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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kubera v. Kubera,*
2010 BCCA 118

Date: 20100309

Docket: CA036463

Between:

Andrzej Henryk Kubera

Appellant

(Petitioner)

And

Sylwia Anna Kubera

Respondent

(Respondent)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel

On appeal from the Supreme Court of British Columbia, August 14, 2008 (*Kubera v. Kubera*, 2008 BCSC 1340, Vancouver Registry, Docket E061433)

Counsel for the Appellant: W.R. Storey

Counsel for the Respondent: D.J. O'Donnell

Place and Date of Hearing: Vancouver, British Columbia

November 5, 2009

Place and Date of Judgment: Vancouver, British Columbia

March 9, 2010

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The issue on this appeal is the application of the "now settled" exception to the defining purpose and obligation under the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 U.N.T.S. 22514, Can. T.S. 1983 No. 35 (entered into force December 1, 1983) (the "*Convention*"): to protect children from the harmful effects of child abduction by promptly returning a child who has been wrongfully removed or retained to the country of habitual residence.

[2] The appellant, Andrzej Kubera, appeals from an order finding that his daughter, J.K., who was wrongfully retained in Canada by her mother, Sylwia Kubera, is now settled in Canada and should not be returned to Poland under the terms of the *Convention*.

[3] The main issue in this appeal is whether the chambers judge erred, in law or fact, in determining that the "now settled" exception under Article 12 of the *Convention* applied and, on that basis, dismissing the appellant's application to return the child to Poland.

[4] The chambers judge applied a purposive and contextual approach to the analysis of whether the "now settled" exception applied in the circumstances of this case, combining a factual inquiry into the child's actual circumstances with a consideration of the objectives of the *Convention*. As will be seen from the following reasons, I conclude that in doing so, the chambers judge considered all of the relevant facts and principles and made no error in concluding that J.K. was now settled in her new environment and in refusing to order her return to Poland. It follows that I would dismiss the appeal.

Background Facts

[5] The appellant and respondent were married in Poland on December 4, 1999. On January 1, 2000, their daughter, J.K. was born. The family resided together in Warsaw, Poland until August 10, 2003.

[6] On August 10, 2003, Ms. Kubera and J.K., who was three at the time, travelled to Canada to stay with Ms. Kubera's uncle in Canada. The trip was intended to be a short holiday, and was undertaken with Mr. Kubera's permission and financial support. The parties originally agreed that Ms. Kubera would return with J.K. in three months. They later agreed that both would return before the expiry of their visitors' visas in February 2004.

[7] Ms. Kubera says that when she arrived in Canada she discovered her uncle was in the process of a divorce, and he asked her and J.K. to leave. In October 2003,

she began to live with a man she met through her uncle. They began living together as roommates, but in March 2004, decided to become common-law spouses.

[8] Mr. Kubera says Ms. Kubera told him she was staying with a friend and wanted to stay in Canada a bit longer so she and J.K. could learn English. On that basis, Mr. Kubera agreed, and extended the travel insurance and sent further funds. He now says she was dishonest with him.

[9] In June 2004, Ms. Kubera's visa extension expired. She did not return to Poland with J.K. In December 2004, Ms. Kubera told Mr. Kubera she intended to stay in Canada permanently. She says that she did not want to return to Poland because during their marriage, Mr. Kubera had been physically, mentally and sexually abusive towards her, and that he was also abusive towards J.K.

[10] Mr. Kubera claims he had no contact with Ms. Kubera or J.K. after March 2005. He says Ms. Kubera tried to hide where she was living and that he tracked her and J.K. down through Canadian immigration authorities. Ms. Kubera says Mr. Kubera knew where they were living.

[11] In early 2005, Ms. Kubera applied for refugee status in Canada for herself and J.K., alleging domestic violence on the part of Mr. Kubera. Their refugee claims were heard on February 2, 2005, and on May 24, 2006, they were found to be convention refugees.

[12] Mr. Kubera says he did not know that Ms. Kubera had applied for refugee status, and that Ms. Kubera did not tell him of the result until October 2006.

[13] The chambers judge described J.K.'s life in Canada at the time of the hearing (at para. 99):

She has been going to school in Canada, is doing well in school, has many friends and is engaged in many worthwhile extra-curricular activities. She has been involved in music and swimming and skating. She has been involved in these types of activities in one way or another for the entire time she has been here. She has been studying Polish here and speaks Polish fluently. She is both physically settled in Canada and is secure and stable in her new environment. For much of that time she has been residing with her mother and [her mother's partner]. She lives in a three bedroom townhouse in a family oriented complex.

History of Proceedings

[14] Proceedings between these parties commenced on August 24, 2005, when Ms. Kubera sought an order in BC Supreme Court of divorce and custody of J.K. with specified access to Mr. Kubera.

[15] On November 16, 2005, Mr. Kubera filed an action in the Provincial Court District for Warsaw seeking an order for custody of J.K.

