IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Suarez v. Carranza,***
2008 BCSC 1187

Date: 20080829
Docket: E080587
Registry: Vancouver

Between:

David Suarez

Petitioner

And

Milagros Carranza

Respondent

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Petitioner	William R. Storey
Counsel for the Respondent	Carol J. Powlett Pepper
Date and Place of Hearing:	June 6 and 11, 2008 Vancouver, B.C.

[1] The petitioner, David Suarez, applies for the return to New York of his two-year-old daughter, Emily. The petition is brought pursuant to the ***Hague Convention on the Civil Aspects of International Child Abduction***, 25 October 1980, Can. T.S. 1983 No. 35 (the "***Convention***"). Emily currently lives in Richmond with her mother, Milagros Carranza.

[2] Ms. Carranza is seeking refugee and landed immigrant status in Canada. When she left New York an Order of Protection ("OOP") from the Criminal Court of the City of New York prevented Mr. Suarez from having any contact with either Ms. Carranza or Emily. Mr. Suarez was charged with assault as a result of a domestic violence incident that allegedly occurred on September 15, 2007. Ms. Carranza left for Canada in early November after spending a few weeks in a shelter in New Jersey. She came to British Columbia because she has an aunt who lives here. She says that it was necessary for her to leave the United States as she and Emily could not be safe because of the risk of further violence from Mr. Suarez.

[3] Mr. Suarez denies any violent behaviour towards either his wife or his daughter. He did plead guilty to disorderly behaviour to the charge that resulted from the incident in September 2007, but says he did that because it resolved the charge quickly in a way that left him with no criminal record. Following the guilty plea, a further OOP was made that prevents any contact between him and his daughter or wife for a year. That OOP expires on December 4, 2008.

[4] Mr. Suarez obtained an order on November 15, 2007 from the Family Court for the State of New York, requiring Ms. Carranza to return Emily to New York. On

January 9, 2008, he obtained a further order declaring Ms. Carranza to be in violation of the November order. The court also issued a warrant for her arrest. His application pursuant to the Convention was made on December 17, 2007.

The Convention

[5] The relevant provisions of the Convention include:

> Article 3
>
> The removal or 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 5
>
> For the purposes of this Convention –
>
> > (a) "right 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;
> >
> > …
>
> Article 12
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the 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
>
> 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.
>
> …

[6] Ms. Carranza says that the Convention does not apply because Emily was not habitually resident in New York when she left the state. Further, she says that Mr. Suarez had no rights of custody or was not exercising such rights because of the OOP. Alternatively, she says that I should decline to order Emily's return to New York because there is a grave risk that her return would place Emily in an intolerable situation.

Issues

[7] 1) Was Emily habitually resident in New York immediately before her removal to British Columbia?

[8] 2) Was Emily brought to British Columbia in breach of Mr. Suarez's rights of custody? If so, was he actually exercising those rights at the time of the removal?

[9] 3) Is there a grave risk that Emily's return to New York would expose her to physical or psychological harm or otherwise place her in an intolerable situation?

Issue 1. Was Emily Habitually Resident in New York Immediately Before Her Removal to British Columbia?

[10] Ms. Carranza argues that she never had a settled intention to remain in New York and so was not habitually resident in that state. As Emily was in her lawful custody, she must have the same habitual residence as her mother. Their residence changed a number of times in the months leading up to the move to British Columbia. They were only in New York on a trial basis to see if Mr. Suarez would keep promises he made to her that he would stop drinking and take anger management courses. When his promises were not kept, she left with Emily.

[11] ***Chan v. Chow***, 2001 BCCA 276, 90 B.C.L.R. (3d) 222, is the leading case in British Columbia on the issue of how to determine "habitual residence" for the purpose of Article 3 of the Convention. As the term is not defined in the Convention, Proudfoot J.A. reviewed decisions from other jurisdictions and concluded as follows at para. 32:

> 1) The question is a question of fact to be decided by reference to all the circumstances of the case.
>
> 2) An "habitual residence" is established by residing in a place for an appreciable period of time, with a "settled intention."

3) A child's "habitual residence" is tied to the habitual residence of his or her custodian(s).

