COURT FILE NO: FDF-19-19

2019 NBQB 046

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
FAMILY DIVISION

JUDICIAL DISTRICT OF FREDERICTON

IN THE MATTER OF AN APPLICATION

FOR THE RETURN OF CHILDREN under

Article 12 of the *Hague Convention on*

the Civil Aspects of International Child Abduction

BETWEEN:

The Attorney General as Central Authority for the Province of New Brunswick for

R.G.,

Applicant,

-and-

K.G. (N.),

Respondents.

REASONS FOR DECISION

(**Re:** Hague Convention Application)

Date of Hearing: January 30, 2019

Date of Decision: February 1, 2019

Before: Mr. Justice E. Thomas Christie

Representation of Parties at Hearing:

Chantal Landry, Esqe., Solicitor for the Attorney General as Central Authority for the Province of New Brunswick

Joseph Wilfred John Fitzpatrick, Esq., Duty Counsel for the Applicant

Josie Marks, Esqe., and Marie-Hélène Haché, Esqe., for the Respondent

Christie, J. (Orally)

INTRODUCTION

[1.] This is an application filed pursuant to the provisions of the *Hague Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (*Convention*). New Brunswick has adopted this convention pursuant to the *International Child Abduction Act*, RSNB 2011, c 175. The central authority for the state of Israel forwarded to the Attorney General for New Brunswick the within application and supporting documents on or about December 18, 2018. The Application was filed on January 15, 2019. No issue was taken with the format or content of the application. The application concerns two children. The eldest is G.G. born on May 5, 2015. The younger is T.G. born on October 26, 2016.

[2.] The *Convention* is an important tool in restricting the wrongful removal of children from those who hold custody rights. In these times of ease in international travel, the *Convention* plays a pivotal role in ensuring the prompt return of children in such circumstances. As stated in *Thomas v. Thomas*, [1994] 3 S.C.R. 551 at para. 1:

> The underlying purpose of the *Convention*, as set forth in the preamble, is to protect children 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.

[3.] The application was filed on behalf of the children's father, R.G. He is the Applicant. The Respondent, K.G., is the mother of the children. The parties were married in 2014 but have been in a relationship since 2008. They lived together in Israel as a family until November 15, 2018. At that time, for reasons that will be set out below, K.G. left Israel with the children for Canada but did not advise the Applicant of her intention. Since her arrival in Canada on or about November 15, 2018, K.G. and the children have been living with a male acquaintance who formerly lived in Israel but now calls Fredericton home. In fact, it was this person who met the Respondent and the children in Montreal upon their arrival and drove them back to Fredericton where they all stayed. No other connection between the Respondent and Canada is evident from the Record. During the present hearing, K.G. acknowledged, through counsel, that it is now a romantic relationship she shares with this person.

[4.] In the absence of an order directing the children to return to Israel, K.G. does not intend to return. She fears for her safety and that of her children if forced to do so. To that end, she has begun the process of seeking refugee status in Canada. After interviewing with officials from Citizenship and Immigration Canada, she and the children were granted permission to stay in Canada until her refugee claim can be formally addressed and determined at a hearing before the Immigration and Refugee Board.

STATUTORY FRAMEWORK

[5.] The *Convention* identifies its overriding purpose in Article 1. That, and other relevant Articles, are set out below:

> Article 1
>
> (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 access under the law of one Contracting State are effectively respected in the other Contracting States.
>
> 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 8
>
> Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.
>
> The application shall contain -
>
> (a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

(b) where available, the date of birth of the child;

(c) the grounds on which the applicant's claim for return of the child is based;

(d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

(e) an authenticated copy of any relevant decision or agreement;
(f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
(g) any other relevant document.

Article 13

Notwithstanding 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 which 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 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not, in the State of the habitual residence of the child without recourse to the

> specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.
>
> Article 18
>
> The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.
>
> Article 19
>
> A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.
>
> Article 20
>
> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

[6.] The following facts are not in dispute as identified in the Respondent's pre-hearing brief:

> i. until November 15, 2018 the children resided in Israel and it was their habitual residence;
>
> ii. on November 15, 2018, the Respondent travelled with the children to Canada without the Applicant's permission.

