CITATION: Cannock v. Fleguel, 2008 ONCA 758
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COURT OF APPEAL FOR ONTARIO

Juriansz, Rouleau and Watt JJ.A.

BETWEEN:

Craig Cannock

Applicant (Respondent on Appeal)

and

Jessica Fleguel

Respondent (Appellant on Appeal)

Martha McCarthy and Will Hutcheson for the appellant

Allan T. Hirsch for the respondent

Heard: October 3, 2008

On appeal from the judgment of Justice R.M. Thompson of the Superior Court of Justice dated June 27, 2008.

Juriansz J.A.:

[1] The appellant (the mother) appeals from the decision granting the application of the respondent (the father) for an order that their son Daine Jordan Alfred Fleguel-Cannock (the child) be returned to Australia pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* (the Convention). The appeal was heard on an expedited basis. After hearing argument, we dismissed the appeal for reasons to follow.

The essential facts

[2] The mother and father are the natural parents of the child born June 5, 2006 in Ontario. The mother, a Canadian, who had been living with the father in Australia when

the child was conceived, returned to Ontario while pregnant with the child. The father was unable to come to Canada at the time because he had a criminal record. He had pleaded guilty to assault with a weapon in Canada in July, 2005, and been deported for the offence. The assault was on the boyfriend of a friend of the mother. The father had also been convicted of assault in Australia in 1998.

[3] When the child was approximately five weeks old, the mother returned to Australia and lived there with the father until they separated on October 29, 2007. She did so on about November 22, 2007 returning to Ontario with the child and his older sibling from a previous relationship. The father contacted the Central Authority[1] on or November 30, 2007 to start the process of securing the child's return.

[4] The application judge found that as of November 22, 2007 the child was a habitual resident of Australia within the meaning of the Hague Convention. He remarked that as of that date the child had lived in Australia for some 16 1/2 of his 18 months of life. The application judge found that the mother knew that the father intended to apply to the Federal Magistrates Court in Australia, for an order for joint custody of the child and for an order that the mother be restrained from removing the child from Australia and "took steps to covertly leave the jurisdiction."

[5] The mother opposed the father's application by relying on Article 13(b) of the Convention. Article 13(b) provides that a court may refuse to order the return of the child if there is a grave risk that the child would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.

[6] The application proceeded on affidavit evidence. The mother filed her answer and supporting affidavits on May 2, 2008, the father replied with his affidavit on May 7, 2008, and the mother was permitted to file a further affidavit in reply at the hearing.

[7] I will set out the application judge's summary of the mother's evidence later in these reasons. In brief, the mother alleged the father was a violent criminal, a drug addict and trafficker, who was incapable of parenting and who had abused her. It was her position that the child would be exposed to physical or psychological harm if he were returned to the father's care.

[8] The application judge concluded that the Article 13(b) standard was not met and ordered the child to be returned to Australia. However, he indicated to the parties that he was considering seeking the involvement of the Department of Human Services in Australia. In the end, he left it to the parties, either solely or jointly, to take whatever steps were appropriate and left it to counsel to arrange a hearing, if necessary, for the presentation of evidence and argument to determine the content of any undertakings to be entered into before the child's return.

[1] Article 6 of the Convention obligates Contracting States to designate Central Authorities to discharge the duties imposed by the Convention. These duties are outlined in Article 7 and have the overall objective of securing the prompt return of children.

Issues

[9] The trial judge's findings that the child was habitually resident in Australia and that he was wrongfully removed from his habitual residence were not contested by the appellant. The issues the mother did raise collapse into one: whether the trial judge erred by considering and determining the issue of the risk to the child under Article 13(b) without hearing *viva voce* evidence.

[10] This court, however, asked counsel to address whether the appeal should be stayed because it was premature. I first discuss this threshold issue.

Should the Appeal be Stayed because it is Premature?

[11] The question whether the appeal was premature arose because the application judge had not yet finally disposed of the application at the time this appeal was heard. Jurisdiction was not the concern; the decision under appeal is final. The trial judge has finally decided that the mother cannot rely on Article 13(b) to avert an order that the child be returned to Australia. Nevertheless, this court had two concerns about proceeding with the appeal.

