JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 81/2003

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

Re: A Peremptory Return Order

Georgia Gibson-Henlin and Kerry Ann Rowe instructed by Nunes Scholefield DeLeon and Co. for the Appellant mother

Ransford Braham and Susan Risden-Foster instructed by Livingston Alexander and Levy for the Respondent father.

November 3, 4, 5. 6, 7, 12, 2003 and July 29, 2005

DOWNER, J.A.

Introduction

This is an appeal by the mother, D. from a Peremptory Return Order made by Mangatal J. (Ag.) which ordered the return of the child A, to K, her father, in Barbados. It is useful to set out the Order which appears at pages 172-173 of the Record:

"IT IS HEREBY ORDERED that:

1. A is to be forthwith returned to Barbados in the care and control of her father. Counsel for both parties are to agree on a suitable place for the handing over of A right after these proceedings.

2. A's passport is to be handed over to the Registrar of the Supreme Court by 9.30 a.m.

on Wednesday, October 8, 2003, for collection by K's Attorneys, if not sooner handed over to the Attorneys for K.

3. Liberty to apply.

4. Permission to appeal granted.

5. Defendant's application for stay of order refused."

Then there follows the conditions which are stated thus:

"This Order is made subject to K giving this Court through his Attorneys-at-law the following undertakings:

a) Custody proceedings in relation to A will be filed in Barbados by 4:00 p.m. on Thursday, October 16, 2003.

b) To use his best endeavours to have the case set down for hearing during periods when D will be on mid-term or holiday break from Norman Manley Law School.

c) K undertakes through his Attorneys-at-Law that he will return A to this jurisdiction if called on by this Honourable Court so to do."

K invoked the jurisdiction of the Supreme Court in an Amended Fixed Date Claim Form which reads at page 37 of the Record:

"1. That the Claimant K be granted sole custody, care and control of A, a girl born on the 2nd day of January 1994 with reasonable access to the Defendant on such terms as this Honourable Court considers in the best interest of the child.

2. That the Claimant, K be given permission to take the child, A out of the

return home to reside with the Claimant at 23 Lower Estate Heights, St. Michael, Barbados subject to the usual undertaking that the Claimant will return the said child to this jurisdiction if called on by this Honourable Court so to do.

3. Further and/or in the alternative that the Court in the exercise of its summary and/or interlocutory jurisdiction do order and direct that the child, A be forthwith returned to Barbados in the care and control of her father.

4. Any other interim or other orders necessary or expedient in the best interests of the child."

The facts

The Record of this case is over two hundred and seventy three pages long. The judgment covers one hundred pages and the remaining pages consist of the lengthy affidavits and submissions filed by Counsel on both sides. There is a partial duplication of D's affidavit at page 213 of the Record. Included also in the Record are two expert opinions.

The learned judge rightly refused to grant the adjournments sought by the appellant to produce further affidavits in these summary proceedings. The issue of adjournment was raised in **Re M (Abduction: Peremptory Return Order),** [1996] 1 FLR 478 a decision of the Court of Appeal. Here is how Waite L.J. treated it at page 479:

> "The father was extremely distressed by this development. He obtained compassionate leave from his work and came to this country to seek a reconciliation, which the mother was not prepared to grant. He issued an application within the family proceedings for what has come to be called a peremptory return order; that is to say an order made

without investigating in depth the general merits of the parents' dispute over the future care of the child, but after making sufficient inquiries to establish that they have been wrongfully removed from the jurisdiction of the country of their habitual residence and should be returned there so that the dispute can be determined in the courts of that country.

The rationale for such orders was explained by this court in L5L5 **Re F (A Minor) (Abduction: Jurisdiction)** [1991] Fam 25, [1991] 1 FLR 1 and L6L6 **Re M (Abduction: Non-Convention Country)** [1995] 1 FLR 89. It involves applying, by analogy, to non-Convention cases the underlying philosophy of the Hague Convention on the Civil Aspects of international Child Abduction 1980 that it is in general in the best interests of all children to have their lives subjected to the minimum of upset after parental breakdown, by ensuring that disputes as to their future should be disposed of in the courts of their country of habitual residence and also by dealing at the same time, peremptorily, with attempts by one parent to abduct the children to a country which may be supposed to offer a better chance of securing the outcome preferred by that parent. The judge regarded the present case as being within those principles and made the return order accordingly.

It should be noted that the order was not, however, made without safeguards. Undertakings were obtained from the father to pay the fares for the return of the mother and children; to provide a separate home for the mother and children in Dubai where he would agree to the children remaining in her care subject to his rights of frequent contact; to maintain her and them; to provide funds for her independent legal representation in proceedings in Dubai regarding the children's future; and to register all those undertakings at the Foreign Office in London and the British Embassy in the United Arab Emirates. The undertaking to maintain and provide a home for her was limited in duration until such time as the financial affairs of the parties should be agreed or adjudicated upon by the court in Dubai."

