COURT FILE NO.: 31208-08
DATE: 20090525

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Victor-Claude Diwandja Djemba v. Ruth Muto Ekwe*

BEFORE: Baltman J.

COUNSEL: Bobbi M. Olsen, for the Applicant

Marie Wafo Fonou, for the Respondent

E N D O R S E M E N T

Introduction

[1] Victor Djemba is the father of two girls, Jade and Joy, ages 5 and 4 respectively. He seeks an order under the *Convention on the Civil Aspects of International Child Abduction* (the *Convention*) for the return of his children. In December 2008 the children's mother, Ruth Ekwe, removed them from Austria to Canada, where she has since retained them.

[2] The issues are:

1. Were the children habitually resident in Austria when their mother brought them to Canada?

* La version française de ces motifs a été publiée en même temps que la version anglaise.

2. At the time Ms. Ekwe brought the children to Canada, did Mr. Djemba have “rights of custody” to them?

3. If I find the children have been wrongfully removed from Austria, can an exception to their return be made under Article 13 of the *Convention* on the basis that there is a grave risk of harm to them should they return to their father’s care?

Factual Background

[3] Except where indicated most of the pertinent facts are undisputed.

[4] The parties were married in July 2002 in Douala, Cameroon, where they are citizens. The father resides in Vienna, Austria; he has been employed as an international expert with the United Nations Industrial Development Organization (UNIDO) since July 2007. He anticipates being employed with UNIDO and residing in Austria on an ongoing basis.

[5] The mother has resided in Canada since September 3, 2005, although she has travelled to Cameroon, Austria and France throughout the period, as outlined below, including an extended stay in Austria from July to December 2008.

[6] From the children's births until September 2005 they resided primarily in England, with both parents, while the father was pursuing post-graduate studies. While there the father was charged with assault following an altercation with the mother; as will be discussed below, that charge was subsequently dismissed.

[7] In September 2005 the family relocated to Canada and lived together in Oakville, Ontario. The parents' time together in Canada was acrimonious. In June 2006, in part to relieve some marital strain, the parents arranged for their children to live temporarily with the paternal family in Cameroon.

[8] In July 2007 the father was offered a position with UNIDO in Vienna, and moved there. The mother remained in Canada and the children stayed in Cameroon, with their extended family. Although there is some disagreement as to why the children remained in Cameroon, and with whom, it is undisputed they stayed there until April 16, 2008, when the mother brought them to Vienna. The mother told the father she wanted to end the marriage and bring the children back to Canada, to live with her. She tried to persuade the father to provide her with the children's travel documents to Canada, which he had in his possession. The father wanted the family to live together in Vienna, believing they could work out their differences. He refused to release the children's travel documents,

claiming his wife was not sufficiently stable to raise the children on her own in Canada.

[9] On April 18, 2008, the parents appeared at the district court in Leopoldstadt, before Judge Gabriela Kopinits. The mother wished to address the father's refusal to provide her with the children's travel documents. The impasse was not resolved. On April 26, 2008 the mother went back to Canada, leaving the children in Vienna with their father in his two-bedroom apartment.

[10] During her brief return to Canada, the mother began an application in the Ontario Court of Justice in Milton, seeking an order for temporary custody and return of the children to Canada without notice to the father. She relied in part on the fact that the children had permanent residency status in Canada. In his endorsement of July 8, 2008, denying the request, Wolder J. stated:

> **It is now clear that the children have last resided in Canada in June 2006.** Since that time they resided with their father in Cameroon and they were left with the paternal grandmother in Cameroon until December 2007. The mother then travelled to Cameroon in January 2008, obtained a travel visa, and travelled with the children to Austria. Since April 16, 2008, the children have been in Austria with the father. **There is no jurisdiction in this Court to deal with this custody application as the children have not been present in this jurisdiction since June 2006.** [Emphasis added.]

[11] Significantly, Wolder J. also added that if, as the mother maintained, the father had improperly retained the children in Cameroon (before their ultimate

arrival in Austria), her remedy was to initiate a Hague application in Ontario, as Austria is a signatory to the *Convention*.

