Toronto Registry No. DFO 09 10073
DATE: 2010·VII·20
CITATION: *Achakzad v. Zemaryalai*, 2010 ONCJ 318

ONTARIO COURT OF JUSTICE

B E T W E E N :

MENA ACHAKZAD,
Applicant,

— AND —

OMEDULLA ZEMARYALAI,
Respondent.

Before Justice Ellen B. Murray
Reasons for Judgment released on 20 July 2010

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully removed child — Declining return of child — Grave risk of harm to child in child's return — Mitigation of risk through undertakings — About 10 years ago, parents of girl (now 6 years old) had wed under arranged marriage — Although born abroad, mother was raised in Ontario but, upon marriage, moved to California where she had no family and few friends and lived in society of father's family — Mother claimed that, shortly before child's birth, father began pattern of escalating abuse against her that she initially tried to hide in keeping with ethnic traditions of family honour, but it gradually became known to members of father's family — Despite apparent pledge between patriarchs of mother's and father's families for mother's safety, father's violent behaviour resumed to point where his own family either could not control him or even abetted his conduct — After particularly violent incident 21 months ago, mother and child fled to maternal grandfather's home in Ontario with no intention of returning — On father's application before Ontario court for child's return under (Hague) *Convention on the Civil Aspects of International Child Abduction*, mother conceded that child was habitually resident in California at relevant time and that she had wrongfully removed child from California but relied on exception in Article 13(*b*) of Convention that order sought by father would place child at "grave risk" of "physical or psychological harm" or otherwise place child in "intolerable situation" — Ontario Court of Appeal and American courts have accepted proposition that grave risk of harm to child's primary caregiver can constitute grave risk of harm to child, which can justify court's refusal to issue return order — In cases of documented domestic violence, courts have suggested that imposing undertakings can serve as useful device to control risk of harm flowing from return order, but

Canadian courts have given little attention to when and how undertakings might actually mitigate such harm — On other hand, American court have pointed out that such undertakings are not at all mentioned in text of Convention; that Convention therefore offers no means to enforce them; and that extensive involvement in creating undertakings entangles court in merits of underlying custody dispute, which is exactly what Convention says that court should avoid in proceedings under Convention — And, despite undertakings, there will always be cases where justice system in requesting state will simply be ineffective in controlling abusive party's behaviour, not because of any defects in that justice system, but because of abusive party's behaviour is beyond control (for instance where party has record of disregarding court orders) — In this case, court assessed credibility of parties and their evidence in detail and rejected testimony of father, his family and witnesses and concluded that father did threaten and assault mother from when she was pregnant until terrifying night he pointed loaded firearm at mother and child — Father's behaviour was beyond control of his own parents who not only refused to involve law enforcement agencies but were prepared to perjure themselves in court on father's behalf — Moreover, father has shown no inclination to admit any wrongdoing — Although no one doubted vigilance of California justice system in protecting interests of victims of domestic violence, father in this case had not been amenable to control by justice system, regardless of undertakings offered by him — Court ruled that gravity of risk of harm posed to mother and child by return order could not be adequately controlled by such undertakings — Any return order would thus place mother and therefore child in "intolerable situation" — Rather than making feeble attempt to mitigate risk, court found that it was truer to Convention's spirit and purpose to refuse to make return order — Father's application under Convention dismissed.

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Reide L.E. Kaiser and Jennifer P. Ryan ..... counsel for the applicant mother
Philip J. Traversy and Janet E. Preston ..... counsel for the respondent father

For previous proceedings, see:

- father's application for child's return to California dismissed: *Achakzad v. Zemaryalai*, 2009 ONCJ 276, [2009] O.J. No. 2564, 2009 CarswellOnt 3548 (Ont. C.J.), *per* Justice Brian C. Weagant;
- father's appeal allowed and new hearing ordered: *Achakzad v. Zemaryalai*, 2009 CanLII 49896, 76 R.F.L. (6th) 345, [2009] O.J. No. 3933, 2009 CarswellOnt 5615 (Ont. S.C.), *per* Justice George Czutrin; and
- motion for removal of father's lawyer allowed: *Achakzad v. Zemaryalai*, 2010 ONCJ 24, 76 R.F.L. (6th) 366, [2010] O.J. No. 431, 2010 CarswellOnt 545 (Ont. C.J.), *per* Justice Marion L. Cohen.

[1] JUSTICE E.B. MURRAY:— The parties are the parents of a daughter, Machell, born on 14 July 2004. They cohabited in California from their marriage in 2001 until 10 November 2008, when the applicant alleges that the respondent beat her and she fled their home with Machell. On 14 November 2008, the applicant, accompanied by Machell, flew to Toronto. She and Machell have lived here with her parents ever since. The respondent asks that this court order the return of Machell to California pursuant to the (Hague) *Convention on Civil Aspects of International Child Abduction*, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, 99 U.S.T. 11, 19 I.L.M. 1501 (the "Convention" or "Hague Convention"). The applicant concedes that the respondent is entitled to a return order under the Convention unless she establishes, as set out in Article 13(*b*) of the Convention, that such an order would place Machell at "grave risk" of "physical or psychological harm" or "otherwise place the child in an intolerable situation". The applicant submits that she has proven that an order would

place Machell at grave risk of both physical and psychological harm, and asks the court to exercise its discretion to refuse to order the child's return.

[2] The issues that I must decide are:

1. Did the respondent assault and threaten the applicant — sometimes in the presence of Machell — as alleged by her? The applicant alleges a series of escalating assaults and threats, which the respondent flatly denies.
2. If I find that all or some of the allegations made by the applicant are true, do those facts provide sufficient basis to find that the 13(*b*) defence is made out?
3. How should any undertakings that could be imposed by the court on the respondent figure into an assessment of risk?

[3] The applicant submits that, in these circumstances, spousal violence is tantamount to child abuse and that neither she nor the child would be safe near the respondent in California. She argues that any undertakings that the court could require from the respondent cannot effectively control this risk. The respondent concedes that "serious, ongoing" violence by a parent to a child's primary caregiver can be the basis for a successful 13(*b*) defence. He submits, however, that, even if this court finds that he committed some acts of violence, those acts are insufficient to demonstrate a "grave risk" of harm. He proposes undertakings that the court may impose to deal with any concerns involved in a return of the applicant and Machell to California, including any concerns that the court may have about risk of physical harm to the applicant.

1: THE CONVENTION

[4] The Hague Convention is an international treaty to which Canada is signatory. Its objective is to prevent the abduction of children from their place of habitual residence by parents, to insure that issues of custody and access are tried in the place where the child is habitually resident, and to prevent forum shopping. The Hague Convention has had the force of law in Ontario since 1 December 1983, by virtue of section 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, as amended.

[5] The provisions of the convention relevant to this decision are set out below.

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

- Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
- Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
- Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention 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 the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose, they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where:

(*a*) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(*b*) at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (*a*) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention:

(*a*) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(*b*) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

. . .

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central

Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Despite the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body that opposes its return establishes that:

(*a*) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(*b*) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

. . .

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained 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 or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

[6] The respondent is required to demonstrate that:

1. Machell was habitually resident in California at the time of her removal from California, or retention in Ontario, and
2. he was exercising rights of custody pursuant to California law at the time of

her removal or retention.

The applicant concedes both these points and concedes that she "wrongfully removed" the child from California.

[7] In this decision, I use the term "requested state" to refer to the jurisdiction in which an application for an order of return is made under the Convention, and the term "requesting state" to refer to the jurisdiction of the child's habitual residence.

2: ARTICLE 13(*b*)

2.1: Interpretive Principles

[8] It is desirable that the Convention and its exceptions have a consistent interpretation among signatories. For that reason, a court dealing with a treaty may find it helpful to refer to the case law of other signatories.[1] The Supreme Court followed this course in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26, [1994] S.C.J. No. 6, 1994 CarswellMan 91. Appeal Justice Harry S. LaForme of the Ontario Court of Appeal, in *Ellis v. Wentzell-Ellis*, 2010 ONCA 347, 78 R.F.L. (6th) 245, [2010] O.J. No. 1987, 2010 CarswellOnt 2981 (Ont. C.A.), set out the rationale for reference to foreign case law in Hague Convention cases:

> **[20]** **. . .** Although foreign case law is not binding, the court should nevertheless take care to ensure consistency with the interpretations adopted by the courts of other states parties, particularly where a consensus has emerged from among them. To do otherwise would, in my view, not only weaken the *Convention* but also run contrary to the will of the legislature which has chosen to enact it into domestic law

For this reason, I have referred in this judgment to the case law of other Convention signatories, and particularly to case law from the U.S., which appears to have given considerable attention to the proper treatment of 13(*b*) claims.

[9] Courts in countries of Hague signatories, including the Ontario Court of Appeal,[2] have stressed that the exceptions to a return order provided for in the Convention should be narrowly construed. As Appeal Justice Jacques Chamberland of the Québec Court of Appeal observed in *R.F. v. M.G.*, 2002 CanLII 41087, [2002] R.D.F. 785, [2002] Q.J. No. 3568, 2002 CarswellQue 1738 (Qué. C.A.):

> **[30]** The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children

1. Ruth Sullivan: *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002), at page 427, deals with sources that may be consulted in the interpretation of treaties, which include case law from other signatories.
2. *Ellis v. Wentzell-Ellis*, *supra*, at paragraph [38]; *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226, 124 O.A.C. 308, 179 D.L.R. (4th) 15, 1 R.F.L. (5th) 222, 1999 CanLII 1722, [1999] O.J. No. 3579, 1999 CarswellOnt 3018 (Ont. C.A.), at paragraph [37]; and *Jabbaz v. Mouammar* (2003), 171 O.A.C. 102, 226 D.L.R. (4th) 494, 38 R.F.L. (5th) 103, 2003 CanLII 37565, [2003] O.J. No. 1616, 2003 CarswellOnt 1619 (Ont. C.A.), at paragraph [25].

> from one country to another. However, it is also, in my view, a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.

Canada, as a country of immigrants, arguably has a special interest in insuring that the Hague Convention is respected, so that international custody disputes are handled in an orderly and predictable manner and that children of immigrants living here are not subject to international child abduction.

[10] The onus is on the party claiming an exception to the rule of return to prove the grounds. Some cases from outside Canada have held that an exception must be proved by "clear and compelling evidence", perhaps suggesting that a standard higher than the balance of probabilities is required.[3] In Canada, the Supreme Court has made it clear that, in civil cases — regardless of the stakes — there is only one standard of proof applicable, proof on the balance of probabilities. See *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, 380 N.R. 82, 260 B.C.A.C. 74, 83 B.C.L.R. (4th) 1, 439 W.A.C. 74, [2008] 11 W.W.R. 414, 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 60 C.C.L.T. (3d) 1, 61 C.R. (6th) 1, [2008] S.C.J. No. 54, 2008 CarswellBC 2041. That is the standard that applies in this case.