An adjournment was sought to adduce further affidavit evidence on behalf of the wife. The adjournment was refused on the ground that the issues sought to be raised, ought properly to have been adduced in Dubai and on the principles of international comity. Waite's L.J. definition in these circumstances will be stated later in this judgment.

In the present case the parties declined to give any oral evidence. They also refused the learned judge's invitation to undertake any cross-examination. The learned judge also examined the infant. All this demonstrated the commendable thoroughness with which the issues were inquired into in the Court below. There was no proper basis for granting an adjournment.

Despite the voluminous nature of the affidavit evidence, and the unresolved conflicts, the main facts are straightforward in relation to the issue of a summary return.

It is easier on review to be more economical than the learned judge below. K and D were born and lived in Montserrat. K is 42 years old while D is 37. A is 9 years old. K, who is a qualified lawyer, left Montserrat and took up a position as counsel with the Caribbean Development Bank in Barbados. Be it noted that when both parties lived in Montserrat K had a visiting relationship with D. A was nearly always with her mother during that period. As a result of the volcanic eruption in Montserrat, the Chief Medical Officer advised that A should reside outside the Island. Her mother was offered relocation in the 'home of the common law', Montserrat being a British dependent territory. D

postponed taking up that option and went to Barbados in 1998 to live with K at his invitation. The relationship appears to have been stormy and eventually broke down in 1999. K then married another lady.

After the breakup of the relationship between K and D, D returned to Montserrat and subsequently enrolled at the Faculty of Law in Barbados. At the completion of her studies in May 2003 she decided to go home and thereafter she would go to England to visit a relative who was ill. During the period of D's studies, A lived with her father sometimes and with her mother at other times. Custody was therefore shared between mother and father. D lived in two homes and it seems dual residence will be the clue to solving the vital issue of whether the learned judge exercised her discretion correctly in ordering the return of A to Barbados.

While studying in Barbados D returned to Montserrat during her vacation from the Law Faculty at Cave Hill. She worked with the Government of Montserrat. When she successfully completed her studies for the Bachelor's degree in Law, in May of this year, she returned to her home. There was some reluctance on the part of K to send A to her mother D but eventually this was done.

What of A during her sojourn in Barbados? She did well in her studies at Primary school and excelled in sports, particularly swimming. Having regard to her father's position, she led a comfortable middle class existence when she was with him. K's wife was also studying for her LLB degree at Cave Hill, and

she was a year ahead of D. There was some complaint by D with regard to how A was treated in terms of her lunch and the care of her hair. Nonetheless, the evidence suggests that on the whole A was well treated by both parents.

D went to England with A and thereafter came to Jamaica for D to enroll at the Norman Manley Law School. In this endeavour she is supported by the Montserrat Government and she plans to return there to be employed as a public servant. She has also made arrangements to purchase a two bedroom apartment which is now being built.

A now attends the Mona Primary School which has a good reputation. It is near to the Norman Manley Law School and she is accompanied by her mother to and from school. She continues her swimming and from all accounts she is doing well at school.

I must quote in full paragraph 34 from K's affidavit to show the circumstances in which A went to England with her mother and came to Jamaica. It reads thus at page 51 of the Record:

> "34 In late July 2003 the Respondent called me from Montserrat and said that a relative of hers was sick in England and that she wanted A to go to England to see him. I asked for an undertaking that A would return for school. She refused to give the undertaking but she later spoke to me in terms which suggested that A would return. She also spoke to A and promised her that she would return on the 25th of August. I therefore felt encouraged and in good faith I took A to Montserrat to enable her to accompany the Respondent to England. A left Barbados with the expectation that I would be returning to Montserrat for her on or before

> August 25th to bring her back to Barbados in time for school on September 8, 2003."

It will be demonstrated that having regard to A's status D was within her legal rights to take A to Jamaica without K's consent.

Life at home in Jamaica also seems to be comfortable. The mother lives in a one bedroom apartment and she has established friendly and helpful relations with Montserratians who live in Jamaica. Furthermore, some of them live in the Mona area. Support from these friends and Jamaicans whom she will meet seems highly probable. Life for the two year duration of the course seems settled and assured. A's welfare will be well attended to it seems. Barbados is abandoned. She now has two residences Montserrat and Jamaica. It is against this background that the learned judge's discretion to order the return of A to Barbados must be examined.

