with other Hague Convention countries, this court will on appeal review a lower court's decision for material error, i.e., for palpable and overriding error or per English law cases, this court will only set aside a decision for a material error of law or if it is plainly wrong on the facts. This means that grounds of appeal that do not plead and demonstrate material errors of law and/or fact will be struck out and/or dismissed. In addition, inadequately pleaded and evidenced grounds of appeal should not be lightly regarded as satisfying the requirements for stays of execution. It is only by employing this strict standard of appellate review that the Hague Convention's prompt return objective can be given substantive effect.

[115] I now turn to consider the principles used to determine habitual residence.

(b) Approaches to determining habitual residence

[116] The Hague Convention does not define the concept of habitual residence. Unsurprisingly, the concept has challenged members states' courts as well as academics and policymakers. In determining habitual residence, courts in different member states have used and sometimes inconsistently and interchangeably (a) the parental intention approach; (b) the child-centred approach; and/or (c) the hybrid approach, i.e., a fact-based approach.

[117] In this jurisdiction, Belize's senior courts are yet to pronounce themselves on the issue. Certainly, as of 13 November 2020 when Magistrate Morrison-Novelo issued her decision there did not exist in Belize any established or definitive approach to determining a child's country of habitual residence for purposes of Hague Convention matters.

i. Parental intention approach

[118] The parental intention approach was the leading approach in the United Kingdom until about 2013. This approach led to the line of cases, which provided that where parents of a minor child have agreed on a child's temporary move to a country that is not his or her country of habitual residence (a) that agreement must be given decisive weight; and (b) a unilateral decision by one parent to retain a child in the other country did not operate to change a child's country of habitual residence. Examples of this line of jurisprudence include the previously leading English case of ***R v Barnet London Borough Council, Ex parte Nilish Shah***, which influenced much of the early US jurisprudence as shown by the previously leading US cases of (i) ***Gitter v Gitter***, 396 F.3d 124 (2nd Cir. 2005), at para. 131-133; and (ii) ***Mozes v Mozes***, 239 F.3d 1067 (9th Cir. 2001), at pp. 1076-79.

[119] As stated in the case of ***Balev*** (see para. 40) the approach in Canada used to be that:

"Where the parents have agreed that the child will stay outside the country of habitual residence for a limited time, that intent governs throughout the agreed period, and allows the parent in the original country to mount a claim for the child's return under the Hague Convention at the end of the agreed period."

ii. Child-centred approach

[120] The child-centred approach determines habitual residence by focusing on a child's acclimatisation in a given country (***Balev***, at 41). It assesses the child's connections with their current state of residence. Examples of cases, which applied this principle include the US cases of (a) ***Feder v Evans-Feder***, 63 F.3d 217 (3rd Cir. 1995; (b) ***Friedrich v Friedrich***, 983 F.2d 1396 (6th Cir.1993, which case was curiously (and potentially inadvertently) cited by the appellant's counsel in her written submissions.[3] In light of the fact that Hague members states' jurisprudence is evolving, care and attention is required in the caselaw cited in support of pleaded grounds.

[121] As noted in ***The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges***, 3rd Ed. (2023), at page. 72, before the 2020 case of ***Monasky v Tuglieri,*** 140 S. Ct. 719 (2020), the majority of the lower courts in the USA followed the parental intention approach laid out in ***Mozes v Mozes*** while the others followed the child-centred approach as laid out in ***Friedrich***, which focused on the "*past experiences of the child, not the intention of the parents*" (see 1401). This explains the point I made above about inconsistent intra-country as well as inter-country jurisprudential approaches and the need for care in the choice of cases cited, and the need for clear explanations why it is proposed a court in this country follow any one particular approach.

iii. Hybrid/fact-based approach

[122] The hybrid-centred approach also known as the fact-based approach requires a judge determining habitual residence to consider the totality of the circumstances to determine a child's country of habitual residence.

[123] Since 2013, this is the rule, i.e., approach now used in the United Kingdom. TSee follows the much-acclaimed opinion written by Baroness Hale in the case of ***A (Children) (AP)*** [2013] UKSC 60[4], which cited with approval in the case ***of Re J (A Minor) Abduction: Custody Rights)*** [1990] 2 AC, 562 and determined that "*habitual residence is a question of fact and not a legal concept such as domicile*"

[3] In ***Friedrich v Friedrich***, the 6th Circuit Court held "*If we were to determine that by removing Thomas from his habitual residence without Mr. Friedrich's knowledge or consent Mrs. Friedrich "altered" Thomas's habitual residence, we would render the Convention meaningless. It would be an open invitation to all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence*."

[4] This case is also sometimes cited as A v A [2013] UKSC 60.

(see para. 54).

[124] In ***A (Children) (AP***), the UKSC expressly overruled the 1983 case of ***R v Barnet London Borough Council, Ex parte Shah***, which as noted above had influenced much of the USA's jurisprudence.[5] In ***A (Children) (AP),*** Baroness Hale stated:

> "The social and family environment of an infant or young child is shared with those whether parents or others) upon whom he is dependent. Hence it is necessary [when determining a child's country of habitual residence] to assess the integration of that person or persons in the social and family environment of the country concerned."

[125] It should be noted that one of the objectives, which it appears the UKSC sought to achieve when it changed its approach to determining habitual residence through the medium of the ***A (Children)(AP)*** case was the harmonisation of UK law and the approach adopted by the Court of Justice of the European Union (CJEU) as stated in the case of ***Mercedi v Chaffe***, C-497/10 [2010] ECR 1-14358.

[126] Under the fact-based approach no single factor is dispositive of the enquiry on habitual residence and the application judge is required to consider the entirety of the circumstances as presented pertaining to the child whose habitual residence is in dispute. And if a first instance judge does so, their decision is generally not open to challenge save where there is a material error of law or if it is plainly wrong.

[127] Following the US Supreme Court's ruling in ***Monasky v Taglieri***, 140 S.Ct 719 (2020), it can be stated with a degree of confidence that in that country, the determination of a child habitual residence is a now a fact-driven enquiry. In that case, the US Supreme Court held that:

> Because locating a child's home is a fact-driven enquiry, courts must be 'sensitive to the unique circumstances of the case and informed by common sense'…For older children capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimitization will be highly relevant. Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations. No single fact, however, is dispositive across all cases. Common sense suggests that some cases will be straightforward; Where a child has lived with her family indefinitely, that place is likely to be her habitual residence. But, suppose, for instances, that an infant lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus." (See para. 726).

[5] ***In R v Barnet London Borough Council, Ex parte Shah***, Lord Scarman had ruled that: "*Unless...it can be shown that the statutory framework or legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man'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*."