[12] The mother returned to Vienna on July 16, 2008, whereupon she acquired separate lodgings. While in Vienna the parties actively engaged in custody litigation in the district court of Leopoldstadt, as follows:

- On April 22 and September 11, 2008, they attended mediation, without success;

- On July 24, 2008, Judge Kopinits ordered that the mother be provided with full legal representation, at no cost to her;

- On July 25, 2008, a social work assessment was conducted. In her report, the assessor noted that the children "currently live with their father" in Vienna, who holds a "secure job." She observed that he was clearly taking care of the children and they appeared well provided for; the mother was currently staying in Vienna and enjoying regular contact with the children; and "both parents are capable of raising their children." In response to the mother's allegation that the father was violent, she recommended an expert psychological assessment of the father, and concluded:

> If this expert opinion does not uphold the mother's complaints with regard to this and if the wellbeing of the children may not be

> established as proven with the mother in Canada, then **we would recommend that sole custody is granted to the father**. [Emphasis added.]

- On August 13, 2008, the parties organized access and agreed to share the time during the week with the children equally, as is customary under Austrian law;

- On September 9, 2008, the mother applied for legal aid at the Donaustadt court of justice, and filed for divorce on November 14, 2008;

- On November 3, 2008, Judge Ingrid Weigl ordered that within eight weeks Dr. Hanspeter Hochfilzer conduct an expert assessment of the parties' respective parenting abilities, as well as any threat the father was alleged to pose to the children; and

- The father met with Dr. Hochfilzer on November 21 and 27, 2008, to complete his portion of the assessment, but the mother left Austria – with the children – before her meeting could take place.

[13] In September 2008, while still in Austria, Jade began attending the International Montessori Kindergarten where, according to the principal, she "settled in very well", made friends easily and was an active member of her peer group. She also took piano lessons twice a week. Joy attended the Vienna International Centre childcare facility at the U.N. headquarters in Vienna. At the

point where the mother removed the children from Vienna (in December 2008) Joy had been registered to attend the same Montessori school as her sister, beginning January 2009, with the registration fee already paid.

[14] The children obtained health insurance with the Vienna Insurance Group and were seen by a family physician, Dr. G. Deecke, on a regular basis. In his report of April 22, 2009 Dr. Deecke stated that the father was the one who brought the children to his office; they were in “excellent health” and “very well taken care of”; and had a “very good” relationship with their father.

[15] On Monday, December 1, 2008, the father brought the children to school, as usual. According to the access arrangement, the mother was to pick them up at the end of the school day on Monday and the father would pick them up from school at the end of the school day on Wednesday, December 3, 2008. On December 2, 2008, the director of Jade’s school phoned the father to advise Jade had not shown up for school. Both children’s schools received messages, from a female, indicating the children were ill and would not be attending school the entire week.

[16] Unbeknownst to the father, the mother had obtained dispensation from the Canadian embassy to travel with the two children to Canada. The precise grounds for the travel authorization are unclear, but it is undisputed the mother

and children arrived in Canada on December 2, 2008. The father has not seen the children since.

[17] On December 9, 2008, one week after the children had been removed, the father appeared in court and informed Judge Kopinits that the children had not been returned following their time with their mother and he was unaware of their whereabouts. The father learned they were in Canada when he was served on January 5, 2009, with a second custody application brought by the mother in Milton, this time in the Superior Court.

[18] In February 2009 Judge Kopinits issued a “Letter of Confirmation” stating that the father had requested the return of the children pursuant to the *Convention* and that “there have been pending custody proceedings at this court since April 18th, 2008”.

[19] The children currently live with the mother in Oakville, in the same apartment where the family resided when they previously lived in Canada. Jade attends senior kindergarten in Oakville, and Joy attends a daycare facility. The mother has found full-time employment and the children receive medical services as needed through OHIP.

[20] In summary, then, over the relevant period the children have resided as follows:

England (February/05 to September/05), with both parents:	7 months
Canada (September/05 to June/06), with both parents:	9 months
Cameroon (June/06 to April/08), with extended family:	22 months
Austria (April/08 to December/08), with both parents:	8 months
Canada (December/08 to the present), with the mother:	5 months

The Legal Framework

[21] The *Hague Convention* is incorporated into the law of Ontario pursuant to s. 46(2) of the *Children's Law Reform Act*. As its preamble states, the *Convention* was created to protect children throughout the world from the harmful effects of their wrongful removal and to establish procedures to ensure their prompt return to the state of their habitual residence.