How judicial discretion is reviewed on Appeal in cases concerned with the welfare of the child

To illustrate the difficulty this Court faces we will cite the following passage from **G. v. G.** [1985] 2 All E.R. 225 at 228 the speech of Lord Fraser. It reads thus:

> "The limited role of the Court of Appeal in such cases was explained by Cumming-Bruce LJ in **Clarke-Hunt v. Newcombe** (1982) 4 FLR 482 at 488, where he said:
>
> > 'There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous,

> having regard to the long-term interests of the children, and so he decided the matter. Whether I would have decided it the same way if I had been in the position of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation. I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer? I emphasise the word "plainly". In spite of the efforts of [counsel] the answer to that question clearly must be that the judge has not been shown plainly to have got it wrong.'

That passage, with which I respectfully agree, seems to me exactly in line with the conclusion of Sir John Arnold P in the present case, which I have already quoted. The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion and they are cases to which the observations of Asquith LJ in **Bellenden (formerly Satterthwaite) v Satterthwaite** [1948] 1 All ER 343 at 345 apply. My attention was called to that case by my noble and learned friend Lord Bridge after the hearing in this appeal. That was an appeal against an order for maintenance payable to a divorced wife. Asquith LJ said:

> 'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is

> possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere'.
>
> I would only add that, in cases dealing with the custody of children, the desirability of putting an end to litigation, which applies to all classes of cases, is particularly strong because the longer legal proceedings last, the more are the children, whose welfare is at stake, likely to be disturbed by the uncertainty."

There is another useful passage from Lord Fraser's speech which is pertinent bearing in mind that the instant case was one where there was no cross-examination and no oral evidence.

The other passage runs thus at page 229:

> "Bridge LJ agreed with Browne LJ and I quote a passage from his speech where, after stating that his view was different from that of the judge, he went on to say ([1976] 1 All ER 417 at 439-440, [1976] Fam 238 at 266):
>
> 'Can this conclusion prevail or is there some rule of law which bars it? The learned judge was exercising a discretion. He saw and heard the witnesses. It is impossible to say that he considered any irrelevant matter, left out of account any relevant matter, erred in law, or applied any wrong principle. On the view I take, his error was in the balancing exercise. He either gave too little weight to the factors favourable, or too much weight to the factors adverse, to the father's claim that he should retain care and control of the child. The general principle is clear. If this were a discretion not depending on the judge having seen and heard the witnesses, an error in the balancing exercise, if I may adopt that phrase for short, would entitle the appellate court to reverse his decision [and Bridge LJ then cited authorities]. The reason for a practical limitation on the scope of that principle where the discretion exercise depends on seeing and hearing witnesses is obvious. The

> appellate court cannot interfere if it lacks the essential material on which the balancing exercise depended. But the importance of seeing and hearing witnesses may vary very greatly according to the circumstances of individual cases. If in any discretion case concerning children the appellate court can clearly detect that a conclusion, which is neither dependent on nor justified by the trial judge's advantage in seeing and hearing witnesses, is vitiated by an error in the balancing exercise, I should be very reluctant to hold that it is powerless to interfere."

Additionally, although the principle of the welfare of the child is paramount there are special features in the exercise of summary jurisdiction to return a child to another country which must be taken into account generally and in instances where an adjournment is sought. The principle which must be taken into account is international comity. It was expressed thus by Waite LJ in **Re M** (supra) at 481-482:

> "Underlying the whole purpose of the peremptory return order is a principle of international comity under which judges in England will assume that facilities for a fair hearing will be provided in the court of the other jurisdiction, and that due account will be taken by overseas judges of what has been said, ordered and undertaken to be done within the English jurisdiction. That is of course reciprocal. It is to be presumed that judges in other countries will make similar assumptions about the workings of our own judicial system.
>
> Very exceptional circumstances would be needed to show that in a particular case the English court would be justified in departing from that general principle."

May we reiterate that in the instant case the witnesses were not cross-examined on their affidavits. Also, there may be an error in balancing as well an error in law which will be addressed in due course.

The ordinary residence of D and A before they arrived in Jamaica.

A crucial finding by the learned judge below runs thus at page 271 of the Record:

> "14. I find as a fact that at the time of the removal "A" was ordinarily resident, or habitually resident in Barbados, and not Montserrat. I find as a fact that she is not habitually resident in Jamaica."

There is no magic in the phrase ordinarily resident. It is a question of fact. The instant case is complicated in that for the preceding three years K has been ordinarily resident in Barbados. He lives there and is employed as Counsel to the Caribbean Development Bank. He is in the process of purchasing a home there. It seems he also has a legal office in Montserrat which was formerly managed by D.

