DATE: 20030505
DOCKET: C39505

COURT OF APPEAL FOR ONTARIO

ROSENBERG, MACPHERSON and SIMMONS JJ.A.

B E T W E E N:	)	
	)	
	)	
GUSTAVO RAYO JABBAZ	)	Linda J. Meldrum
	)	for the appellant
Plaintiff	)	
Respondent	)	
	)	
	)	
- and -	)	Bryan R. G. Smith
	)	for the respondent
	)	
SUHEILA ROLIM MOUAMMAR	)	
	)	
Defendant	)	
Appellant	)	Heard: April 8, 2003

On appeal from the Order of Justice Wailan Low of the Superior Court of Justice dated January 16, 2003, reported at [2003] O.J. No. 198.

ROSENBERG J.A.:

[1] This appeal from the Order of Low J. concerns the application of the *Hague Convention on the Civil Aspects of International Child Abduction*, Can.T.S. 1983, No. 35, and in particular whether the uncertain immigration status of the custodial parent and the child in the child's country of habitual residence is grounds to refuse to apply the *Convention*. The motion judge found that the immigration status was a basis for refusing to order the return of the six-year old child to his mother in the United States. In my view, in the circumstances of this case, there were no grounds to refuse to apply the *Convention*. Accordingly, I would allow the appeal and order that the child be returned to his mother.

[2] At the opening of the appeal, the appellant applied to file fresh evidence, which I will outline later in these reasons. I would not admit the fresh evidence.

THE FACTS

Background

[3] The appellant, Suheila Mouammar, lived with the respondent, Gustavo Jabbaz, in Toronto, for three years from 1995 to October 1998. They have one son, Mateos, who is six years of age. In these reasons, I will refer to the appellant and respondent as the mother and father respectively. The parents and Mateos are Canadian citizens.

[4] The couple separated in October 1998 and in February 1999 they signed a separation agreement. Both parties were represented by counsel. Under the agreement, the couple shares joint custody of Mateos, but his primary residence is with the mother. The father agreed that the mother could relocate with Mateos outside of Ontario and the agreement expressly acknowledged that the mother intended to relocate with the child to Los Angeles. At the time the agreement was being negotiated, the mother had begun a relationship with Robert de Vico, a permanent resident of the United States. Mr. de Vico sometimes worked for long periods outside of California and so the agreement also provides that the mother may change Mateos' residence to a place other than California by giving the father written notice. The agreement gives the mother ultimate decision-making authority if she and Mateos reside outside Ontario. The father is to have "such generous access as is reasonable in the circumstances if the child is residing outside of Ontario".

[5] The mother and Mateos did in fact relocate to Los Angeles. She anticipated that she would marry Mr. de Vico and that she and Mateos would acquire permanent residence through her partner. Mateos lived with his mother for 3½ years in Los Angeles. The mother and Mr. de Vico had a child, Luca. They did not marry as expected, and the relationship ended acrimoniously in the summer of 2002, while Mateos was on an access visit with his father in Toronto. The mother was required to leave the home and she stayed temporarily with friends. Litigation in California ensued over custody and support for Luca.

[6] Because of the mother's unsettled state in the summer of 2002, the parties agreed that the father would prolong his summer access. Later, at the end of July, when the father was to return Mateos to the mother, she agreed that it would be better for Mateos to stay with the father for a further time. In late August 2002, the mother came to Toronto and had discussions with the father about who should take care of Mateos. There was conflicting evidence before the motion judge on the outcome of these discussions. She found that the parties agreed that Mateos would only live temporarily with the father until the mother re-established herself. In the meantime, with the mother's consent, the father enrolled Mateos in a Toronto school.

[7] In October 2002, the mother and a friend moved into the large home of a mutual friend, Andrew Beath, a retired businessman. Mr. Beath is Canadian but is a permanent resident of the United States. Mr. Beath figures in the fresh evidence dealt with below. The mother then told the father that her situation had stabilized and she wished to have Mateos returned to her. The father refused.