[16] On November 22, 2005, Mr. Kubera filed a statement of defence to the BC proceedings, denying there was a breakdown in the marriage, asserting Ms. Kubera

and J.K. were ordinarily resident in Poland and that J.K. was staying illegally in Canada, and seeking sole custody of J.K. with primary residence in Poland. Mr. Kubera also filed a counterclaim asking for an order J.K. be returned to Poland immediately, among other things.

[17] Mr. Kubera said that on November 23, 2005, he filed an application in Poland for the return of J.K. under the *Convention*. Mr. Kubera also provided a letter from the Ministry of Justice in Poland stating that a petition for the return of J.K. was filed in the Ministry on November 18, 2005, and directed to the Canadian Central Authority on November 24, 2005.

[18] On December 15, 2005, Mr. Justice Burnyeat made interim orders in the divorce proceeding, setting terms of access for Mr. Kubera. He declined, at that point, to apply the *Convention.*

[19] On April 16, 2006, Mr. Kubera applied directly to the BC Supreme Court by petition for an order for J.K.'s return to Poland based on the *Convention.*

[20] In the meantime, a court hearing based on Mr. Kubera's application was scheduled before a Polish court on May 12, 2006. The parties dispute what happened at the hearing. Ms. Kubera says the court dismissed the application when advised J.K. was now living in Canada. Mr. Kubera says the court dismissed the case on the basis another Polish court had jurisdiction.

[21] On October 10, 2006, Mr. Kubera's application under the *Convention* came for hearing in the BC Supreme Court but was adjourned generally because Ms. Kubera's counsel had withdrawn.

[22] There were five subsequent adjournments of the matter between December 1, 2006 and December 19, 2007. At each adjournment, orders were made relating to the production of various documents, including affidavits, documents relating to Mr. Kubera's divorce from his previous wife, and all documents relating to Ms. Kubera's and J.K.'s refugee hearing. The court file related to the hearing was sealed.

[23] On December 19, 2007, the parties agreed to hearing dates in April 2008. Ms. Kubera changed counsel again before the hearing, through no fault of hers. The matter was heard by Madam Justice Martinson over four days, from April 4 to 7, 2008. The Polish divorce documents were not received until the end of the April hearing. Counsel made written submissions on the point that were received by the Court in May 2008.

Reasons for Judgment of the Chambers Judge

[24] In reasons for judgment pronounced on August 14, 2008, Martinson J. ordered that J.K. had been wrongfully retained in Canada since June 2004, she was now settled in her new environment, and her return under the *Convention* should not be granted. She therefore dismissed the appellant's application.

[25] Madam Justice Martinson summarized her reasons as follows (at paras. 5-6):

I have reached the conclusion that [J.K.] was wrongfully retained as at June 2004 as required by Article 3 of the *Hague Convention*. I have also concluded that she is now settled in her new environment as provided for by Article 12. In doing so, I have decided that the word "now" in the phrase "now settled in its new environment", found in Article 12, means the date of the hearing, not the date of the commencement of the proceedings. If I have a discretion to return her in spite of these findings, I exercise that discretion in favour of not returning her.

This decision is not a decision on who should have custody of [J.K.] or where she should ultimately live, or even that she is settled for the purposes of determining custody. The Court is deciding that the custody decision should be made in Canada.

Issues on Appeal

[26] The appellant says the chambers judge erred in finding that the settled exception applied and in failing to order J.K.'s return on this basis. In particular, the appellant says:

> (a) The chambers judge erred in concluding that J.K. was "now settled in her new environment" under Article 12 of the *Convention*;
>
> (b) The chambers judge erred in determining that "now" in the context of Article 12 means at the time of the hearing of the petition;
>
> (c) The chambers judge erred by not exercising her discretion under the *Convention* to return J.K. even if she was settled in her new environment; and
>
> (d) The chambers judge erred by failing to give effect to the principle of comity in determining that Canada is the proper forum for the resolution of custody and access matters.

The Hague Convention

[27] The crux of this appeal is the interpretation and effect of Article 12 of the *Convention*, which has the force of law in British Columbia pursuant to s. 55 of the *Family Relations Act*, R.S.B.C. 1996, c. 128.

[28] The objects of the *Convention* are clearly set out in Article 1:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[29] The Preamble to the *Convention* explains that the Contracting States are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody". It is in that context, "to protect children internationally from the harmful effects of their wrongful removal and retention", that

the *Convention* establishes "procedures to ensure their prompt return to the State of their habitual residence".

[30] Article 12 of the *Convention* sets out the basic obligation to return a child who has been wrongfully removed or retained, in breach of rights of custody as provided in Article 3. Article 12 also recognizes some limited and precise circumstances in which an exception to the general obligation to secure the prompt return of children is made in the interests of a particular child:

Where a child is wrongfully retained 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. [Emphasis added.]

[31] Thus, Article 12 describes the scope and duration of the defining obligation of the *Convention*: the commitment to promptly return a child who has been wrongfully removed or retained to the country of habitual residence. It is through this obligation of swift mandatory repatriation that the *Convention* pursues its principal object: to protect children from the harmful effects of child abduction by deterring and, where appropriate, remedying their wrongful removal or retention.