On the other hand D and A, were ordinarily resident in Barbados and Montserrat. Montserrat was then the principal home. They returned to Montserrat during vacations from the Faculty of Law and the Primary School which A attended. When D's studies were completed she returned to their principal home in Montserrat. D was over and done with Barbados. There is a feature which must be noted. D returned to Montserrat in May. A, accompanied by her father, returned in July. D and A went to the United Kingdom and then came to Jamaica where it is envisaged that they will be for

the next two years. The plan is to return to the principal residence in Montserrat. D has made arrangements to purchase a home in Montserrat.

It should be emphasised that there was no abduction in this case. It could be argued that K did not consent for A to return from London to Jamaica. Equally, D did not agree that A should return to Barbados to live with K, and continue her education there. An issue of custody therefore arises which must be settled by a Court. Which Court? Mangatal J (Ag) decided Barbados, so she granted a Peremptory Return Order. This Court has decided on Jamaica so we set aside that Order shortly after the hearing was completed, and we must now say why.

The first issue to be considered is that of ordinary residence. **In Re P. (G.E.) (an infant)** [1964]3 All E.R. 977, Lord Denning M.R. adverts to the issue at 981:

> "As an alternative to domicil, counsel for the mother invited us to apply the test of *ordinary residence,* and supported it by references to some case where the word "residence" was used and also to a case in the State of New York, **Descollenges v. Descollenges** (1959), 190 N.Y. Supplement, (2nd Series) 314; affg. 183 N.Y. Supplement (2nd Series) 943. I think that this is the right test. The fount of the jurisdiction of the Court of Chancery is the Crown which, as parens patriae takes under its protection every infant child who is ordinarily resident within the realm, whether he is a British subject or an alien. As LORD CAMPBELL said in **Johnstone v. Beattie** (1883), 10 Cl. & Fin. At pp. 119, 120:
>
> > 'I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not. The Lord

> Chancellor, representing the Sovereign as parens patriae, has a clear right to interpose the authority of the court for the protection of the person and property of **all infants** resident in England . . .'
>
> The Crown protects every child who has his home here and will protect him in respect of his home. It will not permit anyone to kidnap the child and spirit him out of the realm. Not even his father or mother can be allowed to do so without the consent of the other. The kidnapper cannot escape the jurisdiction of the court by such a stratagem. If, as in this case, it is the father who flies away with the child, the mother is not bound to follow him to a foreign clime. She can bring her proceedings against him in England. I know that it will be difficult for her to enforce any order which the court may make. But it is not impossible. The father may have assets here. Or he may return here for a visit. And if she has eventually to apply to the courts of the foreign country, they will surely respect an order made by the courts of the ordinary residence – just as we should – for the simple reason that it is his home and, as such, is entitled to special consideration."

Then turning to the issue which has a bearing on this case Lord Denning said at page 982:

> "I hold, therefore, that the Court of Chancery has jurisdiction to make an order for the custody, education and maintenance of an alien child who is ordinarily resident in this country, even though the child is for the time being absent from this country or taken out of it. But then we are faced with the question, what is the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of sixteen? So long as the father and mother are living together in the matrimonial home, the child's ordinary residence is the home – and it is still his ordinary residence, even whilst he is away at boarding school. It is his base, from whence he goes out and to which he returns.

> When father and mother are at variance and living *separate and apart* – and by arrangement the child makes his home with one of them – then that home is his ordinary residence, even though the other parent has access and the child goes to see him from time to time. I do not see that a child's ordinary residence so found, can be changed by kidnapping him and taking him from his home; even if one of his parents is the kidnapper. Quite generally, I do not think that a child's ordinary residence can be changed by one parent without the consent of the other. It will not be changed until the parent who is left at home, childless, acquiesces in the change, or delays so long in bringing proceedings that he or she must be taken to acquiesce. Six months' delay would, I should have thought, go far to show acquiescence. Even here months might in some circumstances. But not less."

In this passage Lord Denning implicitly recognized that there may be two ordinary residences, the boarding school and the home and that the principal residence is the home. "It is his base from which he goes out and to which he returns." If this is an apt analogy, as we think it is, then it is appropriate to say that Montserrat was the ordinary residence of D & A while they were in Barbados for three years for a specific purpose and Montserrat was the country where they were ordinarily resident. It was the base to which they always returned. It was their principal residence. They were also ordinarily resident in Barbados for a specific purpose for a duration of three years. That is the way their lives was ordered. Since Lord Denning contrasts 'ordinarily resident' with domicile, it is appropriate to give a short definition of domicile. It is the place where a man has his fixed and permanent home, and

to which, whenever he is absent, he has the intention of returning. Rule 94 Dicey and Morris Twelfth edition at page 815 states:

> "Ordinary residence as opposed to domicile has the advantage that a child can have an ordinary residence of his own, since the test is one of fact and not of law, while domicile depends on that of one of his parents".