[12] The first concern was the fragmentation and protraction of proceedings under the Convention. Should the mother lose the appeal, the application judge would proceed to determine any undertakings that would govern the child's return to Australia. The mother took the position that, should she lose this appeal, she would have another right to appeal the undertakings that the application judge imposed at the subsequent hearing. Multiple appeals to dispose of an application are not conducive to the summary and expeditious process contemplated by the Convention.

[13] The second concern of this court was that any undertakings that the application judge would impose at the subsequent hearing could be germane to the determination of the issues raised on this appeal. This court in *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226), relying on *Thomson v. Thomson*, [1994] 3 SCR 551, stated that Canadian courts can impose undertakings on parties to deal with the transition period between the time when a Canadian court makes a return order and the time at which the children are placed before the courts in the country of their habitual residence.

[14] Undertakings, by giving specific content to the order for return, are capable of defining the initial situation to which the child will return in the requesting State. Thus, leaving aside questions about the content, effectiveness and reliability of undertakings - matters to be addressed at the subsequent hearing - it seems clear that the undertakings imposed may well be relevant to the consideration of whether risk of harm to the child is of a sufficient degree for Article 13(b) to apply. In this case, the specifics of how, to where and to what situation in Australia the child is eventually returned may well affect the assessment of the degree of harm posed by the return itself.

[15] To conclude on this issue, it is worth observing that it was to the appellant's disadvantage to proceed with the appeal at this time. By proceeding with the appeal before the imposition of undertakings, it became necessary for the mother to persuade this court that the application judge erred irrespective of any undertakings the application judge may impose.

[16] Despite our view that there was good reason to stay the appeal until the application judge had completely determined the application, we did not do so. In the absence of prior guidance by this court, we considered that the appellant should be given some leeway. Future appellants who proceed with appeals in like situations should not expect the same latitude.

[17] Before turning to the question raised by the appellant, it would be useful to review the main provisions of the Convention, and Article 13(b) in particular.

The Hague Convention on the Civil Aspects of International Child Abduction

[18] Section 46 of the *Children's Law Reform Act*, R.S.O. 1990, Chapter C.12 implements the Hague Convention as the law of Ontario.

[19] Article 1 of the Convention states that its objects are:

> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

[20] Once a wrongful removal of a child from the Contracting State in which the child was habitually resident has been established, Article 12 of the Convention requires that "the return of the child forthwith" be ordered.

[21] The order is to be made expeditiously. Article 11 provides that "the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children." The Article goes on to give the applicant and the Central Authority the right to request a statement of the reasons for delay if a decision has not been reached within six weeks from the date of the commencement of the proceedings.

[22] Article 16 provides that the court in the State to which the child has been taken "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention". Thus, as LaForest J. put it in *Thomson*, "an application for return pursuant to the Convention pre-empts a local custody application". Or as this court explained at greater length in *Katsigiannis v. Kottick-Katsigiannis*, [2001] O.J. No. 1598 :

> [A] Hague Convention application does not engage the best interests of the child test - the test that is universally and consistently applied in custody and access cases. Hague Convention contracting states accept that the Courts of other contracting states will properly take the best interests of the children into account. See *Medhurst v. Markle* (1995), 26 O.R. (3d) 178 (Gen. Div.) and *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226 (Ont. C.A.). Thus, where there has been a wrongful removal or retention, and no affirmative defence is established within the meaning of the Hague Convention...the children must be returned to their habitual residence.

[23] The philosophy of the Hague Convention is that it is in the best interest of children that the courts of their habitual residence decide the merits of any custody issue. Adhering to this philosophy ultimately discourages child abduction, renders forum shopping ineffective, and provides children with the greatest possible stability in the instance of a family breakdown.

Article 13(b)

[24] The central objective of the Convention to promptly repatriate abducted children to their habitual residence is subject to some limited exceptions. Article 13(b) provides that the requested State is not bound to order the return of the child if "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." LaForest J., after reviewing decisions from several jurisdictions, said that:

> It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "<u>or otherwise</u> place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation... In *Re A. (A Minor) (Abduction), supra*, Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:
>
> > ... the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree ...

> that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.

[25] This statement is the standard applied in Canada.