[12] A settled intention involves a degree of settled purpose that may be general or specific. The intention could be for education, business or profession, employment, health, family or other purposes. It might be for a limited or extended time. However, the purpose of living in the chosen place must have a sufficient degree of continuity to be for an appreciable period of time: ***Chan*** at paras. 33-34.

[13] In ***Chan***, the parties moved a number of times in the four years prior to the removal of the child to British Columbia. During that period, they separated and reconciled more than once. Their residences included Alberta, Ontario, Vancouver and Hong Kong. They had joint custody pursuant to an Alberta order and the husband indicated that it was always the parties' intention to educate their daughter in Canada. For nine months prior to her removal to British Columbia the child resided in Hong Kong with both parents on an approximately fifty-fifty basis. Mr. Chow had a business in Hong Kong and Ms. Chan was employed. He had sponsored her for immigration purposes. Proudfoot J.A. concluded that a nine-month residence satisfied the "appreciable period of time" requirement and that the parties had a settled intention to make Hong Kong their home for the time they resided there.

[14] The facts in this case have some similarity to those in ***Chan***. Ms. Carranza lived with Mr. Suarez in New York for a period of time starting in 2004. In April 2006, she left him and moved to Minnesota where she lived on her own until March 2007. Emily was born on August 30, 2006 in Minnesota. Mr. Suarez was present when

she was born and went to Minnesota from time to time to visit his daughter. He continued to live in New York. On March 15, 2007, Mr. Suarez and friends drove to Minnesota and moved Ms. Carranza, her nine-year-old son and Emily to New York. On May 25, 2007, the parties were married. There is no doubt that they intended to live together as a family. In fact they did reside together until the first OOP was issued in September 2007.

[15] While in New York in 2007, Ms. Carranza worked as a paralegal in her uncle's law office and then did some in-home child care for another infant. Subsequently she went back to work for her uncle. Mr. Suarez is an electrician and was employed in New York throughout the relevant time period. Ms. Carranza says that she was induced to return to New York by his false promises to mend his ways. She says that her return to New York was conditional on Mr. Suarez fulfilling those promises. She says that she never had a settled intention of staying in New York. The intention would only have become settled after some time if Mr. Suarez stopped drinking to excess and controlled his anger.

[16] As a result of the incident where she was pushed in their home in September 2007, she began to reconsider her living arrangements. However, she remained in New York and continued to see Mr. Suarez and spoke with him frequently on the telephone. He has produced telephone records that show that she called him numerous times and spoke on her cell phone with him for more than 800 minutes after the September incident. She knew that he was not permitted to speak with her, but she initiated many of the calls. He has also produced photos of the family at a beach together in early October 2007. The photos show her smiling happily with her

children and Mr. Suarez. The beach visit was also in violation of the OOP, but was done voluntarily by her. She says that it was following a second incident of domestic violence on October 12, 2007 that she decided to leave. She went to the shelter in New Jersey. She enrolled her son in school and says that she formed the intention of staying there. She only left that location after Mr. Suarez telephoned her mother in Peru and made threatening statements to her.

[17] Mr. Suarez's version of the events is very different. He says that when Ms. Carranza left him to go to Minnesota it was to escape from a former husband. He filed a statement from her first husband that suggests she married him solely to obtain a green card. The former husband says that Ms. Carranza obtained a divorce from him in Minnesota in the summer of 2006 by forging his signature on court documents.

[18] Mr. Suarez says that he sent her money on a regular basis and drove to Minnesota to give her a car. He bought all of the items required for the new baby. He traveled to Minnesota every two weeks for visits and flew there for Emily's birth. He says that when she returned to New York in 2007, he understood that it was their mutual intention to live together as a family with their daughter. He facilitated Ms. Carranza's employment with her uncle by paying the airfare for Emily's babysitter to come to New York from Chile.

[19] In support of his contention that he was not violent he refers to the investigation notes from the New York Administration of Children's Services ("ACS"). The notes indicate that the children were healthy and well cared for with no signs of

any bruises or marks. There is a note that Ms. Carranza told the investigators she was not afraid of him because he was not abusive. Another note says the son told the investigator that his mother and Mr. Suarez argued a lot, but he never witnessed any physical violence between them.