Even more important is the case of **Shah v Barnet London Borough Council** [1983] 1 All ER 226. At pp 233-234 Lord Scarman said:

> "For the reasons which I shall endeavour to develop I answer the two questions as follows. The natural and ordinary meaning of the words has been authoritatively determined in this House in two tax cases reported in 1928 (see **Levene v IRC** [1928] AC 217, [1928] All ER Rep 746 and **IRC v Lysaght** [1928] AC 234, [1928] All ER Rep 575). To the second question my answer is No. The 1962 Act and the regulations are to be construed by giving to the words 'ordinarily resident in the United Kingdom' their natural and ordinary meaning.
>
> Ordinary residence is not a term of art in English law. But it embodies an idea of which Parliament has made increasing use in the statute law of the United Kingdom since the beginning of the nineteenth century. The words have been a feature of the Income Tax Acts since 1806. They were used in English family law when it was decided to give a wife the right to petition for divorce notwithstanding the foreign domicile of her husband: see the Matrimonial Causes Act 1950, s 18(1)(b). Ordinary or habitual residence has, in effect, now supplanted domicile as the test of jurisdiction in family law; and, as Eveleigh LJ in the Court of Appeal reminded us (see [1982] 1 All ER 698 at 705, [1982] QB 688 at 721-722), the concept is used in a number of twentieth century statutes, including (very significantly) the Immigration Act 1971."

Then on the same page Lord Scarman continues thus:

> "I do not attempt to give any definition of the word "resident". In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered."

Further support for the fact that it is possible to be ordinarily resident in two countries is to be found in the following passage at page 234:

> "I note that in the nineteenth century bankruptcy case **Re Norris, ex p Reynolds** (1888) 5 Morr 111 it was accepted that one person could be ordinarily resident in two countries at the same time. This is, I have no doubt, a significant feature of the words' ordinary meaning, for it is an important factor distinguishing ordinary residence from domicile."

It was on the basis of the above analysis that we found that D and A were ordinarily resident in Montserrat and Barbados but that Montserrat was the principal residence. They left Montserrat to come to Jamaica via London. They arrived in Jamaica August 23, 2003. The learned judge below erred in preferring Barbados to Montserrat as the principal residence of A and erred in ordering her return to Barbados. In so finding we have taken into account that D and A went in the first instance to Barbados to live with K who was then unmarried. The experiment did not work. The relationship broke down in less than a year and D and A returned to Montserrat. A went to Barbados for the

summer holidays and in September 2000, D went there also to study for a degree in law.

During the three year period when D was studying for her law degree custody of A was shared between D and K. The week-ends were always with D and during other periods A was shared with D and K, although it seems a greater time was spent with K, apart from when D returned with A to Montserrat so that she could work during University vacations.

We do not feel the letter dated May 15, 2001 from D's solicitor seeking maintenance is of any great moment. It is important to set out this letter in full since the Respondent father set a great store on it. The Appellant sought an adjournment to adduce further affidavit evidence on it. The learned judge rightly refused the adjournment. It reads at page 123 of the Record:

" **May 15, 2001**

REMINDER

Mr. K.
#23 Lower Estate Heights
SAINT GEORGE

Dear Sir.

Re: Maintenance-Our client D

Ms. D has instructed us to write this letter to you to discuss maintenance for herself and your child.

Our client hails from the island of Monserrat where you developed a Union Other than Marriage and from that Union a child was born on the 2nd day of January 1994.

You relocated to Barbados in the year 1997 and was reunited with our client and your child in January 1998 and lived and cohabited with our client, firstly at Grazettes in the parish of Saint Michael and secondly at #23 Lower Estate Heights in the parish of Saint George.

We are in no doubt that under the Laws of Barbados the union still exists although you have since got married to someone else (refer to the case of **Hutson & Poleon** 1982).

Our client is at present a student at the Faculty of Law at the University of the West Indies having been invited by you to settle in Barbados.

Yours faithfully
Kissoon & Hanoman

Latchman P. Kissoon
Barrister/Attorney-at-Law"

On this aspect of the case it is necessary to emphasise that the findings of the learned judge was that A was ordinarily resident in Barbados. Here are the relevant passages from her judgment at page 211 of the Record:

> "It also seems to me to be a matter of common sense that if I am to determine whether there has been a wrongful removal of "A" from Barbados, then I must by the law of Barbados see whether it was wrongful."

Here the learned judge seems to have ignored the fact that K took A to Montserrat and handed her over to D. It was no secret that D planned to go to Jamaica via London. K was opposed to taking A to Jamaica. It will be determined later whether he had any right to express any more than his opposition.