[128] In common with the other two approaches, the fact-based approach has attracted criticism, which reflects that this area of the law is still evolving. In my view, the fact-based approach does not give sufficient guidance to application judges on how to determine habitual residence when faced with competing and potentially equally weighty claims about a child's country of habitual residence and acclimatisation in any particular jurisdiction. In practice, it is likely to promote a decision-making approach that results in application judges highlighting in their judgments the competing pleas, evidence and submissions advanced by the parties on habitual residence and to conclude that in their view a child is habitually resident in country A and not country B without specifying which factor or factors operated to sway their decision one way or the other since to do so may result in an appeal on the ground that the court placed too much emphasis on one or a particular category of factors. Granted, the general rule on appellate review may operate to discourage appeals that challenge a judge's decision on the facts. That said, in practice, the fact-based approach will, in my view, likely impede the emergence of clear jurisprudence that assists application judges in determining habitual residence for purposes of the Hague Convention. That risk, in my view, is borne out by the appellant's grounds of appeal in this matter.

[129] The opinions expressed by the minority in ***Balev*** against a fact-based approach that is not signposted by clear principles and a commonsense approach merit serious consideration. The minority in ***Balev*** expressed the view that in any case where parental intention is clear and where in particular the intention has been expressed in writing that a child's travel or stay in a third jurisdiction is temporary – and which was not at the time their country of habitual residence – that agreement should, barring exceptional circumstances, be determinative of the question of the child's country of habitual residence. This assumes, of course, that the parents had joint rights of custody that were being exercised in practice.

[130] They also expressed a view similar to that expressed in many pre-2013 US and UK cases that a unilateral decision by one parent should not result in a change of a child's country of habitual residence. There is much to be said in favour of this commonsense approach, which in my view is both logical and comports with the language used in Article 3 and 12 of the Hague Convention and the treaty's objective of upholding custody rights.

[131] In the UKSC case of ***A (Children) (AP),*** while eschewing the use of any principles in the determination of the question of habitual residence, Hughes LJ endorsed (see para. 85) the decision in ***Re M (Abduction: Habitual Residence***) [1996] 1 FLR 887 in which the court held that the child's

country of habitual residence was not altered by the wish of one parent. In endorsing that ruling, Lord Hughes's opinion sit uneasily with the opinion expressed in the same case by Baroness Hale who stated that the intentions of the parents are merely one of the relevant factors (see para. 54).

[132] In the 2005 case of ***In re J (a child) (FC) [2005***] UKHL 40, whose facts are broadly similar to those in casu, the parents and their child were resident in Saudi Arabia. In 2002 the mother travelled to the UK (the mother's country of nationality) with the father's consent initially for a holiday and later staying (again) with the father's consent while the mother pursued a master's degree course. After the father visited the UK, the mother decided that she did not wish to return to Saudi Arabia when her course was over. On those facts, Lady Hale stated, albeit obiter, that:

> "Technically, had this been a Hague Convention case, this would probably have amounted to a wrongful retention of a child."

[133] In expressing that opinion in that 2005 case, Baroness Hale was no doubt influenced by (a) the parties' agreement that the mother's stay in the UK was temporary; (b) the fact that the mother had retained the child in the UK without the father's consent and consequently in breach of his rights of custody; and (c) the conclusion that the child's country of habitual residence had not (and could not have) been changed by the mother's unilateral decision to not return to Saudi Arabia – the country the parties called home and consequently their and their child's country of habitual residence. Obviously, much has changed in the UK's jurisprudence since **2005** as reflected by the case of ***A (Children) (AP),*** whose jurisprudence was expressly referenced and upheld in the following and more recent cases, i.e.,

(a) In ***re H (Children) (Reunite International Child Abduction Centre Intervening)*** [2014] EWCA Civ 1101 where it was held that there is no rule that "*one parent cannot unilaterally change the habitual residence of a child*"; and

(b) In ***AR v RN (Scotland)*** [2015] UKSC 35 in which the UKSC set aside a decision of the Inner House, which had determined a child's country of residence primarily on the parent's intentions. The UKSC referenced (see para. 21) the decision of the lower court where it held on habitual residence that: "*Nothing in the communications between the parties indicates a joint intention to uproot themselves from France and relocate permanently to Scotland*."

Lord Reed went on to rule that: "*In determining the case on this basis, the Lord Ordinary failed to apply the guidance given in the authorities. As I have explained, parental intentions in relation to residence in the country in question are a relevant factor, but they are not the only relevant factor. The absence of a joint parental intention to live permanently in the country in question is by no means*

decisive. Nor, contrary to counsel's submission, is an intention to live in a country for a limited period inconsistent with becoming habitually resident there. As was explained in A v A, the important question is whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent. The Lord Ordinary's exclusive focus on the latter question led to his failing to consider in his judgment the abundant evidence relating to the stability of the mother's and the children's lives in Scotland, and their integration into their social and family environment there. [Emphasis added]

[134] Which approach should be adopted in Belize? I hold that Belize should prefer "*the interpretation that has gained the most support in other courts and [that] will…best ensure uniformity of state practice across Hague Convention jurisdictions, unless there are strong reasons not to do so.*" (***Balev***, at para. 49). Further, I also share the view (***Balev***, para. 50) that "*many Hague Convention states have adopted the fact-based approach. Absolute consensus has not emerged. But the clear trend is to the rejection of the parental intention approach and to the adoption of the hybrid/fact-based approach. Recent decision from the European Union, the United Kingdom, Australia, New Zealand, and the United States endorse the hybrid approach*." [Emphasis added]. In these proceedings, the appellant has not demonstrated that the trend towards the fact-based approach has become a rule of general application. In the absence of evidence to that effect, it would be remiss to make any such declaration.

[135] In the circumstances, I hold that until there is a contrary ruling by the Court of Appeal or the CCJ, the approach that should be applied in this jurisdiction is the one based on the hybrid/fact-based approach. This is the same approach adopted in all but name by the parties to these proceedings, influenced no doubt by the fact that this jurisdiction considers as persuasive opinions expressed by English courts and other common law jurisdictions.

(c) The Convention's objectives, jurisdiction, forthwith return, when "settled" question and grave-risk

i. The Hague Convention's Objectives

[136] The International Child Abduction Act codifies the entirety of the provisions of the Hague Convention, which was adopted by the Hague Conference on Private International Law in 1980 to address the harmful effects of the wrongful removal or retention of children from the state of their habitual residence.[6] It seeks to achieve this goal through "*the prompt return of children wrongfully removed to or retained in any Contracting State*" and to "*ensure that the rights of custody and rights of access*

6 See the preamble to the Hague Convention on the Civil Aspects of International Child Abduction.

under the laws of one contracting state are effectively respected in the other contracting states."[7]

ii. Court with primary jurisdiction

[137] Section 6 of the International Child Abduction Act identifies the Family Court as the court with primary jurisdiction over matters brought under the enactment with appeals lying to the High Court (see section 17 of the Family Courts Act).

iii. Key Hague Convention provisions - relevant to these proceedings

[138] Article 3 of the Hague Convention provides that:

> "The removal or the retention of a child is to be considered wrongful where –
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." [Emphasis added]

[139] Article 12 provides:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child." [Emphasis added]

[140] Article 13 provides:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) 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. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by

7 Ibid, Article 1.

the Central Authority or other competent authority of the child's habitual residence."