[20] In these circumstances, I have no hesitation in concluding that when Ms. Carranza returned to New York in March 2007, it was for the purpose of establishing a family with Mr. Suarez. In order to carry out that purpose, she enrolled her son in school and obtained employment for herself. To further that purpose, she married Mr. Suarez. She has sworn that she married him and moved to New York as a result of promises that were false. However, it is often the case when someone changes their residence for a particular purpose, that the new home, job or relationship does not live up to expectations. That does not diminish the settled intention to establish that new residence.

[21] I also have no hesitation in concluding that Ms. Carranza's seven-month stay satisfies the requirement that the intention to have a residence in New York be for an appreciable period of time. When she left New York with Emily in late October, both she and her daughter were habitually resident in that state.

[22] Ms. Carranza has also argued that she removed Emily from New Jersey, not from New York, and that she and Emily were habitually resident in that state. That argument is not tenable. Given the brief stay in New Jersey, there was no settled intention to stay there. It would defeat the intent of the Convention if one could easily establish a new habitual residence by stopping for a few weeks on the way to

a final destination. In summary, Emily was habitually resident in New York immediately before the removal which brought her to British Columbia.

Issue 2. Was Emily Brought to British Columbia in Breach of Mr. Suarez's Rights of Custody? If so, Was He Actually Exercising Those Rights at the Time of the Removal?

[23] Mr. Suarez argues that Emily's removal from New York was in breach of his rights of custody. He says that the OOP did not remove any such rights. OOPs are subject to orders issued by the family court which could include access rights. At the time of the removal, there was no custody or access order in place. Mr. Suarez says that in these circumstances both parents are presumed to have custody pursuant to s. 70 of the New York State ***Domestic Relations Law***, N.Y. Stat. (1980).

[24] Ms. Carranza says that the OOP that was in place when Emily left New York did not permit Mr. Suarez to be within 100 yards of Emily or her home. He was not permitted to communicate with her in any way. Emily was thus in Ms. Carranza's care and custody at the time of removal. She argues that in these circumstances Mr. Suarez either had no rights of custody or was not actually exercising such rights. She also argues that given the threat of continuing domestic violence it was lawful for her to remove Emily from New York.

[25] The rights of custody are to be determined according to the law of the state in which the child was habitually resident. Article 14 of the Convention allows me to take notice of New York law without proof of that law in the ordinary course. Nevertheless, at the conclusion of the hearing of this application I invited the parties

to provide me with legal opinions as to whether Mr. Suarez retained any rights of custody following the issuance of the OOP. Mr. Suarez has tendered an opinion from William Salgado, his attorney of record in New York. He has also tendered a letter from Jane McGrady, the Court Attorney Referee who is presiding over the New York hearing regarding Emily's custody. Ms. Carranza has tendered the opinion of Dorchen Leidholdt, the Director of Sanctuary for Families legal center, the largest non-profit legal services program in New York State for domestic violence victims.

[26] Ms. McGrady's letter is based on the record before the court in New York. The record includes both the proceedings in the Queens Family Court and the Queens County Criminal Court. She provides the following opinion regarding the effect of the OOP:

> The order of protection from criminal court does not terminate the father's parental rights. Furthermore, the order, by referencing family court orders, enables the family court to enter appropriate custody or visitation orders which would not be in violation or [*sic*] the protective order.

[27] She notes as well that Mr. Suarez had a motion pending before the family court seeking a final determination on the issues of custody and visitation. Ms. Carranza had a pending motion to dismiss Mr. Suarez's petition for custody on the basis that Ms. Carranza was never properly served with the petition and court order. In this court, Ms. Carranza filed persuasive affidavit evidence to show that Mr. Suarez, or someone on his behalf, forged an affidavit of service for the New York custody proceeding.

[28] Those motions were heard by Ms. McGrady subsequent to the hearing of the petition in this court. I have been provided with two orders dated June 25, 2008. The first order cancelled the warrant of arrest that had previously been issued against Ms. Carranza. The second order dismissed Mr. Suarez's petition for custody "due to lack of jurisdiction". The petition was dismissed "without prejudice". No information has been provided to me to explain why the court determined that it did not have jurisdiction.

[29] Mr. Salgado opines that where both parties are residing with a child they are both presumed to have custody of the child. He says this is "essentially codified" in s. 70 of the ***Domestic Relations Law***. That section provides that either parent may apply to have the court determine guardianship, charge and custody of the child. In addition, the section states that "there shall be no *prima facie* right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child".