Then at page 212 of the Record the learned judge said:

"88. Reasoning by analogy, a determination of whether A was wrongfully removed is a determination under the law where the wrong was committed i.e. in Barbados."

In her summary at page 271 she stated:

"14. I find as a fact that at the time of the removal A was ordinarily resident, or habitually resident in Barbados, and not Montserrat. I find as a fact that she is not habitually resident in Jamaica.

15. I find as a fact that there is still volcanic activity taking place in Montserrat and the question of A's return there in the medium-to-long term future is uncertain, both for reasons of safety and for health reasons based on the ashy conditions. I bear in mind that "A" is a skilled athlete, with great potential, and the risk of exposure to these conditions may be even more detrimental.

16. I find as a fact that K did not agree to, or acquiesce in, the removal of "A" from Barbados for onward transmission to Jamaica. K agreed that "D" could take A to the United Kingdom, to be returned to Montserrat in August for K to collect her and take her back to Barbados in time for school in September 2003.

17. It is in the best interests of A that questions about A's future be determined by the courts in the land of her habitual residence, Barbados.

18. There were no ties to Jamaica, prior to "D" coming here in September 2003, and there is no evidence that A would be here for longer than 2 years. There is uncertainty in relation to a future for A in Montserrat at the end of the 2 years. Barbados in the case of both parties has a higher degree of probability than Jamaica of being the country where A will spend her medium to long term future. The

> Court should exercise its jurisdiction to send A back to Barbados as it is in her best interests for the court there to decide the matter. The Court should merely ensure a speedy and peaceful return to Barbados."

It was the failure, as indicated in the above passages, to recognize that Montserrat was the principal residence of D and A, why the order was made for a return of A to Barbados for the Courts there to decide the issue of custody.

Did the status of A permit D to take her to Jamaica from Montserrat without K's permission?

It is now necessary to ascertain whether K's consent was necessary for D to take A to Jamaica. Being in Jamaica, A is now subject to the jurisdiction of the Supreme Court. To determine this issue it is obligatory to make a finding as to the status of A. This must involve an examination of the Status of Children Act. Section 3 states:

> "All children are of equal status.
>
> 3.-(1) Subject to subsection (4) and to the provisions of sections 4 and 7, for all the purposes of the law of Jamaica the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.
>
> (2) The rule of construction whereby in any instrument words of relationship signify only legitimate relationship in the absence of a contrary expression of intention is hereby abolished."

Then section 3(3) reads:

> "(3) Subject to subsection (4), this section shall apply in respect of every person, whether born before or after the commencement of this Act, and whether born in Jamaica or not, and whether or not his father or mother has ever been domiciled in Jamaica."

Of importance to the issues in this case is section 3(4)(a) which reads:

> "(4) Nothing in this section shall affect or limit in any way any rule of law relating to –
> (a) the domicile of any person."

It is not in dispute that both K and D were born in Montserrat and that that country was their domicile at birth. A's domicile at birth would also be Montserrat. She takes the domicile of her mother, as in law a child born out of wedlock takes the domicile of the mother. We are in the area of Private International Law. The importance of this aspect of the case, is that it is necessary to make a finding as to whether it was wrongful for D to take A to Jamaica instead of returning her to Montserrat. The learned judge below cited Dicey and Morris on the **Conflict of Laws** Twelfth Edition at page 201 of the Record thus:

> "Rule 9(1) Every person receives at birth a domicile of origin:
> (a) A legitimate child born during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at the time of his birth;
>
> (b) A legitimate child not born during the lifetime of his father, or an illegitimate child, has his domicile of origin in the country in which his mother was domiciled at the time of his birth."

The birth certificate of A exhibited at page 120 of the Record classifies her as illegitimate so her mother prima facie has legal custody. The law on status and its relation to domicile was examined by Romer J in **Re Bischoffsheim , Cassell v. Grant and Others** [1947] 2 All E.R. 831 at 832:

> "The Court of Appeal held by a majority (LUSH, L.J., dissenting) that she was so entitled. COTTON,, L.J., expressed his view as to the status of legitimacy, and its acquisition, as follows (17 Ch.D. 291, 292):
>
> It was urged . . . that the law of England recognizes as legitimate those children only who are born in wedlock. This is correct as regards the children or persons who at the time of the children's birth are domiciled in England. But the question as to legitimacy is one of status, and in my opinion by the law of England questions of status depend on the law of the domicil. For this proposition there is authority. It is stated by STORY, J., in his book on the CONFLICT OF LAWS, para. 93, that "foreign jurists generally, though not universally, maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicil or origin," and in para. 93e, he states that "the same general doctrine is avowedly adopted by the courts of England." And he refers to the opinion expressed by LORD STOWELL [2 Hag. Con. 58] in **Dalrymple v. Dalrymple** (1811), 2 Hag. Con.. 54; on appeal (1814), 2 HG. Con. 137, n; 22 Digest 625, 6896., that by the law of England "the status or condition of a claimant must be tried by reference to the law of the country where that status originated." Moreover, in the case of **Doe v. Vardill**, 6 Bing. N.C. 385; West, 500; 1 Scott, N.R. 828; previous proceedings sub nom. Doe d. **Birthwhistle v. Vardill** (1835), 2 Cl. & Fin. 571; 18 Digest 6, 24, when it first came before the House of Lords in the year 1830, ALEXANDER C.B., when giving the unanimous opinion of the judges who were consulted, refers with approval to the opinion so expressed by LORD STOWELL as applicable to a question of legitimacy. In **Fenton v. Livingstone**,

(1859), 3 Macq. 497; 33 L.T.O.,S. 335; 23 J.P. 579; 3 Digest 374, 143 LORD WENSLEYDALE . . . expressed himself thus [3 Macq. 548] : "The laws of the state affecting the personal status of the subjects travel with them wherever they go, and attach to them in whatever country they are resident."

COTTON L.J., then addressed himself as follows (17 Ch.D. 292, 293) to the question of recognition by our courts of the status of legitimacy conferred by the law of a foreign state:

If as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicil of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognizes and acts on the status thus declared by the law of the domicil . . . in my opinion, in deciding questions of legitimacy, that is of status, the law of England looks to the law of the actual, not of an hypothetical, domicil. I am of opinion on principle, that since by the law of Holland, where the parents of Hannah Piereet were in fact domiciled at the time of her birth, she is legitimate, the law of England, for the purpose of succession to personal estate, ought to hold her to be legitimate."

Continuing his judgment Romer J on page 833 said:

"JAMES, L.J. [in **Re Goodman's Trust** (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 3 Digest 372, 135, propounded the question (17 Ch.D. 296): 'What is the rule which the English law adopts and applies to a non-English child?' and then proceeded to answer it as follows (***ibid.,*** 296, 297):

This is a question of international comity and international law. According to that law as

> recognized, and that comity as practiced, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin- the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized world. On principle, it appears to me that every consideration goes strongly to shew, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations..."

It must be emphasized that K took A to Montserrat well knowing that D was going to London to visit relations and of her intention to go to Jamaica to complete her legal studies. He must have been also aware that she intended to take A to Jamaica with her.

There are two expert opinions one from Ms. Tracy Robinson a Lecturer in law at Cave Hill which was sought by the Appellant. The other sought by the Respondent was from Kim Small an Attorney-at-Law in Barbados. They are contrasting opinions. Ms. Small confined her opinion to the law of Barbados while Ms. Robinson's opinion dealt with the law of Montserrat and Barbados. The salient fact for the purpose of this case in Ms. Robinson's opinion is that there is as yet no status of children legislation in Montserrat. Furthermore it is trite law that the Privy Council is the final Court of Appeal for Montserrat. Decisions of the House of Lords on English common law will be followed by the

Privy Council and so are binding on the Courts in Montserrat: see **Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.** [1986] AC 80. It is in this context that **Barnado v McHugh** [1891] A.C. 388 is relevant.

In **Clarke v Carey** [1971] 12 J.L.R. 637 Smith J.A. put the position thus at pp 640-641:

> "The authorities establish that the mother of an illegitimate child has, at least a *prima facie* right to its custody. LINDLEY, L.J., said so in the Court of Appeal in **R.v. Barnado,** [1891] 1 Q.B 194. He said at p.211):
>
> 'The child is illegitimate. The consequence is that he has no guardian. **Re Ullee** (1885), 54 L.T. 286; 2 T.L.R.8. In other words, there is no person who has all the rights of a guardian over either him or his property. But, although this is true, it is now settled, after some fluctuation of opinion, that the mother of an illegitimate child has a *prima facie* right to the custody of the child up to the age of fourteen in preference either to the reputed father or to any other person: **R.v. Nash** (1852), 2 Den. 493; 21 L.J.M.C. 147; 16 J.P. 376, 16 Jur. 553, C.C.R This right is based on the relationship which exists between a mother and her child, and on the absence of all superior right on the part of the reputed father or of any one else.'
>
> When this case went to the House of Lords (**sub nom. Barnado v.McHugh** [1891] A.C. 388; [1891-1894] All E.R.Rep. 825; 62 L.J.Q.B. 721; 65 L.T. 423; 55 J.P. 628, 40 W.R. 97; 7 T.L.R. 726 LORD HALSBURY, L.C. did not dissent from LINDLEY, L.J.'s description of the right (see [1891] A.C. at pp. 395, 396). LORD HERSCHELL (ibid., at p. 398) affirmed that the mother had a right to the custody of her illegitimate child but said that this right arose from the obligation to maintain the child placed on her by the legislation embodied in the Poor Law Act (4 and 5 Will. 44, c. 76, s. 71). In **Humphrys v. Polak and wife** [1901] 2 K.B. 385, 70 L.J.K.B. 752; 85 L.T. 103;