[32] The *Convention* operates on a basic presumption that a child's best interests, and the rights of custody and access that relate to them, should be determined by the courts in the country where he or she is habitually resident: *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 at para. 36. From this one principle arises each of the interrelated objectives of the *Convention*, all of which are directed at protecting the interests of children generally. These include rapid return of the child, restoration of the status quo, deterrence of international child abduction and deference, with respect to the determination of a child's best interests, to the courts of the place of habitual residence: *J.E.A. v. C.L.M.*, 2002 NSCA 127, 220 D.L.R. (4th) 577 at para. 31.

[33] As a result, the *Convention* prohibits a court from approaching the question of a child's return as though it were a custody hearing on the merits, where the test applied is "the best interests of the child". Under the *Convention*, the interests of the individual child are only considered in the most limited and exceptional of circumstances: *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at 578.

[34] Those circumstances are carefully defined by the *Convention* itself. Where an exception is provided, it expresses a careful compromise between the effectiveness needed to deter international abduction and protect the interests of children generally, and the flexibility necessary to protect the welfare of the particular child: *W.(V.)* at para. 37.

[35] I note parenthetically that this Court recently considered in *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61, the operation of Part 3 of the *Family Relations Act*, which applies where a child is abducted from a state that is not a signatory to the *Convention.* Although *Tsuchiya* was not decided under the *Convention*, the considerations addressed were influenced by it. The analysis in this case, on the other hand, flows entirely from the *Convention*, and the jurisprudence interpreting it that has developed in Canada and internationally.

The "Now Settled" Exception

[36] The issue in this case is the application of the "now settled" exception found in the second paragraph of Article 12.

[37] The "now settled" exception provides that where proceedings are commenced after one year from the date of wrongful removal or retention, the judicial or administrative authority shall order the return of the child unless it is demonstrated that the child is now settled in its new environment.

[38] This exception is a recognition that the interests of a child in not having his or her life disrupted once he or she has settled down in a new environment may, in a certain case, override the otherwise compelling need to protect all children from abduction: see Rhona Schuz, "The Hague Child Abduction Convention: Family Law and Private International Law" (1995) 44 I.C.L.Q. 771 at 778. After one year, the immediate return envisaged by the *Convention* is no longer possible. Those policies that are presumed to justify mandatory repatriation in all cases prior to the expiry of the one year period will, with the passage of time, tend to weaken. Those that require consideration of the welfare and interests of the particular child tend to strengthen. The result is that the further one gets from the objective of swift repatriation, the greater the likelihood that ordering the child's return will only "accentuate the harm caused by the wrongful relocation": see Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* (New York: Oxford University Press, 1999) at 203.

[39] A court tasked with applying the exception must determine, therefore, whether in the actual circumstances of the particular case, the balance between these considerations no longer supports what is otherwise a mandatory obligation to return the child.

The Correct Approach to the "Now Settled" Exception

[40] The *Convention* offers little assistance to a court approaching this difficult task. In the present case, the chambers judge sought guidance from the reasons of Justice Cromwell (as he then was) in *J.E.A.*

[41] Writing for the unanimous court in that case, Cromwell J.A. acknowledged that the application of the settled exception involves striking a difficult balance: interpreted too broadly, it undermines the effectiveness of the *Convention*; interpreted too narrowly, it is robbed of any practical effect (at para. 61).

[42] As a result, he concluded (at paras. 67-68):

... the settled exception ought to be approached not simply by examining the child's present circumstances in the new environment, although that is an important part of the inquiry. In addition, the child's present circumstances need to be assessed in light of the underlying objectives of the Convention and in particular how ordering return of the child is likely to further those objectives.

It will be helpful, therefore, to consider how the key objectives of the Convention relate to the specific circumstances of the child whose return is sought. To repeat, the relevant objectives include first, general deterrence of international child abduction by parents; second, prompt return of the child facilitated by precluding a full inquiry into the "best interests" of the child in the state to which the abductor has fled with the child; third, restoration of the status quo; and, fourth, entrusting to the courts of the place of habitual residence the ultimate determination of what the best interests of the child require.

[43] This approach to the interpretation of the phrase "now settled" includes both a factual assessment of the child's integration in the new environment, and a purposive and contextual analysis of the policy of the *Convention* as it relates to the specific circumstances of the child. To determine whether the exception applies, the court must carefully balance the various objectives of the *Convention* weighing in favour of or against return, with the interests of the particular child in not being uprooted.

[44] As Cromwell J.A. explains, the concept of settlement is invariably one of degree. For the purposes of the factual inquiry under Article 12, "settlement" requires more than a mere adjustment to surroundings, and includes "a physical element, relating to being established in a community, and an emotional element, relating to security and stability". Assessing the stability of the child's position involves examining "the child's future prospects as well as his or her current circumstances" (at para. 82).