[7.] With these admissions and, given the age of the children (being under 16 years of age), the intents of Article 4 have been established. Therefore, and with the consent of the parties, I find Israel was/is the habitual residence of the children. That has not changed. While the Respondent says that the relationship with the Applicant was a horrendous one for her, the fact remains, and it was conceded, they were all living as a family unit at the time the children were removed from Israel. The children were removed to Canada without their father's knowledge or permission while living as a family unit. While on the face of it this may be a wrongful removal, there are provisions in the *Convention* that, in

certain circumstances, would provide a basis for not reaching that conclusion or returning the children. The prime basis for not returning the children, as argued by the Respondent, is that to do so puts the children at grave risk of harm to an intolerable degree.

[8.] The Respondent's affidavit details her account of what can only be described as a relationship of serious abuse that existed, essentially, from its beginning. She deposes that their relationship began in earnest in November 2008. Shortly thereafter they moved into the Applicant's parents' home. Within five or six months, the bliss of a new relationship changed for her. It was then that the Applicant began his abusive behaviour. The abusive behaviour includes physical violence and sexual violence and its corresponding psychological abuse. Specifically, the Respondent accuses the Applicant of forced sexual activity in opposition to her attempts to resist.

[9.] The Respondent also recounts how, as the relationship continued, the Applicant became controlling of her in other ways. As she deposes in para. 17 of her affidavit, "… he wanted to know where I was all the time …".

[10.] She deposes that she wanted to escape the relationship but found she had no place to go and felt afraid and humiliated. I quote from para. 19 of her affidavit:

> 19. I thought about leaving him all the time and imagined different ways I could do it. The truth was, I was afraid to leave him and I was afraid that, if I tried, he would find me and hurt me. I could not report this to the police as R. had many friends that work there. I was afraid that they would not believe me and that they would tell R. and it would all get worse I kept thinking that things would get better. That he would change.

[11] Over the years the abuse continued. Despite this pattern of abuse, the parties married on July 17, 2014. The Respondent deposed that she married the Applicant because he said that if she did not, he would kill her. Even their wedding day was tainted by the abuse that she says was characteristic of their relationship.

[12.] The news of their first pregnancy was met with violence from the Applicant. The Respondent deposes that upon learning that the child was going to be a girl the Applicant, being disappointed in the baby's gender, started to punch her in the stomach and thereafter restricting her food intake all in an attempt to have her lose the baby. The Applicant was also disappointed with the news that their second child would also be a girl.

[13.] The Respondent deposes that by February 2017, she had come to the realization that she had to do something to provide safety for herself and the children. In September 2017, the Respondent moved out of the home the parties had been living in and into her mother's home. Being financially strapped, the Applicant's father lent them money so that they could find a home in Eilat. All of them moved into this new home in October 2017. The Applicant had financial troubles and the Respondent was getting pressure from other persons to have the Applicant repay certain debts. The Respondent felt threatened by such demands.

[14.] I wish to highlight three paragraphs of the Respondent's affidavit that capture the essence of her decision to leave the relationship:

> 51. In August 2018, R. came home drunk again. He started to choke me. I tried to defend myself and put my hands on his neck. He said I could not do it because I did not have enough power. He went to the kitchen. He put a big knife on the counter and said if I did not stop pissing him off, he was going to kill me.
>
> 52. We had a very small apartment and everything was near. I asked him to stop yelling and threatening me because the girls can hear everything. He told me to shut up or he was going to kill me; he would make my mother and brothers lives miserable; and that they would regret the day they talked about him and the day they met him.
>
> 53. Something inside me finally gave way. I realized that if I did not get out of there with the girls, I was going to be dead and the girls would be abused and cursed. I could not go to the police. R. had friends in the police from his time in the Army. The only thing they would do is tell R. what I said. I was terrified of what R. would do if I humiliated him.