[141] In interpreting and applying the provisions of the Hague Convention consideration should be given to article 3(1) of the Vienna Convention on the law of treaties, which provides that:

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to the given to the terms of the treaty in their context and in light of its object and purpose."

iv. Personal jurisdiction - forthwith return – when to consider whether a child is now settled in its new environment

[142] A court considering whether a child has been wrongfully removed to or retained in a member state must assess whether (a) the Hague Convention applies to the child in question; (b) whether the child's removal to or retention in a member state was wrongful because that action was taken in breach of the remaining parent's rights of custody as determined by the laws of that child's country of habitual residence and which rights were exercised in actuality (article 3). If the court's answer to these two questions is in the affirmative, it must consider whether legal proceedings were instituted within one year of the alleged wrongful removal or retention. If the answer to that question is in the affirmative, the court "*shall order the return of the child forthwith*" (article 12) except where the respondent prays in aid and successfully demonstrates the existence of facts that engage the exceptions set out in articles 12 and 13.

[143] Notably, if an applicant parent initiates legal proceedings after a period of one year calculated from the date of the unlawful removal or retention, the court "***shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment***" (Article 12).

[144] As relates to the facts of this case, the foregoing begs the question: is a first instance court required to consider a child's settlement into their *new country*, if legal proceedings are initiated within one year of the child's removal or retention? In my view, the answer is in the negative.

[145] The fact-based approach (discussed above) is, in my view, the appropriate approach for determining a child's country of habitual residence. In relation to proceedings initiated *within* one year of the alleged wrongful removal or retention of a child, the fact-based approach should be utilised to determine whether as of the date of the alleged removal or retention, a child was habitually resident in the country of the remaining parent, which it is alleged is their country of habitual residence. This is a rear-view mirror assessment of where the child's home, i.e., country of habitual residence was as of the date of the wrongful retention or removal.

[146] If proceedings were initiated *after* the one-year period, the same fact-based approach should be used to determine whether the child has *'settled'* in the new country to which they were removed or in which they were retained. And if adequately demonstrated that a child has settled in the new country, then the court may not issue an order mandating the return of the child because the child's country of habitual residence would have changed, i.e., the child may be deemed to have become habitually resident in the new country.

[147] In the instant case, as of 8 October 2018, i.e., when the children's mother decided and informed the children's father that she would not be returning the children to the USA, the family unit's and consequently, the children's home and place of habitual residence was in Florida, USA. The mother's unilateral retention of the children in Belize in breach of the father's rights of custody as determined by the laws of Florida constituted wrongful retention of the children as defined in article 3 of the Hague Convention. Relatedly, the father initiated legal proceedings within one year of 8 October 2018. In my view interpreting the words used in articles 3 and 12 of the Hague Convention in good faith and in light of the treaty's object and purpose, the learned magistrate was entitled to order the forthwith return of the children to the USA save if she had determined that the grave risk exception set out in article 13 applied.

[148] I also hold that the issue of the children's settlement, i.e., acclimatisation and integration into the mother's family in Belize (as opposed to Florida, USA) did not arise for consideration before the learned Magistrate because the father initiated legal proceedings within one-year period of their wrongful retention in Belize. To avoid the forthwith return rule, the children's mother who is the one who retained them in Belize was required – after the father's demonstration that the children were habitually resident in Florida, USA - to demonstrate that the children were not (and could not be considered as having been) habitually resident in that country. In my view, this was way nigh impossible given her evidence regarding how she came to be in Belize with the children and her concession that her intentions were to return to the USA after the father had completed his training. This intention, coupled with the fact that the appellant, their two children and the respondent considered and had in fact lived in Florida where they had and continue to have a family home, weighed heavily in favour of finding the USA as the children's country of habitual residence. As of 8 October 2018, the children's home, i.e., country of habitual residence was in Florida. And that determination arises because the question of settlement in the new environment would have arisen only if the respondent father had failed to initiate legal proceedings within one year of retention of the children in Belize.

[149] My ruling departs from some opinions expressed in judicial opinions expressed in some members states, which determined the issue of habitual residence without specifically considering and applying article 12 of the Hague Convention, which requires the considering of whether a child has settled in their new country only if proceedings were initiated more than one year after the alleged wrongful removal or retention.

[150] For emphasis, member countries agreed that their domestic courts will consider whether a "child is now settled in its new environment" if the applicant parent instituted proceedings after one year of the alleged wrongful removal or retention.

[151] Relatedly, as a matter of law, judicial opinions of Hague Convention sister countries that do not consider in their decision-making the distinction imposed by article 12 pertaining to when settlement in the new environment should be considered are in my view neither relevant nor persuasive. Neither are they binding. The future relevance and impact of these opinions on the law and practice on Hague Convention disputes will emerge as members states' jurisprudence in this regard crystallises. I hold that the fact-based test for habitual residence should be applied to interpret the strict terms set out in article 12 of the Hague Convention. Relatedly, caution needs to be exercised when referencing decisions from member countries whose jurisprudence is based on tensions introduced by other treaties such as the Brussels II Regulation[8] whose terms are not entirely similar to those of the Hague Convention. Critically, the jurisprudence in those jurisdictions is evolving and the direction of travel is still in a state of flux.

v. Grave risk exception

[152] As noted above, article 13 provides that a court may not order the return of a child wrongfully removed to or retained in a member state if the party opposing the child's return establishes that there is a grave risk that on return the child would be exposed to physical or psychological harm or otherwise place the child in an intolerable situation.

[153] In this section, I outline the test for the grave risk exception, which I hold should be used in this jurisdiction and which I intend to use below to consider the appellant's grounds of appeal 6 and 7. There is not, as far as I am aware, any authority from this jurisdiction, which defines what constitutes

[8] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

grave risk in the context of the Hague Convention. Relatedly, the parties did not provide me with any binding authority.