2.2: Thomson v. Thomson

[11] The Supreme Court of Canada considered the Article 13(*b*) defence in *Thomson v. Thomson*, *supra*. That case involved an application by a father in Scotland for the return of an infant child to that jurisdiction after the mother had taken the child to Manitoba and did not return. The mother, the child's primary caregiver, had received temporary custody of the child from the Scottish court, but had violated a non-removal order. The father obtained a "chasing order" from the Scottish court granting him custody. The mother argued that she met the "grave risk of harm" test set out in Article 13(*b*), in that it would cause psychological harm to the child to be removed from her care, the necessary result of a return order, given the father's custody order. The Supreme Court rejected that argument, and ordered the child's return.

[12] A number of principles emerge from *Thomson v. Thomson*, *supra*:

- Although the preamble of the Convention states that "the interests of children are of paramount importance in matters relating to their custody", an application under the Convention for return of a child is not a custody hearing. The court should not consider the best interests of the child in the same manner that it would in a custody hearing. (Paragraph [42])
- "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." The harm must be "substantial, and not trivial". (Paragraph [80])
- The Convention aims to restore the *status quo* that existed before a wrongful removal. Sometimes, a chasing order can, in fact, interfere with that objective. For example, in *Thomson v. Thomson*, *supra*, the father's custody

3. For example, *Re M. (Abduction: Intolerable Situation)*, [2000] 1 F.L.R. 930 (Eng. H.C.).

order would have caused the child to be separated from his primary caregiver — a change in the *status quo*. The court recognized that this would be detrimental to the interests of the child. (Paragraph [83])

- In such a case, the child's short-term interests may be protected by requiring of undertakings from the requesting party. With appropriate undertakings, "the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated". (Paragraph [84])

2.3: Domestic Violence and Article 13(*b*) Claims

2.3(a): Pollastro v. Pollastro

[13] Although it was initially questioned whether grave risk of harm to a child's primary caregiver can constitute grave risk of harm to a child, that point was settled in Ontario by the Court of Appeal in *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485, 118 O.A.C. 169, 171 D.L.R. (4th) 32, 45 R.F.L. (4th) 404, 1999 CanLII 3702, [1999] O.J. No. 911, 1999 Carswell-Ont 848. *Pollastro v. Pollastro* was a case in which a primary-caregiver mother of a young child had been ordered to return the child to California, despite the father's past assaults on and threats to the mother. Justice Rosalie S. Abella for the court observed that:

> **[33]** **. . .** it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.

In determining whether a return to California would place the child in an intolerable situation, it was relevant "to take into account the possibility of serious physical or psychological harm coming to the parent on whom the child is totally dependent" (paragraph [34]). Because of the father's past violence, Justice Abella found that a return to California for the mother would inevitably place her in a dangerous situation. The court found that the infant child's "interests are inextricably tied to (the mother's) psychological and physical security," and reversed the return order.

[14] U.S. courts[4] and courts in other Hague signatories[5] have also recognized that domestic violence to a parent can constitute a "grave risk of harm" to a child in her care that will justify a court's refusal to make a return order. In *Walsh v. Walsh*,[6] the First Circuit Court of Appeal noted (at paragraph [24]) the evidence about the harmful effect of domestic violence on children:

- Exposure to violence between parents can cause psychological harm to children.
- Children "often become targets of physical abuse themselves or are injured when

4. U.S. cases include *Baran v Beaty* (2008), 526 F. 3d 1340 (11th Cir., Ala.); *Danaipour v. McLarey* (2002), 286 F. 3d 1 (1st Cir.); *Van De Sande v. Van De Sande* (2005), 431 F. 3d 567 (7th Cir.); *Tsarbopoulos v. Tsarbopoulos* (2001), 176 F. Supp. 2d 1045 (U.S. Dist. Ct., E.D. Wash.).

5. *El Sayed v. Secretary for Justice*, [2003] 1 N.Z.L.R. 349 (H.C.), and an English decision *Re M. (Abduction: Leave to Appeal)*, [1999] 2 F.L.R. 550, [1999] EWCA Civ 1132 (Eng. C.A.).

6. (2000), 221 F.3d 204 (1st Cir.).

they attempt to intervene on behalf of a parent".

- "Credible social science literature establishes that serial spousal abusers are also likely to be child abusers".
- "State and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with an abuser."

2.3(b): Cases post-Pollastro v. Polastro

[15] There have been Canadian cases following *Pollastro v. Pollastro*, *supra*, in which courts have refused to make a return order where there is credible evidence of domestic violence to a child's primary parent.[7] Cases[8] decided under section 23 of the *Children's Law Reform Act* have also recognized that violence by a parent to a child's primary caregiver can constitute harm to a child that is serious enough to warrant assumption of jurisdiction by an Ontario court. The *Children's Law Reform Act* provides that, in custody cases in which the child's habitual residence is in a non-Hague country, the Ontario court should decline to exercise jurisdiction unless it is established on the balance of probabilities that a return order would cause "serious harm" to the child. *Thomson v. Thomson*, *supra*, recognized that the "serious harm" standard found in some provincial statutes is equivalent to the "grave risk of harm" test under the Hague Convention.

[16] However, even post *Pollastro v. Pollastro*, *supra*, many Article 13(*b*) claims that allege grave risk of harm to a child because of domestic violence directed towards his primary caregiver have failed in Canadian courts. Reasons for refusing the claim vary:

- Sometimes the court is simply not satisfied on the balance of probabilities that domestic violence occurred. See, for example, *Ellis v. Wentzell-Ellis*, *supra*, footnote 2, where the abducting mother complained of verbally abusive and drunken behaviour, but not physical assaults or threats. See also *Moller v. Despoja-Moller*, [2002] W.D.F.L. 168, [2001] O.J. No. 5170, [2001] O.T.C. 964, 2001 CarswellOnt 4612 (Ont. S.C.); *Sierra v. Sierra* (2001), 105 A.C.W.S. (3d) 895, [2001] O.J. No. 2044, 2001 CarswellOnt 1869 (Ont. Fam. Ct.).
- Sometimes the court finds that the assault alleged was minor or a one-time occurrence. See *Finizio v. Scoppio-Finizio*, *supra*, footnote 2, where the court noted that there was only one "physical altercation" (a punch) in an 8-year marriage. Also see *Suarez v. Carranza*, 2008 BCSC 1187, 55 R.F.L. (6th) 382, [2008] B.C.J. No. 1657, 2008 CarswellBC 1829 (B.C.S.C.), where a push on two occasions was the violence alleged.
- Sometimes the court notes that, despite the violence alleged, the victim of the

7. For example, *Lombardi v. Mehnert*, 2008 ONCJ 164, 50 R.F.L. (6th) 305, [2008] O.J. No. 1413, 2008 CarswellOnt 2075 (Ont. C.J.).

8. See *Ndegwa v. Ndegwa*, 2001 CanLII 28132, 20 R.F.L. (5th) 118, [2001] O.T.C. 525, [2001] O.J. No. 2849, 2001 CarswellOnt 2528 (Ont. Fam. Ct.); *Rajani v. Rajani*, 2007 CanLII 38126, 160 A.C.W.S. (3d) 294, [2007] O.J. No. 3501, 2007 CarswellOnt 5834 (Ont. S.C.); and *Isakhani v. Al-Saggaf*, 2007 ONCA 539, 226 O.A.C. 184, 40 R.F.L. (6th) 284, [2007] O.J. No. 2922, 2007 CarswellOnt 4805 (Ont. C.A.).

assault expressed no fear of the assailant (*Suarez v. Carranza*, *supra*), or that the violence alleged is not the reason that the abducting parent declines to return with the child to the requesting state. In *Cannock v. Fleguel*, 2008 ONCA 758, 242 O.A.C. 221, 303 D.L.R. (4th) 542, 65 R.F.L. (6th) 39, [2008] O.J. No. 4480, 2008 CarswellOnt 6633 (Ont. C.A.), the court found that the mother did not want to return to Australia because of the hardship that it would work upon other children in her custody.

2.3(c): Presumption of Protection in the Requesting State

[17] In *Finizio v. Scoppio-Finizio*, *supra*, footnote 2, the court rejected an Article 13(*b*) argument that was based a single assault, noting (at paragraph [34]) that:[9]

> 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.

which will implicitly include providing protection for a primary caregiver returning with the child.

[18] It is noted that, in *Finizio v. Scoppio-Finizio*, *supra*, the court recognized that there are some cases — such as *Pollastro v. Pollastro*, *supra* — where the danger presented by domestic violence is so high that the presumption that the requesting state will be able to provide such protection does not apply (paragraph [32]). *Finizio v. Scoppio-Finizio* did not provide further guidance as to how a court should draw the line between cases in which a return order might safely be made, and those in which it should not be made.

2.3(d): Undertakings

[19] The role of undertakings, as set out in *Thomson v. Thomson*, *supra*, is to mitigate "short-term harm" that might result from a return order. *Thomson v. Thomson* was not dealing with the risks to the child that flow from domestic violence to an abducting primary caregiver.

[20] The issue of undertakings was not discussed in *Pollastro v. Pollastro*, *supra*.

[21] *Finizio v. Scoppio-Finizio*, *supra*, decided in 1999, suggested that imposition of undertakings can have a potential mitigating effect on the harm that might come from a return order. The court required the father requesting the order to undertake not to "molest, harass, or annoy" the mother.

[22] Despite the suggestion in *Finizio v. Scoppio-Finizio* that undertakings could provide a useful tool to control risk of harm flowing from orders of return, later Canadian cases have given scant attention to the issue of when and how undertakings might actually

9. The Court of Appeal quoted from Justice John R.R. Jennings in *Medhurst v. Markle*, 1995 CanLII 9273, 26 O.R. (3d) 178, 17 R.F.L. (4th) 428, [1995] O.J. No. 3085, 1995 CarswellOnt 1096 (Ont. Gen. Div.). This was an appeal decision. It should be noted that Justice Jennings did not deal with the issue of domestic violence as the basis for an Article 13(*b*) claim in dealing with the appeal.

mitigate a risk of harm of a return order in cases of documented domestic violence.[10]

[23] In *Cannock v. Fleguel*, *supra*, the court at paragraph [28] made a general observation that imposition of appropriate undertakings may modify a potential risk of harm of a return order, so that Article 13(*b*) grounds will not be made out. The court did not deal with specific undertakings that might have been appropriate in that case, because the appeal was taken before the judge at first instance had considered the undertakings issue.

[24] In *Lombardi v. Mehnert*, *supra*, footnote 7, the court noted that the father had been convicted of assaulting the mother previously and that he had breached a restraining order. The court observed:

> **[26]** . . . I am not convinced that any undertaking would protect the mother and the child from Mr. Lombardi under these circumstances.

[25] Counsel brought to my attention no other Canadian cases in which it was established that there had been domestic violence to a primary caregiver in which a court considered the appropriateness of undertakings to mitigate risk of future harm.

2.3(e): Standard for Article 13(b) Claims — U.S. Approaches

[26] *Friedrich v. Friedrich* (1996), 78 F. 3d 1060, a U.S. case of the Sixth Circuit Appeal Court preceding *Finizio v. Scoppio-Finizio*, *supra*, footnote 2, enunciates a standard for Article 13(b) claims similar to *Finizio v. Scoppio-Finizio*:

> . . . a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute — *e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. . . .