[15.] The Respondent's plan to escape included contacting the person noted at the beginning of these reasons whom she has known since 2010. From what can be understood from the evidence, he lived in Fredericton with his wife and their children. They communicated via social media. She disclosed to this person the abuse she was suffering. There was no affidavit from this person corroborating the disclosure of the abuse. To implement her escape in early November 2018, the Respondent took the children to her mother's home in Israel and began the process of obtaining passports for the children. This took about a week. The Applicant was under the impression the Respondent and the children were visiting a friend of the Respondent's mother. This is what he was told by the Respondent. The Respondent does not deny that she was not honest with the Applicant during this period.

[16.] The Applicant further deposes that he was advised by the Respondent on November 13, 2018 that she was at a friend of her mother's in Tel Aviv, a few hours drive north of their home in Eilat.

[17.] Unbeknownst to the Applicant, the Respondent had obtained plane tickets for travel to Canada for her and the children. Although it is unclear from the affidavit where her port of entry was, it was confirmed by counsel to have been Montreal. When she arrived in Canada, the Respondent deposes that the customs officer required that she get written permission from the Applicant to enter the country with the children. To get his permission, the Respondent told the Applicant that she was in Canada with plans to visit her father (who, incidentally, does not live in Canada) and that she would return shortly to Israel with the children. The Applicant provided his consent as requested. The customs officer perceived that the Respondent was in distress. The officer recommended that she get information about making a refugee claim which she did.

[18.] The Respondent's friend (now acknowledged to be her romantic partner) drove to meet her and the children in Montreal, and they returned to Fredericton and now live together. By this time, it appears, that the wife of this friend, who had been living here (Fredericton) as part of that family unit had, for reasons unknown to me, decided to return to Israel and left her children here.

[19.] Upon having settled in Fredericton, the Respondent, with the help of several agencies, sought refugee status for herself and the children on the basis of the abuse that

she alleges was the hallmark of her life with the Applicant in Israel. To repeat, the Respondent and the children have been given temporary permission to stay in Canada pending a hearing on their refugee claim. No date has been set for the hearing.

[20.] It is also apparent from the evidence that there has been a certain amount of social media chatter in Israel amongst those who know the present parties. I have been provided with translations of some of this communication and it is unsettling and polarizing without a doubt.

[21.] As counsel know, one of the considerations I must address is the adequacy of the home state of Israel to provide for the safety and security of the Respondent, and the children, in the event they are returned to Israel. To address this, the Respondent has deposed that because of the Applicant's past military service and connections in the government neither she, nor the children, would have sufficient state protection. An example of her evidence on this is found in para. 79 of her affidavit. It provides as follows:

> 79. R. has told me many times, and I verily believe it to be true, that he has connections with the Israeli police and other people of power in the Israeli government. These connections stem from this (*sic*) time in the army as a border police officer. Following graduation from high school, R. completed his military service. He was an army border police between November 2007 and May 2009. Several of his friends have obtained positions within police and government. I fear that if I am returned, they would not protect me.
> [emphasis added]

[22.] I must say at this stage, that evidence of this nature, appears to be speculation on the part of the Respondent. As I will discuss further in these reasons, I am not convinced

that it can be properly used to support a claim that the legal system in Israel is unable to address the Respondent's or the children's needs in this respect.

[23.] The Respondent in her affidavit outlines her concerns for the safety of the children if they were returned to Israel. She accuses the Applicant's family of being verbally abusive to her and of the Applicant having licenced guns within reach of the children. Finally, she uses a specific example of an allegation against the Applicant that is fundamentally disturbing in para. 82 of her affidavit. She deposes as follows:

> 82. R. told me, and I verily believe it to be true than on one occasion, he shot a Palestinian child approximately 30 times in the head, emptying all the bullets from his M-16 type gun.

[24.] If this allegation is true, it is profoundly disturbing. If it is not true, it is profoundly disturbing because the Respondent would have made it up or taken some comment out of context (if such a statement could be taken out of context). The affidavit evidence of the Applicant is somewhat limited. There appears to be some overlap or debate as to when he would have received and been able to respond to the Respondent's affidavit. He does depose a general denial of the allegations of abuse but not specifically of the above quoted statement. As I say, I am not sure of the timing of the exchange of affidavits. That, coupled with the obvious difficulties with full, complete or trusted translation between Hebrew and English, and I am left at somewhat of a disadvantage. To say that 'credibility' is an issue arising from the evidence is an understatement.