[45] This concept of settlement was first expressed by Bracewell J., writing for the English High Court in *Re N (Minors) (Abduction)*, [1991] 1 FLR 413 (Fam. D.). Her seminal definition has since been widely accepted, including by courts in Scotland, England and Canada. Justice Bracewell stressed that it is the "new" features of the child's situation that are relevant. These will include "place, home, school, people, friends, activities and opportunities, but not, *per se*, the relationship with the [abductor]". That relationship is only relevant "insofar as it impinges on the new surroundings."

[46] It is important to recall the purpose of the factual inquiry: to determine the actual circumstances of the child and, in so doing, the likely effect of uprooting a child who has already been the victim of one international relocation. This purpose can only be achieved if the court considers these questions from the child's perspective. Other considerations external to that perspective, such as comparative parental turpitude, would only serve to obscure the inquiry, and are relevant at this stage of the analysis only if they have a direct impact on the factual integration of the child. Matters that do not directly impact on the child's integration fall to be considered in the context of examining the policy objectives of the *Convention* that may weigh in favour of return.

[47] To illustrate this distinction, it is useful to consider the situation of an abducting parent who wrongfully conceals the child or otherwise delays the proceedings. Such behaviour would almost certainly be relevant to the question of what weight should be given to the objective of deterrence in the overall balance. It should not, however, have any bearing on the question of factual integration, unless the concealment or delay interfered with the child's ability to settle in the new environment and community.

[48] Thus, to determine if a child is "now settled" in its new environment, a "child-centric" factual inquiry must be undertaken to determine the child's actual circumstances. It is to those circumstances that the policies and objectives of the *Convention*, which favour prompt return, must be applied.

The Relevant Time of the "Now Settled" Exception

[49] This leads directly to one of the key issues raised in this appeal: the relevant time for the factual assessment of the child's integration in the new environment.

[50] The chambers judge concluded that the relevant time was the date of the hearing. The appellant, on the other hand, says that the appropriate time is April 2006, the time when the application under the *Convention* was made. On the basis of the following analysis, I would agree with the chambers judge.

[51] The plain language of Article 12 supports the conclusion that the correct time to be considered is at the time of the hearing:

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.

[52] As the chambers judge observed, a determination of whether the child is settled in the new environment can only occur <u>after</u> the court conducting the hearing has found that the child has been "wrongfully removed or retained". As a result, any decision or demonstration regarding the child's settlement would have to occur at the time of the hearing. However, rather than indicate that the assessment of the child's integration should be historical, rather than contemporaneous with that hearing, the drafters specified that the relevant question is whether the child is "<u>now</u> settled in its new environment" (emphasis added).

[53] Although the equivalent and perhaps superfluous emphasis does not appear in the French version, it too frames the question of the child's settlement in the present tense:

L'autorité judiciaire ou administrative, même saisie après l'expiration de la période d'un an prévue à l'alinéa précédent, doit aussi ordonner le retour de l'enfant, à moins

qu'il ne soit établi que l'enfant s'est intégré dans son nouveau milieu. [Emphasis added.]

[54] No Canadian court has explicitly addressed this issue. Nonetheless, I find the language used in *J.E.A.* to strongly suggest the Nova Scotia Court of Appeal also concluded that the relevant time is the date of the hearing. At para. 67, Cromwell J.A., for that Court, stated:

... the settled exception ought to be approached not simply by examining the child's present circumstances in the new environment, although that is an important part of the inquiry. In addition, the child's present circumstances need to be assessed in light of the underlying objectives of the Convention and in particular how ordering return of the child is likely to further those objectives. [Emphasis added.]

[55] Cases from other signatory jurisdictions suggest the opposite: that the time relevant to the determination of settlement is the date the application is made.

[56] The first such case is *Re N*, in which Bracewell J. commented:

In the absence of any decided authority drawn to my attention, I find that the word "now" refers to the date of the commencement of proceedings, as otherwise any delay in hearing the case might affect the outcome. However, that is a purely academic finding because, on all the circumstances of the present case, it makes no material difference to my conclusions, whichever of the two dates is chosen.

[57] In my opinion, these comments must be placed in context.

[58] First, Bracewell J.'s conclusion that "now" means the date of commencement of the proceedings – conceded to be a "purely academic finding" made in the absence of any decided authority – was based on a concern that delay in hearing the case might affect the outcome. At the time the case was decided, *Convention* jurisprudence in the UK (and internationally) was still in its infancy, and had yet to resolve how to appropriately account for delay and parental turpitude in the analysis.

[59] Second, except where she cites herself (*Re H (Abduction: Child of Sixteen)*, [2000] 2 FLR 51), Bracewell J.'s position has not been adopted or explicitly addressed in subsequent UK decisions.

[60] Third, I find Bracewell J.'s conclusion to fit uncomfortably with her own highly influential definition of settlement, which requires "that the present position imports stability when looking at the future, and is permanent insofar as anything in life is permanent." It would seem convoluted and artificial to look into the past only to then project into the future.

