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COURT OF APPEAL FOR ONTARIO

LABROSSE, SHARPE AND CRONK JJ.A.

B E T W E E N :	)	
	)	
IGOR TOIBER	)	**Roselyn Zisman**
	)	**for the respondent**
	)	
Respondent	)	
	)	
- and -	)	
	)	
OLGA TOIBER	)	**Lawrence S. Crackower, Q.C.**
	)	**for the appellant**
	)	
Appellant	)	
	)	
	)	**Heard: March 17, 2006**

On appeal from the judgment of Justice Keith A. Hoilett of the Superior Court of Justice, dated October 26, 2005 made at Toronto, Ontario.

BY THE COURT:

[1] The appellant ("the mother") appeals the order of the application judge, Hoilett J. ("the application judge"), in which he found that the children of the parties, Liliya (aged 13) and Alis (aged 8), were being wrongfully detained in Ontario by the mother in violation of the *Hague Convention on the Civil Aspects of International Child Abduction* ("the Convention"). He ordered the return of the children to Israel. The mother also appeals the order in which the application judge ordered costs against her in the amount of $500. She further appeals the order of Backhouse J. ordering the appellant to disclose her address in a sealed envelope to the court and awarding costs against her in the amount of $1,000.

[2] The parties were married in the Ukraine in 1990 and immigrated to Israel in 1994. They were divorced in 2003, at which time the parties agreed that custody of the children be granted to the mother with visitation rights to the respondent ("the father"). The

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custody and visitation order prevented the children from being removed from Israel. In July 2004, the Israeli court granted leave for the mother to take the children out of the jurisdiction on the condition that the children be returned to Israel by September 1, 2004. The order was granted with the father's consent on the understanding that the children were being taken to Czechoslovakia to visit the mother's sister and would return on the date ordered by the court. The mother and the children ended up in Canada without the knowledge or consent of the father.

[3] In due course, the father launched this application under the Convention for the return of the children. As of the date of the hearing of the application, the mother had not informed the father where she was residing with the children, and it appears that the secrecy was deliberate.

[4] Since her arrival in Canada, the mother has launched a refugee claim on her behalf and on behalf of the children. The Refugee Protection Division has heard the claim, but reserved its decision.

[5] In detailed reasons, the application judge first reviewed the relevant sections of the Convention. He noted that the mother relied on Article 13 of the Convention, which provides the circumstances when a court is not bound to return the children. The evidence on which she relied in invoking Article 13 was contained in her affidavits. She related her background and the alleged ill-treatment she and the children received from the father. She also referred to the present situation of the children in Ontario.

[6] The application judge noted that, except for the fact that she was awarded custody of the children, the mother claimed to have been ill done by Israeli society. Yet, he found that there was a total absence of corroboration of her assertions of mistreatment in Israel. There was an absence of any record of the children's performance in school in Israel. This absence rendered meaningless a record of their performance at school in Ontario. He also noted the absence of professional intervention to treat the two allegedly traumatized children.

[7] The application judge reviewed the order of the Israeli court granting the parties their divorce, which incorporated a contract between the parties with respect to child maintenance. He also reviewed the order of the court that allowed the mother to take the children out of Israel, but required her to return the children no later that September 1, 2004. He concluded that the children had been habitually resident in Israel immediately before the removal. He found that, on the basis of the evidence, there was a residual right of custody within the meaning of the Convention in both the father and the Israeli court that made the order allowing the mother to take the children out of the jurisdiction for a specific period of time. This finding was not attacked on appeal, and it formed a proper basis for the father's application under the Convention. The application judge also found

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that there had been a wrongful removal or detention of the children with the meaning of the Convention.

[8] The application judge noted that once a wrongful removal or detention is established, the return of the children is mandated unless the mother can bring herself within one of the exceptions contemplated by Article 13, namely, for the present case, (i) the grave risk that the children's return would expose them to physical or psychological harm, or otherwise place the children in an intolerable situation, and (ii) the children object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of their views.

[9] The application judge rejected the arguments of the mother relating to both exceptions. He noted first that there was no corroboration in support of the mother's bald allegations of risk or harm. Secondly, he noted that, despite evidence from Liliya of her objection to return, "the sentiments expressed by Liliya are no more, in my view, than those often expressed by a child caught in the vortex of a custody battle". In his view, such issues would be best dealt with by the courts in the jurisdiction in which the child was habitually resident.

[10] As a result, the Convention required the children to be returned to Israel. We see no error of fact or law in the detailed and careful reasons of the application judge, that would justify the intervention of this Court.

[11] This appeal was scheduled to be heard on March 15, 2006. On that date, Geraldine MacDonald appeared, without prior notice to this court, and advised that she was representing the children on the refugee claim before the Immigration and Refugee Board. She is not representing the children in the present case. Ms. MacDonald apologized for her last minute appearance. She explained that although she had known for some time about the decision of the application judge and knew that the decision was under appeal, she had mistakenly understood that the children's interests were being represented in this proceeding. She, therefore, requested an adjournment for the purpose of preparing representations that she felt could be of assistance to this court. We allowed her request and adjourned the hearing of the appeal to March 17, 2006. Her representations turned out to be essentially a repetition of the arguments made by the Minister of Citizenship and Immigration (Canada) in *Kovacs v. Kovacs* (2002), 59 O.R. (3d) 671 (Sup. Ct.). In that case, the Minister argued that the application of the Convention ought to be stayed pending the final determination of a claim for refugee status. In detailed reasons, Ferrier J. rejected the Minister's argument and no appeal was taken from that decision. The application judge in the present case also rejected a similar request by counsel for the mother for a stay on the basis that "a spirit of urgency infuses the *Convention"* and on the basis of the reasons of Ferrier J. in *Kovacs*.

[12] We see no basis to reach a different conclusion in the circumstances of this case.

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[13] The mother has sought to introduce fresh evidence on appeal. The mother submits that this evidence could not have been obtained before the hearing of the application because she could not communicate very well with the counsel who acted on her behalf at the hearing of the application and the mother did not understand that the fresh evidence should have been obtained for the hearing of the application. The mother's position is not credible in light of her sworn affidavits submitted on the application, containing some fifty-nine paragraphs, which do not support her claim that she had difficulty communicating with her lawyer. More importantly, there is no affidavit from the lawyer to support her allegation.

[14] In any event, the proposed fresh evidence does not corroborate the mother's claim of abuse. It is essentially a repetition of the fears of the mother and an attempt to answer the concerns of the application judge as to the lack of professional intervention to treat the allegedly traumatized children. It also addresses the children's fear that they will be separated from the mother, a fear that the mother herself has produced. The mother's counsel advised this court that she will not be returning to Israel if the children are ordered to return, "unless she changes her mind". The mother has never said in her sworn material that she will not be returning to Israel if the children are ordered to return.

[15] The proposed evidence does not meet the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 for the admission of fresh evidence on appeal. The evidence could, by due diligence, have been adduced on the application. Moreover, it is not evidence that, if believed, could reasonably be expected to have affected the result when taken with the other evidence.

[16] Accordingly, the appeals are dismissed with costs to the respondent, fixed in the total amount of $8,000.

RELEASED: March 27, 2006

"J.M.L."

Signed: "J.M.Labrosse J.A."
"R.Sharpe J.A."
"E.A. Cronk J.A."

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