[25.] The Applicant in his affidavit, deposes that he has never caused any harm to the Respondent or the children. He also deposes that he has a taped conversation between the

parties from November 28, 2018 wherein she tries to convince him to move to Canada. He also deposes that the Respondent placed a call to her sister wherein she admits to leaving the country to avoid financial problems that might impact her ability to leave Israel at some later date. I was not provided the tape or evidence from the Respondent's sister. Nor were there any objections raised as to the propriety of such information being part of the evidentiary record. But I can assure counsel that I am well aware of the limited use of such evidence.

ANALYSIS AND DECISION

[26.] The following central facts are not in dispute by agreement of the parties:

(i) At the time the Respondent and the children left Israel, the parties were living under the same roof (with the children) as a family unit;

(ii) The Applicant and the Respondent both have custodial rights as determined by Israeli law and as contemplated by Article 3(a) of the *Convention*;

(iii) Israel is a signatory to the *Convention*;

(iv) The Applicant did not know of the Respondent's plan to leave Israel with the children and, as a result, the children were removed without consent;

(v) Unless the Respondent is ordered to return the children to Israel she does not plan to return to Israel.

Article 3

[27.] Let me comment on the position of the Respondent as it concerns the provisions of Article 3. It is an important starting point because it brings us to a determination of whether the removal of the children is to be considered 'wrongful'. The Respondent agrees that the Applicant has rights of custody that arise by operation of the laws of Israel. This satisfies, without further analysis or discussion, the requirements of 3(a). In order for the removal to be considered 'wrongful', 3(b) must be engaged as well. I accept the Respondent's argument that both (a) and (b) must be satisfied – it is a two-step assessment.

[28.] To repeat, art. 3(b) provides as follows:

> (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.
> [emphasis added]

[29.] Therefore, the question must be asked whether the Applicant father was *exercising* his custodial rights at the time of the removal of the children. He can be exercising those rights, "… either jointly or alone …". As noted, the Respondent acknowledges that the Applicant has the custodial rights contemplated by Article 3(a) but, says that the Applicant was not exercising his custodial rights. During the course of the hearing I asked the Respondent's counsel to tell me, if he was not exercising his custodial rights at the time of removal, when did he last exercise those rights? Recognizing that the children are 2 and 3 years of age and, given that they were living as a family unit, I further asked if he ever exercised his custodial rights in relation to the children and the Respondent's position was that he had never exercised such rights. This

is despite evidence, as minimal as it might be, that he in fact has been engaged in spending certain time with the children and attending to their needs.

[30.] I accept, based on the affidavit evidence I have, that a finding could easily be made that the Respondent has been the primary caregiver of the children. However, that is not the question. I am not at all convinced that the evidence supports the Respondent's assertion that the Applicant has never exercised his custodial rights.

[31.] I emphasize that the enquiry under Article 3 is not one of determining who is exercising 'primary care'. It is one of determining the exercise of custodial rights. Recall that, at the time of removal, the parties were living together as a family unit under one roof. They were living as husband and wife and parents with custodial rights over their children. In my view, and I so find, the Applicant was, at the time of removal, exercising custodial rights, albeit perhaps marginally so.

[32.] During the course of the hearing, the focus on the Article 3(b) analysis was on determining whether the Applicant *individually* was exercising custodial rights. While that is certainly one dimension of the question, the language of the article speaks of the exercise of custodial rights either *jointly* or *alone*. I have already found that he has, perhaps if only marginally so, been exercising his custodial rights when assessed from an individual point of view. It is also clear to me that, as a consequence of living together as a family unit up until the point of departure, it can also be said that he was, *jointly* with the Respondent, exercising his custodial rights.

[33.] In summary, and based on these findings under art. 3, I find the removal of the children to have been wrongful. As the parties know, despite this finding, I am not bound to return the children if there are circumstances that fall within the exception set out in Article 13(b).