The Role of Undertakings

[26] Finally, as touched on in the discussion of the prematurity issue, it is important to remember that the Hague Convention does not mandate the return of the child to the applicant parent. Rather, it mandates the return of the child to the Contracting State where the child was habitually resident.[2] Beaumont and McEleavy in their text, "The Hague Convention on International Child Abduction", emphasize the flexibility the Convention allows judges making an order of return to tailor the initial situation to which the child is returned. Citing the Australian case of *Murray v. Director, Family Services ACT* (1993) F.L.C. 92-416, they say:

> This flexibility in the drafting allows the child to come back and possibly remain with the abductor while the decision is reached on his future. This is of particular importance in the light of the current trend in abduction cases where the applicant, while having custody rights, might in fact have played a rather limited role in the actual care of the child. To take the child from the abductor would therefore be to create an entirely new custody situation which would not be in accordance with the reestablishment of the *status quo ante*."

[27] The Supreme Court of Canada has recognized the flexibility that the Convention accords courts in the requested State. LaForest J. in *Thomson* observed that the "courts have recognized that frequently an unqualified return order can be detrimental to the short-term interests of the child in that it wrenches the child from its *de facto* primary caregiver." He noted that the use of undertakings enables compliance with Article 12's requirement that child be returned forthwith while ameliorating the short-term harm to the child. He reviewed approvingly the British decision *Re L. (Child Abduction) (Psychological Harm)*, [1993] 2 F.L.R. 401 In that case the mother invoked Article 13(b) to resist the return of the child from Britain to the United States. The father's undertakings included paying the mother's airfare, paying interim support, and vacating the matrimonial home, allowing the mother to stay there with the child until the custody

[2] Article 12 of the Convention, itself, requires the "return of the child forthwith" and does not say more. However, read in the context of the Convention as a whole it is apparent what is contemplated is a return to the state. The preamble talks about children's "prompt return to the State of their habitual residence".

hearing in the U.S. LaForest J. observed at para. 82, that in light of the undertakings "the court was satisfied that the child's interest was safeguarded while the Convention was honoured." In *Thomson* one of the undertakings was that the father would not take physical custody of the child upon his return to Scotland until a court permitted him to do so.

[28] The Convention's flexibility in permitting the courts of the Returning State to require undertakings that define the initial situation to which the child is returned should be kept in mind when applying Article 13(b). Article 13(b) addresses the risk to the child of being returned to the Requesting State in accordance with the terms of the order for return made. Thus, in applying Article 13(b), it may not always be necessary to assess whether the risk to the child of being returned to the applicant parent meets its stringent test.

[29] Once the child has been returned as ordered, it is the courts in the requesting State that take charge of the best interests of the child. In *Finizio*, this court approved of the statement of Jennings J. in *Medhurst v. Markle* (1995), 17 R.F.L. (4th) 428 (Ont. Gen. Div.), at 432:

> It is to be presumed that the courts of another Contracting State are equipped to make, and will make, suitable arrangements for the child's welfare.

[30] MacPherson J.A., writing for the court in *Finizio*, adopted the observations of Lord Donaldson of Lymington M.R. in *C. v. C.* (Abduction: Rights of Custody), [1987] 1 W.L.R. 654 (C.A.), at 664:

> It will be the concern of the court of the State to which the child is to be returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e., the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country - Australia in this case - can resume their normal role in relation to the child.

[31] More recently, Lord Justice Wall in *Re W (a Child)*, [2005] 1 F.L.R 727 cautioned:

> it is always of the utmost importance to remember…that these are summary proceedings, and that the object of the proceedings, subject to the defences under Article 13, is to ensure that the child or children concerned are returned swiftly to the country of their habitual residence for their

> futures to be decided in that country where, of course, the relevant welfare investigation will take place.

[32] Thus, despite the flexibility the Convention allows the judge making an order for return, the role of a court in an Article 13(b) case remains a limited one. Article 13(b) does not supply the court with jurisdiction to conduct the type of inquiry appropriate in a custody dispute. The court must consider only whether there should be a departure from the general rule mandating summary return of the child because the stringent test of Article 13(b) has been met, and if not, what should be the initial situation to which the child is returned. Thereafter, the best interests of the child vis a vis his or her permanent custody arrangement, are left to the courts of the requesting State.