Friedrich v. Friedrich, *supra*, was a not a case involving domestic violence or allegations of child abuse, but, like *Thomson v. Thomson*, *supra*, turned on the psychological harm that might come to a young child if separated from his primary caretaker. The court in *Friedrich v. Friedrich*, like the court in *Finizio v. Scoppio-Finizio*, recognized that, in some cases, the level of risk resulting from a return order will be too high for the order to be made, irrespective of the capabilities of the justice system of the requesting state.[11]

[27] I am guided by the directions of our Court of Appeal in *Finizio v. Scoppio-Finizio*,

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10. *Suarez v. Carranza*, *supra*, is a case in which alleged minor assaults were not confirmed by the court and in which the mother said that she was not afraid of the father. The court found that the Article 13(*b*) claim was not made out. It did, however, require the father to undertake to permit the child to stay with the mother pending a custody order in the requesting state (New York). The undertaking appears to be a response to the stress that the young child would feel at separation from his primary caregiver, rather than the domestic violence issue.

11. The example given was when a return order would place the child in the hands of a parent who had sexually abused the child.

echoed in subsequent cases,[12] with respect to the proper standard to apply in an Article 13(*b*) hearing. Having said that, it is interesting to note that, in the U.S., recent decisions in four circuits of the U.S. Court of Appeal have rejected the proposition that a court in an Article 13(*b*) inquiry is "limited to determining whether the courts of the child's habitual residence can provide protection to the child"[13] — the approach in *Friedrich v. Friedrich*, *supra*. For example, Justice Sarah H. Black of the 11th Circuit in *Baran v. Beaty*, *supra*, footnote 4, observed that neither the "plain language of Article 13(*b*)" (nor the official commentary on the Convention, the Perez-Vera report[14]) says anything "about a reviewing court's duty to assess the home country's ability to protect a child from harm — it says only that return need not be ordered when the risk of grave harm exists. . . . Although a court is not barred from considering evidence that a home country can protect an at-risk child, neither the convention nor ICARA[15] require it to do so." Justice Black for the court held that:

> Although we are cognizant of the Convention's goal of quickly returning abducted children to their countries of habitual residence, the text of the Convention and the commentaries on it place a higher premium on children's safety than on their return. Consequently, we decline to impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return

2.3(f): Undertakings and Risk of Harm — U.S. Approaches

[28] Courts in the U.S. have stated that in Article 13(*b*) cases, undertakings can allow a court to achieve the goals of the Convention, while at the same time ameliorating risk that might flow from a return order.[16] However, over the past ten years, the courts at both the trial and appellate level in that country have noted the pitfalls in the use of undertakings in cases where there is serious risk of domestic violence and other types of child abuse and have raised doubts to whether undertakings should be relied upon routinely in attempts to control that risk. (See *Baran v Beaty*, *Van De Sande v. Van De Sande*, *Danaipour v. McLarey*, *Tsarbopoulos v. Tsarbopoulos*, *supra*, in footnote 4, and *Walsh v. Walsh*, *supra*, footnote 6.)

[29] These courts point out that the text of the Convention does not provide for the use

12. See *Ellis v. Wentzell-Ellis*, *supra*; and *Wedig v. Gaukel*, 2007 CanLII 13522, 38 R.F.L. (6th) 60, [2007] O.J. No. 1547, 2007 CarswellOnt 2479 (Ont. S.C.). This latter case was appealed to the Ontario Court of Appeal and upheld, but the appeal decision did not deal with the Article 13(*b*) claim, but other grounds. See *Wedig v. Gaukel*, 2007 ONCA 521, 38 R.F.L. (6th) 91, [2007] O.J. No. 2651, 2007 CarswellOnt 4299 (Ont. C.A.). See also *De Martinez v. Rios* (2008), 50 R.F.L. (6th) 293, [2008] O.J. No. 3098, 2008 CarswellOnt 2055 (Ont. S.C.); and K.J.G. v. K.J. B., [2000] A.J. No. 290 (Alta. Q.B.).

13. *Nunez-Escudero v. Tice-Menley* (1995), 58 F. 3d 374 (8th Cir.). See also the U.S. appellate cases in footnotes 4 and 6.

14. Elisa Perez-Vera: "Explanatory Report" at pages 426-473 of Hague Conference on Private International Law: *Actes et documents de la Quatorzième session, Tome III — Enlèvement d'enfants* (Permanent Bureau of the Conference in The Hague, 1982).

15. The *International Child Abduction Remedies Act of 1988*, Pub. L. No. 100-300, 102 Stat. 437, 42 U.S.C. §§11601-11610. This is the enabling statute in the United States.

16. For example, in *Walsh v. Walsh*, *supra*, footnote 6.

of "undertakings" and therefore contains no provision for their enforcement. Four reasons are noted for the concern about the use of undertakings in cases of domestic violence or other child abuse:

1. Undertakings cannot be enforced in most cases, as the requesting parent is in another jurisdiction. If a court finds that there is a serious risk of harm in a return order, how can it rely upon unenforceable undertakings to protect a child?

   (Sometimes imposition of an undertaking that requires the requesting parent to obtain a "safe harbour" order is seen as a solution to the problem of enforceability. An applicant for an order of return may be directed to request from the court of the requesting state an order that reflects the terms of undertakings imposed on that applicant by the court of the requested state — for example, a temporary order restraining the applicant from contacting the other parent. This is a "safe harbour" order.)

2. The requirement of a safe harbour order raises "serious comity concerns". Such a practice "smacks of coercion of the foreign court".[17] Further, experience has shown that courts in some requesting jurisdictions refuse automatically to grant orders that reflect the terms of an undertaking imposed by the court in the requested jurisdiction.

3. Imposition of extensive undertakings "could embroil the court in the merits of the underlying custody dispute and would tend to dilute the force of the 13(*b*) exception".[18] This is exactly what the Convention says the court should not do in a Hague hearing.

4. Most importantly, there are some cases "when there is no way to return a child, even with undertakings, without exposing him or her to grave risk".[19] These may be cases in which there is a grave risk of serious harm and in which there is good reason to think that the justice system in the requesting state will be ineffective in controlling the behaviour of an abusive party (the applicant for the order of return) — not because of any flaw in that justice system, but because of the behaviour of the abusive party. For example, the applicant may have a record of disregard for court orders.

   One appellate court that reversed an order of return despite offered undertakings commented that "undertakings are most effective when the goal is to preserve the *status quo* of the parties prior to the wrongful removal. This, of course, is not the goal in cases where there is evidence that the *status quo* was abusive".[20]

[30] The view that emerges in these cases is that, if a grave risk of physical or psychological harm from a return order is established, that — at least in some cases — it is truer to the spirit and purpose of the Convention to refuse to make the return order, rather than make a feeble attempt to mitigate this risk.

17. *Danaipour v. McLarey*, *supra*, footnote 4.
18. *Danaipour v. McLarey*, *ibid*.
19. *Walsh v. Walsh*, *supra*, footnote 6. See also *Van De Sande v. Van De Sande* and *Danaipour v. McLarey*, *supra*, footnote 4.
20. *Danaipour v. McLarey*, *supra*, footnote 4.

3: PROCEDURAL HISTORY

[31] Besides the applicant's custody claim and the respondent's Hague application in this court, there have been custody proceedings instituted by the respondent in California and criminal proceedings in both California and Ontario that have some relevance in this proceeding. A review of the history of these proceedings is set out below.

1. On 27 January 2009, the applicant brings her claim for custody and a restraining order and this court. Within two days, the respondent begins an application under the Convention seeking return of the child to California. On 29 January 2009, the case management judge orders a *viva voce* hearing (because of the credibility issues that were apparent in the affidavit material) on the respondent's Hague application, and schedules hearing dates for February.
2. On 6 February 2009, the respondent begins an action in California seeking custody of the child and obtains a "chasing order" granting him custody and ordering the child's return, to "the extent that it did not interfere with orders made by the Ontario court" in the Hague application. The applicant does not appear in this proceeding.
3. On 2 March 2009 (mid-way through the Hague hearing in Ontario), the respondent obtains an amended California order intended to provide a transitional legal framework if the Ontario court orders the child's return (a "safe harbour" order), valid until a hearing in the California court on 18 March 2009. The order provided that the applicant have temporary custody of the child, that the respondent have telephone access only, that the applicant have temporary exclusive possession of the home and that neither party will contact the other (except for the purpose of the telephone call with the child).
4. On 17 March 2009, shortly after the conclusion of the Hague hearing, the Ontario judge declines to order that the child be returned to California, on the basis of his finding that such return would expose the child to a grave risk of harm. The respondent appeals.
5. On 3 April 2009, the California police charge the respondent with spousal battery on 10-11 November 2008. Their investigation began after a telephone call from the applicant in early January 2009. The court also makes a temporary protective order that restrains the respondent from having contact of any type with the applicant and requires the respondent within 24 hours to turn in any firearm to the police or to sell it to a licensed dealer.
6. On 24 April 2009, the respondent brings a motion in the criminal case in California requesting an order excluding from evidence the photographs that purport to show injuries suffered by the applicant as a result of an assault by the respondent. The motion alleges that an expert retained by the respondent will testify that the photographs have been altered and requests state funding for him to prepare a report. Three days later, the District Attorney asks for the criminal charge to be dismissed, because of "problems with proof" and the motion is granted. The temporary protective order is also vacated.

   (Counsel in the proceeding before me agree, as a result of analysis of the

photographs conducted by an expert in Ontario who has furnished a report, that the pixels in these pictures have not been altered.[21] On consent, those pictures were submitted in evidence. There is, however, no agreement as to the date on which the pictures were taken. This topic will be dealt with further below.)

7. On 6 July 2009, the Ontario Superior Court reverses the decision in the Hague case by the Ontario Court of Justice and returns the case to this court for a new hearing on the issue of whether "the defence raised by the mother pursuant to Article 13(*b*) of the convention" is made out, "with the mother's evidence being presented first".

8. The respondent then decides to change lawyers. After some time, he retains a lawyer, P. B., who had been previously consulted by the applicant about this case. The applicant moves to have this lawyer removed, because of conflict of interest. The respondent resists the motion. Affidavits are exchanged. Because of this dispute, the dates offered by the court for the new Hague hearing cannot be taken up. By the time the motion is argued, it is mid-December 2009. On 25 January 2010, the court removes P.B. as the respondent's solicitor because of conflict of interest.

9. On 17 December 2009, the respondent and his lawyer appear in the California court on his custody claim. The transcript of the hearing shows that the respondent's lawyer advises the judge that "the Hague charade continues" and that the respondent was facing a motion to have his current attorney removed. The lawyer asks for a final order. The California court questions why the new trial in Ontario has not commenced. The respondent and his lawyer provide no explanation, except to say that a new hearing is "not going to happen". The court makes a final order, declaring that California is "the appropriate jurisdiction under the Hague Convention" to make "orders concerning custody and visitation" with respect to Machell, providing that the respondent have custody and directing that the child be returned forthwith to California. Access is not mentioned. The respondent did not serve the applicant or her counsel with the California order; the order only came to light some weeks later, when the applicant's counsel contacted the California court to clarify the status of his proceeding.