[30] Mr. Salgado also opines that "[p]arental rights are not cut off because of the issuance of an order of protection". He says that OOPs in domestic situations are usually made subject to family court orders. On February 5, 2008, this OOP was made subject to family court orders, as a consequence of which "Mr. Suarez's custodial rights and parental rights remain unchanged as a result of the issuance of the order of protection".

[31] Ms. Leidholdt has provided a very lengthy opinion that is based in part on a two-hour telephone interview that she conducted with Ms. Carranza. She set out a

lengthy statement of facts, some of which were before me through Ms. Carranza's affidavit evidence, and some of which were not. Ms. Leidholt provides opinions on three issues:

1) Was Ms. Carranza legally barred from taking the children to Canada?

2) Did Mr. Suarez have access to Emily because of the court OOP?

3) Was there a grave risk that Emily would be exposed to physical or psychological harm if she was returned to New York?

[32] On the first issue, Ms. Leidholdt concludes that it was lawful for Ms. Carranza to flee from New York with Emily. She reaches this conclusion in part because Ms. Carranza was told by an ACS case worker that she could move if she wanted to do so. Further, when she entered Canada, an officer with the Canadian Border Agency contacted ACS and was informed that Ms. Carranza was a domestic violence victim and that her safety plan was to move to Canada with her children. Ms. Leidholt also relies on case authorities that have held that mothers are justified in fleeing domestic violence in order to protect themselves and their children. She further notes that Ms. Carranza's action would not amount to custodial interference as that is defined in New York Penal Law because there was no custody or access order in place at the time.

[33] On the second issue, Ms. Leidholdt opines that Mr. Suarez's rights of custody and access were not violated as there was no court order or custody agreement in place at the time.

[34] On the third issue, she concludes that there was a grave risk that if Emily was returned she would be exposed to physical or psychological harm.

[35] Mr. Suarez raised an objection to the legal opinion of Ms. Leidholdt. He says I should give little or no weight to it for three reasons:

a) It does not provide an opinion on the question that I asked the parties to consider, that is, whether Mr. Suarez had rights of custody under New York law;

b) It is coloured by a reasonable apprehension of bias because Ms. Leidholdt is an advocate for victims of domestic violence; and

c) It is based upon a detailed assessment of her understanding of the facts of the case, many of which were not in evidence before me.

[36] I agree that Ms. Leidholdt's legal opinion covers issues that I did not ask the parties to consider. The third issue is, of course, one of the ultimate issues that I must decide and I have disregarded her opinion on that issue entirely. I did not ask either party to address the first issue as it is not the same issue that must be considered under the Convention. I also find her opinions on the first and second issues to be of limited assistance as they are based on the interview of Ms. Carranza and thus on facts that have not been put in evidence before me. I have, however, considered her opinion on the second issue as the question of access is relevant to the issue of Mr. Suarez's rights under New York law, which I must consider.

Analysis

[37] Custody rights in the Convention are defined to 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". It is apparent that custody is used in its broad sense; it encompasses incidents of guardianship including the right to determine where a child resides. It does not refer solely to the physical custody and day-to-day care and control of a child.

[38] Mr. Suarez did not have custodial rights in the narrower sense. He had lost the ability to care for or have access visits with Emily as a result of the OOP. However, the opinion of Ms. McGrady, the Court Attorney Referee for Emily's case, carries a great deal of weight. I accept her statement that under New York law Mr. Suarez's parental rights were not terminated by the OOP. The question that remains is what is included in those parental rights and, specifically, do they include the right to determine where a child resides.

[39] For the reasons set out below, I have concluded that under New York law Mr. Suarez did retain a parental right to determine in which jurisdiction his child could reside.

[40] The circumstances in this case amount to one of the "five types of situations considered to constitute 'child abduction'" discussed in ***Thomson v. Thomson***, [1994], 3 S.C.R. 551 at pp. 580-81:

> A The child was removed by a parent from the country of the child's habitual residence to another country without the consent of the

> other parent, at a time when no custody decision had yet been handed down but serious problems between the parents already existed.