[61] Finally, since *Re N*, and with the release of the House of Lords decision in *Re M and another (children) (abduction)*, [2007] UKHL 55, the current of UK jurisprudence has shifted strongly towards a more "child-centric", fact-specific approach to Article 12: see Ruth Lamont, "*Re M* and beyond: managing return when a child has settled following abduction" (2009) 31 J. Soc. Welfare & Fam. L. 73. In my

opinion, it would be inconsistent with that approach to routinely distort the factual inquiry into the actual circumstances of the child on the basis of the impact of potential delay on the custody rights of parents. If those concerns have any place in the analytical framework developed by the House of Lords in *Re M*, I believe it would be as general policy considerations given varying weight as part of the residual discretion exercised in the UK under Article 18.

[62] On the other hand, cases from Australia (*Director-General, Department of Families, Youth and Community Care v. Thorpe*, [1997] FLC 92-785 (Fam. Ct.)) and the United States (*Wojcik v. Wojcik*, 959 F. Supp. 413 (E.D. Mich. 1997)) state that the relevant time is the date of the hearing. Although I have reached the same conclusion, I was not assisted in doing so by these cases.

[63] With respect to the Australian case, the court's comment that "the relevant date ... is the date of the hearing" was made in *obiter*. Further, it does not represent the settled state of Australian law. In a later decision, *Director-General, Department of Community Services v. M. and C. and the Child Representative*, [1998] FLC 92-829, the Full Court of the Family Court of Australia (Nicholson C.J. presiding) explicitly left the question open (at para. 91):

The test ... is whether the children have settled in their new environment. That test is to be applied either at the time of the application being made or at the time of trial. It is unnecessary to consider which date is the relevant one in the context of this case, given the short period between the two dates.

[64] Neither do I find the U.S. jurisprudence to be of much assistance. Although the Michigan court in *Wojcik v. Wojcik* observes that the correct question is whether the child is "settled in their new environment as of the time of the hearing", I find this conclusion to be coloured by the unique way in which courts in the United States account for delay and parental turpitude in the analysis. In the U.S., the doctrine of equitable tolling has been imported into *Convention* case law to prevent parental misconduct from working to the advantage of the abducting parent. Essentially, this doctrine allows courts to respond to behaviour that threatens the integrity of the *Convention* by flexibly calculating whether the twelve-month period in Article 12 has been exceeded. This approach has been rejected as "crude" in England (*Cannon v. Cannon*, [2004] EWCA Civ 1330 at para. 51), and has not been adopted in other jurisdictions, including Canada.

[65] More helpful, in my analysis, is to consider how this issue relates to the purpose of the factual inquiry and its role within the broader approach to the "now settled" exception.

[66] As noted above, the factual inquiry seeks to determine the <u>actual</u> circumstances of the child in terms of the disruptive effect of ordering his or her return. The exception reflects a compromise between an indefinite extension of the obligation to return the child, and a recognition that the justifications for that obligation do not persist indefinitely. Beyond one year, the interests of a particular child in not being uprooted may begin to outweigh the generalized objectives of the *Convention* summarized in *J.E.A.* (at para. 68). The objective of securing prompt return has been seriously undercut; restoring the status quo may be impossible; it can no longer be presumed that the country of origin is the best forum to determine the

issue of custody; and, finally, general deterrence, while much less prone to the passage of time, must also eventually yield to the welfare interests of the particular child. As stated by Baroness Hale of Richmond, writing for the House of Lords in *Re M*, one child "should not be made to suffer for the sake of general deterrence of the evil of child abduction world wide" (at para. 54).

[67] The result of all this is that neither the policy of the *Convention* nor the circumstances of the child can be determined in the abstract. Each must be carefully considered and weighed as it applies in the circumstances of the specific case.

[68] Ultimately, a meaningful balance of these competing considerations depends on an accurate and meaningful measure. As the chambers judge observed, it would be "completely artificial to look at [the child]'s circumstances two years before the hearing in considering the effects upon her of being uprooted as a result of a return order" (at para. 91).

[69] In light of these considerations, I agree with the chambers judge. Such issues as delay or deception, if taken into account in determining the child's actual circumstances, may have the result of manipulating the factual inquiry to the point of meaninglessness. Those other circumstances, which may have led to the exception being engaged (that is, proceedings having been commenced after the expiration of one year after the wrongful removal or retention), should be considered on a case-by-case basis as they relate to the underlying objectives of the *Convention*. Consistent with this approach to determining the application of the now settled exception, the relevant date for considering the factual question of the child's actual circumstances is the date of the hearing.

Application

Factual Inquiry

[70] I now turn to consider whether the chambers judge erred in determining that the evidence concerning J.K.'s factual integration provided detailed and compelling support for the conclusion that she was "now settled" in Canada at the time of the hearing. For the following reasons, I find no palpable and overriding error in either her assessment or conclusion that would justify this Court's interference.

[71] The chambers judge summarized the evidence regarding J.K.'s integration as follows (at paras. 97-99):

[J.K.] was born on January 1, 2000 in Poland and lived there with her parents until August 2003, when, at the age of three, she came to Canada with her mother. She has lived here with her mother in Canada ever since and is now eight years old.

She is a Polish citizen. Her father and his extended family reside in Poland.