10. On 12 February 2010, the respondent is charged in Ontario with uttering a death threat directed to the applicant. The respondent is released on a surety bail, with conditions that prohibit him communicating with the applicant except through counsel, and prohibit him from possessing a firearm or having a gun licence.

11. The scheduling for the new Hague hearing is put over three times after the order removing P.B., on the consent of the parties, in order for the respondent to retain new counsel and for counsel to prepare. The hearing before me commenced on 7 June 2010.

21. The pictures were necessarily reformatted when transferred to the California police by e-mail. Counsel agrees that this likely accounts for the preliminary opinion expressed by the expert in California that they were "altered". The Ontario expert report was reviewed by counsel for both parties, but not put into evidence before me.

4: THE FACTS

[32] The applicant alleges a pattern of assaultive, abusive and threatening behaviour by the respondent to her, a pattern that begins with her pregnancy and ends with the parties' separation. The respondent completely denies those allegations. Not surprisingly, the witnesses called by each party support the party's allegations. The witnesses I heard are all aligned — family members on both sides, and the respondent's best friend.

[33] The applicant testified that each of the respondent's parents on different occasions witnessed the assaults and helped to restrain the respondent and protect her and the child after the assaults. The applicant's sister Sona testified that she witnessed the last assault. The applicant's father, Mr. Achakzad, testified that the respondent's father in a phone conversation on 11 November 2008 acknowledged to him an assault by the respondent on the applicant and apologized. (Mr. Achakzad testified that, on two prior occasions, the respondent's father had also acknowledged violence by his son to the applicant and had promised that he would insure that the behaviour did not occur again.)

[34] Witnesses from the respondent's side say that the marriage was happy and uneventful. They never observed or heard anything that would indicate violence or abuse directed by the respondent towards the applicant.

[35] Obviously, a careful assessment of witnesses' credibility is required.

4.1: Agreed Upon or Uncontested Facts

[36] I begin with from a review of the agreed upon or uncontested facts.

1. The parties are first cousins. The applicant is the daughter of Sultan Achakzad ("Mr. Achakzad"), who is the husband of Seddigeh Achakzad. The respondent is the son of Kobra Zemaryalai ("Mrs. Zemaryalai"), who is the wife of Karim Zemaryalai ("Mr. Zemaryalai"). Mr. Achakzad and Mrs. Zemaryalai are brother and sister.
2. Both families are of Afghani origin. The applicant and the respondent were both born in Afghanistan. When the applicant was about 3 years old, her family emigrated to Canada, landing in Montreal but eventually settling in Toronto. When the respondent was 6 months old, his family emigrated to Pakistan; when he was 7 years old, the family emigrated to the U.S., settling in Union City, a city south of Oakland, California.
3. Mr. Achakzad and Mr. Zemaryalai were close. They have known each other for over 30 years. Distance did not permit frequent visits, but — until the events that give rise to this case took place — they spoke on the telephone frequently, exchanging news about friends and family.
4. In December 1998, Mrs. Zemaryalai came to visit her brother, Mr. Achakzad. She brought three of her five children with her, including the respondent, who was 19 years old and a college student. At the time of the visit, the applicant was 15 years old and in grade X. The respondent and the applicant

had never met.

5. The visit lasted 3 weeks. Before Mrs. Zemaryalai and the children returned to California, the families celebrated "shirini", a ceremony in which Mr. Achakzad promised the Zemaryalai family that his daughter Mena, the applicant, would marry the respondent.
6. This visit was followed by another visit to Toronto in 1999 by the whole Zemaryalai family. On this occasion, the families held a "nikah" ceremony. "Nikah" is an Islamic marriage contract. It is entered into by witnesses for the bride and witnesses for the groom, who exchange vows before an imam. After the ceremony, the parties are considered married and are free to have sexual relations with each other.
7. In July 2001, the Achakzad family traveled to California. A three-day wedding feast was held. After this ceremony, the applicant began to live in California with the respondent. On 11 August 2001, the parties went through a civil marriage ceremony.
8. In the first year of their marriage, the respondent and the applicant lived with the senior Zemaryalais in their home in Union City. Thereafter, the respondent and the applicant had their own residence and lived in two different apartments in the area.
9. Machell was born on 14 July 2004.
10. All parties agree that the applicant was a devoted mother and that she provided good care to Machell.
11. The applicant did not work outside the home, except for assisting occasionally in flea market businesses run by Mr. Zemaryalai and the respondent.
12. The respondent worked in the aircraft industry, in mortgage loans and conducted his own businesses, selling cars and then running a pizza store.
13. Sometime before December 2005, the respondent acquired a gun licence and purchased a pump-action shotgun. He stored this shotgun in a case under a bed in the family apartment.
14. In May 2006, the respondent, the applicant and Machell moved into a 4-bedroom home (the Cygnus Court home), which was located close to the respondent's parents' home in Union City. This home was purchased by the respondent and extensively renovated. The respondent also purchased a new car for the applicant's use.
15. In the summer of 2008, the respondent began to pursue his long-standing dream to work as a police officer. He focused his energies on satisfying the requirements for admission to the police academy. Completion of the academy program would allow him to be hired as an officer. The respondent had friends in the police forces in the bedroom communities south of Oakland who encouraged him in his efforts.
16. Late in the evening of 10 November 2008, the applicant and the respondent

had an argument at their home. The applicant's sister, Sona Achakzad, was visiting at the time. The applicant called her in-laws at about 12:30 a.m. on 11 November. They rushed to the house. Mrs. Zemaryalai was still in her pyjamas.

17. The applicant, Sona, and Machell went to the senior Zemaralais' home that evening, and did not go back to the Cygnus Court home to live.

18. The applicant and Machell flew to Toronto on 14 November 2008. The applicant had a large amount of luggage with her, as evidenced by receipt that she paid for four units classed as "excess luggage". Her ticket had a return date of 12 December 2008.

19. The applicant did not contact police before leaving California.

20. In the period from 11 November 2008 to early January 2009, there were several telephone conversations between Mr. Achakzad and Mr. and Mrs. Zemaryalai.

21. On 2 January 2009, the respondent gave the applicant a deadline of 5 January 2009 to return with Machell. The respondent had consulted a lawyer and told the applicant that she had legally abducted Machell.

22. In early January 2009, the applicant contacted the Union City police with allegations of assault on 10-11 November 2009 by the respondent. On 10 January 2009, she forwarded to the police pictures of herself as corroboration of injuries she alleged that she had suffered in the assault.

23. The parties agreed that those pictures be admitted into evidence. The pictures have been analyzed by an expert who has prepared a report. The pixels in the pictures have not been altered. As a result of the transfer of the pictures to a laptop computer from the camera, the pictures do not contain metadata that can confirm when they were taken.

24. After the California temporary protective order was made, the respondent placed his gun with a gun dealer for sale. That sale was not completed and the dealer returned the gun to him in January 2010. The respondent's evidence (questioned by the applicant, although she has no evidence to the contrary) is that he stored the gun with his father. The respondent ultimately surrendered his gun to California police on 5 April 2010, shortly before the rehearing in this case was originally scheduled to begin.

25. The basis for the threatening charge of 12 February 2010 against the respondent is a statement admitted by him. After a proceeding in court on 11 February 2010 (in which he felt he was treated unfairly with respect to an access request), the respondent said to the applicant's lawyers: "This is how wives get killed by their husbands. . . . This is not a threat!"

26. The applicant now lives with her parents in Toronto and works selling cosmetics in a department store. The respondent now lives with his parents in Union City, and works in security for Research in Motion.

4.2: Conflicting Evidence about 10-14 November 2009

[37] I review below the conflicting evidence about the events of 10-14 November 2008.

4.2(a): Evidence of the Applicant, Sona Achakzad and Sultan Achakzad

[38] The applicant and her sister Sona tell essentially the same story. On 10 November, they were out with Machell for the day. During a couple of preceding days, the respondent had been in a bad mood, alternately complaining and silent. He had strained a leg in a test required for admission to the police academy. At about 7 p.m., the applicant, Sona, and Machell went, without the respondent, to the senior Zemaryalais' house for dinner. They returned home about 10:30 p.m. The respondent was not home. The applicant put Machell to bed. Sona did some course work on the computer and she and the applicant chatted. The respondent returned about midnight; the applicant went downstairs to fix him a milkshake, something she knew he liked.

[39] Argument - slapping: As the applicant came downstairs, she saw the respondent with a knife in his hand, peeling an apple. He was angry, and said "Where the fuck were you all day?" She replied that they had been at his parents' home; he said he knew that was not true. He told her to "give me the fucking car keys and cell phone"; she refused. The respondent slapped her twice on the face. Sona came downstairs and tried to place herself between the respondent and the applicant. However, the respondent was able to slap the applicant two more times. Sona and the applicant ran upstairs to the guest bedroom and the applicant called Mr. Zemaryalai. She told him that she would call the police if he did not come.

[40] Head hit against doorframe: The respondent pounded on the bedroom door until the applicant opened it. She gave him her cell phone and car keys. He checked her cell phone and saw that she had called his parents' number. He was furious. He yelled at the applicant that he had forbidden her to call his father to complain about him (something that she had done in the past). The respondent hit the applicant on the side of her head, shoving her head into the door frame. Sona shouted at the respondent to stop, to think of how "god" would view his actions. The respondent replied: "I'm your fucking god . . . fear me, fear me".

[41] The Zemaryalais arrive: The Zemaryalais came. Sona told them what had happened. Mrs. Zemaryalai asked what the applicant had done to provoke the respondent. Then the respondent came in. Mr. Zemaryalai attempted to calm him, without success. The respondent complained that the applicant was neglecting him, and Machell, and the house. He took his father to the kitchen, saying, "This is what she fucking feeds me". He threw the remote control for the garage door at the applicant and it hit her stomach.

[42] Final assault: The respondent then grabbed the applicant by the hair and pulled her around the room. Both Sona and Mr. Zemaryalai tried, unsuccessfully, to physically restrain him. Mrs. Zemaryalai sat down and did nothing. The respondent "flipped" the applicant face-first onto the floor; her face and nose hit the ground. She was stunned and blood ran

down her face. She was very scared. When she got up, she saw that Mr. Zemaryalai had finally succeeded in restraining his son.

[43] Attempt to call police: The applicant asked Sona for her cell phone, saying that she was going to call the police. Mrs. Zemaryalai took the phone from her hand. She asked "Why do you need to call the police? What do you think they're going to do? They'll let him out in a few hours". The respondent screamed at the applicant that "if you ruin my police record, watch what I'll do!" Mrs. Zemaryalai told the applicant to "go clean your face". The applicant screamed that she would not — she wanted them to "see what your son has done to me".

[44] Mr. Zemaryalai succeeded in getting the respondent calmed down. He told the applicant that she and Machell and Sona were coming back to their house and that they should go get their belongings. He took the respondent into a bedroom and made sure he got to bed.

[45] Photographs: While the applicant was upstairs, she used her sister's digital camera to take photos of her blood-covered face and clothing. The photos submitted in evidence appear to show blood coming from a cut on the bridge of her nose and from the inside of her nose. Sona took the chip from the camera, as she was afraid that Mrs. Zemaryalai might try to destroy the photos.