[8] On December 10, 2002, a California court ordered that Luca spend equal time with the mother and Mr. de Vico. Mr. de Vico also pays the mother child support for Luca. A court-appointed social worker inspected the mother's living arrangements and had no concerns. An assessor will make recommendations to the California court as to the most appropriate long-term arrangement for Luca. The mother expected that report would be available in April 2003.

The mother's immigration status

[9] As indicated, the mother is a Canadian citizen. She has worked in California as a part-time translator and consultant for Dream Works SKG and worked for the World Music Festival in Los Angeles. She also performs as a sacred dancer at weddings and other functions. Her contract with Dream Works has now been renewed for a third year. Her immigration status in the United States is, at best, uncertain. The motion judge described the mother and Mateos as being "illegal aliens". The mother does not have a "green card". When she moved to the United States, she expected that she and Mr. de Vico would marry and this would lead to the regularizing of her immigration status.

[10] In an affidavit filed before the motion judge, the mother describes her status and that of Mateos as follows:

> 64. Because I am a Canadian citizen, I may remain in the United States as a visitor for six months from the most recent day on which I entered the country. I can renew my visitors status at any time by leaving the United States and re-entering. This is what many Canadians do who live in the United States for extended periods, but who do not have permanent residence.
>
> 65. Accordingly, if Mateos returns to California with me, he will have the same visitors status there as I do. This is the same status under which he has lived in California up to now and, contrary to what Gustavo says, it has never before been of concern to him. It should certainly not be accepted now as a reason for Mateos to remain in Toronto.

[11] On the motion, the mother, without objection, filed a letter from Glenn Kawahara, a Californian attorney specializing in United States Immigration and Naturalization law. In the letter he states that a Canadian citizen can enter the United States, without a visa, for temporary purposes for a period of six months. If the temporary purpose is not accomplished within the six months, it is possible to obtain extensions of stay in increments of six months. A legitimate, temporary purpose would be to participate in court proceedings in the United States. It will be recalled that the mother is in litigation with Mr. de Vico over the custody and support of Luca.

[12] Apparently without objection, the father was permitted to file a printout from a United States Immigration Services web-site. The motion judge interpreted the information on the web-site as providing that Canadians can only gain lawful entry as visitors:

> (a) If the purpose of their trip to the United States is for business, pleasure or medical treatment,
>
> (b) If they plan to stay for a specific limited period, and
>
> (c) They have a residence outside the United States as well as other binding ties that will ensure their departure from the United States at the end of the visit.

The father's difficulties in travelling with Mateos

[13] In his affidavit, the father set out the difficulties he has had in travelling with Mateos in the United States. He attributes these difficulties to the uncertain/illegal immigration status of the mother and Mateos. While the mother disputed some of these claims, the motion judge accepted the father's evidence that he has had difficulties in getting the child back into the United States following an access visit in Canada. The motion judge also accepted that in 2000, the mother insisted that the father exercise his summer access in California because there was a real possibility that the child would not be permitted to re-enter the United States after leaving. In direct communication and through his lawyer, the father has urged the mother to regularize her immigration status.

The litigation

[14] On December 2, 2002, the father moved, without notice, in the Ontario courts for an order for interim custody of Mateos. Ferrier J. ordered that on an interim interim basis Mateos reside with the father and that the mother not remove Mateos more than 25 kilometres from the City of Toronto.

[15] The father's motion for interim custody was made returnable on December 19, 2002. At the same time the mother brought a cross-motion under the *Hague Convention*. In accordance with Article 16 of the *Convention* the motion judge determined the mother's cross-motion first.

THE LEGISLATION

[16] Section 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, incorporates the provisions of the *Hague Convention* into Ontario law. This appeal principally concerns Article 13 of the *Convention*, which sets out the limited circumstances in which the court is not required to return a child to his or her country of habitual residence. Article 13 and the other relevant parts of the *Convention* are the following:

> *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 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 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.

…

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 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 [emphasis added].