She has been going to school in Canada, is doing well in school, has many friends and is engaged in many worthwhile extra-curricular activities. She has been involved in music and swimming and skating. She has been involved in these types of activities in one way or another for the entire time she has been here. She has been studying Polish here and speaks Polish fluently. She is both physically settled in Canada and is secure and stable in her new environment. For much of that time she has been residing with

her mother and [her mother's partner]. She lives in a three bedroom townhouse in a family oriented complex. The evidence does not support the conclusion that her life is not stable because she has moved. She has simply moved places within the same complex.

[72] The chambers judge also found J.K.'s status as a convention refugee to be relevant to the question of whether she was settled (at para. 101).

[73] The appellant says that, taken together, this evidence is insufficient to satisfy the very high burden required under Article 12. He argues that the test of "settling in" must be very strictly applied, and only overwhelming evidence of a child's integration will suffice to override the otherwise mandatory obligation that demands return in virtually all cases. He also submits that the evidence which has been provided shows only that J.K. has a normal level of integration for a child of her age.

[74] I agree that "detailed and compelling evidence" is required to demonstrate that a child is settled in the new environment: *Bielawski v. Lozinska*, [1997] O.J. No. 3214 (Ct. J. (Prov. Div.)). I also agree that the court must be careful to look beyond the outward appearances and superficial realities to determine the actual degree of settlement: *W.(V.) v. S.(D.*), [1993] R.J.Q. 2076, 58 Q.A.C. 168 (C.A.), aff'd [1996] 2 S.C.R. 108. The threshold is high and requires more than a mere physical adjustment to surroundings.

[75] Nonetheless, I reject the suggestion that the "now settled" exception requires a level of settlement which is itself "exceptional", beyond the high standard already discussed. In the UK, precisely such an additional "exceptionality" requirement had begun to creep into the jurisprudence. It was expressly rejected by the House of Lords in *Re M*. Writing for the court, Baroness Hale stated (at para. 40):

… I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention.

[76] She went on to add (at para. 44):

... the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.

[77] In my opinion, and in light of Baroness Hale's comments, it is wrong to say that the evidence of settling in must "overwhelm" *Convention* policy. The exceptions are themselves an expression of that policy. Although they must be interpreted so as

not to undermine the effectiveness of the *Convention*, to impose an additional exceptionality requirement would distort the "careful balances" of the *Convention* and rob the exceptions it specifically includes of their intended effect.

[78] However wrong her removal from Poland, J.K. has spent the past seven (five to the time of the hearing in Supreme Court) years of her life actively integrating, both physically and emotionally, to her new environment and community in Canada. She has legal status in this country, and there is no evidence that her current security and stability will change in the future. I find no basis to interfere with the chambers judge's conclusions in this respect.

Purposive and Contextual Analysis

[79] I now turn to consider whether the chambers judge properly considered the key objectives of the *Convention* as they relate to the specific circumstances of this case.

[80] The first objective considered by the chambers judge was the general deterrence of international child abduction, which she concluded weighed in favour of ordering return.

[81] The chambers judge found that Ms. Kubera had misled the appellant so that she could establish residence in Canada, and that by keeping J.K. in Canada after June 2004, had wrongfully abducted the child. The chambers judge also noted that Ms. Kubera had not informed the appellant about the refugee claims she had made alleging abuse of both her and J.K., or the result of those claims despite specific requests from the appellant's counsel.

[82] More challenging, in terms of determining who was responsible and what effect it should have on the analysis, was the considerable delay that occurred between the date the appellant filed a petition for return on April 2006, and the date of the hearing on August 14, 2008. After reviewing the many adjournments and delays that occurred, the chambers judge concluded (at para. 106):

... [The appellant filed his petition] in April 2006. [J.K] had been here since August 2003. Two years went by from the date of this application until the date of the hearing. Much of that time was taken up obtaining the refugee files and then the Polish divorce files relating to Mr. Kubera's divorce from his previous wife. Ms. Kubera wanted those as she had reason to believe they would support her allegations of domestic violence. Both counsel agree that Mr. Kubera cooperated, but that there were problems in Poland with obtaining the documents. She then changed counsel through no fault of her own. <u>The evidence does not show that Ms. Kubera was deliberately delaying the process so that she could defeat Mr. Kubera's claim</u>. [Emphasis added.]

[83] To understand how these various considerations should weigh in the analysis, it is helpful to review how the objective of deterrence fits within the broader scheme of the *Convention*.

[84] As noted above, the *Convention* has both a preventive and restorative purpose: to deter abductions in the first place and, where appropriate, remedy them if they occur. Effective deterrence depends on the *Convention* operating with a degree of

certainty to deny the actions of the abducting parent of any practical or juridical effect. As noted in *J.E.A.* (at para. 76), every "[r]efusal to order return detracts from that certainty and therefore detracts from the deterrence intended by the Convention." The importance of this objective of the *Convention* requires that exceptions be applied narrowly and with a careful eye to the message being sent to potential abductors. On the other hand, general deterrence should not be allowed to overwhelm the analysis. In particular, the benefit of sending a message to would-be-abductors must not blind the court to the cost paid by the settled child. The question is at what point the interest of the individual child in not being uprooted becomes so cogent that it outweighs the general interest of all children in preventing future abductions.