Viva Voce Evidence in Hague Convention Hearings

[33] The question of when a judge should hear oral evidence when deciding an application under the Hague Convention has not been the subject of extensive judicial discussion in Canada. Typical is the statement of Little J. at para. 25 of In *Mahler v. Mahler* (1999), 3 R.F.L. (5th) 428 that "The Hague Convention procedures are summary ones and except in the most unusual of circumstances are based on affidavit evidence."

[34] It is worth noting that in *Thomson*, the application judge was asked but refused to order a trial on the issue of harm. The Supreme Court of Canada noted this fact in its description of the proceedings below but said no more about it.

[35] In this court, in *Cornfeld v. Cornfeld*, [2001] O.J. No. 5773 (C.A.) the application judge refused to order a psychological assessment of the children requested by the mother to support the Article 13(b) exception. Charron J.A. in refusing to stay the order of return found that "the applications judge was justified in finding that the matter could, and should, be decided on the basis of the existing record."

[36] The jurisprudence of other jurisdictions is instructive.[3] Lord Justice Thorpe of the Court of Appeal (Civil Division) of England and Wales succinctly stated what I consider the proper approach in *Re W (a Child)*. At para. 23 he said:

> The experience and the instinct of the trial judge is always to protect the child and to pursue the welfare of the child. That instinct and experience sometimes is challenged by the international obligation to apply strict boundaries in the determination of an application for summary return. The authorities do restrain the judges from admitting oral evidence except in exceptional cases. The authorities do restrain the judges from making too ready judgments upon written statements that set out conflicting accounts of adult

[3] All decisions under the Hague Convention from all Contracting States are available in a searchable database at the website http://www.hcch.net/index_en.php maintained by the Child Abduction Section of the Hague Conference on Private International Law ..

> relationships. What the authorities do not do is to inhibit the judge from himself or herself requiring oral evidence in a case where the judge conceives that oral evidence might be determinative. The judge's conduct of the proceedings is not to be restricted by tactical or strategic decisions taken by the parties. However, to warrant oral exploration of written evidence, the judge must be satisfied that there is a realistic possibility that oral evidence will establish an Article 13(b) case that is only embryonic on the written material.

[37] I turn now to whether this was one of those rare exceptional cases that required oral evidence.

The Mother's Evidence

[38] The application judge in this case fairly summarized the mother's evidence as follows at para. 12 of his reasons:

> [The mother], in her material filed with this court, alleges that [the father] is dysfunctional as a parent and a disreputable citizen. She alleges that he is incapable of serving [the child's] best interests. It is her allegation that [the father] possesses no parenting skills, has no legal source of employment/income, is an active participant in the drug subculture and indeed is a producer and seller of illicit drugs. She further alleges that he has been physically, verbally and emotionally abusive towards her. She alleges that he is a violent criminal. It is her position that should [the child] be returned to the care of his father that [the child] will be exposed to physical or psychological harm and consequently this court should refuse to return [the child] to the jurisdiction of the Australian courts.

[39] As can be seen, the mother's evidence focuses on the merits of the custody dispute and does not address the risk to the child in being returned to the state of his habitual residence where the Australian courts would determine his best interests. Her position is stated clearly in her formal Answer to the Application: the child "would be placed in a situation of danger if returned to Applicant in Australia and placed in his care."

[40] The application judge properly recognized that this issue of the risk to the child from a return to the father was not before him. He noted that the test was whether the child "should be returned to the jurisdiction of the Australian courts" and the issue of the best interests of the child were not before him. He went on remark that the Australian courts may well award custody of the child to the mother, but he had no jurisdiction to

make that determination. In considering Article 13(b) he applied the test as stated in *Thomson* by LaForest J.

[41] Here, as the application judge noted, there was no allegation that the father had ever physically harmed the child. The issue is psychological harm. Certainly the risk of physical assaults on or psychological abuse of a mother is capable of establishing the risk of psychological harm to a child. The mother, however, did not allege that she left or could not return to Australia because of fear of abuse and did not express any doubts about the ability of Australian institutions to protect her. The application judge specifically observed that her reasons for not wishing to return to Australia related to her other children. He noted that this made the situation different from the circumstances in *Mahler* where the mother's reasons for not wishing to return related to the alleged risk that would be posed to the child. Even then, in *Mahler*, the child was ordered returned, albeit in the physical custody of the mother if she chose to accompany the child.