[41] At the time of the OOP and the removal of Emily there was no order or custody agreement in place to determine who could make the decision as to her state of residence. Mr. Salgado's opinion regarding New York law is supported by a plain reading of s. 70 of the ***Domestic Relations Law***. In these circumstances, both parties have the right to apply for custodial rights and neither party is presumed to have such rights to the exclusion of the other. It is the best interests of the child that govern. Until a custody application is made, the parent who does not have day-to-day care of the child still retains custodial rights which must include the ability to have some say in the determination as to where the child resides. At the very least, it includes the ability to apply to court to attempt to obtain an order regarding a child's custody, access or residence.

[42] It is evident from the material before me that in New York an OOP may be obtained without a full hearing into the merits of the domestic violence allegation and without a custody hearing. Section 70 of the **Domestic Relations Law** is founded on the same principle as British Columbia law: custody and access orders will be made in accordance with the best interests of the child. The court always retains the jurisdiction to determine what is in the child's best interests when there is a dispute between the parents. If Ms. Carranza's argument is accepted, it would mean that in all situations where an OOP had been issued the custodial parent would be free to remove the child from her state of habitual residence, so long as there was no contrary order or agreement in place. This must be wrong because it would allow

the custodial parent to circumvent the court's jurisdiction to determine what is in the best interests of the child.

[43] A similar issue arose in ***C v. C.***, [1992] 1 FLR 163, [1992] Fam Law 199 (Eng. Fam. D.). The court in England had to consider whether the removal of children from New York to England without the father's consent was wrongful where the mother had an order for custody and the father had access rights. The court decided on the basis of the authorities and evidence before it that under New York law there was an implicit prohibition against removal without leave. It concluded that it was irrelevant whether the mother would have obtained an order permitting the removal to England had she applied for such an order, as the removal was wrongful in the absence of any such order.

[44] Here, the situation is similar. The import of the opinion of Ms. Leidholdt is really the same as those filed in ***C. v. C.*** In other words, if a court had considered an application by Ms. Carranza to remove Emily from New York, such an order may have been granted given the circumstances of this case. However, Emily was removed from New York without Mr. Suarez's consent or a court order. Mr. Suarez retained a right to object to the child's removal, and the New York court had the ability to determine where Emily should reside, taking her best interests into account.

[45] This conclusion accords with the reasoning in ***Thomson*** as to what amounts to wrongful removal. In ***Thomson***, La Forest J. noted that there are two approaches that are consistent with the language in the Convention. Those approaches consider the right to determine the child's place of residence to be a custody right

divisible from the right to care for the person of the child. One approach vests the right in the access parent and the other vests the right in the court. La Forest J. quoted with approval from Lord Donaldson in ***C. v. C.*** (***Minor: Abduction: Rights of Custody Abroad***), [1989] 2 All E.R. 465 (C.A.) at p. 473:

> 'Custody', as a matter of non-technical English, means 'Safe keeping, protection; charge, care, guardianship' (I take that from the *Shorter Oxford English Dictionary*); but 'rights of custody' as defined in the convention includes a much more precise meaning, which will, I apprehend, usually be decisive of most applications under the convention. This is 'the right to determine the child's place of residence'. This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right, in so far as the child is to reside in Australia, the right being that of the mother but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the convention. I add for completeness that a 'right to determine the child's place of residence' (using the phrase in the convention) may be specific, the right to decide that it shall live at a particular address, or it may be general, eg 'within the Commonwealth of Australia'.

[46] In the present case, Ms. Carranza had a right to determine where Emily would live within the state of New York. However, she did not have the right to remove Emily to Canada without the consent of either Mr. Suarez or the court. The removal is therefore wrongful under the Convention.

[47] It will be apparent from this reasoning that I have also concluded that Mr. Suarez was attempting to actually exercise his custody rights at the time of removal and did not consent to or acquiesce in the removal. While the OOP prevented him from exercising any right to physically care for or visit Emily, he has continued to

attempt to exercise rights of custody through the court proceedings in New York. That is sufficient for the purpose of Articles 3 and 13 of the Convention.

Issue 3. Is there a Grave Risk that Emily's Return to New York Would Expose Her to Physical or Psychological Harm or Otherwise Place Her in an Intolerable Situation?