THE REASONS OF THE MOTION JUDGE

[17] The motion judge held that there were two issues to be decided on the mother's cross-motion: first, whether the mother acquiesced in the retention of the child in Ontario and second, whether the child would be in an intolerable situation if returned to California. It is implicit in her reasons that the motion judge found that Mateos was habitually resident in California within the meaning of Article 4 and had been wrongfully retained within the meaning of Article 3. The motion judge found that the mother did not acquiesce in the retention of the child in Ontario within the meaning of Article 13(a) of the *Convention*. The father does not contest that finding on this appeal.

[18] The motion judge concluded that an order should not be made returning the child to the United States. She found that this would put the child in an intolerable position within the meaning of Article 13(b) of the *Convention*, and that such an order would be contrary to public policy. The important parts of her reasons are the following:

> In the absence of the child's immigration status being regularized such that he may lawfully enter the United States as a person intending to reside there, he could only lawfully enter as a visitor. At present, a representation to the U.S. government that the child enters the United States as a visitor would be untrue. If he were to enter into the United States on that misrepresentation, the entry would be unlawful. The child would be an illegal alien. If a true declaration were made at frontier that the intention was that the child would reside in the United States, he would not at present qualify as a visitor and would not be permitted entry. Therefore a court order requiring the return of the child to the United States would be incapable of being effected in a lawful manner.
>
> …
>
> I am of the view that the making of an order requiring the return of the child to the United States would, in the circumstances before me, be both contrary to public policy and would put the child into an intolerable position. Accordingly, an order will not be made at this time.

THE FRESH EVIDENCE

[19] At the opening of the appeal, the mother applied to have the court admit fresh evidence. The evidence consists of an affidavit of Mr. Beath, the man with whom the mother has been living since her break-up with Mr. de Vico, and an affidavit of a California attorney. Mr. Beath states that on April 3, 2003 (a week before the hearing of the appeal) he married the mother. He also states that he is a permanent resident of the United States and is eligible to become a United States citizen. He has begun that process and believes that he will become a citizen by August 2003. Once he becomes a United States citizen, the mother may apply to become a permanent resident.

[20] The California attorney, Mr. Kawahara, confirms Mr. Beath's eligibility for U.S. citizenship and that once he becomes a citizen he will be able to petition for his now wife to become a lawful permanent resident of the U.S. At the same time he will be able to petition for Mateos as his stepson. That process should take a further seven months. Mr. Beath could also petition for his wife to become a permanent resident while he is a permanent resident but the waiting period would be considerably longer, perhaps five years. The affidavit concludes with a statement that while the permanent residence applications are being processed, "with proper admission documents issued by the BCIS [Bureau of Citizenship and Immigration Services]" it will be possible for the mother and her son to travel between the United States and Canada. The affidavit is silent about what that documentation might be or whether the mother and child could legally remain in the United States for an extended period.

[21] The father opposes the admission of the fresh evidence.

ANALYSIS

Intolerable situation

[22] Since his birth, except for the access visits by the father following the separation, Mateos has lived with his mother. There is absolutely no evidence that this situation has been harmful to the child or that the mother's living situation would in any way affect the child's physical or psychological well-being. The fact that a California court has ordered that the mother's other child live with her half of the time is a compelling indication that the child would not be in any danger. The only issue then is whether the mother's

uncertain, even precarious, immigration status in the United States was justification for the refusal of the motion judge to enforce the *Hague Convention*. For convenience, I repeat the relevant parts of Article 13.

> *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 which opposes its return establishes that:
>
> (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].

[23] The circumstances in which a court may refuse to order the return of a child under Article 13 are exceptional. The risk of physical or psychological harm or, as alleged in this case, an intolerable situation must be, as set out in Article 13, "grave". The use of the term "intolerable" speaks to an extreme situation, a situation that is unbearable; a situation too severe to be endured.