[22] The jurisprudence is clear that in considering a Hague application, the best interests of the children are not engaged; the primary focus is to determine whether there has been a wrongful removal and, if so, return the child to her

state of residency where the merits of any custody dispute can then be adjudicated: *Thomson v. Thomson,* [1994] 3 S.C.R. 551, at para. 42.

[23] Under A. 3 of the *Convention*, in order to establish that the removal or retention of a child was wrongful, the father must satisfy the court that:

a) the children were "habitually resident" in Vienna "immediately before" their removal or retention; and

b) the removal was in breach of custody rights that had been attributed to and were being exercised by the father.

[24] Pursuant to A. 12, if I am satisfied that the removal was wrongful, I must order the children returned to Vienna "forthwith" unless the mother can establish one of the exceptions under A. 13, namely that there is a "grave risk" that their return would expose them to physical or psychological harm.

<u>Issue #1:</u> Were the children habitually resident in Austria immediately before their mother brought them to Canada?

[25] The term "habitually resident" is not defined in the *Convention*. As the Ontario Court of Appeal stated in *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (Ont. C.A.), at para. 8, the principles that emerge from the jurisprudence are:

- the question of habitual residence is a question of fact to be decided based on all of the circumstances;

- the habitual residence is the place where the person resides for an appreciable period of time with a “settled intention”;

- a “settled intention” or “purpose” is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.;

- a child’s habitual residence is tied to that of the child’s custodian(s).

[26] The case law also indicates that a settled intention need not be an intention to stay in a particular place indefinitely. As Linhares de Sousa J. observed in *Kirby v. Thuns*, [2008] O.J. No. 3586 (S.C.), at para. 44:

> It may be for a limited period of time or it can be defined by an immediate purpose, such as employment. All that is required is that there be an intention to live in a particular place with a sufficient degree of continuity that one may call settled.

[27] In this case there is strong evidence the children were habitually resident in Austria immediately before their mother brought them to Canada. They had been living in Vienna with their father for 8 months. Their mother also lived there during the majority of that period and the children spent roughly equal time with each parent. They attended school on a consistent basis. They saw a family

physician regularly for vaccinations and other medical needs. The parties agreed on a shared parenting schedule and, until the mother's sudden departure, adhered to it. The father had been steadily employed there since July of 2007; while he is under contract with UNIDO, his uncontroverted evidence is that he anticipates his employment will continue. All in all, the family "settled in" quite well in Austria.

[28] That was certainly the impression of Judge Weigl who, when she ordered Dr. Hochfilzer to conduct a parenting assessment, directed him to consider, amongst other things:

> Whether the transfer of custody to the children's father or the children's mother would be in the best interest and welfare of the children, especially since **the children currently live with their father and attend nursery school here** and, if custody is granted to the mother, it may be assumed that the children will be taken abroad again, after they have lived in Cameroon for a longer time and **are now resident in Austria.** [Emphasis added.]

[29] The mother submits that the children's habitual residence is Canada, because that is the last place the family resided together under one roof. She refers to the comment of Glithero J. in *Cornaz v. Cornaz-Nikyuluw*, [2005] O.J. No. 4121 (S.C.). He was considering a Hague application by a father in Switzerland for the return of his children who had been taken by their mother to Canada. At para. 50 Glithero J. stated:

> While the term “habitual residence” is not defined in the Convention, a consideration of the case law makes it clear that **the habitual residence of a child will be in the state where both parents lived together with the child,** and neither parent can change it unilaterally, without the express or implied consent of the other. [Emphasis added.]

[30] However, in *Cornaz* the issue was whether the unilateral action of one parent (the mother) could bring about a change in the habitual residence of the child. Glithero J. found it could not, and therefore concluded the mother had wrongfully retained the children in Canada. He was not considering whether the parents lived in the same household in Switzerland, but rather whether they both resided in the same *state* as the children. Indeed, whether the parents resided together or in separate homes in the applicant’s state should be irrelevant, as the issue under A. 3 is geographic residency, not the status of the parents’ marriage in the period before the child’s removal.