[48] Pursuant to Article 12 of the Convention, having found that Emily was wrongfully removed from New York, I am obligated to order that she be returned forthwith unless this case falls within one of the exceptions. The only exception relevant to this case is contained in Article 13(b). Ms. Carranza says there is a grave risk that Emily's return would expose her to harm because of the incidents of violence to which Ms. Carranza has been exposed. There is no evidence that either Emily or Ms. Carranza's son have been harmed physically by Mr. Suarez. The allegation is that a risk of psychological harm to Emily arises because of the violence Ms. Carranza has faced and will likely face if she returns.

[49] The allegations of violence are described in the affidavits of Ms. Carranza and in the ACS investigation notes. Ms. Carranza alleges that on September 15, 2007 Mr. Suarez pushed her onto a bed following a lengthy argument. She was not injured, but called 911. Mr. Suarez, who was inebriated at the time, was arrested. She told the ACS workers that this was the first incident of physical violence but that she and Mr. Suarez argued a lot. She says that on October 12, 2007 she was hurt when he pushed her a second time in the course of an argument. At the same time, he also threatened to kill her. After she went to the shelter in New Jersey,

Ms. Carranza's mother in Peru received threatening phone calls from Mr. Suarez. Similarly, Ms. Carranza's relatives in British Columbia received threatening calls from him after she came to Canada.

[50] Ms. Carranza also alleges that there is a risk that Emily's return will put her in an intolerable situation because Ms. Carranza might be deported if she returns to New York. This could leave the children in the care of ACS without their mother. Given the OOP, they could not be returned to Mr. Suarez. Ms. Carranza could be deported as she is a Peruvian national and is in the United States on a visa which could expire and might not be renewed, given the issuance of the warrant for her arrest. This situation would be intolerable as Ms. Carranza has been the primary or sole caregiver for Emily for her entire life.

[51] The leading case in Canada on the application of Article 13(b) of the Convention is ***Thomson***. In that case, the mother removed a young child from Scotland to Manitoba. It was alleged there was a grave risk of physical or psychological harm because by the time of the hearing the mother had been the primary caregiver for 13 months. The court in Scotland had ordered custody to the father and so a return of the child to Scotland would put the child in his care, which was said to create the risk. The court rejected the argument, and in doing so, La Forest J. noted that the physical or psychological harm contemplated by Article 13(b) is harm to a degree that also amounts to an intolerable situation. It has to be more than an ordinary risk and greater than the harm that would be expected on taking a child away from one parent and passing her to another. The risk must be weighty and one of substantial harm: ***Thomson*** at pp. 596-97. The court ordered

the return of the child to Scotland with undertakings to protect the child's best interests while the dispute over custody was dealt with by the court in Scotland.

[52] In ***K.J.G. v. K.J.B***, [2000] A.J. No. 290 (Q.B.) (QL), at para. 91, Romaine J. emphasized the serious nature of the risk of harm that is required under Article 13(b). He quoted with approval the decision in ***Friedrich v. Freidrich***, 78 F. 3d 1060 (6th Cir. 1996), where the court found that a grave risk of harm for the purpose of Article 13(b) could only arise in two situations:

> 1) Where the return of the child may put her in imminent danger prior to the resolution of the custody dispute, for instance, returning the child to a war zone; and
>
> 2) Where there is serious abuse or neglect or extraordinary emotional dependence where the court of the country of habitual residence may be incapable or unwilling to give the child adequate protection.

[53] In ***Finizio v. Scoppio-Finizio*** (1999), 46 O.R. (3d) 226 (C.A.), the court considered a situation with some factual similarity to the present case. In ***Finizio***, the wife brought children aged 2 and 7 to Canada following an incident where the husband punched her in the face. An application was brought by the husband to return the children to Italy, where they had lived with the parents before their separation. The chambers judge found that the removal was wrongful, but refused to order the return of the children because it would expose them to a grave risk of psychological harm. The Court of Appeal overturned the decision and ordered that the children be returned to Italy.

[54] The children were returned to Italy for several reasons described by MacPherson J.A.:

1) There was no evidence that the husband had done harm to the children. The wife continued to permit him to visit the children after the assault.

2) This was the only incident of assault during an eight-year relationship. The chambers judge had criticized the Italian judicial system but this was not a fair criticism because the issue was still in the hands of the police and the wife had taken no steps to raise custody or support issues in the Italian courts before leaving for Canada.