[24] Unlike virtually all other child welfare statutes, the test under the *Hague Convention* and Article 13 in particular is not framed in terms of the best interests of the child. The court to which the application is made under the *Hague Convention* is not concerned with determining which parent should have custody of the child using the best interests of the child test. Canada as a signatory to the *Convention* and Ontario having implemented the *Convention* into domestic legislation have made the policy choice that the best interest determination is to be made in the courts of the child's habitual residence. In this case, at this time, that is California. See *Thomson v. Thomson* (1994), 6 R.F.L. (4th) 290 (S.C.C.) at paras. 42-45; *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (C.A.) at paras. 18-28; *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226 (C.A.) at paras. 27-29; and *J.E.A. v. C.L.M.* (2002) 220 D.L.R. (4th) 577 (N.S.C.A.) at paras. 23-30. As Cromwell J.A. said at para. 30 of the *J.E.A.* case:

> It follows that the Court which is asked to order return is not to address the child's best interests in anything other than limited and exceptional respects. Instead, the Court's primary obligation is to ensure the return of the child to the place where those best interests ought to be determined: see *Thomson* at para. 42. Consistent with this purpose, a judge considering an application for return under the Convention is not to approach the task as he or she would an application for interim or permanent custody. That would involve determining what is in the best interests of the child, something which is to be determined by the courts in the place of habitual residence.

[25] The uncertain immigration status of the mother and the child in the United States do not create a grave risk that return of the child to the custody of his mother in the United States, in accordance with the separation agreement, would place the child in an intolerable situation. The bare fact itself of living without regularized immigration status does not approach the very high threshold required to fall under Article 13(b). In this case, the evidence shows that while living in California, the child's development was "very normal". There is no reason to suspect that this would not continue to be the case upon the child's return to California.

[26] In stating this, I do not suggest that uncertain immigration status can never be a concern under Article 13. For example, if because of their immigration status, the mother and child were deportable to another country in which the child would face a grave risk of harm, then the Article 13 exception *might* be made out. Thus, if upon their return to the United States, there was a grave risk that the mother and child would be deported to some country in the midst of serious sustained armed conflict, this might well be an intolerable situation. But, that is hardly the case here. At worst, this mother and child, who are both Canadian citizens, would be deported back to Canada. Obviously, deportation is not a desirable situation but I cannot see how deportation to Canada could create an intolerable situation for the child.

[27] It may well be that the father now regrets having made the agreement he did with the mother when the couple separated. However, his remedy is not the self-help remedy of retaining the child in breach of the agreement and the *Hague Convention*, but in applying to the California courts for variation of the custody and access terms, if so

advised. Counsel for the father conceded that if Mateos were returned to California, its courts would have jurisdiction over the child and could entertain such an application, as would an Ontario court in comparable circumstances under s. 22 of the *Children's Law Reform Act*. As Jennings J. said in *Medhurst v. Markle* (1995), 26 O.R. (3d) 178 (Gen. Div.) at 182, "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."

[28] There is absolutely no evidence that the California courts would be unable to act to ensure the child's best interests. Any concerns about the effects the child's uncertain immigration status might have on the child's welfare can be fully aired before the California courts. It also seems to me that California courts would be in a far better position to determine the relevancy of that status. I think it highly undesirable that a Canadian court should be asked to make such an assessment, much less to do so on the very scant "evidence" proffered in this case in the form of a printout from the United States Immigration Service web-site.

[29] The father fairly makes the point that the mother has had over three years to clarify and legalize her immigration status in the United States. I agree that it is unfortunate that the mother has not acted more expeditiously and perhaps in a more straightforward fashion. However, it must be remembered that she was expecting to marry Mr. de Vico and that this would apparently have provided a simple route to permanent residency status in the United States. The relationship collapsed in 2002 and the mother then found herself embroiled in custody and support litigation with Mr. de Vico. The uncertain immigration situation that resulted does not, however, indicate that Mateos would be placed in an intolerable situation. For example, there is no evidence that Mateos would be denied schooling or health care while in California. He attended pre-school while in California. He apparently has a suitable residence with the mother who has raised him since birth. Finally, although the father has had some difficulties in the past in travelling with Mateos while exercising his access rights, the evidence shows that in the end he has always been able to take Mateos back and forth across the Canada/U.S. border. Any concerns over access should in any event be raised in California courts.