[85] In *J.E.A.*, the court decided that a child who had spent seven years in Canada and had become integrated in the day-to-day life of her new community should nonetheless be returned to her country of habitual residence.

[86] Deterrence played a critical role in that court's decision. The abducting parent in that case had been advised by her lawyer that Iowa courts would likely order some visitation rights to the father after an investigation had failed to substantiate the mother's allegations that he sexually abused their daughter. In response, the mother absconded with the child to Canada with falsified documents and then concealed the child from the father for six years. Justice Cromwell addressed the particularly compelling circumstances that called for deterrence in the case (at para. 77):

... [T]he present case is a strong one for underlining and emphasizing the deterrent purposes of the Convention. For a time, [the abducting mother] used the Iowa courts to vigorously and continually assert her rights and her claims as to what was in [the child]'s best interests. However, she ultimately thwarted the judicial process in Iowa before it came to a conclusion. Such conduct, if not checked, would make it impossible for any parent to be secure in any court ordered custody and access. The extent of [the mother]'s deception and the long success of her abduction are breathtaking. This was no impulsive flight, making it all the more important to deter others from doing likewise. And she has not done it all alone. [The mother], and any who have knowingly assisted her in this abduction must be made to understand how firmly and unequivocally the courts of this Province will deal with international child abduction. It also must be clear that Nova Scotia is not a haven for child abductors. In all of these respects, the facts of this case call for a response stressing precisely the deterrence which is at the core of the Convention's objectives.

[87] The circumstances of this case are quite different. Without minimizing Ms. Kubera's wrongdoing, the evidence does not suggest that she left Poland with her daughter as part of a well planned scheme to intentionally defeat the custody rights of the appellant. Wrongdoing and deception are inherent in all abduction cases. In some, however, the conduct of the abducting parent is such that greater emphasis must be placed on the objective of deterrence in the analysis.

[88] The relevant question, in my opinion, is not whether Ms. Kubera's conduct was wrong, which it certainly was, but whether it had the intention or effect of undermining the objectives and operation of the *Convention*, including the ability of the appellant to exercise his rights under it. The purpose is not to punish the parent, but rather to protect children by maintaining the integrity and effectiveness of the *Convention*.

[89] The evidence is clear that Ms. Kubera began deceiving the appellant regarding her circumstances and intentions shortly after arriving in Canada in August 2003. After her visa extension ran out in June 2004, her failure to return to Poland with J.K. amounted to wrongful retention under Article 3 of the *Convention*. It was also at this time that the one year time-limit to seek automatic return of the child under Article 12 began to run. However, it was not until December 2004 that Ms. Kubera informed the appellant she intended to remain in Canada permanently.

[90] Although the appellant says that he did not know where Ms. Kubera was living, which Ms. Kubera disputes, nothing prevented him from seeking his daughter's return under the *Convention* after December 2004. Ms. Kubera lied to the appellant, but in terms of eroding his rights under the *Convention*, her culpability for the delay in bringing a petition ended when she told him she would not be returning. Unlike in *J.E.A.*, Ms. Kubera delayed rather than defeated the appellant's ability to commence proceedings within one year. The six months that remained were, in my opinion, sufficient. In fact, the one year time limit was specifically chosen by the drafters of the *Convention* over a shorter period, in anticipation of the challenges a parent may face in locating an abducted child and bringing an application for return. As explained by Beaumont & McEleavy at 203:

Initially a dual system was proposed. Where the presence of the child was known a return would be mandatory if less than six months had elapsed from the time of the abduction, but, where the location was not known, the time period would be extended to twelve months. At the XIVth Session this solution was rejected in favour of a single time limit, while there was support for both longer and shorter time periods a general consensus soon emerged in favour of one year.

[91] The record of the *Convention* negotiations reveals that the primary arguments made in favour of the one-year period were that it was necessary to allow for difficulties in locating the child, deciding when and whether there had been a wrongful removal or retention, and determining what legal course to take: Hague Conference on Private International Law, *Actes et documents de la Quatorizème session*, t. III, Child Abduction (La Haye: Imprimerie Nationale, 1982) at 288, 292. The United States representatives, who were the most forceful proponents of the longer period, used an example that matches the circumstances of this case: "If, for example, one party took a child abroad for an extended vacation with the full consent of the custodian and some time later informed the latter of his intention not to return the child" (*Actes et documents* at 288).

[92] On April 26, 2006, the appellant commenced proceedings in BC Supreme Court under the *Convention*. Significant delays followed which prevented the matter from being heard until April 2008. The chambers judge concluded (at para. 106): "[t]he evidence does not show that Ms. Kubera was deliberately delaying the process so that she could defeat [the appellant]'s claim". There is nothing in the record before this Court that would justify disagreeing with the chambers judge's conclusion. With no basis upon which to attribute the delay to the conduct or intention of either party, I am unable to give it much significance in the deterrence analysis.