Article 13(b)

[34.] Article 13(b) states that I am not bound to return the children if the Respondent establishes that, to quote the words of the Article:

> (a) N/A
>
> (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.
> [emphasis added]

[35.] In considering art. 13, I am also to take into account information relating to the social background of the children provided by the Central Authority. No specific argument was made on this component of the test. Rather, the Respondent focused on the risk of grave harm to the children as the basis for not returning the children. While there appears to have been attempts in the case law to determine exactly what the phrases "grave risk" or "intolerable situation" can mean, it is clear that such wording permits a rather subjective, yet fact specific assessment. With that said, I return to the *Thomas* case where, at para. 82 LaForest, J. writes:

> The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation. [emphasis added]

[36.] While it is easy perhaps to focus on the grave risk of harm to the child resulting from a return order, it is important to note the words of McLachlan, C.J. (as she was then) in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 where, beginning at para. 23, she begins to outline the initial harm to the children that is a consequence of their wrongful removal:

> [23] The harms the *Hague Convention* seeks to remedy are evident. International child abductions have serious consequences for the children abducted and the parents left behind. The children are removed from their home environments and often from contact with the other parents. They may be transplanted into a culture with which they have no prior ties, with different social structures, school systems, and sometimes languages. Dueling custody battles waged in different countries may follow, delaying resolution of custody issues. None of this is good for children or parents.
>
> [24] The *Hague Convention* is aimed at enforcing custody rights and securing the prompt return of wrongfully removed or retained children to their country of habitual residence: see Article 1; *Thomson v. Thomson*, 1994 CanLII 26 (SCC), [1994] 3 S.C.R. 551, at pp. 579-81. The return order is not a custody determination: Article 19. It is simply an order designed to restore the *status quo* which existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by the abduction. Its purpose is to return the child to the jurisdiction which is most appropriate for the determination of custody and access.
>
> [25] Prompt return serves three related purposes. First, it protects against the harmful effects of wrongful removal or retention: see R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (2013), at p. 96; E. Gallagher, "A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence" (2015), 47 *N.Y.U.J. Int'l L. & Pol.* 463, at p. 465; *Thomson*, at p. 559; *Re B. (A Minor) (Abduction)*, [1994] 2 F.L.R. 249 (E.W.C.A.), at p. 260.
>
> [26] Second, it deters parents from abducting the child in the hope that they will be able to establish links in a new country that

> might ultimately award them custody: see E. Pérez-Vera, "Explanatory Report", in *Acts and Documents of the Fourteenth Session (1980)*, t. III, *Child Abduction* (1981),[2] at p. 429; see also *W. (V.) v. S. (D.)*, 1996 CanLII 192 (SCC), [1996] 2 S.C.R. 108, at para. 36; Gallagher, at p. 465; A. M. Greene, "Seen and Not Heard?: Children's Objections Under the Hague Convention on International Child Abduction" (2005), 13 *U. Miami Int'l & Comp. L. Rev.* 105, at pp. 111-12.
>
> [27] Finally, prompt return is aimed at speedy adjudication of the merits of a custody or access dispute in the forum of a child's habitual residence, eliminating disputes about the proper forum for resolution of custody and access issues: see Schuz, at p. 96; Gallagher, at p. 465.

[37.] Suffice it to say that any assessment of the grave risk of harm in a return order must be balanced against the presumed harm created by the wrongful removal. The very fact that this *Convention* exists, with such broad international appeal, is testament to the shared view that wrongful removal of children is itself harmful. To rely again on the words of McLachlan, C.J. is *Balev* at para. 22:

> With more than 90 contracting parties, it ranks as one of the most important and successful family law instruments completed under the auspices of the Hague Conference on Private International Law.

[38.] As I indicated during the hearing, the allegations of the Respondent portray a long period of sexual, physical and psychological abuse. As noted earlier, their relationship is now in excess of ten years old and the abuse is alleged to have been present since the beginning. Apparently, even from the earliest days of the relationship, the Respondent did not feel that she could escape the relationship. It is not the task of this court to determine the truthfulness of the allegations or denials yet I must be mindful of the evidentiary context and its impact on the welfare of the children if returned.