[30] In her reasons, the trial judge relied upon *Chan v. Chow* (2001), 199 D.L.R. (4th) 478 (B.C.C.A.), describing that case as raising a similar issue. The facts of *Chan* are complex. Suffice it to say that the father, who had wrongfully removed the daughter

from Hong Kong, proved that within a few months of the motion the mother and child would be forced to leave Hong Kong. Proudfoot J.A. said the following at para. 62:

> An underlying purpose of the Convention is the achievement of continuity in the residences of children. *If Emily is returned to Hong Kong, she will be forced to move once more in the next few months, an intolerable situation for her in my mind* [emphasis added].

[31] Proudfoot J.A. went on to catalogue a number of other reasons for finding that the intolerable situation exception had been met. She found at para. 63 that a "second and equally important reason is that [the mother] has had a very unstable living pattern" including abducting the child herself at one point. As well, on a prior occasion the mother had left the child with a relative in Mainland China without the father's knowledge. There was also "the added concern and grave risk that Emily will be 'hidden' from [the father] once more" (para. 65).

[32] In my view, *Chan* does not stand for the proposition that in every case, movement of a child to another country within a few months of the child's return in accordance with the *Convention* constitutes an intolerable situation. That would set the intolerable situation test too low. Families, including children, often have to move from town to town and even from country to country. Such moves can be disruptive because they can interfere with schooling and making friends. However, I would not describe every such situation as intolerable.

[33] In *F. (R.) v. G. (M.)*, [2002] J.Q. No. 3568 (Que. C.A.) at para 30, Chamberland J.A. said, "The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children 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." I agree with that observation. Refusing to enforce the *Convention* because the child might have to move a short time later is not consistent with the rigorous interpretation required and is inconsistent with the stated objects of the Convention to secure the prompt return of children wrongfully removed or retained from the Contracting State and to ensure that custody rights are respected. Such an interpretation is, in my view, inconsistent with the thrust of the cases in this province

such as this court's decisions in *Pollastro* and *Finizio.* Continuity in residence is desirable but some instability is not intolerable.

[34] That said, it seems to me that the result in *Chan* may also be explained by the several other concerns noted by the Court of Appeal including the grave risk that the mother would once again hide the child from the father, possibly in Mainland China.

[35] Finally, unlike in *Chan*, the evidence in this case does not show that the child would be forced to move once more in the next few months. However uncertain the mother and child's immigration status in the U.S., they have been able to live there for three and a half years and the mother has been able to access the California courts to obtain custody and support for the other child.

[36] The motion judge's decision is "entitled to deference and should not be set aside unless she applied the wrong legal principles or made unreasonable findings of fact": *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (C.A.) at para. 31. In my view, the motion judge did apply wrong legal principles and in finding that the child would be placed in an intolerable situation she drew unreasonable inferences from the facts.

Public policy

[37] As I read her reasons, the motion judge gave as an independent reason, apart from intolerable situation, that enforcing the *Convention* in this case would be contrary to public policy. She was concerned that the mother would lie about her intentions to gain entry to the United States with the child. At different points in her reasons, the motion judge referred to the mother and child as being illegal aliens and that if they entered the United States as visitors "such representation is not truthful and both the mother and child enter the United States fraudulently". As she put it, "Therefore a court order requiring the return of the child to the United States would be incapable of being effected in a lawful manner."

[38] I do not agree with the motion judge's characterization of the public policy issue. First, a Canadian court is in no position to determine whether or not the mother and child are illegal aliens or whether any representations they would make at the border would be

fraudulent. That is a matter for the United States authorities and, possibly, the California courts.

[39] Second, the motion judge's reasons give no weight to the competing policy consideration as represented by Ontario's incorporation of the *Hague Convention* into its domestic law. I repeat the observations of Chamberland J.A. in *F. (R.) v. G. (M.)* at para. 30 that the *Hague Convention* is "a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy." That means that courts should be very wary of grafting new public policy exceptions on to the *Convention* in the face of the very clear public policy represented in the *Convention* itself.