[46] Machell was in bed when this incident began. She awoke and Sona had to go calm her.

[47] Going to the Zemaryalais: The applicant gathered some clothing and a few important documents and put them in a small tote bag. She and Sona took the child and followed the Zemaryalais to their home. Before she left her home, the applicant also took $3,700 from the store of cash that the respondent always kept. They went to bed immediately.

[48] Injuries: The next morning, the applicant felt so sick that she did not get out of bed all day except to go to the bathroom. Her head throbbed. She had difficulty moving. She had bruises on her face, knees, wrist, back — "all over". She had a large bump on her forehead; she had a laceration on her nose. Sona took care of her and of Machell. Mr. Zemaryalai offered to take the applicant to an Aghan doctor, and she declined.

[49] Call from Mr.Achakzad: On the morning of 11 November, Sona called her father in Toronto and told him what had happened. According to Mr. Achakzad, he called Mr. Zemaryalai immediately. Mr. Zemaryalai apologized profusely for his son's actions. Mr. Achakzad demanded that the applicant and Machell be sent to Toronto as soon as possible. Mr. Zemaryalai promised to get airline tickets for them. Mr. Zemaryalai suggested that this should be a temporary trip, to let the applicant "calm down". Mr. Achakzad declined to give those assurances.

[50] Mr. Zemaryalai buys the tickets: The applicant testified that Mr. Zemaryalai told

her that he would arrange for her and Machell to go to Toronto, but that the respondent needed the money she had taken from the house to pay for the tickets. She gave him the $3,700.

[51] Sona hoped that the applicant and Machell could accompany her on the return flight that was already planned for 13 November. Mr. Zemaryalai explained to her that it would be too expensive to get the applicant tickets for this flight. He instead arranged for tickets for a flight the next day. Sona was not sure that she trusted Mr. Zemaryalai, but was reassured when he showed her the documentation for the tickets. Documents filed with the court show that the tickets were purchased via a travel agency that Mr. Zemaryalai agreed he often uses.

[52] Luggage for the trip: On 12 November, Mr. Zemaryalai accompanied Sona and the applicant on a trip back to the Cygnus Court house. The respondent's car was there and the women waited outside while Mr. Zemaryalai went inside; they saw the respondent leave. Sona then retrieved her luggage and the applicant took clothing and other items from the home. Sona helped the applicant pack her belongings for the trip. Besides her luggage, she had 4 large boxes, which she stacked by the front door of the Zemaryalai house. Mr. Zemaryalai advised the applicant that it was "safer" to leave her gold jewellery with him, as she might have difficulty taking it through customs into Canada. She gave him the jewellery. Later that day, the applicant saw the respondent coming to his parents' home, entering by the front door. He stayed briefly. They did not see each other.

[53] Drive to the airport: Mr. Zemaryalai drove Sona to the Oakland airport that evening. The next afternoon, he drove the applicant and Machell and all her belongings to that airport for a flight to Toronto, via Philadelphia. The respondent's younger brother, Naweed, came along to help with the luggage. When the applicant arrived in Toronto, she called Mr. Zemaryalai to advise him that they had arrived.

[54] The applicant's father, Mr. Achakzad, picked her up at the airport. He saw the injuries to her face.

4.2(b): Evidence of the Respondent, Karim Zemaryalai and Kobra Zemaryalai

[55] The respondent strained his leg badly on 8 November 2008. On 10 November, he stayed home most of the day. He was irritated that the applicant had not stayed in to look after him.

[56] Argument: At about 10 p.m., the applicant and Machell and Sona returned from his parents' house. Machell told him that she was tired and hungry. The respondent became more irritated: why was his daughter hungry, if her mother was taking care of her? He told the applicant that "you have responsibilities around this house". They argued, and she took Machell up to bed.

[57] When the applicant came down, the argument grew more intense. The applicant criticized him for wanting to be a policeman. He felt this was unfair, as she had previously

supported him in this plan. He thought that Sona was influencing her and observed that the applicant "was not the girl I knew". Voices grew louder. Each of them began swearing. The applicant left the room briefly, to attend to Machell. Soon after she returned, the respondent's parents arrived. The respondent realized that the applicant had called his father.

[58] A "problem with Omed": Mr. Zemaryalai testified that the applicant called him about 12:30 a.m., and simply said that she was having a "problem with Omed". Both the senior Zemaryalais were surprised to get a call from their daughter-in-law so early in the morning. This had never happened before. The Zemaryalais had spent a lot of time around their son and his wife and had never seen any arguments between them, let alone a dispute that was serious enough to make their daughter-in-law phone them. They had certainly never seen any violence or threats of violence.

[59] The Zemaryalais arrive: When the Zemaryalais entered the house, Mr. Zemaryalai talked to his son and Mrs. Zemaryalai talked to the applicant. They managed to "calm things down". Sona sat in the living room and said nothing. The Zemaryalais understood that there had been an argument between the parties, as described above by the respondent. They saw no assault and no injuries on the applicant. Mr. Zemaryalai helped his son into the bedroom and put him to bed.

[60] Going to the Zemaryalais: After the respondent was settled in his bedroom, the applicant asked Mr. Zemaryalai whether she and Machell and Sona could come to his house. She did not give a reason, but he assumed that it was because she "would feel more relaxed" at his house. He and his wife agreed.

[61] The applicant, Sona and Machell came to the Zemaryalai home that night and were settled in the guest bedroom. They stayed there for the next three days. One day, the respondent stopped by briefly and saw Machell, but not the applicant. The respondent did not call his father to discuss what had happened or find out what was going on with the applicant and Machell. He did not call the applicant.

[62] Call from Mr. Achakzad: Mr. Achakzad called Mr. Zemaryalai on the morning of 11 November, saying that Sona had told him that the respondent and the applicant had had an argument. Mr. Zemaryalai assured him that everything was under control and that it was a "normal argument that married people have".

[63] Mr. Zemaryalai did not accompany the applicant and Sona back to the house to get their belongings. Neither he nor Mrs. Zemaryalai noticed that the applicant and Sona had retrieved luggage or any boxes from the Cygnus Court house.

[64] The respondent did not notice anything missing from their house and did not notice the applicant or Sona coming to the house, although he was at home for most of the time in the days leading up to 15 November. He did not notice any luggage or boxes in the hall when he came to his parents' home on 13 November.

[65] The applicant visits a cousin: Mr. Zemaryalai drove Sona to the airport on 13

November 2008. The next day in the afternoon, the applicant told then that she was going with Machell to visit a cousin (Mrs. Zemaryalai's niece) in a nearby town and that she planned to stay overnight. The applicant had never visited this relative on her own before or stayed overnight there.

[66] The next morning, on 15 November 2008, Mr. Zemaryalai got a call from the applicant advising that she and Machell were in Toronto. She told him that she had left her car in a nearby Walmart parking lot near their home, which was about a 45-minute drive from the Oakland airport. Mr. Zemaryalai went to get the car.

[67] No reason to leave: The respondent and his parents had no inkling that the applicant planned to separate or to come to Canada with the child. They deny that they purchased tickets for the applicant and the child. They were astounded that she would do what she did. The respondent is baffled as to the applicant's motive for the move. He feels in hindsight, that the applicant may have been influenced by her family. Although neither the applicant nor anyone in her family ever requested that he and the applicant move to Toronto, he knows that they wanted to have their granddaughter closer. The respondent also speculates that the applicant might have resented his request that they have another child, even though he assured her that it would be up to her whether they did so.

[68] The respondent vehemently denies assaulting the applicant on 10-11 November 2008, or at any time. He acknowledges that the person in the pictures filed in evidence with a bloody face and clothing is his wife. He is candid in saying that he has no explanation for the pictures. He has no reason to think that she was assaulted by anyone else.

4.2(c): What Happened 10-14 November 2008?

[69] I have concluded that the evidence of the applicant and her witnesses accurately describe the events of 10-14 November 2008 and that the evidence of the respondent and his witnesses intentionally misrepresent what happened. I reach this conclusion based on the following considerations:

1. Absence of motive for the applicant to separate and leave California. According to the respondent and his parents, the parties had a wonderful life together in California. There may have been occasional arguments, like all married couples have, but they were happy. The respondent describes the applicant as someone who enjoyed-— who insisted on — having an upscale lifestyle, replete with the latest fashions and consumer goods and himself as the indulgent husband who provided the means for her to gratify her desires.
    - The applicant enjoyed living in a beautiful home, renovated to her specifications.
    - The applicant was pleased to live in the same neighbourhood as her in-laws, to whom she was close.
    - The applicant had the use of a new car, purchased by the respondent, as well as free use of department store credit cards.
    - The applicant was praised by the respondent and his family for her qualities

as a mother.

- The applicant was respected and valued by the respondent and his parents as a bright and capable person. They appreciated her help in the flea market and in doing banking and bill-paying for the respondent's pizza business.
- The applicant did not want to work outside the home, other than helping out as described above; the respondent did not complain that she was not working.
- The applicant was able to keep in touch with her family through regular phone calls, and was able to visit Toronto for an extended trip with Machell about once a year. The respondent paid for the phone bills and her trips without complaint. The applicant was happy with this arrangement.

According to the respondent, the applicant threw all of this away because of an argument about whether he would become a policeman. The result of this decision is a drastic decline in the applicant's standard of living. The applicant and Machell now live in a low -income housing unit with her parents and younger brother in Toronto. The respondent describes their home as "very crowded" and infested with "rodents". He was so concerned about these living quarters that he asked a judge of this court to place Machell in a foster home on his first court appearance in January 2009. Mr. Achakzad has been on a disability pension for 12 years. The applicant goes out to work daily in a job selling cosmetics in a department store. Her mother is not employed and looks after Machell while she is at work. Obviously, the applicant does not enjoy an upscale lifestyle.

It simply does not make sense that the applicant would give up what the respondent and his family say she enjoyed in California because of one heated argument. It does make sense, however, that she would abandon a comfortable standard of living if she was the victim of violence and threats of violence by the respondent.

Absence of motive to lie is a relevant factor in assessing credibility, but it does not necessarily mean that a witness is telling the truth. I take other factors into consideration in my assessment of the evidence.

2. Presence of motive for the respondent to lie. The applicant's counsel argued that there were cultural reasons that explained why the respondent felt justified in dominating and physically abusing the applicant and why his family would support him in this behaviour. These arguments were vehemently countered by the respondent's counsel, who asserted that they amounted to cultural stereotyping. The respondent was clear in his evidence that he had no sympathy for outmoded chauvinist values that might have been current in Afghanistan generations ago. I did not have reliable evidence to support the argument that the respondent's culture predisposed him to be abusive to the applicant.

   However, the respondent's own evidence did establish that he had a motive to deny any violence that he may have perpetrated against the applicant. He testified that a conviction of domestic violence could harm the prospects of an individual who was or wanted to be a police officer. He, in fact, believed that the charges he had faced — even though they were dismissed — had damaged his career prospects.