[39.] The record does not indicate that the Respondent reported any incident of abuse to the authorities over the course of their relationship. I am advised that the reason is that she did not feel that she could trust the authorities to fairly address hers (and the children's) safety because the Applicant has connections in the police and government as a result of his time as Israeli military.

[40.] I must reject this as a matter of conjecture and insufficient for the purpose for which it was offered. It just lacks such specificity that it would be unreasonable to use it as a basis for undermining the intents of the *Convention* or the Israeli authorities as a whole.

[41.] An order to return the children to Israel is not an order to return the children to the Applicant or to force the parties to live again as a family unit. In other words, if such a return order is made I do not feel that I must order the Respondent to turn over the children to their father, the Applicant. This is precisely the point made by the Ontario Court of Appeal in *Wentzell-Ellis v. Ellis*, 2010 ONCA 347 where, at para. 50, the Court noted:

> I would conclude with this reminder. It must be appreciated that the court would not be forcing the mother or child to return to live with the father. Rather, an order that the child be returned to England simply recognizes that the mother was not entitled to take the child from England and that custody proceedings should be decided by English courts.

[42.] It is clear from a review of the authorities cited to me that there are cases where allegations of abuse have been used to deny the return on the basis that to do so would be to place the child in a situation of grave risk of harm or an intolerable situation. It appears

from a review that the courts are rightly concerned about returning the child into a volatile home environment. This concern is clearly appropriate in certain cases. This court must be cautious in straying too far from the principle that the *Convention* only mandates the return of a child to the country of habitual residence and not to a specific living environment.

[43.] As a general statement, and in the spirit of the principles of the *Convention*, a question of custody and/or access is best left for a court of competent jurisdiction in the habitual residence of the children. I will not engage in any consideration of custody and access. Nor is this an assessment of whether it is in the 'best interests' of the children to be returned. The *Convention* and jurisprudence clearly forbid such considerations.

[44.] I do not doubt that if the abuse alleged by the Respondent did occur, that some of it may have occurred in front of the children. This undoubtedly, by definition, would be harmful to the children. To what degree this has happened is not clear from the evidence. Whether it creates a situation of grave risk of harm or an intolerable situation to or for the children is not at all clear either and I am unable to find on this evidence that a return order to the country of habitual residence would result in grave risk of harm or an intolerable situation.

[45.] To a degree, having the children be moved from their home in Israel and then returned to Israel would be confusing and difficult for them. In some sense it is fortunate

they are as young as they are. Nonetheless, they have already been through an unfortunate ordeal in many respects.

[46.] There is also an issue created by my offering an opinion or finding on the truthfulness of the allegations. Some of the allegations made by the Respondent could well, at least under Canadian law, be considered criminal in nature. I have little doubt that the same could be true in Israel. It would be imprudent for me to express any findings on the truthfulness of the allegations based on the limited evidence before me and given the limited procedural safeguards the present process provides. Moreover, I am also not prepared to opine on the truthfulness of the allegations since there may be, at some point in time, an administrative hearing to address more fully the allegations raised in the context of the refugee process.

[47.] The Ontario Court of Appeal in *Pollastro v. Pollastro*, [1999] O.J. No. 911 (C.A.) also was a case wherein abuse allegations were at the center of the reasons offered to refuse the return of a wrongfully removed child. Abella, J.A. (as she then was) in commenting on the abuse allegations raised by the mother in that case at para. 32 wrote:

> While many of the facts and allegations in this case are disputed, the following facts supporting Ressa Pollastro's allegations about her husband have been established:
> [emphasis added]

[48.] Thereafter, Abella, J. goes on to list the specific findings of abuse and inappropriate conduct by the father. I am not able to make findings of fact on the present allegations based on the current state of the evidence. In *Pollastro*, it was on the basis of such fact finding, that the child in that case not to be returned.