3) There was no basis for suggesting the Italian courts were not suited for dealing with the issues. MacPherson J.A. agreed with Jennings J. in ***Medhurst v. Markle*** (1995), 26 O.R. (3d) 178 at p. 182, 17 R.F.L. (4th) 428 at (Gen. Div.) 432 that "[i]t 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".

4) As noted in ***Thomson***, through the use of undertakings, the requirements of Article 12 can be met, the wrongful actions of the removing party are not condoned, the long-term best interests of the child can be left for determination by the court of the child's habitual residence, and any short-term harm to the child can be ameliorated.

[55] I have concluded that in this case the risk of harm facing Emily if she is returned to New York does not meet the test of an intolerable situation. I have approached my consideration of this issue by looking at those factors considered by MacPherson J.A. in ***Finizio***:

1) There is no evidence here of any physical harm to Emily. After the incident of September 15, 2007, Ms. Carranza continued to see Mr. Suarez with the two children. She continued to phone him in spite of the OOP. It is difficult for me to determine on the affidavit evidence if these contacts occurred because of pressure from Mr. Suarez as she alleges or because she chose to contact and see him as he alleges. However, I would have expected her to contact the police and inform them of his breaches of the OOP long before mid-October if her allegation was correct. As in ***Finizio***, this suggests that the situation was not intolerable.

2) Ms. Carranza reported two incidents of violence and made a number of other calls to Child Protection Services in the months before the removal of the children. Accordingly, this case does suggest a greater risk of harm than ***Finizio***. However, Ms. Carranza's statement to the ACS case worker following the September incident that she was not afraid of Mr. Suarez because he was not physically abusive to her is significant. She alleges a further incident in October but there are no notes of the investigation of that incident and Mr. Suarez has denied it. In ***Finizio***, the court concluded that the father did punch the mother.

Here, I can conclude on the basis of the evidence, including the guilty plea, that Mr. Suarez did push Ms. Carranza in September. I cannot, however, arrive at the same conclusion about the October incident.

3) There is no basis whatsoever to conclude that the courts of New York are not able to make suitable arrangements for Emily's welfare. The court put the OOPs in place. ACS was closely monitoring the domestic issues when called upon to do so. While the family court issued a custody order in favour of Mr. Suarez and a warrant for Ms. Carranza's request, those have been set aside and the court appears to be ready to reconsider the issue upon Emily's return.

4) I am of the view that undertakings can be put in place that will facilitate the return of both Emily and her mother and that will allow the New York courts to deal with the issue of Emily's long-term best interests.

[56] At the hearing of this matter I was initially advised that Ms. Carranza had made a commitment that she would return to New York if I ordered the return of Emily. I then understood from her counsel that this might not be possible because of the risk posed by the warrant for her arrest. As I have noted, that warrant has now been set aside. Accordingly, that does not pose an impediment to her return.

[57] I was also advised that Mr. Suarez is prepared to give undertakings to facilitate the return of both Ms. Carranza and Emily and to permit the courts in New York to consider the custody issues raised by this case.

[58] In summary, I make the following orders and declarations:

1) Emily Suarez was wrongfully removed from New York to British Columbia by her mother, Ms. Carranza;

2) Emily Suarez will be forthwith returned to New York. The petition asked that she be delivered to Mr. Suarez or his agents. I am not prepared to make that order as I understand that the OOP is still in place. I am of the view that the appropriate order should be that she be delivered to the appropriate authority in New York whether that be the family court or ACS. I am prepared to hear further submissions on this issue if counsel cannot agree on the proper form of the order.

3) The order for the return of Emily is conditional upon Mr. Suarez providing satisfactory undertakings to this court. I will leave it to the parties to agree upon the wording of the undertakings but will hear further submissions on this issue if the parties cannot agree. The undertakings will include, but may not be limited to the following:

- He will provide airfare for the return of Emily, Ms. Carranza and her son;

- He will bring an application to the New York Family Court to determine custody as soon as practicable following Emily's return;

- Pending the resolution of the custody application he will permit Emily to stay with Ms. Carranza; and

- Pending the resolution of the custody application he will provide funds to Ms. Carranza for child support.

[59] Mr. Suarez is entitled to costs of this proceeding at Scale B.

"Butler J."