[93] Overall, I agree with the chambers judge that the deterrent objective weighs in favour of ordering J.K.'s return. It is important that potential abductors not be

encouraged by Ms. Kubera's wrongful actions or any advantage she may have gained by them. I do not, however, find that this case involves the same "compelling circumstances" for emphasizing deterrence that were present in *J.E.A.*

[94] The second objective is the need for prompt return. This is no longer possible.

[95] The third objective is the restoration of the status quo. This is also no longer possible.

[96] The final consideration is the objective of entrusting the courts of the place of habitual residence with the ultimate determination of what is in the best interests of the abducted child. This objective is closely related the settled exception. As the Explanatory Report of Professor Pérez-Vera, the official reporter for the *Convention* describes: "it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it" ("Explanatory Report by Elisa Pérez-Vera", *Actes et documents*, 426 at 458). Justice Cromwell summarized the issue as follows (*J.E.A.* at para. 78): "In short, the settled exception ought to apply where the policy in favour of entrusting the best interests of the child to the courts in the place of habitual residence is no longer a strong one in the circumstances of the particular case".

[97] In this case, the chambers judge found that, although Poland was J.K.'s place of habitual residence at the time of wrongful retention in June 2004, "the reality is that [J.K.] has resided in Canada for the past five years [and] [m]ost of the evidence relating to what is in her best interests will be obtained here" (at para. 110). I find no palpable or overriding error with this conclusion. However wrong her initial removal, J.K. has lived in Canada for the majority of her life. She has started school, made friends and become integrated in her new community. There is no longer a basis to assume that Poland, a country she has not lived in or visited since she was three, is a better forum to resolve the outstanding issues of custody and access.

Conclusion

[98] In light of all these considerations and in accordance with the policy and objectives of the *Convention*, I agree with the chambers judge that it has been established, with detailed and compelling evidence, that J.K. is now settled in her new environment, and the *Convention* does not require this Court to order her return.

Residual Discretion

[99] The appellant argues that even if the chambers judge was correct in finding J.K. was settled in her new environment, she should have exercised her discretion to return J.K. under the *Convention* in any event.

[100] With respect to this issue, the chambers judge stated (at para. 114):

There is some controversy as to whether, when a child is found to be settled in, there remains a residual discretion to return the child. Assuming, without deciding, that such a discretion does exist, I conclude that it is not appropriate to exercise it in favour of returning [J.K.] to Poland.

[101] In other signatory jurisdictions much debate and controversy has surrounded the question of whether a court has a discretion to return an otherwise settled child: see in particular, *Re M.*, and generally, Rhona Schuz, "In search of a settled interpretation of Article 12(2) of the Hague Child Abduction Convention" (2008) 20 C.F.L.Q. 64.

[102] In the context of this case, the issue is academic. The purposive and contextual approach to the settled exception – articulated in *J.E.A.*, followed by the chambers judge and adapted in these reasons for judgment – incorporates the same balancing of factors that in other jurisdictions are considered as part of the exercise of a residual discretion. As a result, the "numerous factors" the appellant says the chambers judge failed to consider in the exercise of discretion were taken into account in her analysis.

[103] In my opinion, this approach, while perhaps more challenging than a clear two-step analysis that first determines on a factual inquiry whether the child is "now settled", followed by an "exercise of discretion" to determine whether the child should or should not be returned, is more consistent with the purpose and objectives of the *Convention*. It is inappropriate to relegate the question of whether the *Convention* objectives apply in a particular case to the exercise of a "residual discretion". Whether the exception applies is a single inquiry, the object of which is to determine if both the objectives of the *Convention* and the interests of the child in the particular factual circumstances are best achieved by determining that the child is now settled in his or her new environment.

[104] Whether there are exceptional circumstances where a court may conclude that it has a discretion whether or not to return a particular child is not a question I need to decide for the purpose of this case. The exercise of discretion could not possibly have led to a different conclusion.

[105] It follows that I do not accede to this ground of appeal.

Comity

[106] The appellant's final ground of appeal is that the chambers judge erred in failing to give proper effect to the principle of comity and the objective of entrusting courts where a child is habitually resident with the decision of what is in that child's best interests.

[107] As noted above, the chambers judge considered this objective as part of her purposive and contextual analysis, and concluded that "[m]ost of the evidence relating to what is in [J.K.'s] best interest will be obtained" in Canada (at para. 110). I find this to be consistent with her overall determination that J.K. is now settled in her new environment, and see no basis to interfere with it.

[108] I do not accede to this ground of appeal.

Disposition

[109] On the basis of the above analysis, I conclude that the chambers judge did not err in fact or law, and would dismiss the appeal.

[110] I note that this decision is not a decision about who should have custody, where J.K. should live or any of the other substantive issues which remain to be determined on the merits and in the child's best interests. Rather, this decision only determines that those other issues are to be resolved in Canada.

"The Honourable Madam Justice Levine"

I Agree:

"The Honourable Mr. Justice Chiasson"

I Agree:

"The Honourable Mr. Justice Frankel"