[154] In the US, courts have defined grave risk to mean "*more than a serious risk*" (see US case of ***Danaipour I***, 286 F.3d 1, at 14 (1st Cir. 2002). This suggests that a demonstrated "serious risk" is not in itself a sufficient basis to deny a request for the return of a child to their country of habitual residence. In ***Asvesta v Petroutsas***, 580 F.3d 1000 at 1020, the court held that grave risk arises in situations where the child faces a real risk of being physically or psychologically hurt as a result of repatriation. There is of course, much jurisprudence on the meaning of "real risk" in the context of refugee claims in the jurisprudence of many countries. In ***West v Dobrov***, 735 F.3d 921 at 931 (10th Cir. 2013, the court held that the potential for harm to the child must be "severe and the level of risk and danger very high". This suggests that the threshold of risk feared must be high and is not satisfied by pleading and demonstrating only that there exists a serious risk of harm on return.

[155] In the UK, the courts have stated that a high standard and threshold is required to demonstrate grave risk and an intolerable situation. Per that country's jurisprudence, the test is stringent, and the facts must be compelling (see ***In re F. (A MINOR) (ABDUCTION: CUSTODY RIGHTS ABROAD***) 1995 Fam 224). In ***Re A (A MINOR) ABDUCTION)*** [1988] 1 FLR 365, the Court of Appeal held that the "*risk to the child must be a weighty risk of substantial harm*."

[156] Member states agreed on "*grave risk*" as the threshold and not merely a risk or serious risk of harm. I hold that grave risk must be interpreted to mean a demonstrated real and substantial risk of grave harm with the abducting parent bearing the onus and burden of proof. Such harm does not, in my view, include general challenges and disruptions that a child may face if returned to their country of habitual residence (see also the US case of ***Colon v Mejia Montufar*** No. 2:20-cv-14035 (S.D. Fla. July 2 2020). Mere allegations of or a belief about the possibility of harm that are not substantiated will not suffice to discharge the burden of proof. Any lesser degree of risk and level of proof will undermine the efficacy of the Hague Convention and the objective of the expeditious resolution of disputes and the prompt return of abducted children to their country of habitual residence. As has been noted in many a Hague Convention matter, the plea of grave risk of harm on return is often raised as a fall-back position in applications for the return of children to their countries of habitual residence.

[157] I will now consider the issues raised by the appellant's grounds of appeal and in particular whether the learned magistrate (a) erred as a matter of law in ruling that the children's habitual residence is

the USA; (b) misapplied the grave risk exception as set out in Article 13(b) of the 1980 Hague Convention; and (c) whether the learned magistrate ordered that on return the respondent's visits to the children be supervised and if so, if this constituted an error of law.

3. The appellant's grounds of appeal

i. First ground of appeal

[158] In her first ground of appeal, the appellant asserts that:

> "The learned magistrate erred in law in misinterpreting and misapplying the concept of habitual residence, namely, by failing to adhere to established legal principles which required consideration of all surrounding facts including the children's integration into the family and social environment in Belize, their physical presence in Belize, their Belize nationality and their enrolment in school." [Emphasis added]

(a) Plea not substantiated

[159] As noted above, an appellant bears the onus of demonstrating the existence of a material error of law in a lower court's decision. That onus is not discharged by submitting bare and unsubstantiated statements that a lower court's decision contains an error of law. The assertion must be supported by evidence, i.e., with specific reference to the text of the lower court's decision and evidence of the specific principle(s) of law alleged to have been misinterpreted or misapplied. The alleged error must also be demonstrated to have a material bearing on the decision on habitual residence.

[160] The appellant did not in her grounds of appeal or written submissions:

(a) demonstrate that there exists "*established legal principles*" in this jurisdiction or as between Hague Convention member states, which have now become rules of law of general application on the approach used to determine a child's country of habitual residence for purposes of the Hague Convention; and

(b) identify where in the learned magistrate's decision she misinterpreted and/or misapplied the concept of habitual residence per the alleged "*established legal principles*."

[161] The appellant's failure to demonstrate these two essential prerequisites is fatal to this ground of appeal. Further, contrary to the appellant's contention, the learned magistrate did in fact use – but without ascribing a label to it – the fact-based approach to determining the children's habitual residence.

(b) Plea based on a misapprehension of how the fact-based approach is applied to determining habitual residence

[162] Relatedly, as noted above and contrary to the appellant's plea, under the fact-based approach as applied to the text of the Hague Convention, the lower court was required to consider whether the children were habitually resident in the USA or Belize and not only whether the children were habitually resident in Belize on the claimed grounds of integration and acclimatisation in Belize.

(c) Fact-based approach rejects the use of legal principles

[163] As noted above, not only are there not any "established legal principles" on the determination of habitual residence for purposes of the Hague Convention but the fact-based approach used by the learned magistrate eschews the use of principles of law in the determination of habitual residence. See for example, the case of ***A (Children) (AP),*** paras. 37, 39, 40, 41 and 42). It is for the appellant to make a choice regarding the three current approaches to determining habitual residence. But any approach contended for must be clearly outlined and substantiated. It serves no purpose to contend that the fact-based approach applies but argue that that approach requires the use of legal principles, when that is factually incorrect.

[164] In addition, as noted above, there is yet to emerge any rule of general application (as a matter of private international law) providing that the approach that must be followed by Hague Convention member countries is the fact-based approach or any other approach. Certainly, progress is being made in that direction, but in the absence of relevant evidence, I am not prepared (just yet) to make any such declaration.

[165] Relatedly, the appellant did not demonstrate that the learned magistrate's decision ran counter to a ruling or general guidance issued either by this court or another superior court on the approach to determining habitual residence. The Family Court must, of course, apply the laws of this country and rules of international law, which are binding on this country. In this regard, this ground of appeal must fail.

(d) The learned magistrate used the fact-based approach

[166] For completeness, the learned magistrate used the approach advocated for by the appellant, which is the fact-based approach. This is borne out by the fact that in her decision, the honourable magistrate expressly referenced (1) the parties' admitted intention that the appellant's stay in Belize with the children was intended to be temporary; (2) the parties agreed that the appellant and the children would live in Belize temporarily for safety reasons pending the father's completion of military

training; (3) the fact that the father visited the children in Belize; (4) the fact that the father discharged his rights of custody by deposing (although he says it was under duress) a consent letter to permit his children to remain in Belize and to temporarily travel during the period set out in that consent letter; (5) the fact that the father requested the appellant to return to the USA with the children and the mother refused; (6) the children's "*acclimatization*" in Belize; (7) the fact that the two eldest children were born in the US; (8) the fact that the youngest child was born in Belize; (9) the children's social and family environment" in Belize; (10) "*the integration of the children into their family and social environment"* in Belize; (11) that the children were being home schooled; (12) the children's relationship with the mother's family members; and (13) that the children had made friends in Belize. The learned magistrate also directed herself, and correctly so, to the case of ***Re R*** [2016] AC 76, which she noted required the "*evaluation of all relevant circumstances*."

[167] Consequently, the appellant had no valid ground to challenge the learned magistrate's use of the fact-based approach, which the parties advocated for.