[40] Third, the motion judge's conclusion gives no weight to the father's own position. He has retained the child in breach of the separation agreement that he entered into with the mother. Given that the test for Article 13(b) is not met, he is thus in contravention of s. 46 of the CLRA and of the *Hague Convention*, wrongfully retaining a child in Canada.

[41] Finally, I am concerned about using a parent's uncertain or precarious immigration status, short of an intolerable situation, as a basis for refusing to enforce the *Hague Convention*. This gives to one parent a potentially potent weapon to use against the other parent in custody disputes. Parents with uncertain immigration status are already in a vulnerable position and I would regret sending a message that would further marginalize them and deny them access to the protections intended by the *Convention.*

[42] In her reasons, the motion judge relied upon the decision of the Newfoundland Court of Appeal in *Bursey v. Bursey* (1999), 47 R.F.L. (4^{th}) 1. In that case, the court refused to enforce an indemnity clause in a domestic contract because the purpose of the clause was to discourage the wife from reporting her husband's failure to pay tax to the relevant authorities. The court held at para. 25 that "it is well settled that a contractual provision whose ultimate design is to perpetrate a fraud on a public taxing authority is contrary to public policy and unenforceable". In my view, that principle and the more general principle that courts will not lend their assistance to a party seeking to enforce rights by relying on an illegal agreement are of limited application to *Hague Convention* proceedings. I have already indicated my view that this province's public policy is reflected in the incorporation of the *Convention* into the CLRA. Moreover, the motion judge was not being asked to enforce a separation agreement tainted by illegality.

[43] Finally, I do not see why this court should prejudge how the United States immigration authorities will deal with the question of the legality of the child's entry. In that respect, I note that it is not at all a foregone conclusion that Mateos would be refused entry even if he were judged an "illegal alien". For example, see *Roszkowski v. Roszkowska*, 644 A. 2d 1150 (Ch. Div. 1993) at para. 21, where the court held that since under United States law treaties are "the supreme law of the land", the *Hague Convention* "should take precedence over any conflicting immigration law".

THE FRESH EVIDENCE

[44] I have not found it necessary to rely upon the fresh evidence in finding that the motion judge erred in holding that returning Mateos to the United States would place him in an intolerable situation and be contrary to public policy. I would therefore not admit the fresh evidence.

THE REMEDY

[45] The question of the appropriate order to make in this case is not a simple one. While, as I have said, the question of entry into the United States is for the U. S. officials, equally, Ontario courts have no right to pre-empt that decision by simply ordering that the child be returned to the United States. Accordingly, I would make the order that the child be returned to the United States, contingent on the child being permitted entry into the United States. At the hearing of the appeal, counsel for the mother agreed that this was an appropriate condition.

[46] I have considered whether the contingency should be that the child be "lawfully" permitted entry, or that the mother must "truthfully" represent her status and that of her child. Because of the heavy weight I place on the public policy as reflected in the *Hague Convention*, I do not think such terms are appropriate or even enforceable.

DISPOSITION

[47] Accordingly, I would allow the appeal, set aside the Orders of Low J. and Ferrier J., and order that, pursuant to the *Hague Convention*, Mateos Andres Jabbaz Mouammar, born April 22, 1997, be returned forthwith to his mother, Suheila Rolim

Mouammar, in Los Angeles, provided that Mateos is permitted to enter the United States by United States authorities.

[48] If the mother is seeking costs of the motion before Low J. and of the appeal she may serve and file brief written submissions together with a bill of costs within ten days of receipt of these reasons. The father shall serve and file his submissions with respect to costs within ten days of receipt of the submissions of the mother.

Signed: "M. Rosenberg J.A."
"I agree J.C. MacPherson J.A."
"I agree Janet Simmons J.A."

RELEASED: MAY 5, 2003