3. Other credibility factors. I will deal first with what I did not find significant. Each side highlighted minor differences in the evidence given by witnesses in the 2009 hearing versus the evidence given before me — for example, where someone was standing during the November 2008 argument; how the respondent strained his leg before that argument (climbing a wall vs. running); or whether the applicant told Mrs. Zemaryalai that she had taken a picture of her face that evening, or not . I do not consider most of these differences significant in assessing credibility. They concern minor facts that someone could easily forget, or, conversely, not think to mention at first telling.

   However, there were aspects of the witnesses' evidence, with respect to consistency, detail, and plausibility that did affect my evaluation of their credibility.

   The applicant and Sona gave evidence that was consistent with each other about the events of 10-14 November and their evidence was not significantly shaken on cross-examination.

   The respondent and his parents also testified in what appeared to be a candid manner. However, on three points, their evidence conflicted with the slim objective evidence available, or supported a version of events that was highly improbable, given the other evidence.

   - Because of the bill for excess luggage charges, which has come into evidence, we know that the applicant had four boxes in addition to her allowed luggage when she boarded the plane in Oakland on 14 November. According to Mr. Zemaryalai, the applicant chose to abandon her car in a nearby parking lot and somehow to make her way, with the child and the luggage and the boxes, to the Oakland airport, a 45-minute drive. This is highly improbable.
   - The tickets that the applicant traveled on were return tickets. It makes no sense that the applicant would have purchased return tickets, given that she did not intend to return to California. It would make sense that those tickets were purchased by either the respondent or his father, if Mr. Zemaryalai had promised Mr. Achakzad that he would send the applicant and Machell back to Toronto, but was expecting that she could be prevailed upon to return.
   - Despite the respondent's denial that he took the applicant's cell phone from her the evening of 10-11 November, the evidence (from phone records) establishes that no calls were made from that phone for several days after the call that the applicant made to her father-in-law at 12:30 in the morning on 11 November; the phone records show calls resuming some days later, calls that the respondent testified he made. He has no explanation why he had the applicant's cell phone.

4. The photographs. The photographs (to which I will refer as the "injury photographs") are powerful objective evidence of violence to the applicant.

   They are pictures of her. Both the applicant and Sona testify that they were taken on the night of 10-11 November, after the respondent assaulted the applicant. The photographs appear to show blood on the applicant's clothing and face, an open wound of the bridge of her nose, blood coming from her nose, and a bruise on her

cheek.

The applicant also introduced "before" and "after" pictures of herself, showing that she had no scar on the bridge of her nose two months before 10-11 November, and that she had what appears to be a scar on the bridge of her nose, (in the same place as the open wound on her nose in the pictures above) in a picture that she testifies was taken some weeks after 10-11 November. The respondent testified that the applicant had no scar on her nose prior to 10-11 November and he has no knowledge of her being injured, in a beating or otherwise, after this date. The applicant testified at the hearing that she covered the scar with makeup, but that the ridges of it could be felt if it was touched.

It is acknowledged that the injury photographs photos have not been altered — that is, the pixels in the photographs have not been manipulated.

The respondent has no explanation for the pictures or the scar. The respondent simply says in his submissions that there are "other illicit ways to produce misleading images", but that he will not speculate on how these images may have come into existence.

The respondent points out that the injury pictures do not contain internal data as to the date taken. (It is acknowledged that this internal data would have been erased when the picture were uploaded to the applicant's computer.)

We know that the pictures were in existence when they were sent to the California police on 10 January 2009. The applicant also introduced in evidence an e-mail she sent of the pictures to herself on 27 November 2008. The respondent's counsel suggests that the date record could have been manipulated.

The respondent points to the fact that the applicant erased the images on the chip in her sister's camera after she transferred the images to her laptop as a reason to call her credibility into question. He says that the original chip from Sona's camera, which would contain the date-stamp, is the best evidence available; why was it erased? I accept the explanation that the applicant thought the transfer of the images to her laptop was sufficient in terms of preserving a record of her injury. I decline to impute to her the knowledge that experts would have about the loss of data in the image caused by the transfer and the possible significance of that.

Given all the facts, I find it highly improbable that the applicant — who, on the basis of the respondent's evidence, had no reason to want to leave California — would have the motivation and the ability to manufacture photographic evidence to justify her departure. I am persuaded that the injury photographs are accurate depictions of what the applicant says they represent — her condition on the evening of 10-11 November.

5. <u>No early complaint to police, no attendance at a doctor.</u> The respondent points to the absence of either complaints to the police (prior to departure from California) or visits to a doctor in California with respect to the alleged attack as reasons to doubt the applicant's credibility.

   It would certainly be easier to assess the competing stories if the applicant had immediately gone to the police, or gone to a doctor. But the absence of this

evidence is not a reason to find that she lacks credibility. It is well known that abused wives often do not go to the police or consult doctors for a variety of reasons — shame, love, fear that they will not be believed, or a desire not to get their spouse into trouble with the criminal justice system.

The applicant had a reason particular to her situation for not going to the authorities with respect to the attack. She knew that the respondent was afraid that such a complaint would derail his attempts to become a police officer. If the applicant was afraid of the respondent, it makes sense that she would not take steps to do something that would anger him even further.

The applicant's specific cultural circumstances also explain why she might be slow to go to the authorities with claims of abuse. Evidence from the applicant, her father, Mr. Achakzad, and her sisters, Semena and Sona, was to the effect that separation and divorce is a cultural taboo in the Afghan community in which Mr. Achakzad moves in Toronto. Allegations of domestic abuse are a private matter, to be handled within the family and, if possible, controlled by the elder males in the family. The respondent and his family insist that they are modern and do not live by these standards, but they accept that Mr. Achakzad does — the respondent described him as like someone "out of the 14th century".

The Achakzad family witnesses illustrated how domestic abuse was handled in this family in their evidence about the marriage and separation of Semena at the end of 2005. Semena lives in Toronto, was only married 5 months before her separation and has no children. She was assaulted by her husband 4 times. The first 3 times (which included one incident of choking), she contacted her father, who convened a meeting with Semena, her husband and her husband's father. Undertakings were given that this would "never happen again". After the third assault, Mr. Achakzad told Semena that she "could" call the police if it happened again and if she could not get in touch with him quickly. It happened again, and she did call the police and separated. The Achakzads perceive that Mr. Achakzad's status in the Afghani community was diminished because of these events. He cannot frequent the same stores and clubs as he did previously.

I find that the applicant was affected by these family values. These values contributed to her reluctance not only to separate, but to involve the justice system in dealing with domestic violence.

4.3: Earlier Alleged Assaults

[70] I turn now to my assessment of the evidence about seven other alleged incidents of violence.

[71] Beginning when the applicant was pregnant with Machell, there are seven incidents of violence or threats of alleged violence by the respondent that the applicant testified preceded the assault of 10-11 November 2008. All are denied by the respondent and his witnesses. I describe these incidents in less detail than the events of 10-14 November 2008, although more detail was provided in the evidence.

1. October 2003. The applicant's evidence is as follows: The applicant is pregnant. The respondent, the applicant and Mrs. Zemaryalai are in the car, going to an appointment that he has scheduled to get health insurance for the applicant. The applicant leaves the car to go to the appointment; she returns with the information that there is no appointment — maybe the respondent has mismanaged the situation. He swears and tells the applicant to "get in the fucking car" or I will "smash your face in". Mrs. Zemaryalai admonishes the respondent "not to yell".

   The respondent and his mother recall no such incident.

2. Fall 2004. The applicant's evidence is as follows: The parties are moving to a new apartment. The respondent becomes frustrated because the move is not going well, blames the applicant and swears at her. She protests. He grabs her by the hair and slaps her face. Machell and Mrs. Zemaryalai are present. Mrs. Zemaryalai intervenes to make the respondent stop, but later says to the applicant that "You shouldn't have made him angry . . . Don't talk back to him when he's upset . . . these things happen between husbands and wives".

   The respondent and his mother acknowledge that the parties moved at around this time, but recall no such incident.

3. December 2004. The applicant's evidence is as follows: The applicant questions the respondent after he stayed out all night. She brings up "pictures of girls" and women's underwear that she has found in his luggage after he returned from a trip to Reno with friends. The respondent becomes furious that she is questioning him and slaps her. He throws a vase, says "clean this fucking shit up" and leaves.

   The respondent denies all aspects of this incident.

4. May 2005, the day before Mother's day. The applicant's evidence is as follows: The applicant, suspicious, checks the respondent's cell phone for messages and finds suggestive messages from a woman. She confronts the respondent, he is angry and begins putting her clothes in a bag, telling her that she can get out. The applicant says that she is not leaving without Machell. The respondent throws her clothes out of the bag, puts in some of his clothes and starts leaving, yelling "don't ever blame me!". As he leaves, he punches the applicant in the face. Her eye is blackened. Machell was present during this exchange — at first sleeping, but awakened by the noise. Later the respondent returns, apologizes but says, "You were going to leave Machell motherless on Mother's day". The next day, the applicant saw Mrs. Zemaryalai. Despite the makeup covering her black eye, Mrs. Zemaryalai detects that something had happened and insists that the applicant and Machell come and stay with the Zemaryalais for a couple of weeks.

   The respondent and his mother recall no such incident. In addition, the respondent's sister Arzo, who was friendly with the applicant, testified that she would have known about this incident and the others described above if they had occurred.

5. August 2005. The wedding of the applicant's sister Semena, for which the whole Zemaryalai family came to Toronto. The applicant's evidence is as follows: The day is tense and includes an argument between Semena and the respondent, which

takes place in front of the applicant and Machell, which culminates in the respondent's slapping Semena. After the evening wedding ceremony, the respondent is angry with the applicant, alleging that she neglected Machell to socialize with her family. The respondent yells and swears at the applicant in front of his mother, younger brother Naweed and sister Tamina. He reproaches her for having decided to attend the wedding without his permission and says "I'm going to make you taste your blood . . . you don't make the rules here". The respondent lunges at the applicant, is blocked by Naweed and hits him. Naweed retreats. The respondent continues to yell at the applicant and grabs her by the shoulders and slaps her. Tamina grabs him and he leaves.

The respondent and his mother acknowledge that they attended the wedding and that there was a verbal argument between the respondent and Semena, but otherwise deny these allegations.

6. August 2005. The applicant's evidence is as follows: The day following the wedding, the respondent tells the applicant to "get in the car", and takes her on a "terrifying" ride around the city. He says: "You're worthless . . . you're a 2-cent whore . . . it's me or death . . . choose now". He takes her to an underground parking lot and says that he is going to rape her. The applicant suffers a panic attack and begins gasping for breath. The respondent is scared and stops. Back in California, both Mr. and Mrs. Zemaryalai question the applicant about what she had done to provoke the respondent.

   The respondent absolutely denies these allegations.

7. Early December 2005 — the shotgun incident. The applicant's evidence is as follows: There was tension between the parties, stemming from an argument the day before in which the respondent was upset with the applicant because $92 was unaccounted for in the account for his pizza store. The applicant advises Semena of the trouble in a phone call. Semena tells her mother and the next day Mrs. Achakzad calls the applicant to discuss what happened. The respondent overhears the applicant speaking with her mother. He is was angry, unplugs the phone and yells: "I'll teach you to respect me if it's the last thing I do". Mrs. Achakzad is alarmed at the line being cut and tells her husband immediately what had happened.