[42] The application judge also observed that the father's alleged lack of parenting skills did not seem to be of great concern to the mother in Australia. This inference was open to him, given the mother's evidence that after leaving the father on October 29, 2007 following the one physical assault she alleged, she continued to allow the father to care for the child, though she adds that he did not fare well and would telephone her to come and pick the child up.

[43] It is evident that the application judge considered that the evidence in this case, on the whole, is similar to that in *Finizio*, where this court set aside the application judge's finding that Article 13(b) applied, and is not comparable to that in *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (Ont. C.A), where this court allowed the mother's Article 13(b) application. We were not persuaded that the trial judge's view of the evidence was incorrect, let alone that there was a basis for interfering with it. He concluded that the evidence did not establish the risk of physical or psychological harm of a degree that amounted to an intolerable risk under Article 13(b).

[44] That said, the application judge indicated that he had some concerns and signalled that he was considering the return of the child to the Child Protection and Family Services Branch of the Department of Human Services in the State of Victoria, Australia. It seems to me he was correct to take into account possible harm to the child even if it fell short of the Article 13(b) standard. An important aspect of his task was to fashion the appropriate undertakings to address the logistics of the return as well as his concerns as to the child's welfare.

[45] I noted above Lord Justice Thorpe's observation in *Re W (a Child)*, that "[t]he experience and the instinct of the trial judge is always to protect the child and to pursue the welfare of the child." This may lead to perceiving a certain tension between an order for return and the best interests of the child in the short term. Lord Justice Thorpe later added:

> [I]t seems to me that those misgivings have no validity other than to return to the debate issues that have been aired extensively during the course of the negotiation of this Convention and in the ensuing decade of its international use. These issues have been debated repeatedly at Special Commissions convened by the Permanent Bureau and there can be no doubt at all that the conclusion of the international community is that only the robust construction and application of the Convention will serve to militate against the risks and dangers of the wrongful removal and retention of children.

[46] LaForest J. in *Thomson* reviewed in some detail the negotiation and adoption of the Convention. He concluded that "...the legislature's adoption of the Convention is indicative of the legislature's judgment that international child custody disputes are best resolved by returning the child to its habitual place of residence."

[47] The application judge fully appreciated the philosophy and objectives of the Hague Convention and the standard that had to be met to establish an Article 13(b) defence. His approach paid proper regard to the obligation on the abducting parent to seek the protection of the courts in the jurisdiction of habitual residence and to obtain the permission of those courts to remove the child from his or her country of habitual residence. He also correctly recognized that in this case, the Australian courts are the most appropriate venue for the determination of the merits of the custody dispute.

[48] Before concluding, it must be noted that the mother in this case did not request the application judge to hear oral evidence. Represented by counsel, the mother was content to proceed on the basis of the written material filed. She did not seek to cross-examine on the father's affidavits and at the hearing sought and was granted permission to file a further affidavit in reply.

[49] To conclude, the argument that the determination of the mother's Article 13(b) defence required oral evidence is simply not tenable. Certainly, there are many factual matters in dispute and resolution of those facts may be relevant to the custody dispute of the parties. However, it cannot be said there was a realistic possibility that oral evidence would establish an Article 13(b) defence that was only embryonic on the written material.

[50] I close with the additional caution that the bifurcation of the application proceedings as in this case in this case is not to be encouraged. It would be preferable that application judges determine all issues and the undertakings required at a single hearing.

[51] The appeal is dismissed and the matter remitted to the application judge for the determination of the undertakings to be entered into prior to the child's return to Australia.

Costs

[52] We were not persuaded the father was entitled to substantial indemnity costs. The father will have his costs fixed in the amount of $8,000.00 inclusive of disbursements and GST.

"R.G. Juriansz J.A."
"I agree Paul Rouleau J.A."
"I agree David Watt J.A."

RELEASED: November 12, 2008