[168] According to the appellant's written submissions, "*the Family Court determined that the habitual residence of the children was in Florida, USA largely because the father was American and because the parents had resided there after marriage. Unfortunately, the Family Court failed to determine habitual residence from the "total" circumstances of the child (sic) and instead looked to the future and the possibility that at the end of his training the father may want to have the children return to the USA. There was substantial oversight we submit in not assessing the integration of the children when the respective location of orange walk and Florida, USA (sic)."*

[169] During the hearing, I requested learned senior counsel to refer to the relevant part of the learned magistrate's decision and highlight where she determined the children's habitual residence "**largely**" on the ground that the father was American, and because the parents had resided in the US after their marriage. Learned senior counsel failed to do so and none is self-evident from her decision.

ii. Second ground of appeal

[170] In her second ground of appeal, the appellant states:

> "The learned magistrate erred in law by failing to appreciate that Article 4 of the Hague Convention requires that a child must have been habitually resident in the country seeking its return for the convention to even apply, and that the youngest child…was born in Belize and has never been to the USA." [Emphasis mine]

(a) Ground is predicated on a misapprehension

[171] The statement that the learned magistrate "*failed to appreciate that Article 4…requires a child be to habitually resident…"* is ill-judged ad hominem criticism. That said, this ground of appeal is predicated on a misapprehension about the parties to the litigation that took place before the learned magistrate in 2020. The USA – as a state - did not take part in the legal proceedings before the lower court. Those proceedings pitted the parents' competing claims and they were initiated by the Department of Human Services with the father of the minor children as the substantive applicant and the children's mother as the substantive respondent. In this regard, the appellant's ground of appeal is based on a material misapprehension of fact.

(b) No rule of law or principle that prior presence is a prerequisite to habitual residence

[172] I propose, however, to address an issue of general importance that arises from this ground of appeal. That issue is whether the Hague Convention applied to L, the parties' daughter, who:

(a) was conceived in the US but born in Belize following the parties' agreement that the appellant and the minor children would remain in Belize during his military training programme; and

(b) had not set foot in the USA as of the date of the legal proceedings before the learned magistrate, i.e., October 2020.

[173] In her grounds of appeal and written submissions, the appellant did not demonstrate the existence of a rule binding on member countries or that exists separately in this country providing that prior presence in a member state is a necessary prerequisite to a finding of habitual residence for purposes of the Hague Convention.

[174] The jurisprudence of member states to the Hague Convention on whether an infant can be held to be habitually resident in country A if they were born in country B and were retained in country B in breach of one of the parent's rights of custody is still evolving and is currently characterised by conflicting decisions.

[175] This issue was considered by the UKSC in the case of ***A (Children) AP***). In that case the parents of the four children whose habitual residence was in dispute had previously lived in the UK. The parents had an acrimonious relationship and while in Pakistan on holiday, there was physical and emotional coercion, and the mother was forced to give up her own and the children's passports. There were also attempts at reconciliation. During that period, the children's mother conceived and gave birth to Haroon, their youngest child. After managing to retrieve her own passport, the children's mother managed to flee Pakistan and left the four children behind, including Haroon. On her return to

England, the mother instituted proceedings for the children to be made wards of the court and for an order that the children be returned to England. She did so partly on the grounds that the children were habitually resident in the UK, including Haroon who was yet to set foot in the UK.

[176] In the High Court, Parker J determined that all four children (including Haroon) were habitually resident in England and Wales. Regarding Haroon, Parker J held that he was habitually resident in England and Wales because he was born to a mother who had remained habitually resident there and had been kept in Pakistan against her will. The children's father appealed. The Court of Appeal upheld Parker J's decision with respect to the three eldest children but set aside her determination with respect to Haroon. In their Lordship's view, habitual residence required some form of prior physical presence in England. The Court of Appeal held that habitual residence was a question of fact, and they declined to uphold a rule that a newly born child is presumed at birth to take the habitual residence of its parents. In their view, such a rule "*would be a legal construct divorced from fact*." **Thorpe J** dissented. At para. 29 of the judgment, Thorpe LJ gave the example of "*an English mother habitually resident in England who gives birth to a child in France. As a result of complications mother and child are hospitalised for an extended period before they are fit to come home*." In Thorpe LJ's view, such a child was habitually resident in England from the time of birth and not just when the child set foot in the UK. Thorpe J's decision was consistent with what I consider to be a correct and commonsense opinion made by the Family Court in the case of ***B v H (Habitual Residence: Wardship*** [2002] 1 FLR 388.

[177] In what I consider to be an attempt to reconcile UK jurisprudence with the CJEU's jurisprudence as set out in ***Proceedings brought by A*** (Case C-523/07) and ***Mercredi v Chafee*** (Case C-497/10 PPU [2012] Fam 22, Baroness Hale favoured an approach (see para. 55) "*which holds that presence is a necessary pre-cursor to residence and thus to habitual residence*." However, in so holding, Baroness Hale expressed anxiety and appropriately signalled (and in my view rightly so) that:

> "…the European Court would have to consider the implications for the Hague Child Abduction Convention if a child such as [Haroon], or a child born on holiday, were held to have no country of habitual residence. The whole Convention, beginning with article 3, is predicated upon there being a state where the child is habitually resident immediately before the wrongful removal or retention. Can it be the case that the Convention would not apply if the child born to an English mother while on holiday abroad were abducted from the hospital?"

[178] In my view, Baroness Hale's statement explains why there is need for a few key principles that can be used in determining the habitual residence in particular of infants and why the parent's shared intentions can be a helpful but not necessarily dispositive determinant of habitual residence.

[179] Baroness Hale also expressed the view that the CJEU had not had to address a case such as one before the UKSC (see para. 56). Without intending any criticism, that may have been a missed opportunity to get a definitive ruling and one which could have created greater clarity and certainty of the jurisprudence among Hague Convention members states within the European Union on how to determine an infant's country of habitual residence when they were born in country B, yet their family members were habitually resident in country A and whether the retention of the child in country B leaves that child without habitual residence or leads to a presumption that their country of habitual residence is where they were born. And also, whether such a child falls outside the parameters of the Hague Convention and if so, the reasons thereof.

[180] I must also point out Hughes LJ's remarks (at para. 76) relating to the Hague Convention. The learned Lord Justice stated:

> "…wrongful removal or retention is to be ascertained by reference to the rights of the parties under the law of the State in which the child was habitually residence immediately before the event. That has spawned, in England at least, a proposition closer…to a rule of law, namely that where two parents have parental responsibility for a child, one of them cannot by unilateral action alter the habitual residence of the child: see…Re J (A Minor) (Abduction: Custody Rights), at 572 and…In Re S (Minors) (Abduction: Wrongful Retention [1994] Fam 70."