49 H. W.R. 612, VAUGHAN WILLIAMS, L.J., expressed the view that there was at common law a duty on the part of the mother towards her child and that the series of legislative enactments on the subject, such as the Poor Law Act (supra), did not create that duty but merely recognized and defined it [1901] 2 K.B.at p. 389). In the same case STIRLING, L.J., said at pp. 389, 390:

> 'It is I think clear, from **Barnado v. McHugh** [1891] A.C. 388; [1891-1894] All E.R. Rep. 825; 62 L.J.QB 721; 65 L.T. 423; 55 J.P. 628; 40 W.R. 97; 7 T.L.R. 726, that the mother of an illegitimate child has by law imposed upon her obligations in respect of the child, and by reason of such obligations is vested by law with corresponding rights, one of which is the right *prima facie* to the custody and possession of the person of the child.'
>
> In **Re G.**(an infant), [1956] 2 All E.R. 876; 100 Sol. Jo.529, LORD EVERSHED, M.R., said that the mother's obligations existed at common law. He said ([1956] 2 All E.R. at p. 877): "As the child was illegitimate, according to the common law of the land, the mother was, and is, the person responsible for the upbringing of the child." Whether the right in the United Kingdom arose from obligations imposed at common law or by statute there can be no doubt that the right exists. The position is exactly the same in Jamaica. The statutory obligation upon a mother to maintain her illegitimate child was first imposed by s. 1 of Law 31 of 1869, "A law to provide for the Maintenance by Parents and step-Parents of children", and the provision is still in force in s. 3 of the Maintenance Law, Cap. 232."

Fox J.A. stated the position in **Finlayson v. Matthews** (1971) 12 J.L.R. 401 at 407:

> "At common law, an unmarried mother is *prima facie* entitled to the custody of her illegitimate child. This right may be enforced by *habeas corpus* proceedings.

> **Barnardo v. McHugh** (1871), A.C.. 388; 61 L.J.Q.B. 721; 65 L.T.423; 55 J.P. 628. I can see no objection to construing the word "mother" in s. 7 (1) of the law to include an unmarried mother. In this way she would be given an additional remedy against infringement of her common law right of custody. She could maintain the action against all persons including the person alleged to be the father, and would be entitled to such redress as was appropriate in the circumstances."

At page 410 Smith, J. A. stated the position thus:

> "IN **Re M** (an infant), [1955] 2 All E.R.911; [1955] 2 Q.B. 479; 119 J.P. 535; DENNING, L.J. said [1955] 2 Q.B. at p. 488):
>
> 'the law of England has from time immemorial looked upon a bastard as the child of nobody, that is to say, as the child of no known body *except its mother*. The father is too uncertain a figure for the law to take any cognizance of him except that it will make him pay for the child's maintenance if it can find out who he is. The law recognises no rights in him in regard to the child, whereas the mother has several rights. . . . The truth is that the law does not recognize the natural father at all'."

On this analysis D did not require the consent of K to take A from London to Jamaica.

Conclusion

The foregoing analyses are our reasons for differing from Mangatal J. (Ag.) in the Court below. That learned judge decided to order the return of A to Barbados. Regrettably she erred in the balancing exercise or she erred in law as regards ordinary residence. Our decision is without prejudice to K's right to continue proceedings before the Supreme Court for custody if he so

desires. In those proceedings the Children (Guardianship and Custody) Act will be applicable. May we add that we are indebted to counsel on both sides for their excellent research and cogent submissions.

This Court is aware of the need for promptitude in delivering its decision and reasons in this case. So when judgment was delivered we recommended that if custody proceedings are continued they be put on the fast track. For ease of reference we reiterate the order made by the Court.

ORDER

Appeal allowed.

Order of the Court below set aside. Costs of Appeal to the Appellant to be agreed or taxed.

Order for speedy trial of the custody proceedings pending in the Supreme Court.

HARRISON, J.A.

I agree with the reasons advanced.

WALKER, J.A.

I agree.

DOWNER, JA.

ORDER:

1. Appeal allowed.
2. Order of the Court below set aside.

3. Costs of the Appeal to the Appellant to be agreed or taxed.

4. Order for speedy trial of the custody proceedings pending in the Supreme Court.