[49.] What I do know is that the present allegations are of very serious misconduct. Misconduct that has occurred since the beginning of the relationship. There is no evidence that the Respondent ever sought any help from any police or social agency at any time during the course of their relationship. Her first and only attempt to seek relief was to escape Israel and seek shelter in Canada with a friend with whom she is now in a romantic relationship. No other connection to Canada is evident on the record. She has sought no direction from competent Israeli authorities to seek sole custody of her children or to have any limitations placed on the Applicant's interaction with them or her. Nor has she asserted that Israel does not have the judicial and administrative structure to handle her concerns. She has never attempted to utilize them and her reluctance to do so is based on her conjecture that the Applicant has the influence to usurp the appropriate Israeli authorities. Conjecture in this situation is not enough.

[50.] In *Mbuyi v. Ngalula*, 2018 MBQB 176 at para. 62 the court therein observed as follows:

> [62] In determining whether or not a situation of alleged domestic violence is of such a nature that return of the children would expose them to physical or psychological harm or place them in an intolerable situation, the Court must in any Hague *Convention* proceeding start from the basis that, except in the most extraordinary of cases or where evidence is sufficient to establish the contrary, the Courts and the authorities in the state of the children's habitual residence will be able to take measures to protect the children, including protecting their mother from any domestic violence.
> [emphasis added]

[51.] Article 13(b) focuses attention on the "*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*". By definition this accepts that, from a public policy point of view, some risk of harm is, perhaps, inevitable if a court orders a child returned. The court is not seeking - nor can it offer - guarantees. How could there not be the *risk* of harm in situations like this? Furthermore, the court must ask whether the return would place the child in an intolerable position as describe in my quote from *Thomson* above.

[52.] In this case it can be taken as certain that the children, by the very nature of their removal from Israel, have been exposed to the risk that they may have suffered psychologically having been physically removed from their home environment – their habitual residence. They have been taken from what I understand to be an extended family on both sides. This cannot come without some disruption or risk of psychological harm.

[53.] I am not convinced that an order to return the children will expose them to a grave risk of physical or psychological harm or place them in an intolerable position. It will certainly create a period of disruption and discord but not intolerable as contemplated by the *Convention*. Moreover, I am not convinced that there could not be arranged in advance such supports as may be necessary to mitigate any impact on the children if returned.

[54.] I wish to comment briefly on a position adopted by the Respondent in her pre-hearing brief that, at the time of writing the brief, her intention was to stay in Canada in the event the children are sent back to Israel. She uses this point to submit that not only are there risks to the children arising from any return but that it may also result in harm from being separated from her as their primary care-giver. At para. 53 of the pre-hearing brief:

> The Children would face grave risk of harm or an otherwise intolerable situation by being returned due to serious domestic violence against the Respondent by the Applicant and the fact that an order to return the Children is likely to result in separation of the Children from their mother. [emphasis added]

[55.] In other words, the Respondent intended to remain in Canada if the children were ordered to be returned. However, during the hearing, she expressed through counsel the opposite intention. Therefore, any argument that there would have been a grave risk of harm or an intolerable situation based on the Respondent's refusal to return with the children is no longer relevant.

[56.] I wish to address any impact on this proceeding arising from the refugee process that is also in the works. I have had no evidence that the hearing before the Immigration and Refugee Board is at all imminent. In fact, counsel for the Respondent acknowledged that that process is perhaps months away from resolution, if not longer. I was provided with no case law to support any conclusion that the existence of an ongoing refugee claim would, essentially, act as a stay of proceedings of this *Convention* proceeding. In fact, and to counsel's credit, she did not argue that it did, or should have, that effect. I refer to *G.M. v. V.M.* 2012 ONCJ 745 where at para. 68 the court considers this issue writing:

> [68] In *A.M.R.I. v. K.E.R.*, (2011) O.J. 2449, the Ontario Court of Appeal found that "when a child has been recognized as a Convention refugee by the IRB, a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence. A risk of 'persecution' in the immigration context clearly implicates the type of harm contemplated by art. 13(b) of the *Hague*" The court recognized that even if a risk of persecution was established before the IRB, that there was no duty under the *Hague* for a court to refuse a return order, but cautioned that a child found to be a refugee had a prima facie entitlement to protection against refoulement.