[181] Using an example, Hughes LJ stated that:

> "To hold that parent B's unilateral actions cannot bring about a change of habitual residence is one route to ensuring that the 1980 Convention is not made ineffective."

[182] That, in my view, is a rule of law or principle, which if and when accepted by a greater number of members states and if applied to cases initiated within one year of the alleged removal or retention will help to speed up the resolution of Hague Convention matters, reduce unnecessarily complex proceedings and appeals.

[183] After noting that the UKSC had not been called upon to resolve the question of habitual residence as it pertained to Haroon who was born in Pakistan to parents habitually resident in the UK and who had not yet set foot in the UK, Hughes LJ stated, at para. 78 that:

> "It may well be that the correct view is that unilateral acts designed to make permanent the child's stay in State B are properly to be regarded as acts of wrongful retention…"

[184] That is a view I share. In para. 90, Hughes LJ concluded that in the determination of habitual residence, there ought not be imposed a rule that a child may not possess habitual residence of a country in which he has not yet set foot. Hughes LJ continued at para. 93 to say:

> "The only difference between the elder children and the youngest is the accidental fact that he has not

yet reached the shores of his homeland. The reason why he has not done so is because he has been wrongfully detained elsewhere by coercion. In my view, he is, like them, a member of a family unit which is firmly based in England and when born into it he was like the rest of its members habitually resident there. His wrongful retention commenced immediately afterwards. Indeed, if the Court of Appeal is right, he could now be removed to another country without the removal being wrongful; such successive transportation of children to avoid enforced return is by no means unknown. There would, in my respectful view, be a serious failure of the protection afforded by the 1980 Hague Convention and Article 10 if a newly born baby in this situation is held to have no habitual residence and thus to be incapable of wrongful or retention. I am unable to see any sufficient reason for such a conclusion." [Emphasis mine]

[185] Unlike the UK, which is required to interpret some of its laws consistently with European Union law and the pronouncements made by the CJEU, this court has no similar challenges. All that is needed is that courts in this jurisdiction faithfully interpret and apply the provisions of the Hague Convention, which were domesticated through the International Child Abduction Act and adopt a fact-based and commonsense approach to the determination of habitual residence. I remain to be persuaded that any valid purpose is served by holding that an infant born in country B of parents habitually resident in country A is not to be presumed (barring exceptional circumstances) as being habitually resident in the same country as the parents simply because that infant is yet to set foot in its parent's country of habitual residence.

[186] That said, it was not argued before me that there exists a rule as a matter of Belizean law that an infant born outside the country to parents who are habitually resident here is regarded as not being habitually resident in this country by virtue of that fact and would only be deemed to be resident in Belize only after they have physically set foot in this country.

[187] Using the above framework, I hold that the approach to be taken in this country for purposes of applying and interpretating the law set out in the International Child Abduction Act and the Hague Convention is that unless demonstrated otherwise, a child born in a Hague Convention member state **B** to parents habitually resident in Hague Convention member state **A** and is retained in country B by one parent without the consent and in breach of the other parent's rights of custody as determined by the laws of country A, including potentially through coercion, deception, fraud or other wrongful reason that child shares at birth the same country of habitual residence as its parents. Where there is not in common a country of habitual residence between the parties, more evidence would, of course, be needed to determine the infant's country of habitual residence. But those situations are likely to be rare. And if that be the case, the fact-based approach – broadly speaking – is likely to produce an answer.

[188] In my view any other interpretation would undermine the objectives of the Hague Convention since it would enable a mother who gives birth away from her country of habitual residence, i.e., in a third state to successfully claim that the Hague Convention does not apply on the basis that the infant child has no country of habitual residence or that the country of the child's birth is by virtue of that fact the child's country of habitual residence even if the infant has no rights of residence or nationality in that third country. Obviously, these facts also apply to a father or any other party who retains an infant born abroad in a third state and declines to return the child to his and the rest of the family's country of residence (country A) on the grounds that that child is not habitually resident in country A by virtue of his birth in country B and because the child has not travelled to country A. The preferable interpretation is one that brings all children, i.e., infants, minors and adolescents under 16 years of age under the general rubric and protection of the Hague Convention and that uses the commonsense approach of determining the country, which the family unit considered as their home at the material time, as the country of habitual residence. Consideration should be given to the laws of unintended consequences in adopting rules that require prior physical presence in determining habitual residence.

[189] In short, in my view, the learned magistrate was entitled to hold on the totality of the facts before her, including in particular that as of the date of the appellant's retention of the children on 8 October 2018, the family unit was habitually resident in the USA and the appellant did not say at the material time, i.e. prior to 8 October 2018 that she had intended to make Belize her permanent home/country of habitual residence. That family unit included L, who was conceived in the USA but born in Belize on the understanding that the family in Belize was in the country for an agreed temporary period. The learned magistrate's decision on the facts ought to be given deference and not lightly set aside unless if it was demonstrated that it was plainly wrong. In my view, the appellant has not demonstrated that Magistrate Morrison-Novelo's decision suffered from any material error of law.

iii. Third ground of appeal

[190] In her third ground of appeal, the appellant stated:

> "The learned magistrate erred in law by failing to appreciate that though the second child…was born in and spent over a year in the USA, he could not, in law, be considered to have been "habitually resident" in the USA based on the established criteria for determining habitual residence."

[191] Notably, the appellant has not explained if there is any difference between what she calls in her first ground of appeal "*established legal principles*" and what she calls "*established criteria*" in her third ground of appeal. If there is any distinction, no explanation was tendered to distinguish between the

two phrases and the legal implications of each.

[192] That said, and as noted above, as of 13 November 2020 there was no and there still are no "*established criteria*" or "*established legal principles*" that operate as a rule of law of general application in Belize or as between Hague Convention member countries, which the learned magistrate failed to consider and apply in determining the children's country of habitual residence. Relatedly, the appellant, who bore the onus, did not demonstrate that there exists any such established criteria or legal principles.

[193] Additionally, as noted above, the learned magistrate applied the fact-based approach (contended for by both parties) and determined that when the children's mother informed the children's father on 8 October 2018 that she would not be returning with the children to the USA, the middle child was (as of that date) habitually resident in the USA. It is clear from the oral evidence that was led in the lower court that the children's home country at that time was the USA.

[194] Relatedly, the issue of the children's settlement in Belize did not arise for consideration because the children's father initiated proceedings within one year of the date of retention. The issue of the children's settlement in the USA and whether or not they were habitually resident there was a relevant factor determined using the fact-based approach. However, this issue was not in contention between the parties before the lower court. The agreed facts are that the children were born in and had lived all their lives in Florida up until they travelled to Belize in July 2017. The USA was their home country of habitual residence.