   Mr. Achakzad is panicked. He calls Mr. Zemaryalai, telling him that he has to go to the parties' apartment, or that something awful would happen. Mr. Zemaryalai is minutes away and hurries over.

   In the apartment, the respondent berates the applicant. He grabs her by the hair and throws her over the bed. Machell is there, crying and runs to the applicant, who picks her up. The respondent takes his shotgun from under the bed and takes the gun out of the case. He loads the gun. Then he points the gun at the applicant while she is holding Machell. Mr. Zemaryalai arrives. The applicant flees into the bathroom with Machell and locks the door.

   After a few minutes, Mr. Zemaryalai tells the applicant that she can come out, that the respondent is gone. He takes the applicant and Machell to his home. They stay almost two months. During that time, Mr. Achakzad and Mr. Zemaryalai have

discussions about the couple. Mr. Zemaryalai assures Mr. Achakzad that he will control the respondent and that nothing like this will happen again. He tells the applicant that she should come to him if there is a problem and that he will protect her.

Towards the end of January 2006, the applicant and Machell return to live with the respondent. A month later, the respondent buys a house, which he begins renovating. They move in sometime in May 2006. The applicant's evidence is that, after she returned to live with the respondent, she became like a "robot wife". She tried to anticipate what the respondent would want and make sure she complied.

The respondent and his parents absolutely deny these allegations.

[72] The respondent's counsel offer three reasons why I should doubt the evidence of the applicant and her father about this alleged shotgun incident.

1. Evidence of house-hunting by the parties in December 2005-January 2006. The respondent gave evidence at this trial that he and the applicant were house-hunting from early December 2005 to January 2006, assisted by his best friend, a real estate agent and mortgage broker, Masud Ezat. Mr. Ezat gave evidence corroborating what the respondent said. Obviously, if this evidence is correct, it detracts significantly from the applicant's evidence about the respondent's threatening her with a shotgun in early December 2005, and her living with the respondent's parents for some weeks thereafter.

   I reject the evidence of the respondent and Mr. Ezat on this point for two reasons.

   - This evidence was not offered at the earlier trial, although the respondent and Mr. Ezat both gave evidence at that trial.

     The evidence was not even in the "will-say statement" provided by Mr. Ezat a few weeks prior to this trial. The respondent attempts to explain this by saying that he did not realize the significance of this evidence until his current lawyer pointed it out. He also points out that, at the first trial, he gave his evidence first, so that he did not hear all the details of the applicant's evidence about the shotgun incident (and specifically, her allegation that she and Machell had lived with his parents for some weeks after the incident) until after his witnesses' evidence was complete.

     I do not accept these explanations as believable. The respondent presents as bright and well-organized in this litigation. In this trial, it was clear that he was more familiar with the transcripts of the prior hearing than the lawyers were. He was represented by a capable lawyer at the first hearing. It strains credibility to believe that he did not understand the significance of the alleged house-hunting, which supposedly took place both before and after what was allegedly an extremely serious threat of violence by him to the applicant. He had an opportunity to present reply evidence on this point at the first hearing, and did not do so.

   - If the house-hunting story was correct, I would have expected to see some

documentation provided by Mr. Ezat. Mr. Ezat told a story of many home visits and even one offer allegedly presented by the parties prior to their eventual purchase. Mr. Ezat allowed in cross-examination that he probably had records of this search — maybe in his shed — but that no one had asked him to bring them. It defies belief that the respondent did not make the request, if this story is true. I have a stack of documentary evidence presented by each party on less significant points.

2. The loading of the shotgun. The respondent spent much time cross-examining the applicant about her recollection of how the shotgun was loaded during the alleged incident in December 2005. He led evidence himself in an effort to show that she was mistaken about how the shotgun was loaded, to buttress his argument that she was fabricating a tale of abuse. Ultimately, the applicant's counsel produced a manual for the shotgun, used in cross-examination of the respondent. The respondent acknowledged that the shotgun could in fact be loaded in a manner similar to that described by the applicant. His evidence was that he had never seen the manual before and he did not realize that the gun could be loaded in this manner. The respondent also emphasized that his gun was single barrel; the applicant testified that she remembered seeing "both barrels" of the gun pointed at her and Machell in December 2005. Upon cross-examination, with reference to the gun manual, it was established that the barrel of the gun rides on a tubular metal magazine that is the same length and diameter of the gun's barrel. An individual like the applicant, unfamiliar with guns and in a terrifying situation, could easily mistake the magazine for another barrel when it was pointed straight at her, as she testified it was.
3. Variance of Mr. Achakzad's evidence about the phone call. At the first hearing, Mr. Achakzad testified that he learned that there was an emergency between the applicant and the respondent when his wife told him that she had been on the phone with the applicant discussing the issue and the line had been cut. At the hearing before me, Mr. Achakzad testified that his wife had handed him the phone and the line had been cut after he asked the applicant what was wrong. The later version conformed with the applicant's evidence on the subject. This is not an important factual issue. The change in evidence may represent, as suggested by the respondent's solicitor, an ill-advised effort by Mr. Achakzad to assist his daughter. It is akin to the change in Mrs. Zemaryalai's evidence — from the first hearing to this hearing — on whether the applicant and Machell ever stayed overnight without the respondent at her home prior to 11 November 2008. This behaviour is troubling, but overall I do not find it very significant in my assessment of the credibility of the evidence of the alleged assaults.

4.4: Findings with Respect to Alleged Assaults from October 2003 to December 2005

[73] I find as a fact that the assaults alleged by the applicant between October 2003 and December 2005 occurred. I make this finding for three reasons.

1. My finding that the respondent and his parents were willing, while under oath, intentionally to misrepresent the facts of 10-14 November 2008, in order to aid the

respondent, figures prominently in my assessment of their credibility with respect to the other assaults alleged. If they were willing to lie with respect to the 2008 events, I see no reason to believe that they would not be equally willing to do so with respect to earlier allegations of assault.

2. The senior Zemaryalais' panicked response to what Mr. Zemaryalai described as a cryptic phone communication from the applicant on the evening of 10-11 November 2008 (I am "having a problem with Omed") makes sense if one accepts that there had been earlier incidents in which the respondent had assaulted the applicant and in which the senior Zemaryalais had been compelled to intervene.
3. The considerations that I made in relation to the assessment of credibility of witnesses in the evidence about the events of 10-14 November 2008 — an absence of motive for the applicant to concoct a story of abuse and a presence of motive for the respondent to deny such allegations — are also applicable here.

5: ANALYSIS

5.1: Comity and the California Decision of 17 December 2009

[74] A preliminary issue arises as to how this court should deal with the findings and orders made by the California court under the Convention on 17 December 2009.

[75] That order made findings pursuant to the Convention that Machell's habitual residence is California, that Machell was wrongfully removed from California and that California is the proper jurisdiction to deal with the issue of custody and the court issued a final order that Machell be immediately returned to California and not removed without further court order. I have set out above the circumstances under which the order was made.

[76] The Convention provides that:

- The court of the requested state has the jurisdiction to order a child's return under the Convention (Article 12). In this case, Ontario has that jurisdiction.
- The court of the requested state may ask the applicant to obtain a decision from the court of the requesting state (in this case, California), a decision whether the child's removal or retention was wrongful (Article 15).[22] In this case, that request was not made by the Ontario court.
- If the applicant or the Central Authority of the requesting state is concerned about delay in a Hague proceeding, it may ask the court in the requested state for a statement of the reasons for the delay (Article 11). This step was not taken.

[77] The Ontario Court of Appeal in *Pitts v. De Silva*, 2008 ONCA 9, 232 O.A.C. 180, 289 D.L.R. (4th) 540, 47 R.F.L. (6th) 43, [2008] O.J. No. 36, 2008 CarswellOnt 41, dealt with the tension that arises when the courts of two states both purport to make orders under the Convention and make conflicting orders as to the return of a child. The court was

22. This order is distinct from a temporary chasing order.

considering conflicting orders made by Oklahoma and Ontario courts; the father argued that Ontario should decline to take jurisdiction and defer to the Oklahoma order. The fact situation was complex but, under the Convention, Ontario was the "requesting state" and Oklahoma was the "requested state". The Court of Appeal observed that:

> **[35]** Among the most important factors guiding courts' decisions to decline jurisdiction is comity — the deference owed to the legitimate judicial acts of other countries: . . .

It noted that:

> **[36]** Beyond the overarching principle of comity, the Hague Convention's effectiveness depends on there being a general respect for the decisions under the Convention by the courts of the Contracting State to which the child has been removed. It is these courts that have primary responsibility for adjudicating Hague Convention applications: . . .

The court went on to hold that:

> **[37]** The combination of comity, on the one hand, and of the need to preserve the Hague Convention's effectiveness, on the other, calls for courts to avoid interfering, as much as possible, with foreign interpretations of the Convention. . . .

The court found that the refusal of the Oklahoma court to order the child's return should be respected by an Ontario court "unless that decision evinces a clear misinterpretation of the Hague Convention or fails to meet a minimum standard of reasonableness".

[78] The respondent's solicitor does not argue that the order of 17 December 2009 deserves deference from this court. I agree. I say this for three reasons:

1. It is clear under the Convention that it is the courts of the requested state — in this case, Ontario — that have the authority to adjudicate applications for return of the child. The California court did not appear to consider this.
2. If the concern was delay in dealing with the Hague application in Ontario, the proper course for the applicant was to request a statement of reasons for the delay from the court in Ontario.
3. The California court was given incomplete and misleading information with respect to the reason why a rehearing had not taken place in Ontario.

5.2: The Article 13(*b*) Claim

[79] I have concluded that the respondent assaulted or threatened the applicant on eight occasions, beginning when she was pregnant and culminating on the night of their separation in November 2008. On some of these occasions, Machell was present or nearby. On one occasion, in December of 2005, Machell was in her mother's arms.

[80] Does this finding establish that a return order would place Machell at a grave risk of physical or psychological harm, or otherwise place the child in an "intolerable situation"?

5.2(a): Harm to Primary Caregiver is Harm to the Child

[81] The shotgun incident establishes one instance of serious risk of direct harm to the child. If the respondent had further lost control and fired the gun at the applicant — or if the gun had discharged by accident — Machell could have been injured. For the reasons set out in my discussion above of the law in an Article 13(*b*) analysis, I find that there is no need to establish instances of physical harm or risk of such harm perpetrated directly against the child. The applicant is Machell's primary caregiver and the respondent concedes that she should remain so. If I order that Machell be returned to California, the applicant will return to California with the child. I find that a risk of harm to the applicant, as Machell's primary caregiver, would constitute a risk of harm to the child.

5.2(b): Is There "Grave" Risk of Harm?

[82] Has the applicant established that any risk of harm to her or the child is "grave", resulting in an "intolerable" situation? As observed by Justice Richard A. Posner of the Seventh Circuit U.S. Court of Appeal in *Van De Sande v. Van De Sande*, *supra*, footnote 4:

> The gravity of a risk involves not only the probability of harm, but also the magnitude of the harm if the probability materializes.

I add that, in assessing the risk of a return order, the impact of any undertakings that might be imposed on the respondent must be taken into account.