[57.] I take the Respondent's argument to be that, because the Canadian government has granted temporary status to remain in Canada based on the same abuse allegations, I could place greater reliance on the abuse allegations being true. I do not accept that logic. The Immigration Board has yet to determine by way of a full hearing whether the allegations can be substantiated to the degree necessary to allow the Respondent and/or the children to remain permanently in Canada. The fact that there is an ongoing refugee claim does not persuade me that I should hold in abeyance this *Convention* process.

[58.] The Respondent also argues that Article 20 of the *Convention* would allow me to refuse the removal of the children if I was of the view that to do so would be contrary to the protection of hers (and the children's) human rights and fundamental freedoms as guaranteed by section 7 of our *Charter of Rights and Freedoms*, specifically, the right to life, liberty and security of the person. In this respect, the Respondent relies on *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177. I take no issue with that general assertion.

[59.] But, more to the point, I asked Respondent's counsel during the hearing if her argument was that the present *Convention* process represents an infringement of the Respondent's (or the children's) s. 7 rights and the response was that the present process did not undermine such rights.

[60.] In other words, there are no s. 7 rights under threat from the process utilized in the present application.

[61.] The Respondent also asserts that if the refugee claims are determined to be successful then mandating the return of the children would, "… violate Canada's domestic and international obligations of non-refoulement." (para. 62 of Respondent's brief). She argues that a ruling on the refugee claim may make this application moot. If refugee status is rejected, the children will be sent back to Israel in any event. If granted, Canada's other international obligations concerning refugees would prevail over this proceeding thus preventing an order being made that directs the return of the children in the face of a valid refugee claim.

[62.] However, as I alluded to earlier, there was no argument that a *Convention* process is in any way hindered by the granting of temporary permission to remain in Canada pending determination of the refugee claim. The present application stands alone.

[63.] It is basic to the understanding of *Convention* applications that each of the signatory countries recognize that other *Convention* countries contain their own judicial

and administrative framework sufficient to address issues of custody or access, including where such issues arise based on allegations of abuse. As Walsh, J. wrote in *J. M. H. v. A. S.*, 2010 NBQB 275:

> [48] Then again, as noted before, the task here is not to decide what is in the children's best interests. After all, "Hague Convention contracting states accept that the Courts of other contracting states will properly take the best interests of the children into account" (See: Katsigiannis v. Kottick-Katsigiannis, supra, at para. 32.),

[64.] I am not at all convinced, on the evidence before me, that the judicial or administrative authorities in Israel are not able to address issues of the proper custody of these children. The Respondent has never tried to engage them. It is, by way of a general statement, the responsibility of the Israeli judicial authorities to consider issues of custody and access of those who are habitually resident in Israel - not this court's.

[65.] I do not accept that the words of Article 20 are relevant in this case as a basis to refuse a return order for the children.

CONCLUSION

[66.] To repeat, I find that the removal of the children from Israel was wrongful and I am not satisfied that the Respondent has met the onus on her to establish a basis to prevent the issuance of an order to return the children to Israel forthwith. It is so ordered.

[67.] To that end, I direct the Attorney General for New Brunswick to advise the applicable Immigration and Refugee agency of this order and to take possession of the

passports of the two children at issue and to file them with the Office of the Clerk of the Court of Queen's Bench (Judicial District of Fredericton) where they will remain until released as necessary for the return trip to Israel.

[68.] The Respondent is prohibited from attempting to get the children's passports from the refugee agency and can only obtain them from the Clerk of the Court of Queen's Bench for the purposes of accompanying the children back to Israel.

[69.] I further order that the children are not to leave the judicial district of Fredericton until it becomes necessary to begin their journey back to Israel.

[70.] This order is effective, of course, immediately. I retain jurisdiction to address any further logistical issues in the event that the parties are unable to resolve them on their own.

[71.] Ms. Landry, I would appreciate if you could draft the order.

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Mr. Justice E. Thomas Christie