[195] There is also no question that the learned magistrate properly directed herself and referenced the relevant provisions of the Hague Convention that applied to the matter before her and proceeded to set out in detail all facts relevant to the proper determination of the case and thereafter arrived at her decision. In the circumstances, the learned magistrate's evaluation is not open to challenge because the appellant failed both in the grounds of appeal and the written submissions filed of record to demonstrate that the learned Magistrate's decision was not open to her. Relatedly, since the standard of appellate review is one that treats the lower court's findings of fact deferentially, the appellant was required but failed to set out facts that demonstrate that the learned magistrate's decision was plainly wrong.

iv. Fourth ground of appeal

[196] In her fourth ground of appeal, the appellant contended that:

> "The learned magistrate erred in fact and in law by determining that the children's habitual residence was the United States of America, despite uncontroverted evidence showing the children's integration into the social and family environment in Belize, their physical presence in Belize and their Belizean nationality."

[197] In essence, the appellant's case is that the learned magistrate should have ruled that the children's country of habitual residence was Belize because (a) the children had integrated into their social and family environment in Belize; (b) the children had allegedly acquired Belizean nationality; and (c) the children were physically present in Belize. No explanation was tendered why these three factors (out of all the others expressly considered) required the learned magistrate to rule that the three children were habitually resident in Belize.

[198] This ground of appeal presumes, incorrectly, that the fact-based approach used by the learned magistrate at the request of the parties' priorities the factors raised by the appellant in her grounds of appeal in the determination of habitual residence. Rather, under the approach used, whether or not a child is habitually resident in a particular country "*is a question of fact to be decided by reference to all the circumstances of any particular case*" and no one or select group of factors is dispositive of the enquiry (see ***Re J (A Minor) (Abduction: Custody Rights)*** [1990] 2 AC 562.)

[199] As mentioned above, I am of the view that unilateral acts taken by an abducting parent to make permanent a child's stay in a third state, which was not the child's country of habitual residence as of the date of the removal or retention is properly to be regarded as an act of wrongful retention. Ruling otherwise encourages and enables abducting parents to use factors arising from their wrongful actions (such as acquiring new nationality for a child without the consent and in breach of the other parent's rights of custody) in support of their opposition to applications for the return of an abducted child to his or her country of habitual residence. There is a clear need for jurisprudence that removes incentives – under the fact-based approach - for parents who take or retain children in third countries in breach of the other parent's rights of custody as defined by the Hague Convention and to use the new facts to build a case against returns of children on the grounds of settlement/integration in situations where legal proceedings were initiated within one year of the removal or retention.

[200] In addition, and for emphasis, in my view, the issue of the children's integration into the social and family environment in Belize was irrelevant because the children's father initiated legal proceedings within one year of their wrongful retention in Belize. In the instant case, the learned magistrate considered all the evidence led by the children's mother demonstrating the children's integration into her family environment in Belize and the USA and held that on balance, the children were habitually

resident in the USA. The assessment of the evidence is for the applications judge and unless it is proven that the decision was plainly wrong, which the appellant failed to demonstrate, this court is not entitled to interfere with the same.

v. Fifth ground of appeal

[201] In her fifth ground of appeal, the appellant stated:

> "The learned magistrate erred in that, while she did not reject the evidence of sexual abuse by the respondent against the first child…she instead ordered that the children be returned and that the father's visits be supervised, which was an order not open to the magistrate to make."

[202] This ground of appeal has no merit. In her reasoned decision and order, the learned magistrate did **not** rule that on return the father's visits to the children should be supervised. During oral submissions, I requested learned senior counsel to point out where in her decision and ruling, the learned magistrate ordered that on return the father's visits be supervised. Learned senior counsel could not identify any such determination. I recognise, of course, that learned senior counsel did not draft the relevant grounds of appeal.

[203] In my view, members states to the Hague Convention should consider adopting an amendment that permits the reciprocal recognition and enforcement of orders relating to foreign orders and/or undertakings given in Hague Convention matters, including on issues such as access and parental visits. Such an amendment would assist in expediting the resolution of litigation proceedings as well as the enforcement of orders made.

vi. Sixth ground of appeal

[204] In her sixth ground of appeal, the appellant stated:

> "The learned magistrate erred in law by not properly considering the risk of psychological harm or other damage to the first child…which is an established ground under the Convention for not ordering the return of a child."

[205] To sustain this ground of appeal, the appellant needed but failed to demonstrate an objective basis for the plea that the learned magistrate failed to properly consider the risk of psychological harm to the parties' eldest child. The appellant did not point to any issue relating to the claims of psychological harm, which were not considered by the learned magistrate in arriving at her decision. It is clear that the learned magistrate, after outlining all relevant facts stated:

> "After careful examination of both oral and documentary evidence, this court concludes that the mother has failed to make the requisite evidentiary showing that the child [C] had been sexually abused. The court is not satisfied that there is a grave risk that the return of all three children will expose them to

physical or psychological harm or otherwise place them in an intolerable situation."

[206] In the court below, the children's mother bore but failed to discharge the burden of demonstrating that there existed a real and substantial risk of more than serious harm to the eldest child.

[207] It bears restating that the children's mother contended that the factors demonstrating that the children's father had sexually abused his eldest child were that: (i) the eldest child's defecated in a closet while in Florida, which potty-training problem the parents raised with their doctor who recommended measures; (ii) while in Florida, there was a time when the child had a sore bottom but which the father attributed to ring worm and presented medical reports and the mother did not dispute; (iii) the child feared using an outside toilet when the appellant came with them to Belize, which (at some level) is not surprising given the change in the children's living environment; (iv) the child feared men in general (although not his material grandfather and uncles); (v) the child had a cut finger, which the child later in Belize allegedly said was done by the father but did not say the same thing in Florida where the incident took place; and (vi) the child had/has behavioural issues, which necessitated home schooling in Belize and which the mother sought to address through a church pastor.

[208] When the mother was in Florida, she did not report any concerns to their family doctor or the authorities. Relatedly, she did not make any immediate report to the authorities in Belize until the period that coincided with the Department of Human Resources contacting her about the Hague Proceedings.

[209] In addition, the mother refused to have the child medically examined in Belize in relation to the claims of sexual assault opting instead to talking to pastor who was not called to give evidence.

[210] Further, in her evidence the mother stated that she initially believed that the eldest child's behavioural issues were spiritual and were caused by demon possession blamed in part on the father. In response the children's mother cut communication between the eldest child and the respondent father because, she believed that would help stop the devil from getting to the eldest child. The children's mother also stated in cross-examination that she thought that their eldest child's behavioural issues were spiritually connected until the child "confessed" to having been sexually abused. In my view, the learned magistrate was entitled to hold that this was not a sufficient basis for any conclusion that the father had sexually or physically harmed the eldest child.