5.2(c): Magnitude of Harm.

[83] The magnitude of potential harm to the applicant is great. The respondent's abuse started with a threat to hit her, progressed to slaps, then to a punch and then escalated to a frontal attack and the brandishing of a loaded gun. In the final attack in November 2008, the respondent conducted a prolonged assault that left the applicant with visible injuries that easily could have been worse, given the level of violence involved.

[84] This is not a case of a single incident of violence, as in *Finizio v. Scoppio-Finizio*, *supra*, footnote 2. It is not a case in which the assault was relatively trivial — for example, two slight pushes as in *Suarez v. Carranza*, *supra*. It is not a case in which the applicant, despite claims of past violence, is not afraid of the other parent, and is actually motivated by other factors, such as in *Cannock v. Fleguel*, *supra*, or in *Suarez v. Carranza*. The applicant's evidence made it clear that she is terrified of a return order that would place her closer to the respondent, in a state in which she knows no one except relatives who are also the respondent's relatives.

5.2(d): Probability of Future Harm

[85] The probability of a recurrence of an assault is high, because the respondent does not admit his past wrong-doing. The respondent is in the same position as the abusive husband in *El Sayed v. Secretary for Justice*, *supra*, footnote 3, a case of the New Zealand Appellate Court in which the court observed:

> [The perpetrator's] violence appears more threatening because he simply denies

> that it ever occurred. . . There is no question therefore of [his] accepting any responsibility for his behaviour or appreciating in any way the effects of his behaviour on his wife and children. There is no suggestion of [his] having taken any remedial action to address his behaviour.

If the respondent had admitted his assaults on the applicant, shown remorse and perhaps demonstrated some reason to think that his behaviour would change, this would have been a different case.

[86] Is the danger of future harm lessened, because the parties are no longer cohabiting? Although judges a generation ago may have held that belief, we know now that the risk of domestic violence actually increases following separation.[23] Separation can mean a loss of control and an abusive spouse is often anxious to re-assert control. Despite the respondent's assurance that he knows that the marriage is over and that he just wants to have regular access to his daughter, I cannot ignore his clear resentment with the applicant's Article 13(*b*) claim. He has had to deal with allegations that he finds profoundly insulting. The allegations have hampered him in his ambition to become a police officer. Dealing with the allegations has cost him thousands of dollars.

[87] I find that an order of return would result in a grave risk of harm to the applicant and necessarily to Machell. What impact could undertakings have on this risk?

5.2(e): Will Undertakings Control the Risk?

[88] Without admitting any of the allegations of violence, the respondent offers undertakings to facilitate the applicant's return with the child to California, which are set out below:

1. Not to enforce his order for physical custody of Machell until a further order of the California court, made after the applicant has had a reasonable opportunity to place evidence before the court.
2. If the applicant begins an application in California, to consent to a temporary order granting her custody of Machell, subject to reasonable access as ordered by the court, and subject to a non-removal order from California and an order that the passports of the parties and the child be lodged with the court. Further, the respondent would consent to a temporary order restraining him from possessing a firearm, or from coming within 600 yards of the applicant or from contacting her except through his lawyer, his father, or other agreeable third party to implement access.
3. To provide a rented automobile and a home for the applicant's use for three months. The respondent presented evidence that he has rented a home from a friend of his

23. Roxanne Hoegger: "What If She Leaves? Domestic Violence Cases under the Hague Convention and the Insufficiency of the Undertakings Remedy" (2003), 18 Berkeley Women's L.J. 181, at page 185, quoting Peter Jaffe, Nancy Lemon and Samantha Poisson: *Child Custody and Domestic Violence — A Call for Safety and Accountability* (Thousand Oaks, CA: Sage Publications, 2003); and at page 197, quoting Martha R. Mahoney: "Legal Images of Battered Women: Redefining the Issue of Separation" (1991), 90 Mich. L. Rev. 1.

father's for this purpose, near his parents' house in Union City, California.

4. To provide $3,000 for airfare and transitional expenses, payable to the applicant after she waives her right to appeal any return order, or when the appeal period elapses.

[89] The respondent's counsel advised that the respondent was agreeable to other undertakings that the court might find advisable, although his financial resources are limited.

[90] The applicant says that she does not feel safe anywhere near the respondent and certainly not in Union City in a home owned by a friend of Mr. Zemaryalai. She says that no undertakings can offer adequate protection.

[91] Will the undertakings proposed by the respondent — or any undertakings that might reasonably be imposed — adequately control this risk?

[92] I do not read our Court of Appeal as saying that undertakings can always mitigate a grave risk of harm sufficiently so that, in every case of risk, a return order may be made. Such a reading would ignore the text of the Convention. The Court of Appeal has not had the occasion to offer guidance when undertakings may offer sufficient protection and when they will not. U.S. appellate courts have had more opportunities to consider the issue.

[93] This case does not raise some of the concerns about undertakings noted in the U.S. case law. The fact that the respondent is willing to agree to a "safe harbour" order in California order addresses the issue of enforceability of undertakings. It appears reasonable to assume that the applicant, with the respondent's consent, could in fact obtain the safe harbour order from the California court, given that, in March 2009, the respondent obtained an order similar to the one proposed. This at least partially addresses the concern about comity.

[94] The undertaking proposed by the respondent would require this court to address what might constitute "reasonable access" for the month or two before he estimates the matter could go back before the California courts. That exercise would, to some extent, "embroil" this court in the details of the custody-and-access dispute.

[95] However, the most serious issue raised in this case by the proposed use of undertakings is, taking into account the gravity of the risk of harm in a return order, whether the respondent's future behaviour could be adequately managed and controlled by the judicial system in California.

5.2(f): When Undertakings Are Not Sufficient

[96] No one doubts that the California courts are vigilant in guarding the interests of victims of domestic violence and their children. That is a given.

[97] However, Canadian and U.S. courts, as well as the courts of other Hague signatories, have recognized, that in some Article 13(*b*) cases, a return order simply cannot safely be made. As recognized by our Court of Appeal in *Finizio v. Scoppio-Finizio*, *supra*,

footnote 2, such cases —cases like *Pollastro v. Pollastro*, *supra* — do exist. As Justice Posner observed:[24]

> . . . "undertakings," as an alternative to refusing to return the child, will not always do the trick.

A review of the case law indicates that return orders will be refused when past violence has been severe and is likely to recur; when past violence has been life-threatening; or when the record shows that the applicant for the return order has not been amenable to control by the justice system.[25] Such an approach reflects a narrow construction of Article 13(*b*), while still giving appropriate meaning to the text of the Convention.

[98] In this case, past violence has been severe. I have found that it is probable that the violence will continue in the future if the applicant returns to California where the respondent resides. In addition, there are two factors that give me serious concern whether a court could control the respondent's future conduct:

1. The respondent's perjury. The respondent gave false evidence, under oath, to this court on the central issue in this proceeding, knowing it was false, with an intention to mislead. He perjured himself and corralled his family to assist him. If an individual is willing and able to do this, can the court expect that he will have respect in the future for any judicial system and the orders that a court may issue?

   For a justice system to function effectively in making orders and in enforcing those orders, it is required that individuals have respect for the court, that they give evidence honestly, to the best of their ability, and that they obey orders. The *Criminal Code* recognizes this. Both perjury and disobedience of a court order are classed as offences against the administration of justice. In fact, the sentences provided for these offences indicate that perjury is regarded as the more serious offence.[26] I note that, in the U.S., the Maryland District Court in *Rodriguez v. Rodriguez* (1999), 33 F. Supp. 2d 456, a Hague Convention case in which violence to a primary caregiver was in issue, recognized that a denial of abuse by the perpetrator in his sworn evidence was a reason to be concerned about his future compliance with court orders.[27]

2. The respondent's lack of control when angered. The second factor that concerns me is the respondent's lack of control over his behaviour when he is angered. The respondent presented as cool and rational during his almost two days of testimony. However, reviewing the history of this matter, it is apparent that, when he is angry, he has grave difficulty exercising appropriate control. I say this for the following reasons:

   (a) The respondent has repeatedly engaged in abusive and physically violent behaviour in front of his mother and, in November 2008, in front of his father. Most individuals, if they were to engage in socially sanctioned behaviour,

24. *Van De Sande v. Van De Sande*, *supra*, footnote 4.
25. In reviewing the case law, I have considered all the cases referred to in this judgment, from Canada, the U.S., New Zealand and England.
26. *Criminal Code*, R.S.C. 1985, c. C-46, as amended, sections 127 and 131.
27. At page 462.

would have the control not to do so in front of their parents. In this case, the respondent's father testified about his own revulsion towards violence and the respondent testified as to the respect he has for his father. Despite this, the respondent beat the applicant in front of his father.

(b) The respondent's evidence establishes that he was aware that a charge of domestic violence could jeopardize his greatest dream, to become a police officer. Despite this, he assaulted the applicant while he was attempting to qualify for the police academy.

(c) The respondent was aware that allegations of domestic violence against him were the central issue in this proceeding. Despite this, he acknowledges that, when he was frustrated and angry, he could control himself so little that, in this courthouse, he said to the applicant's lawyers : "This is how wives get killed by their husbands. . . . This is not a threat!"

[99] The respondent's solicitor submits that the fact that the respondent has not breached bail orders in California or Ontario or the restraining order issued in Ontario in January 2009 shows that his client can be trusted to comply with court orders. I am not persuaded by that submission.

[100] The respondent has in fact breached those orders. He did not dispose of his gun within the time period required by his California bail order and ultimately disposed of it only shortly before this hearing began. He has asked Machell to ask the applicant to speak to him on the phone, an acknowledged breach of his Ontario bail. He continues to possess a California gun licence, potentially a breach of his Ontario bail order.

[101] There has been no direct breach of the no-contact provision in those orders, but it is important to note that those orders have covered brief periods of time.[28] It is more important to note that, during the currency of these orders (except for the days of this hearing and one scheduling appearance), the respondent has been in California and the applicant in Ontario, over two thousand miles apart. The respondent's behaviour during this period is not a good predictor of what his behaviour would likely be if the applicant was in California with the child.

[102] Given these factors, I am of the view that the grave risk of harm posed to the applicant and Machell by an order of return cannot be adequately controlled by undertakings. A return order thus would place the applicant, and therefore the child, in an "intolerable situation".

[103] I considered very carefully whether I should refuse a return order in this case. International child abduction is a serious problem, a problem that the Convention was crafted to address. However, the Convention recognizes that there are certain limited cases that are exceptions to the rule of return to the jurisdiction of habitual residence. The applicant has established on the balance of probabilities that this is one of those cases. I note that this case

28. Nine days for the Ontario restraining order, 3 weeks for the California protective order, and from 11 Febraury 2010 for the Ontario bail condition.

is a rarity, in that the applicant was able to present convincing evidence that satisfied the onus on her to demonstrate the grave risk of harm of a return to California. In many cases, most of the relevant evidence about risk of harm will be in the country of habitual residence, and the parent raising an Article 13(*b*) defence will not be in a position to present that evidence in the country to which he or she has travelled.

[104] I deny the application requesting that the child Machell be returned to California.