[31] The mother’s alternative argument is that she and the children were merely in transit to Canada and were forced to stop in Vienna in order to obtain travel documents. Although it is clear the mother ultimately wished to relocate in Canada with the children, the evidence indicates she and the children were not simply visiting Vienna. They established a home there, at least until the custody proceedings could be resolved. And she arguably attorned to the jurisdiction when she not only agreed to but exercised rights of access pursuant to the court process underway in Vienna. I find it significant that the mother, who had for

many months been participating in the proceedings, chose to remove the children when it was her turn to be assessed by the court appointed expert.

[32] For all the above reasons, I find that the children were habitually resident in Austria when their mother brought them to Canada.

Issue #2:. At the time the mother brought the children to Canada, did the father have "rights of custody" to them?

[33] Although the mother's counsel identified this as an issue, it is not clear to me at all from her materials or submissions on what basis the mother can plausibly argue that the father did not have or was not exercising his rights to custody at the time of the removal. The evidence cited above clearly indicates the couple agreed and adhered to a shared parenting arrangement. This was in keeping with Austrian law, which provides that parents have equal rights and are joint guardians of their children.

[34] In this case that the father was not only exercising his shared custodial rights but was arguably the primary caregiver. I therefore have no difficulty finding in the father's favour on this issue.

[35] Having found that the children were habitually resident in Austria when the mother removed them and that the father was then exercising his rights to

custody, I conclude that the mother's removal of the children from Austria and their retention in Canada was wrongful within the meaning of the *Convention*.

Issue #3: Having found that the children have been wrongfully removed from Austria, can their return be exempted on the basis that there is a grave risk of harm to them should they return to their father's care?

[36] The mother argues there is evidence that the father is physically violent and psychologically abusive, and therefore returning the children to his care creates a grave risk of harm. I disagree. As Abella J.A. stated in *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (C.A.), both the risk and the harm must be substantial, based on credible evidence. The imposition of this high standard is consistent with the goal of the *Convention*, namely that custody should be litigated in the court of the child's habitual residence.

[37] The evidence advanced by the mother does not meet this standard. She relies primarily on the assault charge laid against the father in England several years ago following a marital dispute. However, the allegation is denied by the father; there was never any corroborative evidence to support it; and the mother later withdrew the charge. Although she states she did so only because the father convinced her that otherwise the family would not be permitted to immigrate to Canada, in my view this single, dated incident does not constitute

the kind of grave risk contemplated by A. 13. Further, the alleged abuse was toward the mother, not the children; although physical violence toward another parent can cause children psychological trauma, there is no evidence whatsoever that either of the children were aware of or affected by this incident.

[38] Moreover, other evidence directly contradicts the mother's assertion of abusive behaviour: a) the mother left the children with the father in Austria for nearly two months in 2008, which she logically would not have done if she truly believed he was a menace; b) their physician in Austria observed that the children were in good health and being well taken care of by their father; and c) the social worker from the Youth Welfare Office in Vienna opined that the father was taking good care of the children and they were not at risk with him.

[39] The mother also suggests that because the father's current residency permit expires on July 5, 2009, returning the children to his care would place them in an unstable environment. I reject that assertion; this permit has been renewed regularly since his arrival in Vienna and there is no evidence it will not be again.

[40] This does not mean that the mother cannot raise allegations of abuse or neglect in a full hearing on the merits. But on the evidence before me her present concerns do not amount to anything near the "grave" risk contemplated by A.13.

Whether they should reflect on the father's custodial and access rights is a matter the Austrian court is fully capable of determining, and indeed had been in the process of doing before the mother removed the children.

[41] For these reasons, an Order shall issue as follows:

1. The children shall be returned to the father's care forthwith, to be collected by the father and travel with him to his home;

2. The mother's consent to the children's travel to Austria is dispensed with;

3. The father shall have sole possession of the travel documentation for the children;

4. The issue of the mother's further contact with the children, whether custody or access, is remanded to the district court of Leopoldstadt for its adjudication.

[42] If the parties cannot agree on costs they may make submissions in writing, the father by June 12, and the mother by June 22. If a reply is required the father shall deliver one by June 29.

Baltman J.

DATE: May 25, 2009

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ENDORSEMENT

Baltman J.

DATE: May 25, 2009