[211] That said, in this ground of appeal, the appellant is challenging the learned magistrate's assessment

of the evidence not based on any specific error that has been identified but plainly based on the fact that the learned magistrate ruled against the appellant on her plea that the child faced a grave risk of harm if returned.

[212] The determination of whether the mother had discharged the burden of demonstrating that the child faced a grave risk of sexual assault and/or psychological harm if returned depended on the learned magistrate's findings of primary fact and credibility, which an appeal court is not entitled to interfere with save where the decision is plainly wrong (***Piglowska v Piglowska*** [1991] 1 WLR 1360, pp. 1372-3). The appellant did not make any such plea in its grounds of appeal, and the submissions made in support of this ground of appeal do not demonstrate that the learned magistrate's decision was plainly wrong. And there is not any error, which this court is able to discern from the learned magistrate's ruling.

[213] In this regard, I draw upon and share the opinion expressed by Baroness Hale in ***In re J (a child) (FC)*** [2005] UKHL 40 in which she stated:

> "If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is…a matter for the trial judge. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere…To ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful…in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any discretion in the matter."

vii. **Seventh ground of appeal**

[214] In her seventh ground of appeal, the appellant contended that:

> "The learned magistrate erred in law by misapplying or failing to appreciate the "grave risk" exception under Article 13(b) of the Hague Convention when she failed to consider credible evidence presented by the Appellant demonstrating a substantial risk of physical and/or psychological harm to [C] and his two siblings by the respondent if returned to the United States."

[215] This ground of appeal suffers from the same fatal defects I have outlined in relation to the appellant's sixth ground of appeal. In particular, the appellant did not demonstrate in her grounds of appeal and through her counsel's written and oral submissions that the learned magistrate misinterpreted or misapplied the grave risk exception or that the appellant presented evidence, which the learned magistrate failed to consider or that the learned magistrate took into consideration one or more irrelevant issues.

[216] In my view, the appellant's reaction to the alleged report of abuse was inconsistent with that expected of a parent with serious and objective concerns that her child had been abused. The mother refused to have the child medically examined and did not request an order from the court for the child to be examined by appropriate professionals in Belize. I am puzzled that the children's mother initially attributed her child's behaviour issues to alleged demon-possession and later to alleged sexual abuse. The reasoning and leap from the metaphysical to abuse raises many an unanswered question and certainly did not satisfy the high threshold proof required under the article 13(b) grave risk exception set out in the Hague Convention.

V. Observations

[217] How this case progressed through the judicial system leaves much to be desired. The delays in the setting down and case management before the Family Court offers an opportunity for anxious introspection. There is need for changes, including of the civil procedure rules to require the summary consideration on an expedited basis of Hague Convention matters supported by active case management. Certainly, case management of Hague Convention matters should be judge-led, i.e., to say, the judicial officer before whom a matter arises for determination should actively case manage the case and not permit the parties to draw it out. Relatedly, consideration should be given to producing reasoned decisions in a matter of weeks at most and not months.

[218] Further, Hague Convention matters should, save in exceptional circumstances, be determined on affidavit evidence. This is to say, a matter of practice, "*admission of oral evidence in [Hague] Convention case should be allowed sparingly*" and only if strictly necessary in the just and effective resolution of the matter. See for example, ***In re F (A MINOR) (ABDUCTION: CUSTODY RIGHTS ABROAD)*** [1995] 3 All ER 641. This will assist in expediting the resolution of litigation proceedings, which also promotes the overriding objective as well as the best interests of the child whose habitual residence is in dispute. Had this approach been deployed, this dispute could have been resolved in a matter of months and not years. The delays experienced in this case are likely to have had real life and potentially negative consequences for the children and the parties to the dispute.

[219] Relatedly, where a stay of execution is granted pending a Hague Convention appeal on the usual grounds (see ***Fowler Works Ltd v Minister of Natural Resources and Another***, Claim No. Civ 725 of 2022 (No.2), at 72) consideration should be given to the immediate issuance of directions for an expedited hearing of the appeal proceedings. See for example the opinions expressed in the US cases of (i***) da Silva v de Aredes***, 953 F.3d 67 at 72 (1st Cir 2020); (ii) ***Koch v Koch***, 450 F.3d 703, at 710 (7th Cir.2006). Such a measure would impose guardrails against warehousing of stays of

execution and delaying the resolution of Hague Convention matters.

[220] I should also point out that if the circa four month delay by the Department of Human Services in progressing the respondent's father's Hague Convention application reflects current practice, changes should also be considered to ensure expedited processes.

[221] Belize is a longstanding member of the Hague Convention having domesticated it in 1989. This case provides many a salutary lesson on what is needed to ensure that the country continues to live up to its international commitments under the Convention and above all to play its part in combatting the wrongful cross-border removal or retention of children in breach of parental rights of custody. To be clear, Belize is not alone in struggling with the challenges posed by international child abduction.

[222] In view of the above, I direct the court office to share a copy of this decision with the Rules Committee. My decision, notwithstanding, I also hope that the parties will spare no effort in finding solutions that enable their children to build and maintain healthy relationships with both of them as parents.

VI. Costs

[223] I requested the parties' counsel to address the court on the issue of costs. The appellant's counsel requested costs if the appellant was successful and argued that if not, each party should be ordered to bear their own costs. The respondent sought costs pursuant to the general rule.

[224] I rule that the appellant shall bear costs of suit. I do so in consideration of the fact that (a) the appellant chose not to progress her appeal in the manner and within the timelines set out in the 1991 ICA Rules; and (b) the appellant made several and unmeritorious applications for extensions of timelines to comply with this court's court orders and the repeated requests for adjournments increased the respondent's costs. In addition, the grounds of appeal were unsubstantiated and consisted largely of bare allegations of alleged but unproven errors of law and alleged fact. In the circumstances, no compelling reason has been advanced to depart from the general rule on costs. Relatedly, none of the parties argued hardship and inability to pay litigation costs.

VII. Disposal

[225] Drawing on the above, I rule and order that:

1. The appellant's notice of appeal be and is hereby struck out.
2. This court's oral order issued on 11 March 2021 staying the execution of Magistrate Morrison-Novelo's 13 November 2020 decision is lifted and set aside.

3. The order issued by Magistrate Morrison-Novelo on 13 November 2020 ordering the return to the United States of America of the three minor children C, G and L stands, subject to the proviso that the children shall be returned to the United States of America on or before 15 December 2024.

4. If the children's mother is unable or unwilling to travel with the children to the United States on or before 15 December 2024, the respondent is granted leave to arrange for the children's travel to the United States with effect from 15 December 2024.

5. This Order shall serve as authority for purposes of the three children's travel to the United States of America.

6. The appellant shall bear costs of suit, which if not agreed shall be assessed.

HHJ Tawanda Hondora
Judge
High Court